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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
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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

HUNTER *v.* SCOTT.

Opinion delivered February 9, 1925.

1. EXCHANGE OF PROPERTY—FRAUD—NOTICE.—In a suit to cancel as fraudulent deeds and notes executed by plantiff in an exchange of lands with defendant vendee, a finding that two parties who purchased plaintiff's notes acquired them with knowledge of the fraudulent representations which induced the trade *held* not clearly against the preponderance of evidence.
2. EXCHANGE OF PROPERTY—RESCISSION—LACHES.—Plaintiff was not guilty of laches in suing to rescind an exchange of lands for fraud where she offered to rescind immediately upon discovery of the fraud.

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

Henry S. Julian and *Roland Hughes,* for appellant.

Abe Collins, for appellee.

SMITH, J. This suit was brought by appellee to cancel two deeds which she had executed conveying lands owned by her in Sevier County, Arkansas, and to cancel certain notes which she had executed in connection with the sale of these lands. The transaction was in form an exchange of the plaintiff's Arkansas lands for lots in Kansas City, Missouri, on which were located a residence and an apartment house.

The court below made an extended finding of fact, from which the issues in the case are made to fully appear. We copy from this finding the following recitals.

On November 1, 1921, plaintiff executed two warranty deeds to F. M. Hunter. By one she conveyed 1,887.20 acres of her land; by the other she conveyed

823.06 acres of land, the last including the cleared and cultivated land. The consideration for said deeds was an exchange of properties.

Hunter conveyed to plaintiff, Mrs. Scott, the Kansas City lots. The deed from Hunter was made subject to a mortgage for $10,000 on the dwelling, and a mortgage for $23,000 on the apartment, and a $5,000 mortgage covering both buildings.

To indemnify Mrs. Scott from the lien of these mortgages, Hunter executed to her the following notes: One for $4,500, due November 1, 1922; one for $1,900, due November 1, 1923; and six notes, for $5,000 each, due November 1, 1926, all being secured by a vendor's lien reserved in the deed to the larger body of land from Mrs. Scott to Hunter.

A further consideration for the exchange of properties was an agreement on the part of Mrs. Scott to deliver to Hunter a stock of merchandise and certain other personal property. No demand for the delivery of the personal property was ever made, and it was in the possession of Mrs. Scott at the time of the rendition of the decree.

Mrs. Scott indorsed to Benjamin Davis, as agent for Hunter, the $4,500 note, with the understanding that Davis would discharge three notes, for $1,500 each, which were a part of the indebtedness secured by the mortgages on the Kansas City property. Davis claimed to have transferred the note to G. W. Harmon for $1,500, and he converted the proceeds thereof to his own use and did not pay any one, or any part of any one, of the $1,500 notes which he had agreed to pay with the proceeds of the $4,500 note. Harmon claimed to be an innocent purchaser of the $4,500 note, but the court found that he was not.

Plaintiff indorsed the $1,900 note to Davis to cover his commission for making the deal, and Davis indorsed this note to Pearson, who claimed to be an innocent purchaser thereof, and the cause was continued as to this note.

Plaintiff owned the remaining notes, aggregating $30,000.

The court found the fact to be that the execution of the two deeds by plaintiff had been procured by the concerted fraudulent acts and misrepresentations of F. M. Hunter, Benjamin Davis, Isaac F. Tyson, J. M. McPherson, G. W. Harmon, and W. L. Perkins.

The false and fraudulent representations were that the parties named had represented to plaintiff and her son, who acted as her agent, that the residence and apartment were rented for $910 per month, when, in fact, they were earning, less running expenses, only about half that amount. It was represented that $1,600 had been paid on the $5,000 mortgage and that the balance was payable at the rate of $500 per month, and could easily be paid out of the rents; and that nothing would be due on the $23,000 mortgage or on the $10,000 mortgage for three years; when, in truth, there was $4,304 due on the $5,000 mortgage, instead of $3,400, as represented, and a suit was pending to foreclose the $10,000 and the $23,000 mortgages.

The 800-acre farm was conveyed to Hunter by a deed which gave him an unincumbered title thereto, and he executed a mortgage on this land to Isaac F. Tyson to secure a note for $16,800, which was delivered to Isaac F. Tyson in payment of the purchase price for the Kansas City property, Tyson being the owner of the equity of redemption therein. The court found that this note and mortgage were, in fact, forged, and that Hunter had never executed either.

The court further found that the mortgages on the Kansas City property were about to be foreclosed, and that it was a part of the conspiracy for this $16,800 note to be executed to Isaac F. Tyson, and that Isaac F. Tyson had indorsed this note to his father, John Tyson, in apparent payment of past due indebtedness due by Isaac F. Tyson to his father, who claimed to be an innocent purchaser of the note, for value, and before maturity; but the court found that John Tyson was not an innocent purchaser.

Upon these findings the court ordered that the $16,800 note, together with the mortgage securing it, the two deeds from plaintiff to Hunter, and all of the notes purporting to have been signed by Hunter and which were secured by the vendor's lien, except the note for $1,900, be canceled, and that the plaintiff's title to all the land be quieted against all the defendants, and that the case be continued as to J. R. Pearson.

It was further ordered that the decree canceling the notes secured by the vendor's lien should not apply to the $4,500 note of that series owned by G. W. Harmon in so far as defendant Hunter was concerned, but only in so far as it appeared to be a lien against the land.

From this decree the Tysons only have appealed.

We will not set out the testimony showing the sordid conduct of the parties upon which the court made the finding of fact set out above.

According to the defendants, Mrs. Scott was represented by her son and by W. L. Perkins, a real estate agent, whose home was in Sevier County, and that these agents dealt with the defendant Davis, who was the agent of Hunter, and Davis, as the agent of Hunter, dealt with the agent of Isaac F. Tyson, and with Tyson himself. It is pointed out that the testimony does not show that Tyson himself, or his agent, dealt directly with Mrs. Scott or her son. It is also insisted that the testimony shows that it was Davis, agent for Hunter, who dealt with Mrs. Scott and her son, on the one hand, and with Tyson and his agent, on the other, and that, if any fraud was practiced by Davis, they were not parties thereto, nor were they the beneficiaries thereof, and it is especially insisted that there was no testimony tending to show that John Tyson was not an innocent purchaser of the note for $16,800 which he acquired from his son; and it is also insisted that the offer to rescind was not made until after the Kansas City property had been sold under a decree of foreclosure.

There appears to be no question that the exchange of properties was induced by false and fraudulent rep-

resentations made to Mrs. Scott's son, who was her agent, and the only real questions in the case appear to be whether Isaac F. Tyson was a party to the fraud, and whether his father was an innocent purchaser of the $16,800 note.

The undisputed testimony shows that Hunter, who ostensibly bought appellee's farms and Tyson's lots, was a figurehead. He was a day laborer on the farm of McPherson, who was one of the real estate agents who put over the deal. The court found that Hunter's signature to the $16,800 note and the mortgage securing it was a forgery, this finding being based on the testimony given by him when his deposition was first taken, that he knew nothing about the transaction and had not executed either instrument. In a deposition taken later he admitted signing both the note and the mortgage. We think it is not essential to find, in order to sustain the decree of the court below, that these instruments were in fact forged. The transaction was fraudulent, even though it be conceded that Hunter had signed both instruments.

We are of the opinion that the finding of the court below that Isaac F. Tyson knew what the fraudulent representations were which induced the trade is not clearly against the preponderance of the evidence. Henderson, one of the real estate agents who participated in the deal, testified that Tyson furnished him the information upon which he based the statements made to appellee's son and agent as to the rental value of the property.

We are also of the opinion that the finding of the court that John Tyson was not an innocent purchaser is not clearly against the preponderance of the evidence. The indebtedness due from Isaac F. Tyson to his father was past due; the amount involved was large; the relationship was that of father and son; and the fair inference is that the father would have made some inquiry about the transaction whereby his son had acquired this $16,800 note.

We conclude also that appellee acted with reasonable and sufficient promptness in offer to rescind the sales. It

is true that the Kansas City property was sold under a decree of foreclosure, and this may have been done before the offer to rescind was made. But the suit to foreclose the mortgages on the Kansas City property was pending when the deal was made, and the concealment of this fact, or, rather, the statement in regard to the maturity of this indebtedness, was one of the false representations which induced the contract, it having been represented that the part of the indebtedness which could not be discharged with the monthly rentals did not mature for three years. Appellant did offer to rescind immediately when she discovered the fraud practiced upon her, and we think the court committed no error in according her this right.

The decree of the court below is therefore affirmed.

PEARSON v. SCOTT.

Opinion delivered March 9, 1925.

1. BILLS AND NOTES—INNOCENT PURCHASER OF NOTE.—Evidence *held* to sustain a finding that the holder of a certain note was an innocent purchaser for value.
2. VENDOR AND PURCHASER—VENDOR'S LIEN—ENFORCEMENT.—Under the rule that where one of two innocent persons must suffer the one whose act first made it possible for the injury to occur must suffer the consequences, *held* an innocent purchaser for value of one of a series of notes constituting a lien on land, after the other notes had been cancelled for fraud in their inception, is entitled to satisfaction out of the entire proceeds of sale of the land, though, if the other notes were valid, he would be entitled only to a *pro rata* share of the proceeds.

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

J. S. Lake and *Gordon Carlton,* for appellant.

Appellee has made no claim that the notes for $5000.00 each and the $4500.00 note were not merged and extinguished when the court by its decree cancelled the deeds which she had given Hunter and quieted her title

to the lands. The only exception from the doctrine of merger in such cases is where the manifest intention of the parties, or the ends of justice require that the rights be kept separate. 84 Ark. 277. If all the series of notes were outstanding obligations, there would be no contention but that, in the absence of special equities in the appellant, all should participate ratably in the proceeds of the sale; but here they are not outstanding obligations, and in addition the special equities in appellant do exist. 51 Ark. 105; 72 Ark. 350; 76 Ark. 245; 92 Ark. 291; 103 Ark. 473.

WOOD, J. This action was instituted by Flora G. Scott in the Sevier Chancery Court against F. M. Hunter *et al.,* to cancel certain instruments on the alleged ground of fraudulent representations made by Hunter and his agents, by which Mrs. Scott was induced to convey certain real estate to F. M. Hunter. In the original complaint Hunter, Isaac F. Tyson and Benjamin Davis were made parties defendant, and afterwards, by amendments to the complaint, W. L. Perkins, J. R. Pearson, G. W. Harmon, J. M. McPherson and John Tyson were also made defendants. The plaintiff, Mrs. Scott, alleged that the several parties named had entered into a conspiracy to cheat and defraud her out of her lands; that, as a result of the conspiracy, she executed two deeds to F. M. Hunter, in one of which was conveyed 1,887 acres and in the other 823 acres of land in Sevier County, Arkansas; that, as a part consideration for these deeds, F. M. Hunter exchanged certain property in Kansas City, Missouri, and executed certain notes; that in consideration for the 1,887 acres, Hunter executed to Mrs. Scott eight promissory notes, one for $1,900, due in one year; one for $4,500 due in two years; six for $5,000 each, due in five years, all bearing interest at the rate of 7 per cent. per annum; that a vendor's lien was reserved in the deed to secure these notes; that, as a result of fraudulent representations, the instruments set forth in the complaint were without consideration, and

void. She prayed that the instruments and notes be canceled, and that the defendants be enjoined from transferring certain notes, and for all legal and equitable relief to which she might be entitled. The answer of all the defendants, except Harmon, admitted the exchange of properties and the execution of the instruments and notes set up, but denied all the allegations as to fraud. The defendant Harmon demurred to the complaint, and his demurrer was overruled. He stood on his demurrer, and decree was rendered against him, canceling the $4,500 note which he held. On the hearing of the other parties of the issues raised by the pleadings, the court entered a decree also canceling the six notes for $5,000 each, in so far as they represented a lien upon the land, but these notes, and also the note for $4,500, by direction in the decree, were kept alive for the purpose of sharing with the $1,900 note in the distribution of the proceeds of the sale of 1,887 acres of land. The cause was continued as to J. R. Pearson, and, at a later day, was heard on the issues raised by the complaint and his answer and cross-complaint. The court found that he was a holder in due course of the note for $1,900 executed by Hunter to Mrs. Scott; that this note was a lien on the 1,887 acres of land, and directed that the land be sold to satisfy his lien, and that he be paid out of the proceeds of the sale a sum equal to the proportion that the note for $1,900 bore to the whole amount represented by the eight notes given as part consideration for the land. Pearson appeals from the decree ordering this distribution of the proceeds of the sale of the 1,887 acres.

The facts bearing upon the issues raised as to the allegations of conspiracy and fraud are fully set forth in the recent case of *Hunter* v. *Scott, ante* p. 1, where we affirmed the decree of the chancery court holding that the transaction by which Mrs. Scott exchanged and sold her property to Hunter was fraudulent. The present case grows out of and is a branch of that case, and we

refer to the facts there stated as helpful to a thorough comprehension of the issues raised by this appeal. It appears from the testimony in this record that the negotiations leading to the consummation of the deal between Mrs. Scott and Hunter were conducted by one Benjamin Davis. Mrs. Scott indorsed the note for $4,500 executed by Hunter to her, and delivered same back to Hunter, to be used by him in removing certain incumbrances from the property, which Mrs. Scott agreed to take as a part consideration for the conveyances made by her to Hunter. The note for $1,900 was indorsed by Mrs. Scott without recourse and delivered to Benjamin Davis, in payment of his commission for making the deal. The six notes for $5,000 were retained by Mrs. Scott, and were in her possession when the final decrees were entered in the case.

Davis, on the 14th day of November, 1921, borrowed of J. R. Pearson $1,600, for which he executed his note due February 14, 1922, with interest at the rate of 8 per cent. per annum from date until paid. As collateral security to this note, Davis indorsed and delivered to appellant the $1,900 purchase money note. Davis did not pay the $1,600 note executed to appellant for borrowed money, and, on the 2d day of July, 1922, appellant sold the collateral note of $1,900, and purchased the same himself, the consideration therefor being the amount of the principal note due him by Davis, with accrued interest. A witness who procured the loan for Davis from appellant testified that appellant did not know Davis until the witness introduced him. Appellant agreed to make the loan and advance to Davis the money. Witness saw him give Davis the check. Appellant acted in good faith in the transaction, without any knowledge of any fraud, collusion or conspiracy to defraud Mrs. Scott. The only business transaction witness had with appellant was the one in which he procured the loan from him for Davis.

The appellant himself testified that he was the owner of the note for $1,900; that he obtained it as collateral to

secure a personal loan of $1,600 that he made to Benjamin Davis. He made the loan upon the representation of Davis' agent that the loan was safe and would be secured by the $1,900 note on 1,887 acres of land in Sevier County, and that the note of $1,900 given as collateral security was the first lien note on the land, which was worth some $40 or $50 an acre, making the note perfectly safe. Appellant, before making the loan to Davis, asked him if the trade had been completed which they had talked about, and he stated that it was entirely completed, and that they had the deed to the Arkansas property. Davis and his agent came to the office of appellant, and produced the deed, which appellant mailed to the recorder at DeQueen, Arkansas. Appellant gave Davis checks for the amount of the loan, and exhibited the checks on the Commonwealth National Bank of Kansas City, Missouri. The check showed that it passed through the Kansas City Clearing House November 15, 1921. The deed, after having been recorded, was returned to the appellant. He made no effort to have the title to the property examined. Davis and his agent stated that it had been examined and had been found to be all right. Appellant had the deed and the collateral note for the $1,900 before him when the loan was made, and he knew that the note was one of a series amounting in the aggregate to $36,000, the note of $1,900 offered appellant as collateral being the first of the series to mature. Appellant did not know that Davis went through bankruptcy after this transaction, but reached the conclusion that he was irresponsible after he failed to pay his note.

The court correctly found, under the above evidence, that appellant was an innocent purchaser for value of the $1,900 note, and that he was entitled to recover the sum of $1,900 with interest thereon at the rate of 7 per cent. per annum, making the amount due appellant at the time of the rendition of the decree the sum of $2,199, and the decree of the court declaring such sum a lien on

the land described, and directing that same be sold for the satisfaction of the decree, was also correct.

But the court erred in directing that the commissioner pay appellant, out of the proceeds of the sale, a sum equal to the proportion that the note held by the appellant bore to the whole amount represented by the eight notes executed by Hunter to the appellee.

The court, by its decree on the other branch of the case, which was affirmed by us in *Hunter* v. *Scott, supra,* canceled all other conveyances, notes and incumbrances which might affect appellee's title, and revested the title in her, subject only to the lien of the $1,900 note in controversy. The six notes for $5,000 and the note for $4,500, held by Harmon, were merged in and extinguished by that decree. After that decree, these notes were no longer outstanding liens on the land and entitled to *pro rata* in the proceeds of the sale of foreclosure for the $1,900 note. As between the appellant and the appellee, the appellant's equities are superior to those of the appellee, for the appellee, by her act, although free from any fault or intentional wrongdoing, made it possible for the appellant to buy this $1,900 note, and he must suffer injury if her equities in the proceeds are declared equal to his. His equities must be protected and declared superior, under the doctrine that, where one of two innocent parties must suffer, the one whose act first made it possible for the injury to occur must suffer the consequences. If a series of purchase money notes contain no stipulation as to the order in which they should be paid, and without any agreement between the holders as to precedence of payment, in the absence of special equities, the proceeds of the sale should be applied *pro rata* in part payment of the several notes, irrespective of the dates of their maturity or assignment. See *Penzel* v. *Brookmire,* 51 Ark. 105; *Smith* v. *Butler,* 72 Ark. 350; *Bank of Fayetteville* v. *Lorwein,* 76 Ark. 245; *Cook* v. *Collins,* 92 Ark. 291; *Kissire* v. *Plunkett-Jarrel Grocer Co.,* 103 Ark. 473. But, in the case at bar, there are

special equities, as already indicated, in favor of the appellant, which entitled him to the proceeds of the sale without a ratable division or distribution with the appellee.

The decree of the trial court is therefore reversed, and the cause is remanded with directions to enter a decree in accordance with this opinion.

FIRST NATIONAL BANK OF PARIS v. GRAY.

Opinion delivered February 16, 1925.

MORTGAGES—NOTICE OF RIGHTS OF TENANT IN POSSESSION.—The possession of a tenant or lessee is not only notice as against a subsequent mortgagee of all his rights and interst connected with or growing out of the tenancy or lease, but is also notice of all interests he may have acquired through subsequent or collateral agreements.

Appeal from Logan Chancery Court, Northern District; *J. V. Bourland,* Chancellor; reversed.

Robert J. White and *Kincannon & Kincannon,* for appellant.

Appellee, having knowledge at the time he took the mortgage that Caldwell was in possession of the land, took subject to any claim or interest of Caldwell, or any one claiming under him in the land. 145 Ark. 306, 309, 310; 101 Ark. 163 168-9; 137 Ark. 538, 543.

Holland, Holland & Holland, for appellee.

Possession of land by a person generally known to be a mere tenant, as is the case here, is not the character of possession required to put a purchaser on notice that the occupant has any right other than that of a tenant Possession, to charge a purchaser with notice, must be unambiguous, not liable to be misunderstood or misconstrued by the public. 128 Fed. 293; 30 So. 991; 85 Ala. 585, 5 So. 309. By failure to record his deed, Caldwell and those claiming under him are estopped to rely thereon as against one who has been led to believe in its

non-existence. 3 Devlin on Deeds, §§ 626, 626a. See also 70 Ark. 256, 260 261.

SMITH, J. This appeal involved the priority of a mortgage securing a note acquired by the First National Bank of Paris, Arkansas, for value, in due course of business, as an innocent purchaser, and the litigation arose out of the following facts:

A. L. Gray owned a certain tract of land in the Northern District of Logan County. He had rented the land in 1918 to J. M. Caldwell, who moved on to the land and occupied it as the sole tenant during the years 1918 and 1919, and, on February 13, 1920, Gray conveyed the land by warranty deed to Caldwell. The consideration for this deed was $500 cash and five notes, each for $500, the first of which fell due November 1, 1921, and one note each year thereafter. Caldwell paid no rent after his purchase, except that he did pay rent for one year, under an order of the court, after a receiver had been appointed to take charge of the land, and this was paid subject to the court's order. There was no showing of any visible change in the character of his possession, and the deed was not filed for record until the 27th day of October, 1921.

T. C. Gray testified that A. L. Gray applied to him for a loan of a thousand dollars, and proposed to secure the note evidencing the loan by giving a mortgage on the land. T. C. Gray caused the records of the clerk and recorder to be examined, and, after being advised that there was no prior lien against the land, T. C. Gray made the loan on September 12, 1921, and took a mortgage on the land to secure it, and this mortgage was duly recorded on September 15, 1921. T. C. Gray knew that Caldwell was on the land, and he made no inquiry to ascertain what interest Caldwell had.

Is this mortgage lien prior to the deed? The court below held that it was, and, upon this finding, decreed accordingly, and this appeal involves the correctness of that decision.

In the case of *American Bldg. & Loan Assn.* v. *Warren,* 101 Ark. 163, this court held: "Actual possession is evidence of some title in the possessor, and puts the subsequent purchaser or mortgagee on notice as to the title which the occupant holds or claims in the property. Generally actual, visible and exclusive possession is notice to the world of the title and interest of the possessor in the property, and it is incumbent upon the subsequent purchaser or mortgagee to make diligent inquiry to learn the nature of the interest and claim of such possessor; and, if he does not do so, notice thereof will be imputed to him" (citing authorities).

It is pointed out that there are certain exceptions to the general rule quoted, and it is stated that one of these exceptions is that, if a tenant in possession, even though his possession was exclusive, as was that of Caldwell in the instant case, continues in possession without exercising any acts of ownership of such character as to indicate a charge in the nature of the possession, such as the making of extensive improvements, notice will not be imputed to a subsequent purchaser or mortgagee of the tenant's title.

In § 486 of the chapter on Vendor and Purchaser, in 27 R. C. L., page 722, it is said that "the fact that a person was, prior to his purchase, in possession as a tenant or the like, does not, according to the better view, prevent his continued possession from being notice of his rights."

In the notes to the text quoted the following annotated cases are cited: *Carr* v. *Brennan,* 57 A. S. R. 119; *Crooks* v. *Jenkins,* 104 A. S. R. 326; *Phelan* v. *Brady,* 8 L. R. A. 211; *Bell* v. *Twilight,* 45 Am. Dec. 367; *Niles* v. *Cooper,* 13 L. R. A. (N. S.) 49.

Many cases bearing on this question are cited in these annotated cases.

The case of *Crooks* v. *Jenkins, supra,* itself contains an extended review of the cases on the subject. In that case Justice Ladd, speaking for the Supreme Court of Iowa, said: "The plaintiff took the mortgage without

notice of the deed to Patterson (the tenant), other than the possession of the premises afforded. The doctrine that a purchaser of real estate—and a mortgagee has been held to be such—takes the same charged with notice of the equities of a person, other than the vendor, in possession at the time of the purchase, is not questioned. *O'Neill* v. *Wilcor,* 115 Iowa 15, 87 N. W. 742. But, like other general rules, this has its exceptions. Thus, when possession is consistent with the record title, it is presumed to be under such title, and is not notice of outstanding, unrecorded equities. (Citing cases). This is on the ground that, having given notice to the world of his estate in land by a proper record of a conveyance to himself, a possession justified by said recorded title is to be presumed to have been under such title, and is not notice of any other which he may have subsequently acquired, but which, through neglect, he has failed to record. *Dutton* v. *McReynolds,* 31 Minn. 66, 16 N. W. 468. So too, where a vendor remains in possession after a conveyance, such possession, unless long continued, is not notice to subsequent purchasers of any rights reserved inconsistent with his conveyance. (Citing cases). Such possession is to be presumed to be continued by the sufferance of the purchaser. Appellant contends that there is still another exception, to the effect that possession begun under one kind of right is not notice of another or different interest subsequently obtained by the occupant, unless circumstances direct the purchaser's attention to the change of title, and thereby operate as actual notice. The authorities ordinarily cited by text-writers cannot be said to sustain this proposition."

The learned justice then proceeded to review the cases cited as so holding, and distinguishes them, and, after having done so, he proceeded to say: "Indeed, we have discovered no case holding that the notice charged by the possession of a tenant is limited to rights incident to his tenancy."

He proceeded further to say: "On the contrary, the doctrine has long prevailed in England that the posses-

sion of a tenant or lessee is not only notice of all his rights and interests connected with or growing out of the tenancy inself or the lease, but is also notice of all interests acquired by collateral or subsequent agreements. *Daniels* v. *Davidson,* 16 Ves. 249. The same rule has been approved by several courts in this country," and the cases so holding are cited.

The learned justice concluded his discussion of the question with the following quotation from Pomeroy on Equity Jurisprudence: "In a note in § 616 of his work on Equity Jurisprudence, Mr. Pomeroy declares that, in his opinion, 'these decisions are much more in harmony with the general doctrine than those others which have speculated and drawn fine distinctions upon the amount of notice derived from the occupant's original right to the possession. The reasons upon which the whole doctrine rests seem to be conclusive. The possession of a third person is said to put a purchaser upon an inquiry, and he is charged with notice of all that he might have learned by a due and reasonable inquiry of the occupant with respect to every ground, source, and right of his possession. Anything short of this would fail to be reasonable and due inquiry.' "

We have quoted thus extensively from this case because it is directly in point and contains a review of what are regarded as the leading cases on the subject.

We conclude therefore that the learned chancellor erred in holding that the mortgagee was not affected with notice of Caldwell's possession, and the decree of the court below will therefore be reversed, and the cause remanded with directions to enter a decree conforming to this opinion.

FIRST NATIONAL BANK OF CORNING v. CORNING BANK & TRUST COMPANY.

Opinion delivered February 16, 1925.

1. MORTGAGES—INDEBTEDNESS SECURED.—A mortgage, the preamble of which described the debt secured as the sum of $80.02, evidenced by a note, and a defeasance clause of which recited that, on payment of the note "together with all other indebtedness which may be due," to the mortgagee at a later date, the mortgage should be void, *held* to secure only indebtedness evidenced by note and additional advances subsequently made, and not indebtedness evidenced by prior notes.
2. MORTGAGES—CONSTRUCTION.—The intention of the parties to a mortgage at the time of its execution, as expressed by the language employed, governs, and this purpose cannot be enlarged by any contemporaneous parol or subsequent agreement that it should secure any indebtedness other than that referred to in the mortgage.

Appeal from Clay Chancery Court, Western District; *J. M. Futrell,* Chancellor; affirmed.

F. G. Taylor, for appellant.

Under the defeasance clause of appellant's mortgage, it secured all of the indebtedness of the mortgagor to the mortgagee at the time it became due. 46 Ark. 70; 68 Ark. 256; 91 Ark. 400; 96 Ark. 594. Appellee is estopped from questioning the validity of appellant's mortgage, by the provision in appellee's mortgage that it was given subject to appellant's mortgage. 48 Ark. 258; 63 Ark. 268; 27 Cyc. 1168-9, and note, 27; *Id.* 1226, and note 82; Jones on Chattel Mortgages, 2nd Ed. 494; 123 Mass. 105.

Harper E. Harb and *Oliver & Oliver,* for appellee.

The defeasance clause had reference to future indebtedness that might be incurred, and can not be extended to include notes evidencing a pre-existing indebtedness, not mentioned in the mortgage. 11 C. J. 497; 66 Ark. 550; 55 Ark. 569. Appellee is not estopped. The mortgage was taken subject to appellant's mortgage *given to secure* $80.02.

SMITH, J. This cause was submitted to the court below on an agreed statement of facts, under § 1340, C. & M. Digest, from which we copy the following recitals:

On April 17, 1922, one Ben Allen executed to the First National Bank of Corning, Arkansas, hereinafter referred to as appellant, a note for $80.02, and, on the same day, he executed to this bank a chattel mortgage. At the time of the execution of this note and mortgage Allen was already indebted to appellant in the amount of two notes, one for $161.29, and the other for $201.12. The mortgage was duly filed with the clerk and recorder on April 20, 1922.

On the 27th of April, 1922, the said Allen executed a chattel mortgage to the Corning Bank & Trust Company, hereinafter referred to as appellee, covering the same personal property described in the mortgage to appellant, except that it did not cover a certain mule, which was one of a pair of mules mortgaged to appellant. The mortgage given appellee recited that it was subject to a mortgage from Allen to appellant "to secure the sum of $80.02, mentioned in said mortgage to said First National Bank."

There was no question about the amount or the validity of the indebtedness claimed by either appellant or appellee, and no further or other indebtedness was incurred by Allen to either bank.

Appellant foreclosed its mortgage by a sale thereunder on November 18, 1922, and at this sale the mule was sold which was not covered by appellee's mortgage, along with all of the other property described in appellant's mortgage. After paying the expenses of the sale and the note for $80.02 due appellant, there remained in the hands of appellant the sum of $136.65. The team of mules sold for $175; and it was agreed that the mules composing the team were of equal value.

On the day of the sale the parties hereto entered into an agreement that the property should be sold by appellant and, after paying the expenses of the sale and the note for $80.02, the balance should be held by appel-

lant until it was determined which of the parties hereto was entitled to this balance, the sum being held by appellant pending the decision of the controversy upon an agreed statement of facts, it being the contention of each bank that it was entitled under its mortgage to this balance of $136.65.

The mortgage to appellant contained the following provision: "Whereas, the said party of the first part is indebted to the party of the second part in the sum of eighty and 02/100 dollars, evidenced by one note of even date herewith, for the above said sum, for value received, with interest from date, at the rate of ten per cent. per annum until paid, and payable on October 1, 1922."

The defeasance clause of the mortgage reads as follows:

"Now, if the party of the first part shall well and truly pay to party of the second part the sum hereinbefore mentioned, or any subsequent renewal or renewals thereof (it being understood that party of the second part has the right to accept a renewal note without renewing this mortgage), together with all other indebtedness which may be due the party of the second part by the party of the first part, together with the cost of this trust, on or before October 1, 1922, then the conveyance shall be void and satisfied of record at the cost of the party of the first part; or otherwise to remain in full force and effect."

Thereafter followed authorization to sell the property described in case of default of payment under the power of sale contained in the mortgage.

The question presented for decision is, which of the banks is entitled to the proceeds of the mortgaged property remaining after paying the expenses of the foreclosure and the note for $80.02.

The court below made a finding that appellant bank, which was the defendant below, should first apply the proceeds of the sale of the mule not included in both mortgages to its debt, but also found that, after this had been

done and all of the indebtedness due appellant which was secured by its mortgage had been paid, there remained in its hands the sum of $136.65, and judgment was rendered for appellee for this amount, and this appeal is from that decree.

There is a discussion in the briefs of counsel of the doctrine of marshaling assets, which we find it unnecessary to consider, as, in our opinion, the point at issue will be disposed by deciding what debt due appellant was covered by its mortgage, and, as we have concluded that only the $80.02 note was covered by the mortgage, and as the balance in appellant's hands exceeds the proceeds of the sale of the mule not included in both mortgages, there is no question of marshaling of assets to consider.

The validity and priority of appellant's mortgage are conceded, but did it cover the entire debt due appellant?

Appellant cites and relies on the cases of *Curtis* v. *Flinn,* 46 Ark. 70, and *Hoye* v. *Burford,* 68 Ark. 256.

The syllabus in the first case is as follows: "Though usual, it is not necessary that a mortgage state the amount of the debt to be secured, or that it is evidenced by a note or any other instrument. If it contains a general description, sufficient to embrace the liability intended to be secured and to put a person examining the records upon inquiry, and to direct him to the proper source for particular information of the amount of the debt, it is sufficiently certain."

In the other case a syllabus reads: "The recital in a mortgage that it is given to secure all indebtedness that the mortgagor owes the mortgagee, is a sufficient description of the debt intended to be secured."

The rule announced in those cases has been applied in a number of later ones; but we do not think there is anything in the rule stated which authorizes us to construe appellant's mortgage to cover the two notes from Allen to appellant outstanding at the time of the execution of the mortgage to it.

The preamble to the mortgage recites the existing debt which the mortgage was intended to secure, and it is described as the sum of $80.02, evidenced by a note. No intimation is given that there was any other indebtedness outstanding.

It is true the defeasance clause of the mortgage provides that, if the note shall be paid, "together with all other indebtedness which may be due the party of the second part (appellant) by the party of the first part (Allen), together with the cost of this trust, on or before October 1, 1922," that the mortgage should be void. But we think this additional indebtedness here referred to contemplated an indebtedness not then existing, but which might later be incurred. The note for $80.02 was specifically described in the preamble as the indebtedness then due, and the preamble does not provide that it shall secure any other indebtedness due at the time of the execution of the mortgage.

It does not appear in the mortgage, until the defeasance clause is reached, that any other indebtedness existed or was contemplated, and this clause begins with the proviso that, if this note is paid, that is, the existing debt which the mortgage secures was paid, and further, that any other indebtedness which may become due later is paid, the mortgage shall be void, and shall be satisfied of record.

The court below construed this language as covering the indebtedness described and any additional advances, and we think this construction was correct. There were, however, no additional advances made, so the mortgage secured only that mentioned.

In the case of *Lightle* v. *Rotenberry,* 166 Ark. 337, we considered the cases relied upon by respective counsel, although they are not all reviewed in that opinion, but in that case, as in this, we thought the applicable rule to apply was the one announced by Chief Justice COCKRILL in the case of *Martin* v. *Halbrooks,* 55 Ark. 569. In following and applying that case we recognized the rule announced in other cases, that the mortgagor might

employ language sufficiently broad to cover any indebtedness he might owe the mortgagee at the time foreclosure was sought, and that this could be done without specifically mentioning the debts to be secured, if the language of the mortgage was sufficiently comprehensive to secure all indebtedness that might be due. But the doctrine of that case is that an effect so broad will not be given to a mortgage unless it is apparent, from the language of the instrument, considered in its entirety, that such was the intention of the mortgagor.

The case of *Lightle* v. *Rotenberry* is also authority for holding here that the intention of the parties at the time of the execution of the mortgage, as expressed by the language there employed, governs, and that this purpose cannot be enlarged by any contemporaneous parol or subsequent agreement that it should secure any indebtedness other than that referred to in the mortgage. See also *Page* v. *American Bank of Commerce & Trust Co.*, 167 Ark. 607.

We conclude therefore that the mortgage in question secured only the note described and additional advances to be made, but, as no additional advances were made, the mortgage was satisfied when this note was paid, and the decree was properly rendered in appellee's favor for the balance remaining after this note and expense of foreclosure were paid. That decree is therefore affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* PORTER.

Opinion delivered February 16, 1925.

1. COMMERCE—EXCLUSIVE POWERS OF CONGRESS.—Congress has exclusive power to regulate both interstate and foreign commerce, and its regulations in either field will supersede State statutes relating thereto.
2. CARRIERS—EXEMPTION FROM LIABILITY FOR FIRE LOSS.—Carriers may, under laws applicable in federal tribunals, stipulate for exemption from liability for loss by fire, but not from the consequences of their own negligence.

3. COMMERCE—CONTROL OVER COMMERCE WITH NON-ADJACENT FOREIGN COUNTRIES.—Congress, by the Cummins Amendment to the Carmack Amendment (Comp. Stat. § 8604a) did not cover the subject of commerce with non-adjacent foreign counties, and hence a stipulation in a bill of lading covering a shipment to England, exempting the carrier from liability for loss by fire, is void under Crawford & Moses' Dig., § 843.

4. COMMERCE—CONSTRUCTION OF ACT OF CONGRESS.—Crawford & Moses' Dig., § 843, prohibiting carriers from limiting their statutory and common-law liability by contract, is not, as to inland carriers, superseded by Interstate Commerce Act § 25, ¶ 4, amended by Transportation Act of 1920, § 441 (U. S. Comp. St., 1923 Supp. § 8596a.), which relates only to carriers by water.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

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

It is not denied that this shipment constituted foreign commerce. The power to regulate commerce given to Congress by the Constitution is exclusive, and a regulation of foreign commerce by the Congress under that power is exclusive and supersedes any State statute or rule. Cons. U. S. Art. 1, § 8. Where Congress has entered the field and assumed control of the subject, the the law applicable to every case within that subject is determined by Federal legislation, and the common law rules as applied in Federal tribunals, 241 U. S. 327, 60 L. Ed. 1022; 240 U. S. 612, 60 L. Ed. 827; 243 U. S. 592, 61 L. Ed. 921; 107 U. S. 102, 27 L. Ed. 325. If Congress has entered a certain field of regulation by passing legislation relative to the subject, the States are restrained from doing so, although Congress may not have covered the entire field or enacted anything inconsistent with the particular State regulation sought to be applied. 222 U. S. 370, 56 L. Ed. 237; 236 U. S. 439, 56 L. Ed. 661; 242 U. S. 255, 61 L. Ed. 276; 237 U. S. 597, 59 L. Ed. 1137, 1140; 162 Pac. 111; 212 Mo. 658; 19 L. R. A. (N. S.) 326; 236 U. S. 439, 59 L. Ed. 661, 665; 244 U. S. 147, 61 L. Ed. 1045; 222 U. S. 424, 56 L. Ed. 257; 76 So. 505; Cummins Amendment, 4 Fed. Stat. Ann. (2nd Ed.) 506, 507.

The Federal law applicable here permits the carrier to stipulate for exemption from liability for loss by fire. 226 U. S. 491; 112 U. S. 331, 28 L. Ed. 717, 720; 194 U. S.. 427, 48 L. Ed. 1053; 204 U. S. 505, 51 L. Ed. 590; 279 Fed. 929, 933

J. C. Marshall, for appellee.

If Crawford & Moses' Digest, § 843-844, controls, that ends the controversy, because it prohibits any contract or rule or regulation which limits the common law liability of a carrier. That statute, we contend, does apply to this shipment. 169 U. S. 133; 28 L. R. A. 718; 128 N. W. 663, 115 N W. 230; 80 S. W. 488; 25 L. R. A. (N. S.) 938; 64 S W. 511; 22 L. R. A. 335; 3 L. R. A 129; 70 N. W. 508; 64 S. E. 38; *Id.* 35; 3 L. R. A. (N S) 183; 94 Ark 407; 101 Ark 310; 111 Ark 102.

The Carmack Amendment is confined by its terms to interstate shipments. The Cummins Amendment enlarged its scope by including shipments to *adjacent* foreign countries, saying nothing about export or import shipments which pass from or to *nonadjacent* foreign countries. Therefore, as held by the interstate commerce commission and by Federal and State courts, the Carmack and Cummins Amendments have no application to these last-named shipments. 212 Fed. 324; 281 Fed. (C. C. A.) 385; 114 Alt. (Md.) 905; 52 I. C. C. 671; Roberts, Fed. Liability of Carriers, §§ 322, 327. The statute has no application to interstate shipments, as was held of the Iowa statute (*Ry.* v. *Cramer,* 232 U. S. 490), but until counsel can point to a Federal statute which has done the like as to the inland haul of shipments to or from nonadjacent foreign countries we must maintain that our statute is still intact as to that. 61 Mass. 53; 46 S. E. (Va.) 911; Traffic Law, § 2005; *Id.* § 3037 A; 91 L. R. A. (Va.) 511; 150 Ark. 571; 209 U. S. 56; 101 Ark. 313; 244 U. S. 147; 169 U. S. 613; 234 U. S. 412; 236 U. S. 434; 187 U. S. 137; 219 U. S. 453; 234 U. S. 280; 128 U. S. 96; 165 U. S. 628. See also 254 U. S. 357. Where Congress has not spoken at all, but

the State by taxation or other regulation has attempted to impose a burden upon commerce, the silence of Congress restrains the State from making the regulation; but where the State's action is not a burden upon commerce, then it must stand, unless Congress has spoken to the contrary on the same matter of regulation. 265 U. S. 298.

HUMPHREYS, J. Appellees brought suit against appellant in the circuit court of Pulaski County, Third Division, to recover the value of seventy-five bales of cotton which they shipped from Earle, Arkansas, to Liverpool, England, on an export bill of lading, which was destroyed by fire while on the cars of appellant, before its train left Earle.

Appellant interposed as a defense the following provision in the bill of lading:

"No carrier or party in possession of said property shall be liable for any loss thereof by causes beyond its control, or by floods, or by fire, or by riots, strikes, or stoppage of labor."

A jury was waived, and the case was tried before the court, who rendered a judgment against appellant for $10,999.70, from which is this appeal. The sole question involved on this appeal is the validity of the provision in the bill of lading, which exempts the carrier from liability for loss of the cotton by fire. The case was submitted upon the following agreed statement of facts raising that issue:

"On October 21, 1920, the Missouri Pacific Railroad Company received from Porter, Weaver & Company, at Earle, Arkansas, 75 bales of cotton referred to in the petition, for shipment to Liverpool, England, and on said date issued to said shippers an export bill of lading, an exact copy of which is attached and made part thereof, consigning said shipment to shipper's order, Liverpool, England; that, after the execution of said bill of lading, and before said cotton had been removed by the carrier from Earle, Arkansas, and while same was on the cars of defendant, same was destroyed by a fire originating at

the compress at Earle, Arkansas, and not set by defendant; that the only issue in the case is whether, in view of the execution of the bill of lading with the condition hereinafter referred to in regard to loss by fire, the carrier is liable for such loss and damage by fire; that said export bill of lading, under and pursuant to which this shipment was made, provided that the carrier should not be liable for loss of said cotton occasioned by fire; that claim for the loss in question was timely filed and declined by the carrier, and suit thereafter was timely filed for said loss."

The provision in the bill of lading exempting appellant from liability on account of fire is a limitation upon appellant's common-law liability, and is void under § 843 of Crawford & Moses' Digest, if the shipment was controlled by the laws of the State.

Appellant contends that the shipment was governed by the Cummins Amendment of 1915 and 1916 to the Carmack Amendment, because the Cummins Amendment evidenced an intention on the part of Congress to occupy the field of regulating foreign commerce, just as the Carmack Amendment evidenced its intention to enter the field of regulating interstate commerce. Congress has exclusive power to regulate both interstate and foreign commerce, and, when it has entered upon the field of regulating either, and does regulate either, the effect is that the regulatory acts of Congress upon the subject will supersede State statutes relating thereto, and all interstate and foreign shipments will be governed by Federal legislation and the common-law rules as applied in the Federal courts. *C. N. O. & T. Ry. Co.* v. *Rankin,* 241 U. S. 327; *So. Exp. Co.* v. *Byers,* 240 U. S. 612; *St. L. I. M. & S. R. Co.* v. *Starbird,* 243 U. S. 592; *Mich. Cent. R. Co.* v. *Myric,* 107 U. S. 102. Carriers are permitted, under the law applicable in the Federal tribunals, to stipulate their exemption from liability for loss by fire, except that it cannot exempt itself from consequences resulting from its own negligence. *Hart* v. *Pa. R. Co.,* 112 U. S. 331. Liability in the instant case, then,

depends upon whether the Cummins Amendment to the Carmack Act has covered the field of regulating commerce with foreign nonadjacent countries. The liability paragraph of the Carmack Act reads as follows:

"That any common carrier receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to holder thereof for loss, damage," etc. The Cummins Amendment inserted therein the following words: "or from any point in the United States to a point in an adjacent foreign country." Did the insertion of these words evince an intention on the part of Congress to cover the entire subject of regulating foreign commerce? We think not. The plain language of the amendatory act reflects that Congress was dealing only with commerce with adjacent foreign countries. There is not an indication in the amendatory act that Congress intended to regulate commerce with non-adjacent foreign countries. We think it inconceivable that Congress would manifest its intention to enter the field of regulating commerce with non-adjacent countries by indirection. We are unable to gather an intention on the part of Congress to regulate commerce with non-adjacent foreign countries because it enacted regulatory measures relating specifically to commerce between adjacent countries. Such an inference would be far-fetched and unreasonable. The subject of commerce with adjacent foreign countries and with non-adjacent foreign countries are separate and distinct, so it cannot be inferred that Congress, in dealing with one subject, intended to embrace both.

Since Federal laws have not been passed covering the field of regulation of loss in shipments of this character, the shipment is governed by § 843 of Crawford & Moses' Digest. Our attention has been called to paragraph 4 of § 25 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (Fed. Stat. Ann. 1920 Supp. p. 124), in support of the contention that § 843 of Crawford & Moses' Digest has been superseded by the Federal

law. The only provision in the section relative to limited liability refers to a carrier by water, and does not relate to the issue involved in this case of limited liability of an inland carrier.

Having concluded that the stipulation in the bill of lading exempting appellant from liability on account of loss by fire is void under § 843 of Crawford & Moses' Digest, which prohibits a carrier from limiting its common-law liability as an insurer against loss by fire, it becomes unnecessary to discuss and decide other questions argued in briefs of learned counsel for the respective parties.

No error appearing, the judgment is affirmed.

AMERICAN LAW BOOK COMPANY v. HURST.

Opinion delivered February 16, 1925.

1. SALES—RIGHT OF SELLER TO RECOVER POSSESSION.—Where the seller of books first violated its contract by removing the purchase money note from the local bank at which it was payable, it was not error to impose a condition on its recovery of articles sold of a return of the amount paid under the contract by the purchaser.
2. SALES—WAIVER OF DELAY IN PAYMENT.—Acceptance of belated payments on a contract for the purchase of law books, without objection by the seller, is a waiver of the right of forfeiture on account of such delay.

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

Appellant *pro se.*

The plea in defense that it was agreed to leave the note at the Bank of Fayetteville is bad in the absence of the further pleading that the defendant was and has been at all times ready, willing and able to pay the installments. C. & M. Digest, §7836; 8 C. J. 527. A plea of tender is bad unless a continuing willingness to pay is alleged. 33 Ark. 340; 38 Cyc. 158; 90 Ark. 524.

Defendant admitted the contract, the signing of the note, and that he had paid only $185 thereon, but alleged he had an equitable defense in avoidance of his contract. Under these circumstances the burden of proof was on the defendant. 8 Ark. 290; 11 Ark. 442; 13 Ark. 644; 24 Ark. 124; *Id.* 410; *Id.* 459.

HUMPHREYS, J. This is a suit in replevin for certain law books, brought in the circuit court of Washington County, to which equitable defenses were interposed, and, upon motion of appellee, was transferred to the chancery court of said county. The cause was submitted for trial upon the pleadings and testimony adduced by the respective parties, which resulted in a decree in favor of appellant for the books and a judgment in favor of appellee for $180, the amount he had paid appellant on the book. Appellant has prosecuted an appeal to this court from the money judgment and the lien declared on the books therefor.

The facts revealed by the record are, in substance, as follows: On October 21, 1915, appellant sold appellee, under written contract, forty volumes of Cyc. and Index, forty-three volumes in all, and Corpus Juris as issued (sixty-two volumes, estimated), which appellee agreed to pay for at $7.50 per volume, as follows: $15 cash herewith, and my note payable $7.50 monthly for forty-one months, and thereafter $7.50 per volume upon delivery of volumes 41 to 62 inclusive of Corpus Juris, upon the terms stated below. The company will exchange volumes 1 to 40 inclusive of Corpus Juris as issued, volume for volume, for Cyc. purchased by subscriber under this contract, such exchange to be in full payment for volumes 1 to 40 inclusive of Corpus Juris. Cyc. may be retained until Corpus Juris is completed."

The contract also provides that, in default in any payment including payments covered by note, for thirty days, the purchase price of all books delivered should become due and payable, and that the books should belong to appellant until the entire purchase price was paid.

Of even date with the contract a note was executed by appellee to appellant for $307.50, payable at the rate of $7.50 per month, beginning December 1, 1915. The note contained a provision that it was payable at the McIlroy Banking Company in Fayetteville, Arkansas. Credits appear on the back of the note in the sum of $165, the last credit being for $7.50 made on February 5, 1918. Appellee paid appellant $15 cash when the note and contract were executed. Appellant delivered Cyc. and the Indexes and sixteen volumes of Corpus Juris to appellee. The last two volumes were delivered to him after the date of the last payment made by him on the note. After the last payment was made on the note, of date February 5, 1918, appellant directed the McIlroy Banking Company, who had held the note during the period the payments had been made, to return the note to it. Appellee called at said bank to make another payment, and was informed that the note had been returned to appellant because it was unwilling to pay $0.25 to the bank on each collection. During the time the note had remained at the bank, appellee had fallen behind in his payments, and, at the time he made the last payment, was six months behind. Appellant made no objection to these delays, but accepted each delayed payment when made. Appellant demanded that appellee send the payments directly to it, which he refused to do, insisting on his right under the contract to pay same and receive credit therefor on the note at the McIlroy Banking Company in Fayetteville, Arkansas. Appellee testified that this provision was inserted in the note so that he could see that the credits were entered thereon as he made the payments.

This suit was, in effect, an attempt to enforce the contract by retaking the books for failure on the part of appellee to make the monthly payments provided for in the contract and note. The note provided for the monthly payments to be paid at the McIlroy Banking Company in Fayetteville, Arkansas, and the undisputed testimony shows that this provision was inserted in the

contract in order that appellee might see that the payments were credited upon the note. The refusal to leave the note in said bank for collection, under the circumstances, constituted a breach of the contract on the part of appellant. Having breached the contract itself, appellant was not in a position to enforce it without first offering to do equity. This the court required it to do by rendering a judgment against it for the amount appellee had paid it at the time he rendered a judgment in favor of appellant for the books. It is argued that appellee first breached the contract by falling behind in his monthly payments. Nearly every payment made by appellee was a belated payment, but each payment was received without objection by appellant, and these breaches, if any, were waived by appellant, who accepted them without complaint. The record reflects that the note was withdrawn from the place of payment because appellant did not want to pay $0.25 on each collection, and not because appellee was behind in his payments.

No error appearing, the judgment is affirmed.

ALEXANDER v. MORRIS & COMPANY.

Opinion delivered February 23, 1925.

1. DEEDS—REPUGNANCE.—Where there is irreconcilable repugnance between the granting clause of a deed and the habendum, the latter must yield to the former, and is to that extent void.
2. DEEDS—HABENDUM CLAUSE.—The purpose of the habendum clause in a deed is to define the extent of the grant, and it is controlling except where it conflicts with the granting clause.
3. DEEDS—CONVEYANCE UPON LIMITATION.—A conveyance of lands to a lumber corporation, "its successors and assigns forever," which specified that the conveyance was for the purpose of the grantee cutting and removing the timber which required the grantee to pay the taxes as long as it should use the land, and provided for reversion to the grantors of all the lands except a small tract to be used for a mill site, as to which the fee simple title passed to the grantee, *held* to convey an estate upon limitation, to be determined on the removal of the timber or abandonment of same, and not a fee simple.

Appeal from Greene Crancery Court; *J. M. Futrell,* Chancellor; reversed.

D. G. Beauchamp, for appellant.

The deed under which appellee claims was nothing more than a timber deed. To ascertain the intention of the parties to a deed, it must be construed from its four corners. 129 Ark. 485; 140 Ark. 512. If the granting clause is so plain that it cannot be misunderstood, then there is no room for construction and other clauses must harmonize with this, or yield to it. 28 Ark. 285; 121 Ark. 95; See 26 S. E. 844; 93 Ark. 5. This case is distinguished from the one in 82 Ark. 209, as there the deed showed that it was the intent of the grantor to convey a fee simple title. See also the annotated case in Ann. Cas. 1917 B., p. 661.

M. P. Huddleston, for appellee.

Evidence was not admissible to explain, contravene or limit the terms of the deed. Where a case is tried without a jury, it is presumed that only competent evidence will be considered; hence it is not necessary to object to incompetent testimony. 99 Ark. 218; 76 Ark. 153; 92 Ark. 315; 97 Ark. 135. The reservations in the deed were personal to the grantors and good only during their life; they were not such covenants as pass with the title to the land to the heirs or legal representatives of the grantor. 88 Ark. 148; 38 Calif. 111; 100 Pa. St. 84; 70 N. Y. 419; 64 Ark. 339. Subsequent clauses repugnant to granting clause are void. 88 Ark. 209; 92 Ark. 324; 78 Ark. 230. See also the following cases, 94 Ark. 615; 131 Ark. 103; 135 Ark. 412; 117 Ark. 192; 121 Ark. 95. Courts will not disturb contractual relations or valuable rights resting upon the strength of decisions of courts of last resort, except from the most urgent considerations of public policy. 99 S. W. (Ky.) 311; 116 Pac. 426.

McCULLOCH, C. J. This litigation involves the construction of a deed of conveyance executed on January 2, 1901, by appellants to the National Box Company, appellee's grantor. It is the contention of appellee that, under a proper construction of the deed, it operated as

a conveyance of the lands therein described in fee simple to appellee's grantor, National Box Company, and this action was instituted in the chancery court of Greene County by appellee to have its title to the land confirmed. Appellants contend, on the other hand, that a proper construction of the deed is that it conveyed only the right to remove the timber on the land (except a small tract conveyed as a mill-site, which it is conceded passed to the grantee in fee simple) and that such rights have terminated by the removal of the timber. Appellants, in a cross-complaint, ask that their title be quieted. The deed, omitting formal parts, reads as follows:

"Know all men by these presents:

"That we, H. A. Amberg, L. P. Alexander, Scott Alexander, J. W. Alexander, R. L. Alexander and W. J. Slayden (the latter being a widower), composing the firm of Alexander, Amberg & Company; and Emma Amberg, wife of the said H. C. Amberg; Cretia Alexander, wife of the said L. P. Alexander; Maud Alexander, wife of the said Scott Alexander; Kate W. Alexander, wife of the said J. W. Alexander; and Mary I. Alexander, wife of the said R. L. Alexander, in consideration of the sum of eight thousand ($8,000) dollars to us cash in hand paid by the National Box Company, a corporation, of the State of Illinois, with its *situs* at Chicago, in the State of Illinois, the receipt of which is duly acknowledged, do hereby grant, bargain, sell and convey unto the said National Box Company and unto its successors and assigns, the following lands, together with all the riparian rights incident and appurtenant thereto, situate in the county of Greene, State of Arkansas, to-wit: (Then follows description of tracts of land containing in the aggregate 4,383.22 acres). Except the five following described meandered and measured tracts, namely (Here follows description).

"The above described five (5) tracts so excepted containing in the aggregate 2,896.79 acres.

"Also excepting ten acres at the county bridge on the east side of Bagwell's Lake, at the northwest corner

of section 16, township 17 north, range 7 east, and 70 acres in the southwest quarter of section ten, township 17 north, range 7 east, belonging to Livesay.

"Also excepting two acres of land in a square in the southeast corner of the northeast quarter of the southeast quarter of section 21, township 17 north, range seven (7) east, containing schoolhouse and grounds, reserving to ourselves the right of ingress and egress through and over said lands, perpetually, and also reserving the sassafras and mulberry, and sufficient cypress for necessary improvements to the lands above, to consist of bridges and house building, also the privilege of grazing, and fencing for that purpose, any parts of said lands any time we may so desire, and hereby granting to said grantee the right to them over such parts of our excepted tracts as may be convenient in pursuance of its business, provided the same shall be done in a reasonable manner so as to not substantially interfere with and injure said excepted tracts and our enjoyment thereof.

"It is the intention of this instrument to convey the grantee all the land unfit for cultivation on Bark Camp, Panther, and Boland's Islands owned by grantors, the inner boundaries of which have been meandered, measured and marked by a blaze with notch above on trees along the line, together with sufficient dry land for mill-site at east side of Bagwell's Lake, at crossing of P. S. E. R. R. and on the north side thereof, which said dry land is also without the meander line above given, and is conveyed subject to existing timber contracts.

"To have and to hold the same unto the said National Box Company and its sucessors and assigns in fee simple forever.

"And the said grantee, its successors and assigns, hereby convenant and agree to use said land, and the riparian rights appurtenant thereto, so hereinabove conveyed, for the purpose of cutting and removing the timber therefrom and conveying the same to and from the sawmill of said grantee (to be located and erected by

it upon a portion of said land hereinabove conveyed, containing about ten acres, and situate in the southeast quarter of section (29) twenty-nine aforesaid, at the east side of Bagwell's Lake, on the north side of the crossing of the Paragould Southeastern Railroad), and for said mill-site and grounds and for such other purposes as may be convenient and incidental to or beneficial for the purpose of said grantee's business; and said grantee, its successors and assigns, further covenant and agree to pay the taxes hereafter levied and assessed on the said lands so conveyed to it so long as it or they shall use, occupy and enjoy the same as hereinabove mentioned. Upon notice in writing of the election of said grantee, its successors and assigns, the said grantors, their heirs, legal representatives or assigns, to abandon any or all of said land (excepting the above described mill-site and grounds, which shall not in any event so revert), such lands or any part or parts thereof so abandoned shall thereupon revert to said grantors and their heirs."

(Here follow covenants of warranty and relinquishment of dower in regular form.)

Evidence was introduced at the trial of the cause tending to show the construction placed upon the deed by the grantee subsequent to its execution, but we deem it unimportant to consider this testimony, for the reason that we conclude that the deed, when considered as a whole, is unambiguous, and that it must be interpreted according to its own language.

The chancery court decided that the deed operated as a conveyance of the title to the land in fee simple, and accordingly decreed in favor of appellee, quieting the title.

One of the rules often recognized by this court in the interpretation of deeds is that, following the rule of the common law, where there is an irreconcilable repugnance between the granting clause of a deed and the *habendum,* the latter must yield to the former, and is to that extent void. The purpose, however, of the *haben-*

dum is to define the extent of the grant, and it is controlling except where it conflicts with the granting clause. One of the comparatively recent cases on that subject, where former decisions were reviewed, is the case of *Stokes* v. *State,* 121 Ark. 95. We have a number of cases affording examples where the *habendum* is not found to be in conflict with the granting clause and is held to control the grant. *Whetstone* v. *Hunt,* 78 Ark. 230; *McDill* v. *Meyer,* 94 Ark. 615; *Dempsey* v. *Davis,* 98 Ark. 570; *State* v. *Stokes, supra.* We have held that reservations, conditions or limitations in the granting clause of a deed constitute a part of the grant and serve to limit it, and that such reservations, conditions or limitations which are not repugnant to the granting clause in a deed are equally effectual wherever they may appear in the deed. *Fletcher* v. *Lyon,* 93 Ark. 5; *Russell* v. *Pagan,* 167 Ark. 143.

In the case of *McDill* v. *Meyer, supra,* we construed a deed which, in the granting clause, purported to "bargain, sell, alien and convey" to the grantee, without the use of words of inheritance or other express grant of the title in fee simple, and there were restrictions and limitations in the *habendum* clause which we held not to be in conflict with the grant as expressed in the granting clause. In *Stokes* v. *State, supra,* there was substantially the same situation, and we held there that the limitation in the *habendum* clause controlled the grant.

We are of the opinion that these decisions control the present case, for an examination of the deed in question discloses the fact that, while there is used in the granting clause the words, "grant, bargain, sell and convey," which imply a conveyance in fee, yet there is no express grant of a fee, hence the limitation or reservation expressed in the *habendum* or other part of the deed is not in conflict with the grant and operates as a limitation upon the estate granted. Use of the word "successors" in a deed to a corporation takes the place of the word "heirs" in a deed to a natural person and implies

a grant in fee simple, but it is not an express grant to that extent so as to put the grant in conflict with words of limitation in the *habendum.* The use of the word "successors" is superfluous and adds nothing to the effect of a conveyance. 1 Tiffany on Real Property, p. 49. Nor does the use of the words "assigns forever" add anything to the effect of the grant. *Watson* v. *Wolf-Goldman Realty Co.,* 95 Ark. 18. When we come to examine the deed as a whole, it is plain that a conveyance of the fee was not intended. The first sentence or paragraph in the *habendum* declares a grant in fee simple, but this must be construed with the other parts of the clause which show the fee was not granted except as to the tract purchased for use as a mill-site. There is, in the first place, a stipulation as to the use to which the land is to be put, that is to say, "for the purpose of cutting and removing the timber therefrom and conveying the same to and from the sawmill of said grantee." There is a further covenant that the grantees should pay the taxes on the land, and a provision in express terms that the title should revert to the grantors and their heirs. There is no escape from the interpretation of this language that the title, except as to the particular tract expressly conveyed in fee simple for a mill-site, was to revert upon the removal of the timber, and the deed conferred upon the grantee the privilege of "reverting" the several tracts and thereby escaping the burden of paying taxes thereon as the timber should be removed therefrom. The deed conveyed more than the mere privilege of removing the timber—it conveyed the land itself, not in fee simple however, but upon limitation.

A conveyance upon limitation, that is to say, an estate to be determined upon the happening of a certain event or at the expiration of a certain time, is a character of estate recognized in the law. Tiedeman on Real Property, 4th ed., § 211; *Church* v. *Moses,* 69 Mass. 142; *Attorney General* v. *Merrimac Mfg. Co.,* 80 Mass. 586; *Henderson* v. *Hunt,* 59 Pa. St. 335.

Our conclusion is that the deed before us conveyed an estate upon limitation, and that, upon the happening of the event, namely, the removal of the timber, the estate terminated and reverted to the grantors or their heirs. Such being the case, the decree of the chancery court was erroneous, and the same is reversed, and the cause remanded with directions to enter a decree in favor of appellants in accordance with this opinion.

SMITH, J., dissents.

McRAE v. FARQUHAR & ALBRIGHT COMPANY.

Opinion delivered February 23, 1925.

1. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Whether an action to compel members of the text-book commission to execute a contract for furnishing books and a suit to restrain them from breaking such contract are suits against the State will not be considered where not expressly raised below nor discussed on appeal.
2. CONTRACTS—WHEN CONSUMMATED.—When a contract is actually entered into between the parties with intention to become bound thereby, it is consummated within the meaning of the law, though it was agreed that the terms of the contract should be reduced to writing.
3. SCHOOLS AND SCHOOL DISTRICTS—CONTRACT TO FURNISH TEXT-BOOKS.—Under Crawford & Moses' Dig. § 9075, providing that contracts for school text-books shall be prepared by the Attorney Genaral, shall be executed in triplicate, and that the contractor shall execute a bond, which presumably is to be approved and accepted by the Text-Book Commission, a contract with such commission to furnish text books is not consummated until formal execution of the written contract and approval of the bond by the Text-Book Commission.
4. ESTOPPEL—REFUSAL TO EXECUTE WRITTEN CONTRACT.—The Text-Book Commission is not estopped to refuse to execute a written contract under Crawford & Moses' Dig., § 9075, on terms of an accepted bid for furnishing text-books, nor from entering into a new contract with another publisher for the same books, where the time for performance had not arrived nor any benefits been accepted.

5. SCHOOLS AND SCHOOL DISTRICTS—DISCRETION OF TEXT-BOOK COMMISSION.—Members of the Text-Book Commission may recede from negotiations for the purchase of text-books at any time before the final signing of the contract and approval of the bond, as contemplated by Crawford & Moses' Dig., § 9075.

6. CONTRACTS—REDUCTION TO WRITING.—Where the statute requires reduction to writing of a contract for text-books, there can be no presumption of intention to consummate it in any other form.

(1) Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; reversed.

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

H. W. Applegate, Attorney General, and *Brooks Hays,* Assistant, for appellant.

The act of signing the contract was one involving discretion, hence mandamus will not lie. 18 R. C. L. 116; 106 Ark. 506; 102 Ark. 470; 146 Ark. 255. No valid contract between the parties was consummated, the acts undertaken being merely preliminary steps, the signing of a formal contract, the consummation. 6 Eng. Ruling Cases 170; 144 N. Y. 229; 29 L. R. A. 431; 116 S. W. 693; 52 Am. Dec. 291; 103 Mo. 70; 26 Okla. 209. Our court has held in 97 Ark. 613 and 95 Ark. 421, that there must be a meeting of the minds on all essentials. Appellee is charged with the limited powers and duties of appellant, and is bound by the law respecting the making of any contract. 94 Ark. 583; 43 Ind. app. 58; 167 Ind. 622; 6 R. C. L. p. 618; 66 L. R. A. 812. The statutory requirement rather than the intention of the parties is controlling. 184 U. S. 524. See also 137 N. Y. S. 384; 87 Ark. 93; 108 Minn. 322; 122 N. W. 173. Mandamus will not lie against the Governor at all. 1 Ark. 570; 18 R. C. L. 199; 45 L. R. A. (N. S.) 500; 40 L R. A. (N. S.) 505; 156 N. Y. 136, 41 L. R. A. 231.

H. E. Mecartney and *Owens & Ehrman,* for appellee.

A valid contest was entered into and the board did not have the discretion to recede from its actions, especially in view of the extensive preparation made by appellee looking to the fulfillment of the contract. 262

S. W. 728; 93 S. E. 759; 249 U. S. 313. When the essential terms of a contract are entered into, it is binding upon the parties, notwithstanding the fact that it is later reduced to writing. 140 Ark. 448. The duty of the Governor as chairman, to sign the contract, was purely ministerial, and he could be compelled to do his duty by mandamus. 129 Ark. 286; 39 Cal. 189.

McCULLOCH, C. J. The statutes of this State provide for the creation of the State Textbook Commission, a board composed of the Governor, the State Superintendent of Public Instruction, and seven other citizens, with authority to select and adopt a uniform series of books for use in the public schools of the State, and to enter into contracts with publishers for furnishing the books at agreed prices for a period of six years. The statute provides that the Commission, after its organization, shall advertise for bids from publishers of schoolbooks, and, at a public meeting of the Commission, on receipt of bids, shall select and adopt the books to be used, and consider bids from publishers for furnishing the same. Crawford & Moses' Digest, § 9065 *et seq.*, as amended by Acts of 1921, p. 326, and Acts of 1923, pp. 198, 347. The section of the statute relating to the form of contract with publishers reads as follows:

"Section 9075. *Contracts and bonds.* After the Textbook Commission shall have adopted the books hereinbefore provided, the Commission shall notify the publishers to whom the contracts shall have been awarded, and it shall be the duty of the Attorney General to prepare said contracts, and said contracts are to be executed by the chairman and secretary of said Commission. Said contracts are to be executed in triplicate, one copy to be kept by the contractor, one copy by the State Superintendent of Public Instruction, and one by the Secretary of State. At the time of the execution of the aforesaid contracts, the contractor shall enter into a good and sufficient bond, with a bonding company authorized to do business in the State of Arkansas, in a sum to be determined by the Commission, but not

more than $20,000, and conditioned upon the faithful performance of all the conditions of such contract, not contrary to the provisions of this act. Such bonds shall not be exhausted by a single recovery thereon, but may be sued upon from time to time until the full amount thereof is recovered. In case of recovery on such bond, the Commission may require such additional bond as may be necessary to keep the bond equal to its original amount."

Appellee, a foreign corporation, is engaged in the business of publishing school books, and it instituted against the members of the State Textbook Commission the two actions involved in these appeals, one an action at law to compel the chairman and secretary of the Commission, by peremptory mandamus, to execute a written contract covering the terms of appellee's accepted bid for furnishing certain books, and the other in the chancery court to restrain the State Textbook Commission from breaking an alleged contract with appellee by entering into a new contract with some other publisher for books covered by appellee's contract.

The same facts were, in substance, stated in each of the complaints, and the cases were heard below on an agreed statement of facts in substantial conformity with the material facts alleged in the complaint. The circuit court, on a trial of the case, decided in favor of appellee, and ordered the chairman and secretary of the State Textbook Commission to approve the bond presented by appellee and execute the form of contract which had been previously prepared by the Attorney General and signed by appellee. The chancery court, on final hearing of the cause, rendered a decree restraining the State Textbook Commission from breaking the alleged contract with appellee and from letting the contract to another concern.

The material facts are undisputed. The State Textbook Commission advertised for bids, in accordance with the statute, for furnishing textbooks, the bids to be presented and opened on December 21, 1923, and on that

day appellee filed its proposal to furnish a series of textbooks on the subject of writing. On the day mentioned the Commission opened the bids, and accepted the one of appellee, and awarded to appellee the contract for furnishing the books mentioned in its proposal. The secretary of the Commission mailed a notice to the county and city superintendents in the State, advising them that the Commission had adopted appellee's proposal to furnish a textbook termed, "Applied Movement Writing," and also notified appellee in writing of the acceptance of its proposal. The Commission also sent to appellee by mail a form of contract in triplicate, prepared by the Attorney General, as provided by law, and requested that the same be executed and returned to the secretary of the Commission, accompanied by a surety bond in the sum of $5,000; and appellee signed the contract and executed the bond as requested, and returned the same to the secretary of the Commission. The performance of the contract was to begin September 1, 1924. The chairman and secretary of the Commission did not sign the contract, nor was there a formal approval of the bond, and nothing further transpired between the Commission and appellee with relation to the contract until February 7, 1924, when appellee was notified by the secretary of the Commission that there was to be a meeting of the Commission on a stated date before any contracts would be signed. There was a meeting of the Commission on March 17, 1924, and the Commission, by vote, decided to postpone the signing of the contracts until a later date; and, at a meeting held by the Commission on May 24, 1924, by vote the acceptance of appellee's bid was reconsidered and the bid rejected. Prior to the time that appellee was notified that there was to be a reconsideration of the acceptance of its bid, it had entered into preparations for the performance of the contract.

The contention of appellee is that a binding contract was consummated by the written acceptance of appellee's written proposal, notwithstanding the fact

that the terms of the agreement were to be reduced to writing in a formal contract to be signed by the parties.

We pretermit any discussion of the question whether or not these are suits against the State, since the question was not expressly raised below and has not been discussed here, and we will confine ourselves to a discussion of the principal question which is argued by counsel, the solution of which will control the decision of the cases—that is to say, whether or not there was a consummation of the contract between the State Textbook Commission and appellee.

This court has, in many decisions, recognized and enforced the principle of law that, when a contract is actually entered into between the parties with intention to become bound thereby, it is consummated within the meaning of the law, notwithstanding the fact that it was agreed that the terms of the contract should be reduced to writing. *Emerson* v. *Stevens Grocer Co.,* 95 Ark. 421; *Skeen* v. *Ellis,* 105 Ark. 513; *Friedman* v. *Schleuter,* 105 Ark. 580; *Alexander-Amberg Co.* v. *Hollis,* 115 Ark. 589; *Kilgore Lumber Co.* v. *Halley,* 140 Ark. 448. The precise language used in the several opinions of this court is slightly variant, but the substance of the rule in each case is that it turns on the question of the intention of the parties whether or not they intended to consummate a contract prior to its formal reduction to writing. In the case of *Friedman* v. *Schleuter, supra,* we quoted with approval the language of Lord Blackburn in the case of *Rosster* v. *Miller,* 3 App. Cas. (Eng.) p. 1151, as the basis of the rule, as follows:

"So long as they are only in negotiation, either party may retract; and, though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed

by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not."

In another English case, decided by the same court about that time (6 Eng. Rul. Cases, p. 170), the rule is laid down as follows:

"Where parties agree in a binding manner to all the terms of the contract, the agreement is none the less a contract because it appears from the terms of the written agreement, or otherwise, that the parties intended to embody the terms in a more formal contract; but, where it appears that the drawing up and signing a formal contract was contemplated as a condition precedent of the final transaction by which the parties were to be bound, there is no contract until this is done."

The decision of the present case therefore comes down to the question whether the parties intended, and the statute permits, the consummation of a contract prior to its formal reduction to writing, or whether the formal execution of the written contract and the approval of the bond were essential to the consummation of the contract. Our conclusion is that, under the statute authorizing this contract, there can be no consummation until formal execution of the writing required by the statute and the approval of the bond which the statute also requires; nor could there be any presumed intention of the parties to consummate the contract prior to the fulfillment of those details. It will be observed that the statute (Crawford & Moses' Digest, § 9075) provides that the contract must be prepared by the Attorney General, who is the law officer of the State, and that it must be executed in triplicate. It also requires that the bond be executed, which must, presumably, be approved and accepted by the Commission. In order to comply with this statute, there must be a written contract, and one which in form must not only be satisfactory to the Commission, but one which the Attorney General,

as law officer of the State, prepares. These requirements of the statute are necessarily mandatory, and no unexecuted contract is valid unless consummated in the required manner. *Griggs* v. *School District,* 87 Ark. 93. There is no element of estoppel in the present case, for the reason that the time for performance of the contract had not arrived, and no benefits under the contract had been accepted.

The design of the statute was to lodge a discretion in the State Textbook Commission with respect to the sufficiency of the bond and the form of the written contract as prepared by the Attorney General, and this discretion could be exercised at any time prior to the formal signing of the contract and the approval of the bond.

The motives or reasons of the members of the Commission in declining to consummate the contract are unimportant, for, however capricious the conduct of the members of the Commission was, they had a right to recede from the negotiations at any time prior to formal consummation of the contract. In other words, until the Commission became bound by a legally consummated contract, there could be a rescission from the negotiation by either party.

Counsel for appellee press upon our attention as controlling in this case the decision of the Supreme Court of the United States in *U. S.* v. *Purcell Envelope Co.,* 249 U. S. 313, and it must be conceded that there is much similarity in some respects between that case and the one now under discussion. There is, however, in that case one important distinction, in that there was no statute, so far as we have been able to discover—certainly none referred to in the opinion of the court—which expressly requires that the contract between the government and the other party should be reduced to writing. If there was any such practice, it was presumably a mere departmental rule and not one absolutely required by the statute. That, we think, is an important distinction, for, as we have already said, where there is a statute requiring that a contract be reduced to writing, there

can be no presumption of an intention to consummate the contract in any other form.

The decision of the trial court in each of the cases before us was erroneous, and the judgment of the circuit court in the one case, and the decree of the chancery court in the other case, are reversed, and the complaint in each case dismissed. It is so ordered.

MERRITT MERCANTILE COMPANY v. NELMS.

Opinion delivered February 23, 1925.

1. HIGHWAYS—PERMISSIVE USE—EVIDENCE—In a suit to enjoin defendant from closing up a road the trial court's finding that the use of the roadway by the public was not adverse but permissive was not against the preponderance of the evidence.
2. HIGHWAYS—PERMISSIVE USE OF ROAD.—Where the public use a road running through open, unfenced land without any order of the county court making it a public road, and without any attempt to work it or exercise anthority over it as a public highway, it will be presumed that the use of the road is not adverse to the rights of the owner of the land, but by his consent, and when he needs the land he may withdraw his consent and exclude the public.
3. HIGHWAYS—SUFFICIENCY OF PROOF OF USER.—Proof of user alone of a road is insufficient to show it to be a public highway; it must appear that such user was under a claim of right hostile to and independent of the will of the owner, as by repairing the road or assuming control of it in some ostensible manner.
4. HIGHWAYS—PRESCRIPTION.—Adverse use of a road for seven years by the public is necessary to establish a road as a public highway by prescription.

Appealed from Craighead Chancery Court, Eastern District; *J. M. Futrell,* Chancellor; affirmed.

Hawthorne, Hawthorne & Wheatley, for appellant.

The road is a public highway. A road may be appropriated for travel by an individual, a corporation or the public. 13 R. C. L. 15-17; 121 N. W. 652, 22 L. R. A. (N. S.) 1221; 172 Pac. 869; L. R. A. 1918 E. 400. Improvement for public use is not necessary. 191 S. W.

151; 127 Ark. 364; L. R. A. 1918 E. 400. If open to all who may desire to use it, it is a public highway, though it may accommodate only a limited portion of the public or even a single family. 13 R. C. L. 16, 33; Lewis on Eminent Domain § 166; 15 Ark. 43. An intent to dedicate for public use may be inferred where the owner suffers it to be used by the public for a great length of time 13 R.C.L. 34; 198 S. W. 69, 5 A. L. R. 198. An easement is not limited to the traveled path, but carries with it the usual width of the highway in the locality. 29 C. J. 375; 388; 13 R. C. L. 58; 106 A. S. R. 418; 57 A. S. R. 740; 156 Ark. 501. Appellee's fence is a nuisance and should be abated. 89 Ark. 175; 147 Ark. 290; 13 R. C. L. 186, 201. Appellants have the right to sue as they suffer special injury. 73 Ark. 1; 13 R. C. L. 227, 240; L. R. A. 1917A. 1150; 91 A. S. R. 46, 59 L. R. A. 399; 4 A. L. R. 343. Appellee should be compelled to remove the obstruction. 66 Ark. 40; 146 Ark. 300; 50 Ark. 53; 135 Ark. 496; 132 Ark. 316; 29 C. J. 379; 125 Ark. 50; 130 Ark. 64; 79 Ark. 5; 83 Ark. 369; 102 Ark. 553; 127; Ark. 364.

Horace Sloan, for appellee.

None of the appellants has the right to maintain this suit. 159 Ark. 335. The use of the Nelms property was permissive, and not adverse. He had the right to withdraw consent at any time. 83 Ark. 236. See also the opinion of the chancellor. There must have been some act by the public authorities to establish the road as a public highway. 74 Neb. 868, 105 N. W. 713; 78 Hun. 280, 28 N.Y.S. 858; 69 Tenn. 375; 92 Iowa 755; 23 N. H. 327; 112 N. C. 889.

WOOD, J. This is an action by the appellants against the appellee for a mandatory injunction to compel the appellee to remove certain obstructions from an alleged public highway. The appellants alleged in substance that they were the owners of certain lands in the town of Black Oak, Arkansas; that there had been a road between their property and the railroad in said town for more than twenty-five years, which had been used by the public generally; that the appellant, Citi-

zens' Gin Company, a corporation, had been operating a gin for many years, and they would not have purchased the gin had there not been a public road leading to it from the main street in the town of Black Oak; that the property would be worthless without such outlet; that the appellee had placed posts in said right-of-way along close to a platform constructed on the railroad right-of-way; that, unless enjoined, he would close up the entire road, and appellants would suffer thereby irreparable injury; that all of appellants were financially interested, and that their money was invested with the knowledge that said road was the public highway. They prayed that appellee be compelled to remove the posts which he had placed in the roadway.

The answer denied each of the allegations of the complaint, and set up that the posts were placed by the appellee on his own private property; that the appellants did not have any particular interest in the alleged road and would not suffer any peculiar injury which would entitle them to the relief prayed.

The trial court made the following findings:

"That this is a suit brought by the plaintiffs to restrain and enjoin the defendant from closing up what is alleged to be a highway by prescription located on a strip of land in the town of Black Oak, Craighead County, Arkansas, lying between the south boundary line of the right-of-way of the J., L. C. & E. R. Co. and the north fence, as now located, in front of the residence property owned and occupied by the defendant, T. P. Nelms, the said residence property of the said T. P. Nelms being bounded on the west by the store building of the Merritt Mercantile Company and partly on the east by certain gin property owned by the Citizens' Gin Company; the court finds that the use of said property, in so far as it has been used by the public, has not been adverse but permissive, and that said strip of land has not become a public road by prescription, but that the same is the individual property of T. P. Nelms, free from any kind of public easement of right-of-way, and that the defend-

ant T. P. Nelms should not be required to remove the posts which he has placed on said strip of land." The court thereupon entered a decree dismissing the appellant's complaint for want of equity, from which is this appeal.

1. We pretermit the discussion of, or a decision on, the issue as to whether the appellants had a right to maintain this action, for the reason that the conclusion we have reached makes it unnecessary. Conceding that the appellants had the right to institute this action, we are convinced that the decided preponderance of the evidence shows that they are not entitled to the relief which they seek.

There was a plat before the trial court which showed the *locus in quo,* and which has been brought into the transcript. We have examined the same, and found it helpful in the determination of the cause. The testimony on the issue as to whether the public had acquired a right-of-way over the land of the appellee by prescription is quite voluminous, and it could serve no useful purpose to set out and discuss it in detail. The appellants contend that the alleged road was used by the public generally ten or fifteen years before the appellee acquired the fee to the land on which the alleged road is situated; that one George W. Mangrum, a former owner, had set his fence back so that the public could use the road, and had thus indicated his intention of dedicating the land to the use of the public, and that the public had used the same as a public highway without objection by the owner of the fee for twenty years; that the appellee was charged with knowledge of this use, and that such use vested a right to the easement in the public.

Upon examination of the testimony of Mangrum, we conclude that it does not sustain the contention of the appellants. He stated that he owned the property in 1909 and sold it in 1913. He had owned it ever since the railroad had been located there. He built the first fence along there in 1910, something near about the location of the present fence. He put the fence on that

line because the people had been using it, and he didn't want to be "bull-headed"—wanted to let the people have a passway. It had been used to haul lumber some time. He recognized that the public had been using it as a highway, and put his fence on the line where it is now. The land had been used as a highway in the same way ever since the fence had been put there. On redirect examination he pointed out on the plat the location of the posts placed by the appellee on the land in controversy, and stated that the people coming out around this way (indicating) created a mud-hole coming up the alley. They used that for unloading freight at the back door of the mercantile company. The Merritt Mercantile Company had their own private use in unloading stuff. People came in in the front of Nelms' —most any one that would come along—go in there to the platform or switch to get the freight out. The mud-hole was created from ten to twelve years ago. Most of the way ran across the J., L. C. & E. Railroad. Witness was asked whether he put his fence up because it had become a road, and answered: "Not because it had become a road—I didn't want to shove my fence out and shut people off." Witness was willing for them to use it at that time. No one asked witness' permission. There wasn't any objection then nor later, so far as witness knew. When the public was using the territory in front of the appellee, they were also using part of the right-of-way at the same time. After a period of time they got to running over on the Nelms property—about the time or after the witness first owned the property; got to stacking lumber against the track, and, in order to do that, they had to back off on Nelms' property. There had been no general use of the land where the mud-hole is for the last year. They had been going on the right-of-way for the last year or so, but that had not interfered with the passway actually used. There had been a defined road across Nelms' property probably since the railroad right-of-way. The mud-hole on Nelms' property was created by the public travel.

If the passageway were closed up between Nelms' fence and the railroad track, it would not inconvenience the public. The way was obstructed in 1919 because they shipped lumber in and sometimes four or five freight cars. The part along Nelms' property had never been obstructed altogether. Witness further testified that he didn't think it would inconvenience the public generally to close the road. He stated that the people could not get on the property in front of Nelms' without trespassing on the railroad right-of-way.

The testimony of the county judge of Craighead County was to the effect that the road in controversy had never been worked by the county authorities as a public road. This witness was asked "if the gin and the cantaloupe shed were removed, would that be used as a highway at all?" and answered: "My observation has been that that road has been used as a matter of convenience for the railroad in unloading carloads of stock and materials, and for the benefit of the gin and cantaloupe shed. The cantaloupe industry is just a recent thing. The platform for loading cotton was used for the last five or six years. The gin has been there a long time. When they first started using this, they would drive in where the Merritt Mercantile Company is now." This witness, further along in his testimony, stated, with reference to the space in front of appellee's property, "they rode all over it at one time on one part and later on another part. It was just like any other open territory not fenced—could drive on any of it. The road was usually used for business, and the business was along the right-of-way. There was nothing to obstruct them. They could go on Mr. Nelms' property if they saw fit."

It is unnecessary to set out more of the testimony. We have examined it all, and are thoroughly convinced that the finding of the trial court to the effect that the use of the roadway by the public had not been adverse, but permissive, is not against a preponderance of the evidence. In *Brumley* v. *State,* 83 Ark. 236, among other

things, we said: "When the public use a road running through open and unfenced lands, without any order of the county court making it a public road and without any attempt to work it or exercise authority over it as a public highway, the presumption is that the use of the road is not adverse to the rights of the owner of the land, but by his consent. When he needs the land, he may withdraw his consent, fence the land, and exclude the public without violating the law."

In *Sharp* v. *Mynatt,* 1 Lea (Tenn.) 375, it is held, (quoting syllabus): "Mere user by permission of landowner of a way over his land cannot establish a right to a public way, unless such user is shown by facts and circumstances showing the user by the public under a claim of right, and not simply by permission, actual or tacit, of the owner. The fact that the road had never been worked, repaired, taken control of by the public, or overseers appointed, is an important element of evidence against such claim of right, though not conclusive." See also *State* v. *Nudd,* 23 N. H. 327; *K. C. & O. Ry. Co.* v. *State,* 74 Neb. 868; *Harriman* v. *Howe,* 78 Hun 280.

In the last cited case it is said (quoting syllabus): "Proof of user alone of a road is insufficient to show it to be a public highway. It must be associated with some act showing such use to be claimed as a right, hostile to and independent of the will of the owner, such as reparation or assuming the control of the road in some ostensible manner." There is nothing in the testimony to show that the public was claiming the roadway in controversy adversely to the appellee.

3. The appellants' case falls down on the failure to prove an adverse use by the public of the roadway in controversy for a period of seven years. For aught that the testimony shows to the contrary, the use by the public of the alleged roadway was only permissive and temporary. In this respect the case is clearly differentiated from the cases of *Osceola* v. *Haynie,* 147 Ark. 290; *Mebane* v. *City of Wynne,* 127 Ark. 364; *McCracken* v.

State, 146 Ark. 300; *Peeples* v. *Aydelott,* 125 Ark. 50; *Ry.* v. *Taylor,* 130 Ark. 64; *Road District* v. *Winkler,* 102 Ark. 553, upon which the appellee relies.

4. The testimony in this record does not warrant a finding that the gin company had acquired a right-of-way over appellee's land by adverse use. The decree is in all things correct, and it is therefore affirmed.

MOLITER *v.* PEOPLE'S BUILDING & LOAN ASSOCIATION.

Opinion delivered February 23, 1925.

1. BUILDING AND LOAN ASSOCIATION—BY-LAWS AS PART OF CONTRACT.—The by-laws of a building and loan association at the time of execution of a contract for a loan are part of its contract, and must be read in connection with it.
2. BUILDING AND LOAN ASSOCIATION—BOND OF BORROWER.—Though a by-law of a building and loan association provided only for the execution of a bond by the borrower for payment of labor and materials on a contemplated improvement, this did not impliedly prohibit an additional contract that the borrower should expend the entire amount borrowed in making the improvement.
3. ESTOPPEL—SILENCE.—A building and loan association will not be estopped to set up a breach of covenant to expend the entire sum borrowed in making certain improvements by having said nothing to the borrower's sureties about the alleged failure to make such expenditures for more than a year, as silence will operate as an estoppel only when there is a duty to speak.

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

STATEMENT OF FACTS.

People's Building & Loan Association brought this suit in the circuit court against E. C. Hornor and J. S. Hornor, as principals, and E. P. Molitor and Jas. C. Rembert as sureties, on a construction bond, to recover the sum of $10,000, alleged to be due for money advanced by said association to the principals on said bond.

E. C. Hornor and J. S. Hornor made application to the People's Building & Loan Association of Helena for an advance on their 400 shares of stock in the sum of

$10,000. They proposed to secure the payment of the loan by a lien upon five lots, specifically described, situated in that part of the city known as West Helena. They agreed further to keep insured the buildings which were to be erected on said property for such amount as the board of directors of said building and loan association might require. People's Building & Loan Association accepted the loan under the terms prescribed in the application. E. C. Hornor and J. S. Hornor, as principals, and E. P. Molitor and Jas. C. Rembert, as sureties, executed a bond to the People's Building & Loan Association in Helena, Ark., in the sum of $10,000. The bond is conditioned as follows: "Whereas the said E. C. Hornor and J. S. Hornor have borrowed of the said People's Building & Loan Association the sum of ten thousand and no/100 dollars for the purpose of erecting five houses on the following described lots or parcels of land situated in Phillips County, Arkansas, towit: (Here is inserted a description of the lands.)

"And whereas the said E. C. Hornor and John S. Hornor desire to secure the payment of said money by executing a mortgage on the property as improved as aforesaid.

"Now therefore, if the said E. C. Hornor and J. S. Hornor shall well and truly expend the said sum of $10,000 in making said improvements, as aforesaid, and shall thereby cause said property to be increased in value to the extent of $10,000, and shall pay or cause to be paid all amounts that may be due for labor or materials so used in erection or improvement of said buildings, and shall cause the same to be freed of all liens for such labor or materials, and shall cause to be issued and delivered to said association policies of insurance against loss by fire and tornado, as required in said deed of trust, then and in that event this obligation shall be null and void, otherwise to be and remain in full force and effect."

We incorporate into our statement of facts a portion of § 12 and the whole of § 53 of the by-laws of said building and loan association.

"Section 12. Whenever a loan is made for building purposes, all contracts shall be first submitted to the board of directors for their approval, and, as the building progresses, the building committee shall see that the work is properly done, and audit the bills in favor of the contractor. Before, however, paying any part of such loan, the contractor, contractors, or borrower must be required to give a bond to indemnify the association against liens of mechanics and materialmen. The sufficiency of such bond shall be determined by the board. Whenever a bill for any such work is presented to the secretary with an order to pay same written on the bill, signed by the borrower and the chairman of the building committee, the secretary shall issue his check for the amount. The check must be countersigned by the president before being paid by the treasurer."

"Section 53. The building committee shall examine all the plans, specifications and contracts of the members, and shall exercise a general supervision over all buildings which are in course of erection by the association. All matters relating to plans, estimates and materials, repairs, etc., shall, before being passed upon by the board, unless otherwise ordered, be referred to them for examination. The chairman of this committee shall audit all bills pertaining to buildings being erected by the members before such bills can be paid by the secretary's check."

The $10,000 was advanced to E. C. and J. S. Hornor in April, 1920. They used the sum so advanced in their business, and failed to erect any buildings on said lots for the period of more than a year after the advancement of the $10,000 was made. E. C. and J. S. Hornor then began the erection of houses on said lots, but very inferior materials were used.

The present suit was instituted on June 21, 1921. On motion of the defendants, the case was transferred to the chancery court and tried there. The chancellor found the issues in favor of the plaintiff, and a decree was entered of record in its favor. The case is here on appeal.

P. R. Andrews and *J. G. Burke,* for appellant.

The by-laws of the appellee are to be considered a part of the bond executed by the appellant as sureties. 105 Ark. 140; 113 Ark. 400; 103 U.S.222; Thompson on Corp. (2nd Ed.) vol. 1, § 979, p. 1191; 4 R. C. L. § 4, p. 344; 95 N. W. 230; 6 R. C. L. § 240, p. 85. The sureties are released from the bond for the reason that the appellee failed to comply with its by-laws, sections 12 and 13 in particular, 159 Ark. 405; 74 Ark. 600; 4 Pa. St. 348; 112 Ark. 207; 113 Ark. 429; 123 Ark 486; 93 Ark. 472. Appellee has been guilty of such acts and conduct as would create an equitable estoppel to prosecute and maintain this suit. 33 Ark. 465; 125 Ark. 146; 155 Ark. 172; 89 Ark. 349; 83 Ark. 548.

W. G. Dinning, for appellee.

Estoppel not having been interposed as a defense in the lower court, appellant cannot now insist upon it. 12 Ark. 769; 152 Ark. 1. In any event, mere silence will not work an estoppel. 10 R. C. L. 693-694. To have the benefit of an estoppel, one must show diligence and good faith, 10 R. C. L. 696-697.

HART, J., (after stating the facts). The by-laws of the People's Building & Loan Association incorporated in our statement of facts were in existence at the time the contract in this case was executed, and became a part of the contract. Therefore they must be read in the light of each other in construing the contract.

It is the contention of counsel for the defendants that, when the by-laws are read into the contract, the two in effect provide that the sole object of the execution of the bond was to protect the association against the liens of laborers and materialmen in the construction of the buildings to be erected upon the lots in question. In making this contention they referred to that part of § 12 which reads as follows: "Before, however, paying any part of such loan, the contractors or borrower must be required to give a bond to indemnify the association against liens of mechanics and materialmen." "Such loan" means the loan made to the borrower for the pur-

pose of erecting buildings on the lots described in the application. When the clause of the by-laws just quoted is read in connection with the conditions of the bond, it will be noted that the terms of the bond are broader than warranted by the by-laws. In other words, the by-laws only provide for the execution of a bond to indemnify the association against the liens of mechanics and materialmen. The terms of the bond go further and provide that the borrower shall expend the whole of the $10,000 in making the specified improvements on the lots and thereby cause the property to be increased in value to the extent of $10,000. It then provides that the signers of the bond shall pay or cause to be paid all amounts due for labor or materials used in the erection of the buildings.

The parties were capable of contracting between themselves, and there is nothing in the by-laws to prevent said building and loan association from requiring a bond that the borrower shall expend the amount borrowed in making the proposed improvements on the property, in addition to paying all amounts due for labor and materials used in the erection of the buildings. If the sureties only wished to become liable for the amount of laborers' and materialmen's liens on the proposed buildings, they should have signed a bond which restricted them to liability to that extent. Having signed a bond conditioned that the borrower should expend the amount borrowed in making certain improvements, they are liable for any default by their principal in failing to carry out the conditions of the bond.

It cannot be said that, because the by-laws only provided for the execution of a bond for the payment of labor performed and materials used in the erection of the buildings, this is an implied prohibition against executing a bond, not only for that purpose, but containing the additional covenant that the borrower should expend all of the $10,000 in making the improvements. It is true that the building and loan association was not required to take a bond having this additional cove-

nant, but it was not *ultra vires* for it to do so. Therefore, having written into the bond a covenant that the principals should expend the sum of $10,000 in making the improvements, the sureties are liable for default therein.

It is next contended that the plaintiff is estopped from making this contention because it allowed a period of more than one year to elapse without saying anything to the sureties about the alleged default. This did not make any difference. In order that mere silence may operate as an estoppel in equity, it is necessary that one should maintain silence when in conscience he ought to speak. In short, it is only when the party is under a duty to speak that mere silence will operate as an estoppel. *Pettit-Galloway Co.* v. *Womack,* 167 Ark. 356.

To illustrate: Suppose the building and loan association had approved a contract for the erection of the buildings as contemplated in the application for the loan, and its building committee had approved the plans and specifications, it could not then have urged that the whole of the amount borrowed had not been expended in making the improvements.

Again, if it had exercised a general supervision in the course of the erection of the proposed buildings, it could not wait until they had been completed and then complain that inferior or faulty materials had been used in the construction of the buildings.

It follows that the decree must be affirmed.

PASCHAL v. MUNSEY.

Opinion delivered February 23, 1925.

1. COUNTIES—REFUND OF ERRONEOUS TAXES.—Where the taxes for county purposes were assessed on the usual 50 per cent. basis, and were doubled by order of the levying court, a proceeding by taxpayers for a refund under Crowford & Moses' Dig., § 10180, was proper, the double assessment being unauthorized and erroneous within the statute.

2. TAXATION—WHEN PAYMENT NOT VOLUNTARY.—The payment of taxes under an erroneous assessment without objection to the levying of the tax was not voluntary within the rule that prohibits the recovery of taxes voluntarily paid, since the collector could and would have sold the property assessed for nonpayment of the taxes.

3. TAXATION—PAYMENT VOLUNTARY WHEN.—Payment of taxes by a railroad company under an erroneous assessment not objected is voluntary since the illegality could be set up as a defense in an action to enforce the collection.

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

J. E. Brazil and *W. H. Donham,* for appellant.

Crawford & Moses' Digest, § 10180, has no application to this case. Appellees do not seek the refund on the ground that the doubling of the assessed values constituted an erroneous assessment, but solely on the grounds that the action of the quorum court in making a levy of two and one-half mills for a "county redemption fund" was illegal and void. Such being the case, appellees should have objected to the levy, as provided in C. & M. Digest § 9870, 9871. That levy was not erroneous within the meaning of § 10180, *supra,* 90 Ark. 413. Appellees can not recover the refund because the payments were voluntary. *C. R. I. & P. Ry. Co. v. Brazil,* ms. op. Nov. 24, 1924; 107 Ark. 24; 97 U. S. 181; 98 U. S. 541; 143 Ark. 435; 145 Ark. 185; 153 Ark. 337; 130 Ark. 520; 95 Ark. 501; 86 Ark. 165; 74 Ark. 270; 48 Ark. 70; 37 Cyc. 1178-79.

G. B. Colvin, for appellees.

The payment of the excess amount of taxes was the result of an erroneous assessment, within the meaning of C. & M. Digest § 10180. Bouvier's Law Dict., "Erroneous." We agree that 90 Ark. 413 should largely control here. Certainly the quorum court exceeded its jurisdiction, and its act in doubling the assessment for the county tax was erroneous, and would have been erroneous even if done by the county assessor in the regular way. 162 Ark. 443. We confess error with respect to excess payment made by the receiver for Fourche River Valley and I. T. Ry. Co., since under the previous holding of

the court in *Railway* v. *Bazil*, that payment was voluntary, but as to all other appellees the payments were involuntary, and they were entitled to have the excess refunded. 107 Ark. 24.

SMITH, J. Appellees, eighty-four in number, filed a joint petition in the county court of Perry County for the refund of taxes paid by them for the year 1922, and, upon the appeal from the judgment of the county court to the circuit court, the cause was heard on an agreed statement of facts, from which we copy the following essential recitals:

Con Grabel had recovered a judgment in the United States District Court for the Eastern District of Arkansas, Western Division, against Perry County, and, to secure its enforcement and payment, a mandamus had been issued to the assessing officers of that county, directing that an assessment for county purposes be made of 100 per cent. of the market value, instead of 50 per cent., as is customary. Such an assessment had been made for the taxes for the year 1921, and sufficient revenue had been raised to satisfy this judgment.

An assessment for 1922 taxes had been made on the customary basis of 50 per cent. of the market value of the property assessed, when the levying court, at its regular session for levying taxes at the October term, 1922, entered an order directing the county clerk to double this valuation for county purposes, and to extend the taxes on that basis.

Pursuant to this order, the county clerk, in making up the taxbooks, doubled the valuations made by the assessing officers for county purposes, and the collector proceeded to collect the taxes on that basis. No notice was given that the levying court intended to take this action, and it is stipulated that the taxes would not have been received by the collector on any other basis, and that, had the taxpayer "failed and refused to pay the tax caused and occasioned by said increased valuations, all of the property (of appellees) subject to said taxes would have been immediately seized and sold for said

increased taxes and the other taxes against said property for the year 1922, as provided by law."

Petitioners made no objections to the levying of the tax by the levying court under §§ 9870, 9871 and 9872, C. & M. Digest, but brought this proceeding under § 10180,, C. & M. Digest.

As a part of the agreed statement of facts, a schedule was attached showing the amount of tax paid by each petitioner for county purposes as a result of this order of the levying court.

It was further stipulated that the county treasurer had in his hands these funds.

The court below rendered a judgment awarding the relief prayed, and the county has appealed.

For the reversal of the judgment of the circuit court it is very earnestly insisted that § 10180, C. & M. Digest, under which petitioners proceeded, does not authorize the proceeding, for the reason that the assessment complained of is not an erroneous assessment within the meaning of that statute.

By this section it is provided that "in case any person has paid or may hereafter pay taxes on any property, real or personal, erroneously assessed, upon satisfactory proof being adduced to the county court of the fact, the said court shall make an order refunding to such persons the amount of the county tax so erroneously assessed and paid, * * *." We think this proceeding is authorized by that section, and the taxes which petitioners seek to recover were paid under an "erroneous assessment" within the meaning of that section.

In the case of *Clay County* v. *Brown Lumber Co.*, 90 Ark. 413, the taxpayer complained of an overvaluation, and proceeded under § 7180, Kirby's Digest (which is now § 10180, C. & M. Digest) for relief, but relief was denied upon the ground that this section of the statute was not intended to afford relief in such cases, for the reason that an excessive valuation was not an erroneous assessment within the meaning of that statute.

The court defined what was meant by an erroneous assessment, and, in doing so, said: "It is urged by the appellee that an excessive valuation of property is an erroneous assessment thereof within the meaning of § 7180 of Kirby's Digest, so that a remedy is here given to one who has paid taxes under these circumstances, by having the taxes refunded. But we do not think that the term 'erroneously assessed,' as used in said section, refers to an overvaluation of the property. The term 'erroneous assessment,' as there used, refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature; and does not refer to the judgment of the assessing officers in fixing the amount of the valuation of the property."

The levying court had no authority to double the valuations. The judgment of the Federal court had been paid, but, if it had not been paid, the court was without authority to change the valuations.

In the case of *Summers* v. *Brown,* 157 Ark. 509, it was said: "It may also be observed that the quorum court (the levying court) had no authority whatever to assess or approve an assessment of value for the purposes of taxation."

And in the case of *State ex rel. Craighead County* v. *St. L. S. F. R. Co.,* 162 Ark. 443, where there was an outstanding unsatisfied judgment of the Federal court and a mandamus pursuant thereto directing the assessing officers to double the regular assessment of value for county purposes, we held that this order could be executed only by the proper assessing officer.

The principles announced in the case of *Dickinson* v. *Housley,* 130 Ark. 259, support the judgment of the court below in this case.

It is insisted that the refund of the taxes so erroneously assessed should be refused for the reason that they were paid voluntarily. We have held, however, that, where the collector could have sold the property assessed for the nonpayment of the taxes, and would have done

so if they had not been paid, that action would have constituted a cloud on the title, to prevent which the owner had the right to pay the taxes and to thereafter sue to recover them. *White River Lbr. Co.* v. *Elliott,* 146 Ark. 551; *Walton* v. *Arkansas County,* 153 Ark. 285.

The last-mentioned case is cited by counsel for appellant as authority for holding that the tax here in question cannot be recovered back. That case was one in which a taxpayer had proceeded under § 10180, C. & M. Digest, to recover a special road tax which he had paid the tax collector, of ten cents an acre, levied by a special act of the General Assembly on all lands in Arkansas County belonging to nonresidents of that county. We there held that relief could not be afforded the taxpayer, although the tax was illegal, but we did so for the reason stated, that the tax sought to be recovered was not assessed within the meaning of that statute, as it had no relation to and was not dependent upon the value of the lands and had not been levied by the usual assessing officers, but was a tax which the Legislature had itself fixed on an arbitrary basis.

It appears, from the facts herein stated, that this litigation arises out of facts very similar to those stated in the opinion of this court in the recent case of *C. R. I. & P. Ry. Co.* v. *Brazil,* 166 Ark. 246, and it is insisted that inasmuch as we there held that the railroad company could not recover back the tax it had paid, for the reason that the payment was voluntary, we should, for the same reason, hold here that these petitioners cannot recover. This does not follow. We there pointed out the difference in procedure in enforcing payment of delinquent taxes due by railroads from that employed against other taxpayers, and we need not repeat here what we there said. It suffices to say that, because of this difference in procedure, the payment by the railroad company was voluntary, whereas the payment by petitioners was not.

It does appear, however, that one of the petitioners operated a short line railroad as receiver, and that $315.23 of the taxes paid by him was paid on this rail-

road property. It is therefore conceded by the attorney for the receiver—upon the authority of *C. R. I. & P. R. Co.* v. *Brazil, supra*—that the taxes paid by the receiver on this railroad was voluntary, and that the judgment in the receiver's favor must be reduced to this extent, and it will be so ordered. In all other respects the judgment of the court below is correct, and will be affirmed. It is so ordered.

CAIN v. CARLLEE.

Opinion delivered February 23, 1925.

1. ELECTIONS—PAYMENT OF POLL-TAX.—Persons who paid their poll taxes, but whose names were added to the tax lists by the county collector, and not by the county clerk, as required by Crawford & Moses' Dig., § 3738, had no right to vote at a primary election.
2. ELECTIONS—ERROR IN COUNTING VOTES—PREJUDICE.—Where, in an election contest, the court erred in counting improper votes, though it does not appear for whom they were cast, the error calls for a reversal; an affirmance being directed only where the judgment is correct under undisputed testimony, notwithstanding the error.
3. ELECTIONS—DIFFERENCE IN NAME OF VOTE.—A difference in the names of a voter as signed upon a ballot from that contained in the printed list of votes, under Crawford & Moses' Dig., § 3740, did not require that the vote be excluded; parol evidence being admissible in election contests to prove the identity.

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

Roy D. Campbell, for appellant.

All the votes cast by voters whose names were added to the tax books and whose poll taxes were paid after the tax books were certified to the collector for collection were illegal and void. C. & M. Digest, § 3738; 160 Ark. 275.

Ross Mathis and *J. F. Summers,* for appellee.

The court was correct in holding that where the name of a person does not appear on the tax books and the name is not certified by the clerk to the collector, yet

if he pays a poll tax within the time prescribed by law, he is a legal voter. That is the law. C. & M. Digest, § 3738 is merely directory in this respect. 97 Ark. 221; 92 Ark. 67; 129 Ark. 185.

Under the state of facts presented by this record, appellant presents nothing to consider. The burden is on him as the contestant to show that he received a majority of the legal votes cast. 32 Ark. 553; 148 Ark. 83.

SMITH, J. E. M. CarlLee and W. R. Cain, together with J. L. Bronte, were rival candidates for the Democratic nomination for county judge of Woodruff County in the primary election held in that county on August 12, 1924, and, in due time thereafter, Cain filed his complaint against his two opponents, contesting the nomination of CarlLee, who had been certified by the Democratic County Committee as the nominee.

The complaint, which was in proper form, alleged that, on the face of the original returns, CarlLee received 925 votes, Cain 910, and Bronte 170. That a recount, which was demanded by Cain, was granted, and a subcommittee of three, consisting of two partisans of CarlLee and one of Cain, recounted the votes and, as a result of this recount, the vote of CarlLee was announced as 847, Cain 815, and no votes was announced as having been cast for Bronte. This recount resulted in 173 votes having been thrown out by the subcommittee as illegal, for one reason or another, but, as stated, this recount showed that CarlLee had received a plurality of the votes cast, and he was duly certified as the nominee, and thereafter this contest was instituted.

The complaint contained many allegations of illegality and fraud. It was alleged that many persons, whose names were stated, had voted for CarlLee whose names were not on the legal list of voters which the clerk of the county court is required to furnish, under § 3740, C. & M. Digest, and that the poll-tax receipts of such parties were not attached to the ballots, as required by § 3777, C. & M. Digest. That, after the clerk had delivered the personal taxbooks to the collector, the

names of many persons were added to the taxbooks by the collector, and poll-tax receipts issued, and that this was done without such persons appearing before or being assessed by the county clerk, as required by § 3738, C. & M. Digest. The poll-tax receipts were issued to and votes cast by persons who were not otherwise entitled to vote. That persons had been permitted to vote in townships in which they did not reside. That votes had been received and counted as being cast by persons who did not, in fact, vote at all. That many persons had been permitted to vote on poll-tax receipts which had been paid for by other persons without the voter having requested that this be done, and without any agreement on the voter's part to pay for same. That ballots had been mutilated by the judges, and thrown out because of such mutilation. That, in counting the votes cast for Cain, many ballots were thrown out because of a difference in the initials or the spelling of a name. That in this number were included the wives of a number of electors who had paid the tax in their names and had given the names of their husbands, and *vice versa;* for instance, May Browning, the wife of Luke Browning, voted as May Browning, when she appeared on the list as Mrs. Luke Browning; but that the same rule was not applied in recounting the votes cast for CarlLee. That the ballots of certain electors whose names appeared on the published list of electors with the letter (C) opposite the name were thrown out on that account, although they were white men and were otherwise qualified to vote in the primary election. That a majority of the election officers were partisans of CarlLee, and, had the same rule been applied alike in passing upon the competency of the electors voting for both Cain and CarlLee, there would have been a difference in Cain's favor in the count of 50 votes. The complaint is specific in its allegations, but we only summarized them.

The answer filed by CarlLee contained a denial of all these allegations, and alleged that a number of illegal votes had been cast for Cain. The answer, in effect,

charged that fraud had been committed by election officers of which Cain was the beneficiary. The answer further alleged that the votes of six electors cast for CarlLee under the absent voters' law had been rejected. In reply to this last allegation, Cain admitted that these six votes had not been counted for CarlLee, but it was alleged that they should not have been so counted because of a failure on the part of the electors to properly comply with the absent voters' law.

Upon these charges and countercharges a great many witnesses were examined, and we have before us a transcript of more than six hundred pages.

After hearing all the testimony, the court made the general finding that CarlLee had received a majority of all the legal votes cast at the election, and was entitled to be declared the nominee.

The judgment of the court did not indicate the court's finding on any of the numerous questions of fact raised, and there was no finding as to the number of legal votes either candidate had received, so we do not know which, if any, of the contentions made by Cain were sustained by the court.

A motion for a new trial was filed by Cain, consisting of sixteen assignments of error, in which error was assigned in the refusal of the court to sustain each of the allegations contained in the complaint.

The tenth ground for a motion for a new trial reads as follows: "That the court erred in holding that the following parties, whose names were added to the list of those who had paid their poll taxes after the taxbooks had been certified by the clerk to the collector for collection, were legal voters, and counted the same as a part of the vote having been received by the defendant, E. M. CarlLee, when said voters had not complied with the laws of the State of Arkansas in order to get their said names added to the list of poll-tax voters, said parties being in the following townships and as follows, towit." Then follows a list of the names of such electors, under the name of the township in which they

had voted. And the tenth assignment of error concludes with the following statement: "The above list of names, being one hundred and four, substantially all of said parties having voted for the defendant, E. M. CarlLee, and neither of the said parties having caused their names to be added to the list of parties paying their poll taxes as required by the laws of the State of Arkansas, and particularly § 3738 of Crawford & Moses' Digest of the Statutes of Arkansas, it appearing from the ballots cast by said parties that approximately all of the number had cast their votes for the defendant, E. M. CarlLee."

The court overruled the motion for a new trial, and, in doing so, made the following finding of fact and declaration of law:

"This case turns upon the tenth ground alleged in plaintiff's motion for new trial, that 'said voters had not complied with the laws of the State of Arkansas in order to get their names added to the list of poll-tax voters.'

"It is conceded by counsel for contestant that they paid their poll tax within the time prescribed by law, § 3741, C. & M. Digest, the contention being made that the elector must first apply to the county clerk to have his name included in the list, under § 3738. In other words, he must be registered somewhere before he has the right to tender to the collector his poll tax.

"But art. 3, § 2, of our Constitution is to the effect 'nor shall any law be enacted whereby the right to vote at any election shall be made to depend upon the previous registration of the elector's name.' This provision annulled all requirements for registration under the reconstruction acts of 1868.

"There is no form even of registration required under Amendment No. 6 (Poll Tax Amendment), the only requirement being that the elector shall have 'paid his poll tax at the time of collecting taxes next preceding such election.' And § 3741 defines the meaning of the phrase 'time of collecting taxes.' If the collector accepted his money and issued a receipt or other evi-

dence of payment of poll tax, that is all the Constitution required.

"It appears here that the collector entered the names of these electors upon the tax books in the same manner that the clerk would have done, and thereby charged himself with the taxes in the same manner that the clerk would have done had the electors applied to him in the first instance and before the books were delivered. And that the clerk approved the action of the collector by including these names in the list he furnished the election commissioners, under § 3740, C. & M. Digest.

"It is held in 160 Ark. 269 that the collector cannot issue poll-tax receipts after the first Monday in July, but that holding was upon the facts in that case, and the question here was not before the court."

The court was in error in the application made of the decision of this court in the case of *Craig* v. *Sims*, 160 Ark. 269. We there construed § 3777, C. & M. Digest, and, in doing so, we said: "The statute does not give the county collector the power to assess a poll tax and deliver it to a person otherwise qualified to vote at an election. Hence he can have no such power. His power is only to collect a poll tax as provided."

In that case the contention of the contestant, that the votes of such persons were illegal and should not be counted, was upheld, but no relief was given him on that holding because he had not shown that the votes of such persons were cast for his opponent. We there said: "Conceding that these poll-tax receipts were illegally issued by the collector and purchased by the contestee or other persons for his benefit, still this falls short of establishing that the illegal votes were cast for the contestee. The ballots must have been cast by the persons holding the poll-tax receipts, and, in the absence of that showing, we have no means of knowing how they voted. The contestee might have furnished the receipts and intended them to vote for him. The votes may have been cast for the contestant, or for some other person."

In the instant case the showing was made that the questioned votes were cast for CarlLee, and, upon the authority of *Craig* v. *Sims, supra,* those votes should have been thrown out.

Section 3738, C. & M. Digest, provides how omitted names may be added to the taxbooks. These names can be added only by the county clerk, and, in adding such names, the clerk is required to assess a penalty of a dollar against each person so added, and, in addition, it is made the duty of the clerk "to assess any property held by said applicant, and which, for any reason, has been omitted from the tax books." And this section also imposes on the clerk the duty of certifying this supplemental assessment.

The purposes of these provisions are obvious and are two-fold: (1) to protect the public revenues, and (2) to prevent fraud in elections.

At any rate, this statute was upheld in *Craig* v. *Sims, supra,* and we perceive no reason for changing the construction there given it, and, upon the authority of that case, we hold that the court was in error in counting such illegal votes.

It is insisted, however, that, even though the court was in error in the ruling made, that fact does not call for the reversal of the judgment of the court below. But we cannot agree with counsel in this contention.

It is true that this court reverses only for error, and we would not reverse the judgment here if we could say that the judgment of the court below was correct under the undisputed evidence, notwithstanding this erroneous ruling; but we do not so find. We cannot affirm the judgment, in view of this erroneous ruling of the court, unless we do find that the judgment was correct under the undisputed testimony, notwithstanding this error.

In the case of *Arkadelphia Lumber Co.* v. *Whitted,* 81 Ark. 247, a syllabus reads: "Errors of the court in giving or refusing instructions were not prejudicial if the undisputed evidence shows that the judgment of the court was right upon the whole record."

That ruling was followed in the later cases of *St. L. I. M. & S. Ry. Co.* v. *Randle,* 85 Ark. 127; *Thompson* v. *Southern Lbr. Co.,* 113 Ark. 380; *Patterson* v. *Risher,* 143 Ark. 376; *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123; *Davis* v. *Kelly,* 152 Ark. 151; *Gage* v. *Arkansas Central R. Co.,* 160 Ark. 402. In each of those cases the court refused to reverse the judgment of the court below, notwithstanding the erroneous declaration of law, but the reason assigned in each case was that the evidence was undisputed The effect of those cases is that a reversal must be ordered where an erroneous declaration of law is made, unless the evidence is undisputed and the judgment is correct under the undisputed evidence, otherwise this court cannot know whether the error was prejudicial or not, and must assume that it was.

Counsel for CarlLee insists that the undisputed evidence shows that as many such votes were added to the taxbooks in the townships which Cain carried as were added in the townships which CarlLee had carried. There appears to have been 160 such names added to the taxbooks in the Central District of the county, and that this district voted largely for Cain, but there was no attempt to ascertain how these persons had voted, and, as was said in the case of *Craig* v. *Sims,* from which we have already quoted, this falls far short of showing that they voted for the contestant, whereas the showing was made by Cain that the voters which he challenged under this tenth assignment of error had, in fact, voted for CarlLee. Certainly, the court did not find that as many, or more, of such electors had voted for Cain, for the votes of these 160 electors were not inquired into. After examining the vote of one small township, counsel for CarlLee said: "Now, may it please the court, after we introduce, specifically, this ballot, it may be understood by counsel that the certified record of votes, together with the poll-books in Freeman, Wiville, Bullville, Hunter, Pumpkin Bend, Patterson City, Hilleman, Howell, Riverside, Revelle, with the understanding that they may be treated as in

the record, we will close." There followed the statement that this was all the evidence in the trial of the case.

It does not appear that the ballots cast in the townships named in which the 160 poll taxes were paid were canvassed, or any attempt made to ascertain how many of the 160 persons had voted, or for whom they had voted. We think it affirmatively appears that the court did not find that these 160 votes had been cast for Cain. The finding that they were cast for Cain could not have been made, for these ballots were not canvassed. We think there is at least such doubt about the facts that they cannot be treated as undisputed.

This appeal is from a trial at law, and the contestant was entitled to have the court pass on the questions of fact raised by the testimony, and there are many such questions in the case. We have no way of knowing how many, if any, of the contentions of Cain were sustained, but, as we understand the court's finding, he had come to the conclusion that the question raised in the tenth assignment of error was decisive of the contest. The court finds that "this case turns upon the tenth ground alleged in the plaintiff's motion for new trial, that 'said voters had not complied with the laws of the State of Arkansas in order to get their names added to the list of poll-tax voters.' "

In view of this finding of fact, we are unable to say that the court would have found for CarlLee, even though he had construed the case of *Craig* v. *Sims, supra,* as we do. Certainly, we do not think we should say the undisputed evidence shows this when this was only one of the numerous grounds of contest which Cain had offered testimony to sustain.

Appellant earnestly insists that, where there was a difference in the name of a voter as signed on the ballot from that contained in the printed list of voters certified by the clerk under § 3740, C. & M. Digest, the votes should not be counted. The holding of this court in the case of *Wilson* v. *Danley,* 165 Ark. 565, is against that

contention. There the supporting affidavit of an elector in an election contest was made by Emmet Austin, and it appeared that no poll-tax receipt had been issued in that name to the affiant, who testified as a witness before the court. He exhibited a receipt which had been issued to E. Y. Austin, and testified that, while his name was E. Y. Austin, his custom was to sign his name as Emmet Austin. We held this testimony was competent and properly identified and qualified the affiant.

We therefore hold that parol testimony is competent to show the identity of an elector who voted under one name with that of a name appearing on the list of voters. Indeed, it is provided by § 3742, C. & M. Digest, that, if the judges of election have any doubts as to the identity of any person being the person whose name appears upon the official list of those who have paid poll tax, they may take evidence by the oath of the person who presents himself claiming to be such person, or by other competent evidence, and the judges are empowered to administer oaths for that purpose.

For the error indicated the judgment of the court below will be reversed, and the cause will be remanded for a new trial.

HART, J. (dissenting.) It may be stated at the outset that the findings of fact by a circuit judge in the trial of the contested election are as conclusive as the verdict of a jury upon conflicting evidence. *Williams* v. *Buchanan,* 86 Ark. 259.

In this case there was a general finding of facts that E. M. CarlLee received a majority of the votes cast at the primary election for county judge which was contested by W. R. Cain. In trying this issue no declaration of law was made or refused, and the court is therefore presumed to have acted upon correct views of legal principles applicable to the facts. In other words, the case stands as though a properly instructed jury had returned a verdict for CarlLee. *Blass* v. *Lee,* 55 Ark. 329, and *Blass* v. *Anderson,* 57 Ark. 483.

It is true that the court has held that findings of facts may be reduced to writing after the trial; but the court is not required to do so. In the case before us there was no request made by appellant to the court for a special finding of facts. The motion for a new trial filed by him was an assignment of errors alleged to have been committed at the trial, and was not a request that the findings of the court be reduced to writing and filed. *Buell* v. *Williams,* 127 Ark. 58.

Of course, the objection that the court's general findings of facts is not sustained by the evidence may be made by a motion for a new trial, no exceptions at the time the finding is made being necessary. In such a case, however, the only question on appeal is whether there was any evidence to support the finding of the court. *Greenspan* v. *Miller,* 111 Ark. 190.

The rule as to the court's conclusions of law is different. Where there are no exceptions to the court's conclusions of law, they cannot be reviewed here. *Dunnington* v. *Frick Co.,* 60 Ark. 250, and *Bluff City Lbr. Co.* v. *Floyd,* 70 Ark. 418.

Mere statements in a motion for a new trial that certain rulings were made by the court and excepted to by the party amount to nothing unless it is shown by the bill of exceptions that such rulings were made and excepted to. A motion for a new trial has never been used to incorporate anything into the record or any exceptions to anything done by the court. Its sole use is to assign errors already committed by the court, except for newly discovered evidence. *McKinley* v. *Broom,* 94 Ark. 147, and *Cravens* v. *State,* 95 Ark. 321.

We do not think that the ruling in *Craig* v. *Sims,* 160 Ark. 269, is conclusive on the point of law decided by the majority opinion. In that case it was held that persons not paying their poll tax after a certain day named in the statute were not entitled to vote in the primary election. The precise point was whether a poll tax could be paid subsequent to the first Monday in July just preceding the primary election in August of the same year.

The language used in an opinion should be construed as a whole with reference to the precise question under review. Isolated sentences may be frequently quoted from in an opinion which would tend to give it a color not warranted by construing the opinion as a whole and with reference to the precise point under discussion and review.

The question under consideration in this case involves the construction of § 3738 of Crawford & Moses' Digest. That section provides for the addition of omitted names at any time after the assessment list has been delivered to the county clerk and placed in the hands of the collector before the Saturday next preceding the first Monday of July when the collector is required to make his final settlement with the county court. This section is a part of our general election laws, and it is more in accord with our previous decisions to hold that it is directory and not mandatory. For example in *Whittaker* v. *Walson*, 68 Ark. 555, it was held that payment of one's poll tax by another, not by request, but as a gift, in order to influence his vote without any offer on the voter's part to reimburse the other for such payment will not constitute him a competent voter, though otherwise qualified.

In its opinion the court referred to the fact that the Constitution of this State declares the qualifications of an elector and further provides that every such elector who shall exhibit a poll tax receipt, or other evidence that he has paid his poll tax at the time of collecting taxes next preceding such election, shall be allowed to vote at any election in the State of Arkansas. The court said that the object of the requirement of the receipt, or other evidence of the payment of the poll tax was to make the payment of the tax by the elector a condition upon which he shall be allowed to vote, and to prohibit him from voting until he does so. The court further said that the elector need not pay the tax in person, provided he in good faith authorized another to pay it for him, or ratified the act of another who had done so without having been pre-

viously authorized, and that the ratification must be accompanied with the promise to reimburse him.

It would seem that, if the court thought that section 3738 was mandatory, it would not have been necessary for the court to have held that another person could not pay the poll tax for an elector without being first requested to do so by such elector and without any expectation or promise of reimbursement. *Whittaker* v. *Watson,* 68 Ark. 555, and *Rhodes* v. *Driver,* 69 Ark. 501.

Art. 3, section 2, of our Constitution provides that no law shall be enacted whereby the right to vote at any election shall be made to depend upon any previous registration of the elector's name. If § 3738 is to be construed as mandatory, it would for all practical purposes be a registration statute.

Moreover Amendment No.6 of our Constitution, after declaring the qualifications of an elector, provides that if such elector shall exhibit a poll tax receipt, or other evidence that he has paid his poll tax at the time of collecting taxes next preceding such election, he shall be allowed to vote at any election in the State of Arkansas. We think this provision should be construed liberally in order to carry out its purpose. The only prerequisite is that the poll tax be paid within the time prescribed by law.

It is no answer to this to say that we have held that the provisions of our Constitution do not apply to primary elections. As we have already seen, § 3738 is a part of our general election laws and is also made a part of our primary election laws. It will be presumed that the Legislature intended that this section in question should receive the same construction as it would receive in a contest under the general election laws of the State.

The writer is authorized to announce that Judge HUMPHREYS concurs in this dissent.

KNIGHTS OF PYTHIAS OF NORTH AMERICA ETC.
v. REINBERGER.

Opinion delivered February 23, 1925.

ATTORNEY AND CLIENT—COMPENSATION—IMPLIED CONTRACT.—Though an attorney's employment on behalf of a fraternal association was unauthorized, yet where his services were accepted by officers of the association authorized to employ him, the association will be liable for his compensation under an implied contract.

Appealed from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

J. R. Booker and *S. A. Jones,* for appellant.

Appellee was employed to represent the personal interests of Morris, who had no authority to bind appellant. A person who has availed himself of the act of an agent must prove the authority under which the agent acted. 53 Ark. 208; 21 R. C. L. p. 858, § 36. A principal is not liable for acts of his agent, which are not within the scope of his employment. 21 R. C. L. p. 899, § 28; 111 Ark. 575; 114 Ark. 9. Those who deal with an agent must ascertain the extent of his authority. 111 Ark. 229; 105 Ark. 11; 21 R. C. L. § 85, p. 908; 104 Ark. 459; The question of apparent authority had no evidence to sustain it, and instruction No. 5 was error. 21 R. C. L. § 34 pp. 854, 855.

June P. Wooten, for appellee.

Conceding that Morris had no authority to employ appellee, and that appellee performed the duty imposed on him, without objection on the part of those in authority to bind the lodge, and with their knowledge, the lodge would still be liable for a reasonable compensation. 103 Ark. 513; 26 Ark. 360. Even though the contract was void, appellee could recover upon *quantum meruit.* 133 Ark. 422; 66 Ark. 190. Motion for new trial was not filed in apt time. 49 Ark. 75. Bill of exceptions was not filed in time allowed. 58 Ark. 110; 96 Ark. 319; 53 Ark. 415; 82 Ark. 196; 109 Ark. 543.

McCULLOCH, C. J. Appellee is a practicing attorney, and he instituted this action against appellant, a fraternal organization, to recover a sum alleged to have been earned as fee for services rendered by him for appellant. He alleged that he was employed by F. D. Morris, one of the officers of appellant society, the title of his office being Grand Keeper of Records and Seal, and that his employment was to appear for appellant at a hearing before the Attorney General, and in an action instituted in the circuit court of Pulaski County by the Attorney General to liquidate and dissolve appellant corporation. Appellee alleged that his contract with Morris was that he was to be paid a retainer in the sum of $250, which was paid, and the further sum of $2,250, payable at the end of the litigation. He alleged that he appeared before the Attorney General as well as in the circuit court, and performed the services for which he was employed. Appellant answered denying that appellee was employed, and alleged that Morris had no authority to employ an attorney for appellant. There was a trial of the issues, which resulted in a verdict in favor of appellee for the recovery of $250.

The statutes of this State provide that the Attorney General may, at the instance of the Insurance Department, institute an action in a court of competent jurisdiction against any domestic insurance society which has failed to comply with any provisions of the law with respect to carrying out its contracts in good faith or in the transaction of its business, and thus procure a receivership to wind up the affairs of such corporation, but that such proceedings shall not be commenced "until after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceedings should not be commenced." Crawford & Moses' Digest, § 6111. An adverse recommendation to the Attorney General was made by the Insurance Department against appellant society, and the Attorney

General notified the officers to appear on a given date to answer the charges against the society.

According to the testimony of appellee, he was employed by Morris to appear for appellant society before the Attorney General, and he did in fact appear there and represent the society in the examination. The president and other ranking officers of appellant were also present, and permitted appellee to appear there in the name of appellant to resist the proceedings against it. They contended, however, that appellee appeared as personal counsel for Morris, and the latter testified that he employed appellee solely for that purpose.

The Attorney General instituted an action against appellant in the circuit court, and, pursuant to his employment, appellee appeared there for appellant, but subsequently other attorneys were employed to represent appellant, and, according to the testimony introduced in that case, the record made by appellee in the hearing before the Attorney General was used in the circuit court as a basis of appellant's defense in that action, and upon which a decision favorable to appellant was secured, and an affirmance of that judgment was obtained in this court. *State* v. *Knights of Pythias,* 157 Ark. 266.

The testimony adduced by appellant tended to show that Morris was without authority to employ counsel, but the verdict of the jury can be sustained upon the theory that appellee performed the services for which he claims compensation, and that officers of the corporation whose authority is unquestioned accepted these services and knew that they were being performed for appellant; hence there was an implied contract. *Boynton* v. *Brown,* 103 Ark. 513. The proceedings were against appellant, and its officers present at the hearing had no right to assume that appellee appeared in any other capacity than as appellant's counsel.

Appellee did not recover his full fee according to the contract, but it is unimportant to determine whether his recovery should have been on the implied contract

or upon the *quantum meruit,* since he has not appealed, and the evidence is sufficient to establish the reasonableness of the compensation awarded by the jury.

The court's charge to the jury and the court's rulings with respect to giving and refusing instructions have not been abstracted, hence we must assume that the case went to the jury upon proper instructions and that there was no error of the court in that respect.

Judgment affirmed.

NATIONAL LIFE INSURANCE COMPANY *v.* GREGG.

Opinion delivered March 2, 1925.

1. INSURANCE—CONSTRUCTION OF POLICY AS A WHOLE.—As it is the duty of the court to give effect to all of the clauses of a policy of insurance, a clause defining the insured's liability and containing no stipulation against liability will be construed not to conflict with another clause containing a clear and unambiguous stipulation against liability for injury from specified causes.
2. INSURANCE—WAIVER OF STIPULATION.—Where the insurance company wrote two letters requesting certain proofs and expressly stating that it neither admitted nor denied liability, a third letter constituting a mere continuation of the request for proofs will not be a waiver of a stipulation concerning non-liability.

Appealed from Craighead Circuit Court, Jonesboro District; *G. E. Keck,* Judge; reversed.

Gordon Frierson and *Carmichael & Hendricks,* for appellant.

The court erred in holding that the covering clause could be extended by waiver. 122 Ark. 468. The company had the right to fix the terms and conditions upon which it would insure appellee. 143 Ark. 374. Where there is no ambiguity, policies of insurance must be interpreted according to the plain import of the language used. 161 Ark. 597. As to the question of the violation of law, we think the case of *American National Ins. Co.* v. *White,* 126 Ark. 493, controls in this case. See also, 13 L. R. A.

(N. S.) 262; 261 S. W. 320; 132 Ark. 546; 12 Am. St. Rep. 484; 59 Am. St. Rep. 476; 25 Am. St. Rep. 685.

Hawthorne, Hawthorne & Wheatley, for appellee.

There was no error in holding that the covering clause was extended by waiver. 134 Ark. 52; 128 Ark. 92; 96 U. S. 234; 24 L. Ed. 689; 217 U. S. 323; 54 L. Ed. 782; 96 U. S. 234; 187 U. S. 335; 183 U. S. 308; 164 Ark. 75; 53 Ark. 494; 14 R. C. L. 1181, § 357; 25 Cyc. 872 Requests for further proofs of loss constitutes a waiver of known forfeitures. 152 Ark. 64; 14 R. C. L. 1197; 74 So. 807; L. R. A. 1917-D 1091, 164 Ark. 608; 163 Ark. 7; 118 Ark. 22; 53 Ark. 494.

When a clause in a contract of insurance is susceptible of two constructions, that one will be adopted which is most favorable to the assured. 74 N. E. 964; 8 L. R. A. (N. S.) 708; U. S. 25; 46 L. Ed. 64; 46 Tex Civ. App. 394; 102 S. W. 773; 34 L. R. A. 301; 59 Am. St. Rep. 473; 36 S. W. 169.

McCULLOCH, C. J. Appellant issued to George McGee its policy of indemnity for "loss of life or time by either accident or sickness and for loss of limb or sight by accidental means," the total sum payable for loss of life being $200. The policy was payable to appellee's intestate, Mary McGee, who was the wife of George McGee. While the policy was in force, George McGee came to his death as the result of a pistol shot fired by Toney Dowell, and this action was instituted against appellant by appellee's intestate, Mary McGee, to recover the sum of $200, the amount specified in the policy as a death benefit. There was a recovery in the trial below, and, after the appeal was prosecuted here, Mary McGee died, and the cause was revived in the name of appellee as administrator of her estate.

The pertinent clauses in the policy are as follows:

"Total Accident Disability."

"(A). At the rate of twenty dollars per month for the period, not exceeding five consecutive years, that bodily injuries effected during the life of this policy, solely through external, violent and accidental means,

shall, directly and independently of all other causes, wholly and continuously, from date of accident, disable and prevent the insured from performing every duty pertaining to his business or occupation, and require and receive at least once in each seven days the attendance of a legally qualified physician or surgeon, but shall not result in any of the losses mentioned in paragraph C."

"Specific Total Losses."

"(C). If the injuries described in paragraph A shall, independently of all other causes, immediately, wholly and continuously from date of accident disable and prevent the insured from performing every duty pertaining to his business or occupation shall, during the period of such disability and within ninety days from date of accident, solely result in any one of the following specific total losses (suicide, sane or insane, is not covered), the company will pay, in lieu of all other indemnity except that arising under paragraph L * * *, but only one specific total loss (the greater) resulting from one accident will be paid."

"Not Covered."

"(F). This policy does not cover injuries, fatal or non-fatal, which are received as the result of or while violating law or being under the influence of any narcotic or intoxicant or on the right-of-way or other property of a railway corporation, other than stations, platforms or regular crossings prescribed by law, not being at the time a passenger or employee of such railroad in the discharge of duty, or which are caused wholly or in part by the intentional act of any person other than the insured (assaults committed on the insured for the sole purpose of burglary or robbery excepted)."

It is, as before stated, undisputed that George McGee came to his death as the result of a pistol shot fired by Toney Dowell, and the evidence tends to show that Dowell fired the shot intentionally, but was acting in self-defense, but it may be said that the evidence on the matter of self-defense was conflicting.

The court refused to submit the case to the jury, and, on the trial, gave a peremptory instruction in favor of the plaintiff for the recovery of the full amount specified in the policy.

Appellant defends on the sole ground that the fatal injury of the assured resulted either while he was violating the law or from the intentional act of Toney Dowell in firing the shot. On the other hand, it is contended by counsel for appellee, in support of the judgment, that clause "F" of the policy is in conflict with clause "C," under which liability is predicated, and that the former must control, there being no condition or stipulation against liability in that clause. Our conclusion is that this contention is not well founded, for the various clauses of the policy are to be read together, and clause "F" is a clear and unambiguous stipulation against liability where an injury results from either of the causes mentioned therein. The several clauses can be read together in harmony, and it is our duty to do so and give full effect to all of the clauses of the policy to the extent that they are harmonious.

It is next contended by appellee that there was a waiver on the part of appellant of the stipulation concerning non-liability for injuries resulting from causes mentioned in clause "F" of the policy. On the other hand, it is the contention of counsel for appellant that the policy does not cover the causes of injury mentioned in clause "F," and that therefore a waiver cannot create liability. It is also contended that there was, in fact, no attempt at waiver and no conduct on the part of appellant or its agents which would constitute waiver. The shortest way out of this controversy is to determine whether or not there was a waiver, pretermitting any decision of the dispute as to the effect of clause "F."

According to the evidence in the case, there was correspondence between appellant and Mary McGee, through the latter's attorney, concerning the proofs in the case, and appellant, in the correspondence, asked for

proofs as to the manner in which George McGee came to his death. Each of the letters written by appellant, except one of them, contained a statement to the effect that, in requesting proofs, the company neither denied nor acknowledged liability, but desired to obtain information for use of the claim department. This statement was contained in the first letter and in another, but in still another letter there was no qualification of the request for proof. In the face of the disclaimer, the requests for proof did not constitute a waiver. *Phoenix Insurance Co.* v. *Minner,* 64 Ark. 590; *Interstate Business Men's Accident Assn.* v. *Green,* 132 Ark. 546. It is not essential that the disclaimer should have been repeated in every letter of the continuous correspondence in order to keep it alive and prevent a waiver. Later letters constituted a mere continuation of the request for proofs, and it was stated in the beginning that the request should not be understood as either an admission or a denial of liability. We are of the opinion therefore that, according to the undisputed evidence, there was no waiver of the stipulation, whether the clause in question constitutes an exclusion from liability or a condition upon which liability rests.

Reversed and remanded for a new trial.

JONES v. KEEBEY.

Opinion delivered March 2, 1925.

1. SALES—AGREEMENT TO WAIVE RETENTION OF TITLE.—If there was an agreement, otherwise valid, for the relinquishment of a seller's retention of title, the effect of this agreement would not be obviated by the fact that the seller erroneously believed that the purchase money was secured by a bond given in an action by the seller against the purchaser.
2. SALES—CONDITIONAL SALE—WAIVER.—A seller of chattels retaining title until paid did not waive his title as to a transferee by suing the purchaser to recover possession, such action not being

inconsistent with a subsequent action against the transferee for possession of the chattels.

3. SALES—CONDITIONAL SALE—ELECTION OF REMEDIES.—The fact that a seller sued the purchaser for possession of chattels of which the title was retained, instead of the purchaser's wife to whom the chattels had been transferred, did not constitute an election of remedies, nor preclude the seller from subsequently suing the wife.

4. SALES—AGREEMENT TO WAIVE RETAINED TITLE—CONSIDERATION.—A seller's agreement to waive title retained as security for payment of the purchase price of chattels which the purchaser gave to his wife, upon the wife's agreement to hold possession of the property and not to return it to the purchaser, *held* without consideration.

5. APPEAL AND ERROR—HARMLESS ERROR.—The error of instructing that a seller would not be bound by an agreement to waive the title to chattels sold to a purchaser and by him given to his wife, if the seller believed that he was secured by a bond excuted by the purchaser, *held* harmless where such agreement was without consideration.

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

A. A. McDonald, for appellant.

Melbourne M. Martin, for appellee.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover possession of two diamond rings. Appellee is a dealer in jewelry and gems, and he sold the rings in controversy to appellant's husband, R. W. Jones. The sale was on credit, except a small amount paid, and Jones executed two notes for the purchase price of the rings, each of the notes stipulating that the title to the rings was retained by appellee until the purchase price should be paid in full. Neither of these notes has ever been paid. Jones gave the rings to appellant as a wedding present. Appellant and Jones have since separated, and a divorce suit is pending, or was at the time of the trial of this cause below. After the maturity of the notes, and after appellant and Jones separated, appellee instituted an action against Jones to recover possession of the rings, and caused an order of delivery to be issued with a

capias clause, which was served, the officer failing to find the property, and Jones gave bond for his appearance, and was released from the writ. On the trial of that cause the court rendered judgment in favor of appellee against Jones on the pleadings, refusing to submit the issues to the jury as to whether or not Jones had possession of the property, either actual or constructive, at the time of the commencement of the action. The court rendered judgment on Jones' bond, but, on appeal to this court, the judgment was reversed and the cause was remanded. *Jones* v. *Keebey,* 159 Ark. 586. Appellee having ascertained that the rings were not in the possession of Jones, he dismissed that action and commenced the present one against appellant. The foregoing facts are undisputed.

The only defense offered by appellant is that appellee waived his retention of title by an election to pursue another remedy and by express agreement entered into with appellant. The basis of this defense is that, while appellee's action against Jones was pending in this court on appeal, appellee entered into an oral agreement with appellant that, if she would hold possession of the rings and not return them to Jones, he (appellee) would permit her to borrow money on the rings, and would look to Jones' bond for settlement of his debt. Appellant testified to that effect, but there was a conflict in the testimony, appellee denying that he made any such agreement with appellant. The court gave an instruction, over appellant's objection, telling the jury that, if it was found that appellee, "when he waived his lien upon the rings, if he did waive it, believed that the bond was for the value of the rings or their return to him, then in that event Keebey would not be bound by such waiver, if it was made." This instruction was erroneous, for, if there was an agreement, otherwise valid, for the relinquishment or waiver of appellee's retention of title, the effect would not be obviated by the fact that appellee believed that his debt was secured by the bond in the

other action. This instruction was, of course, prejudicial, unless we conclude that the undisputed evidence fails to show a valid waiver or relinquishment by appellee of his retention of title.

Our conclusion is that, upon the undisputed evidence, there was no valid relinquishment by appellee of his retention of title. In the first place, it cannot be said that there was any relinquishment or waiver by election to pursue an inconsistent remedy. The prior action against Jones was not an inconsistent remedy, for the reason that it was an action to recover the property or its value. We have often decided that, upon retention by the vendor of title to property sold as security for the payment of the purchase price, an action to recover the price constituted a recognition of the passage of the title of the vendee, and operated as a waiver. *Neal* v. *Cone,* 76 Ark. 273; *Thornton* v. *Findley,* 97 Ark. 432.

The fact that appellee sued Jones for possession, instead of instituting the action then against appellant, did not constitute an election of remedies so as to preclude him from following the property into the hands of whosoever held possession, and instituting an action therefor.

The question of election of remedies being thus eliminated, it remains only to consider the alleged agreement of appellee to waive his retention of title and look to Jones' bond for settlement of his debt. This agreement constituted a new contract, and must have been based upon some consideration as between the parties. A bare agreement between the parties permitting appellant to borrow money was not binding on appellee. *Ames Iron Works* v. *Richardson,* 55 Ark. 642; *Bell* v. *Old,* 88 Ark. 99. The effect of the agreement might be different if appellant had, pursuant to the agreement, borrowed money from a third party against whom appellee attempted to assert his right to the property. In the present action there are no rights of third parties

involved. The mere agreement on the part of appellant to hold possession of the property and not return it to her husband was not a consideration to support a new agreement with appellee with respect to his relinquishment or retention of title. The effect was merely an agreement to hold possession of the property, which was already in appellant's possession. The erroneous instruction given by the court was therefore harmless, for the reason that appellee was entitled to recover upon the undisputed evidence.

Affirmed.

McCRARY v. WILKINS.

Opinion delivered March 2, 1925.

1. TRIAL—TRANSFER OF CAUSE—WAIVER OF OBJECTION.—Objection to the removal to equity of an action requiring an accounting between partners, when it was properly triable at law, was waived where the removal was by consent.
2. PARTNERSHIP—EVIDENCE.—Evidence held to sustain a finding that a partnership in the hauling business existed between plaintiff and defendant.
3. JOINT ADVENTURE—ACCOUNTING.—Where a Ford car was acquired, either as a result of a joint enterprise or as part of partnership assets, it was proper to direct an accounting to determine the interest of the parties in the car.

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

S. S. Hargraves and *John M. Prewett*, for appellant.

The demurrer should have been sustained. The court erred in transferring the cause to the chancery court. 108 Ark. 252. An action at law cannot be brought by one partner against another for money alleged to be due him on account of partnership transactions until after a settlement. 140 S. W. 1193; 142 N. Y. 1. The only action that could be sustained before settlement is a suit for an accounting. 72 Ark. 469; 23 Ark. 333; 12 Am. Dec. 649. The agreement of counsel to transfer the cause to the chancery court did not give that court jurisdiction of

subject-matter. 48 Ark. 151; 88 Ark. 1; 129 Am. St. Rep. 73; 85 Ark. 213; 203 Ill. 92; 67 N. E. 497; 124 Ill. 516; 16 N. E. 909. An agreement by two persons to buy an article together does not amount to an agreement to form a partnership. 79 Ark. 499; 130 N. Y. 54; 145 App. Div. 280; 132 N. W. 477; 54 Ark. 384; 138 Ark. 287; 42 Ark. 390; 60 Am. St. Rep. 344; 30 Cyc. 370; 93 Ark. 526; Parsons on Partnership, § 58.

Mann & Mann, for appellee.

The chancery court had jurisdiction. 74 Ark. 104.

WOOD, J. This action was instituted by Wilkins against McCrary and the St. Francis Motor Company in the circuit court of St. Francis County, Arkansas, to recover the sum of $240. Wilkins alleged that he and McCrary were joint owners of a Ford touring car of the value of $480; that McCrary, without right and over his objection, sold the car to the St. Francis Motor Company, and thereby converted the car to his own use, to his damage in the sum of $240, for which he prayed judgment. McCrary and the motor company answered denying the allegations of the complaint. The cause was, by agreement of parties, transferred to the chancery court.

Wilkins, in his deposition, was asked to explain the exact arrangement between him and McCrary in regard to the purchase of a wagon, and said: "Well, to start at the first of it, Mr. McCrary and I were talking over this seed business, and he told me that he had the contract for the hauling from the Planters' Gin to the oil mill, and made the proposition to me that if I was to go one-half on a wagon and expenses that we would go in one-half each in the seed hauling, that he had a team that he would furnish, and I was to look after the hauling and the team while it was down there. This was agreeable to Mr. McCrary and myself." McCrary was asked to state the business relationship between himself and Wilkins in 1922, and testified as follows: "The fall of 1922 I offered Mr. Wilkins a proposition that, if he would

help me buy a wagon and get a place to keep a team here in town, and look after this team, that, after the expense of the wagon and the expense of the hauling come out, why I would split the profit 50-50 on the seed hauling from the Planters' Gin."

Witness T. R. Shawver testified that, on or about September 6, 1922, he heard a conversation between Wilkins and McCrary in regard to the purchase of a wagon from Stevens Hardware Company. McCrary had bargained for a wagon from Pettus & Buford. Wilkins had bargained for a wagon from Stevens Hardware Company. The wagon was to be charged to the two men jointly. The first reason for purchasing the wagon from the Stevens Hardware Company was that the purchasers thought they were getting a better value than from the other dealer. The second reason for making the purchase from the Stevens Hardware Company was that a Ford car was being given away in a drawing contest, and they could get tickets on this purchase of the wagon, provided they paid the account in thirty days from date.

Witness Fenner Laughinhouse, a member of the firm of the Stevens Hardware Company, testified concerning the purchase of the wagon above mentioned as follows: Witness negotiated with McCrary and Wilkins for the sale and purchase of the wagon. Witness' firm delivered the wagon to a negro sent after it by McCrary. Before this, McCrary had agreed with witness as to the price of the wagon. The wagon was to be charged to McCrary, to keep from opening an account with McCrary and Wilkins. McCrary already had an account with witness' firm. McCrary paid for the wagon by check. He paid his account, and the wagon was included in the account. About that time there was an advertising scheme on hand by the merchants in Forrest City by which they gave to cash purchasers tickets in a drawing that was to take place some time in October, at the Imperial Theatre, and the merchants in the city took

advantage of it and gave to cash purchasers coupons or tickets which entitled them to a chance in the drawing. The Stevens Hardware Company took part in that advertising scheme. When the wagon was purchased and paid for by McCrary, the Stevens Hardware Company delivered to him coupons or tickets for the drawing. They delivered to McCrary about 187 tickets. Witness did not give him in one lot 180 tickets to cover the wagon purchase and seven to cover his account separately. They were all attached. Witness was asked what connection Wilkins had with the sale of this wagon, and answered, "Only he came in to ask about it, figured on it, and told me they were figuring on it together." Witness thought it was two different wagons at first—didn't know it was to be used by both of them. Wilkins came up and had a conversation with witness, and looked at it, and witness didn't mention that he was figuring on selling another. Wilkins told witness that it was the same wagon. Witness thought he was selling two wagons instead of one. He stated that both Wilkins and McCrary had individual accounts with the hardware company. After the controversy arose between Wilkins and McCrary as to whether the purchase of the wagon entitled Wilkins to an interest in the Ford car drawn by McCrary with one of the tickets issued by the hardware company, McCrary wrote Wilkins a letter in which he stated: "Inclosed you will find a slip with the expense and the returns of the wagon. There is still a balance of $20.40 on the wagon, and the expense not paid by the proceeds of the wagon. If this is not satisfactory enough to show that you have no interest in the drawing, you will have to prove otherwise, for I can't see it in any other way." Accompanying this letter was a statement showing that the proceeds from the wagon amounted to $150 and the expense in the purchase of the wagon and in connection with the use thereof was $170, there being a difference between the proceeds and the expense of purchase and operation of $20.40.

The above are the salient features of the testimony upon which the court found that there was a partnership between McCrary and Wilkins for the hauling of cottonseed during the season of 1922, and, over the objection of McCrary, directed an accounting between the parties, and, upon these statements in evidence, found that there had been received from the partnership business $423.55; that there had been invested in property out of the partnership funds the sum of $127.50, and that the expense incurred in addition to this amounted to $272.85, leaving a balance in money in McCrary's hands of $23.20, in addition to the proceeds of the car and the items of personal property purchased with partnership funds. The court entered a decree in favor of Wilkins against McCrary and the motor car company for the sum of $243, a half value of the Ford car, and in favor of Wilkins against McCrary for a half of the balance of the money in the hands of McCrary, and also directed that the articles of personal property be sold and the proceeds divided equally between the parties. From that decree McCrary prosecutes this appeal.

1. Under the pleadings in the case, the action was properly begun at law, and, if the appellants had objected, it would have been error, without an amendment in the pleadings, to have transferred the cause to the chancery court. But the appellants and the appellee by express agreement asked that the cause be transferred to the chancery court. Although the issue raised by the pleadings was one involving only the title to the Ford car and the damages resultant from the alleged conversion of appellee's interest by the appellants, nevertheless, to determine that issue under the proof of the contract between the parties, it was necessary to have an accounting. It turns out, from the developments made by the testimony, that there was no complication in the matter of accounting, and that the cause could have been determined in the law court. Still, the subject-matter of an accounting was one over which the chancery court had jurisdiction, and when the parties asked the chancery

court to assume jurisdiction of the subject-matter and it did so, they must be held to have waived any objection to the determination of the cause by that court. As was said by this court in *Cribbs* v. *Walker*, 74 Ark. 104, at page 122, "this is not a case where there is such a lack of jurisdiction of either the parties or subject-matter as the parties cannot waive." See other cases cited in the opinion.

2. The testimony was ample to justify the court in finding that a partnership existed between the appellant and the appellee in the business of hauling during the fall of 1922 from the Planters' Gin to the oil mill.

In *Mehaffy* v. *Wilson*, 138 Ark. 287, this court said: "Mere participation in the profits and losses of a business alone would not make a participant a partner. Whether in fact a partnership exists depends upon the intention of the parties to be discovered from the contract into which they entered, construed in the light of all the facts and circumstances that obtained. Whether a given agreement amounts to a partnership between the partners themselves is always a question of intention."

But, whether the relation of partnership existed between the appellant and appellee or not, it is clear that the purchase of the wagon from the Stevens Hardware Company and the drawing of the Ford car in controversy grew out of their joint enterprise. An accounting between them was essential to determine whether the appellee had any interest in the car which he alleged the appellant had converted to his own use. The court therefore did not err in directing an accounting between the appellant and the appellee of their joint enterprise, and, having assumed jurisdiction for the purpose of ascertaining whether or not the appellee had an interest in the car which the appellant had converted to his own use, it was not error for the court to determine the status of the accounts of the joint enterprise and to render its decree adjusting the accounts and concluding the rights of the parties.

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

SHULL v. WALRATH & SHERWOOD LUMBER COMPANY.

Opinion delivered March 2, 1925.

1. TRIAL—ARGUMENTATIVE INSTRUCTION.—An instruction in an action for breach of a contract for the sale of a carload of lumber, that, even though the buyer was diligent in corresponding with the seller in relation to the claim that the lumber did not comply with the order, the seller's failure to answer all letters was not an admission of liability, *held* properly refused as being argumentative.
2. SALES—INSPECTION OF LUMBER—INSTRUCTION.—An instruction that if the seller of a carload of lumber agreed to its inspection and the buyer in compliance therewith had the lumber inspected the seller would be bound by the inspection and liable for the costs thereof, unless the seller withdrew the agreement, and that the burden was on the seller to prove such withdrawal *held* correct.
3. SALES—BREACH OF CONTRACT—EVIDENCE.—In a buyer's action for damages for breach of a contract to deliver a car of lumber of a certain grade, admission of the correspondence between the buyer and a lumber dealers' association and between the buyer and its customer was not error where the jury were told not to consider such correspondence in detemining whether the lumber complied with the contract.

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

Trimble & Trimble, for appellant.

A letter properly mailed is presumed to reach its destination in due course of mail. 127 Ark. 498; 98 Ark. 389; 10 R. C. L. 352.

Chas. A. Walls, for appellee.

After an agreement has been made to arbitrate, it cannot be defeated by a change in mind of one of the parties. 76 Ark. 153; 132 Ark. 215; 28 Ark. 519; 36 Ark. 317. The action of the arbitrator is final and is enforceable. 96 Ark. 410; 83 Ark. 136; 88 Ark. 213; 79 Ark 506; 88 Ark. 557; 170 Pac. 360; 221 Fed. 612; 165 Cal. 497; 133 Pac. 289; 107 Md. 146; 48 Pa. 61.

WOOD, J. In March, 1922, one B. H. Beverstock, acting for the appellee, Walrath & Sherwood Lumber Company, of Omaha, Nebraska, ordered a carload of

lumber from the appellant, O. L. Shull, of Lonoke, Arkansas, to be shipped to the appellee at Dallas, South Dakota. In compliance with this order, and as directed by the appellee, the appellant, on April 16, 1922, shipped a carload of lumber to J. H. Smith Lumber Company at Dallas, South Dakota. Beverstock also wrote appellant that his customer "wanted a nice car of clear white oak, wagon stock." When the car arrived at its destination, the Smith Lumber Company notified the appellee that the car was not up to the grade ordered, and that it would not be accepted on that account. The appellee, on the 9th of May, wired and also wrote the appellant that the car was rejected, giving as a reason therefor that it was brittle, checked, worm-eaten, water-soaked and dry-rotted. In response to the telegram, the appellant wired the appellee to have the car unloaded, and wrote the appellee to the effect that its customer was entirely in error in stating that the car was not up to grade, and requesting the appellee to have its customer go through the material carefully, lay out any pieces that it might consider not up to grade, and that appellant would do all possible to reconcile its views to meet the views of appellee's customer.

On May 17, 1922, the appellee wrote the appellant, stating that appellee had asked its customer to unload car and inspect the same, and that, in answer, the appellee's customer still insisted that the car had been inspected by it sufficiently to ascertain that it was off-grade; that appellee, on its own account, had asked its customer to unload the car in order to save demurrage, and requested the appellant to arrange for official inspection of the car, stating that, if such inspection proved the lumber to be up to the grade, appellee would accept it; otherwise, it would expect the appellant to make disposition of the car and return to the appellee the money it had paid on the car. On the 19th of May the appellee again wired the appellant, and also wrote, stating that the investigation developed that the car was not what

appellee ordered, and that its customer refused to handle the car; and offered its assistance to appellant to make the best disposition of the car possible, and concluding its letter as follows: "If you want us to have this car of oak unloaded for your account to stop demurrage, and desire to have it officially inspected, we will stand by the inspection and try to arrange for the unloading."

On May 20, 1922, the appellant responded, saying in effect that the appellant considered that the car was up to grade, according to the contract, and that appellee and its customer were wrong in the inspection, and, among other things: "We are arranging with the National Hardwood Lumber Association to send a national inspector to make an inspection, if we felt your customer was wrong in his inspection. * * * We are willing to abide by the decision of a National Hardwood Lumber Association inspector, party in the wrong to stand all costs attached thereto. * * * We are going to insist that you accept the above offer, namely, to abide the inspection of a national inspector, or that you pay us in full for the shipment."

On May 25 the appellee, in response, wrote to appellant, stating in substance that it had requested its customer to unload the car and to hold the same for inspection by the National Hardwood Lumber Association, and requested the appellant to arrange for prompt inspection. On June 14 the appellee notified the appellant that the lumber had been unloaded and was awaiting the inspection by the National Hardwood Lumber Association, and renewing its request that appellant promptly have the inspection made. On June 28 appellee wired the appellant to answer its letters of May 25 and June 14 in regard to inspection, and on July 10 the appellee again wired that it must have reply to wires and letters with reference to the car. On July 12 the appellee wrote the appellant urging it to have the inspection quickly made, in order that the matter might be adjusted, and again on July 18 urging the appellant to answer its wires

and letters, and again on 19th appellee wrote the appellant, stating that, up to the 12th, no inspector had reached Dallas, and asking of the appellant the courtesy of a reply, stating the steps appellant had taken, if any, looking to the inspection. On the 19th of July the appellee wrote to the National Hardwood Lumber Company Association (hereafter called association) stating the transactions and correspondence that had taken place between the appellee and the appellant, and inquiring of the association whether the appellant had taken any steps to have the inspection made, and whether the delay was caused by the inability of the inspector to reach Dallas, South Dakota. The association replied to the appellee's letter, saying that the inspection had not been ordered by the appellant.

On the 24th of July the appellee wired the appellant, asking the date and through whom the inspection of the car was ordered. Thereafter appellee wrote other letters to the appellant, urging him to prompt action and to make replies to its letters and telegrams. On August 5 the appellee wrote the association asking it whether the inspection was ordered and the date when it would be able to inspect, and also on the same day wrote the appellant urging prompt action and replies, and again on the 10th to the same effect, and stating that, if it didn't instruct the association to arrange for a prompt and immediate inspection, appellee would ask for an inspection, and that "if, upon inspection, the lumber was not up to grade, appellee would take the necessary steps to retrieve its loss." On August 9, one W. E. Robinson, who was the inspector of the association in that territory, wrote to the appellee notifying it that the appellant had made no request of him for inspection. Thereafter there was a correspondence between the appellee and the association in regard to the inspection, which shows that the appellee requested the association to make the inspection, and the association directed its agent in that territory to make the inspection at the expense of the

appellee, and that the inspection was made, and the appellee paid the expense thereof.

On October 4 the appellee wrote appellant, inclosing the amount of the expense of the inspection, and notifying it that appellee would draw on appellant for that sum, and stating that, if the draft was returned unpaid, it would immediately bring suit for its damages.

This action was instituted by the appellee against the appellant. The appellee alleged in substance that the appellant had failed to comply with its contract to ship a carload of lumber according to the order given by the appellee to the appellant, and that, by reason of such breach, the appellee had been damaged in sums amounting in the aggregate to $1,483.03, for which the appellee prayed judgment.

The appellant answered admitting that it had accepted the order of the appellee and had shipped the lumber, but denied specifically that it had not complied with its contract in every particular, and set up by way of cross-complaint that the carload of lumber shipped under appellee's order was priced at $1,383.39, on which the appellant had received an advance payment of $735, leaving a balance due of $648.39, for which the appellant prayed judgment.

The testimony adduced on behalf of the appellee was substantially as above set forth, and, on behalf of the appellant, there was testimony tending to show that the lumber was carefully inspected before shipment by the appellant and the man from whom the appellant purchased the lumber, and that the invoice of the lumber was correct, and that the lumber, when it was shipped by the appellant to the Smith Company, under the direction of the appellee, was in strict compliance with the order; that, if there was any red oak contained therein, as reported by the inspector of the association, and if the lumber was not otherwise up to grade, it was not the car shipped by the appellant.

The appellant testified to the effect that, in August, 1922, he wrote the appellee not to have the inspection by the association, that the appellant would not abide by it, and requested the appellee to have its customer go through the car and reject only the pieces not up to grade; that he mailed these letters to the appellee's address, with the appellant's return address on the corner of the envelope, and that said letters were never returned. The testimony on behalf of the appellee was to the effect that it did not receive these letters of the appellant saying that it would not abide by the decision of the inspector. There was testimony on behalf of the appellant to the effect that, if the lumber had been unloaded and stacked in May, unless it was properly stacked, it would be damaged by exposure to the weather, and that any damage or failure of the lumber to come up to the grade as shown by the inspection in September following would be the result of the exposure to the weather or improper handling of the lumber after its delivery at its destination. The appellant objected to the correspondence concerning the carload of lumber between the appellee and the Smith Lumber Company at Dallas, South Dakota, and also to the correspondence between the appellee and the association and its inspector. The appellant objected to the following language of the court's charge: "The correspondence passing between these parties is identified by the defendant authorizing such inspection, that thereby created liability against the defendant in this case on the report of the inspector, and the only way that he can escape such liability is by establishing by a preponderance of the testimony his refusal to authorize such National Hardwood Lumber Dealers' Association inspector to make such inspection, and the burden is upon him to show the withdrawal of such proposition and such agreement."

The appellant also objected to the following language in the concluding part of the fourth paragraph,

as follows: "In addition to that, the order must meet the size, it being dimension stuff." The appellant asked the court to instruct the jury as follows: "1. The jury are instructed that, although you may find from the testimony in this case that the plaintiff was very diligent in its correspondence, and that the said defendant did not answer a number of its letters, yet, under the law, his silence to said correspondence of the plaintiff, after a dispute had arisen between the plaintiff and the defendant as to the grade of the lumber, cannot be regarded as an admission of liability on the part of the said defendant." The court refused to give this instruction, to which ruling the appellant duly excepted. The appellant also asked the court to instruct the jury in effect that, if the appellant first agreed to an inspection by the association, and later, before an inspection was made, wrote the appellee that it would not abide by the inspection, and that such letter was posted by the appellant, properly addressed to the appellee and mailed in due course as other letters, then the burden would be upon the appellee to show that the letter was not received, and that, unless the appellee made this proof, it would not be entitled to recover the inspection fees, and would not be bound by the inspection, even though the lumber was found to be defective. The court refused this prayer, to which appellant duly excepted.

The jury returned a verdict in favor of the appellee in the sum of $1,515.33. Judgment was entered in appellee's favor for such sum, from which is this appeal.

1. The appellant's prayer for instruction No. 1 was argumentative, and the court did not err in refusing to grant such prayer. The court did not err in refusing to grant appellant's prayer for instruction No. 2. The undisputed testimony shows that the appellant agreed to be bound by an inspection of the association. In a letter of May 20 it says, among other things: "We are willing to abide by the decision of a National Hardwood Lumber Association inspector, party in the wrong to stand all

costs attached thereto. * * * We are going to insist that you accept the above offer, namely, to abide by the inspection of a national inspector, or that you pay us in full for the shipment." This proposition was definitely accepted by the appellee. The undisputed evidence likewise shows that there was an inspection of the car by the association.

The appellant contends that, after the agreement for the inspection, but before it was made, it wrote a letter to the appellee in which it countermanded and withdrew from the agreement to inspect, which letter it addressed and mailed in due course to the appellee, and that, such being the case, the burden was thus placed on the appellee to prove that it did not receive the letter and that the agreement for inspection had not been recalled, and was still in force. The phraseology of instruction No. 2, in which this theory and contention of the appellant is presented, was calculated to confuse and mislead the jury as to the burden of proof on the issue as to whether or not there was an agreement for inspection and whether or not the inspection was made by which the appellant and appellee were bound. These issues were fully and correctly submitted to the jury in the oral instruction which the court gave, and which is, in part, as follows: "In addition to that, if you find that the defendant directed that this lumber be inspected by a man representing the National Hardwood Lumber Dealers' Association, and, in compliance with such directions, plaintiff procured a man to make such inspection, and the defendant agreed to be bound by that inspection, then he would likewise be liable for the expenses of the inspection for which the plaintiff must pay; unless you further find by a preponderance of the evidence that, after making such agreement, and expenses were incurred in connection with obtaining such inspection, he countermanded and refused to be governed by such inspection, and the burden is upon him to establish that. The correspondence passing between these parties is

identified and admitted by the defendant, authorizing such inspection; that thereby created liability against the defendant in this case on the report of the inspector, and the only way that he can escape such liability is by establishing by a preponderance of the testimony his refusal to authorize such National Hardwood Lumber Dealers' Association inspector to make such inspection, and the burden is upon him to show the withdrawal of such proposition and such an agreement."

The appellant also contends that the court erred in permitting the correspondence between the appellee and its customer, the Smith Lumber Company, and between the appellee and the association and its agent, Borgeson, and between the appellee and the appellant, to be introduced in evidence. In admitting the correspondence, the court instructed the jury in effect that it was not to be considered by them in determining whether or not the car of lumber in controversy was in compliance with the contract as to quality and quantity. With this restriction as to the correspondence, it was competent and relevant to show the transaction between the parties as to the order and shipment of the lumber. The principal issues in the case are whether or not the carload of lumber ordered by the appellee from the appellant for its customer was delivered, and whether or not the lumber was in compliance with the order. There was no dispute, as we understand the evidence, about the dimensions. The issues upon the facts were submitted to the jury under correct instructions, and its verdict on these issues is conclusive here against the appellant.

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

EDWARDS v. CLARK.

Opinion delivered March 2, 1925.

APPEAL AND ERROR—NECESSITY OF BRINGING UP ALL THE EVIDENCE.—An assignment of error in giving a certain instruction as "not justified by the evidence in the case" will not be considered on appeal where the bill of exceptions does not show either expressly or inferentially that it contains all the evidence.

Appealed from Greene Circuit Court, *G. E. Keck*, Judge; affirmed.

Jeff Bratton, for appellant.

Instruction No. 6 given by the court was erroneous. The instruction was given after argument of the case had commenced, and laid undue stress upon the matter of the sun shining in appellant's eyes, practically amounting to instructing a verdict for the plaintiff, and that, too, upon a proposition injected into the case by the plaintiff not based on any allegation in the pleadings and not supported by any evidence of any consequence. As sustaining the contention of appellant, see 14 Ark. 296; 14 R. C. L. p. 780, 784; 10 A. L. R. 296. If section 1292, C. & M. Digest, is to be construed literally, the instruction came too late and was improper. Instruction No. 1 was erroneous in that no qualification was made to the statement as to "the law of the road." 136 Ark. 31.

D. G. Beauchamp, for appellee.

The bill of exceptions did not contain all the evidence. Where there is no affirmative or inferential showing that all the evidence is contained in the bill of exceptions, the rulings of the court, etc., are presumed to be correct. 74 Ark. 551; 54 Ark. 159; 80 Ark. 74; 81 Ark. 327; 133 Ark. 105.

WOOD, J. This is an action by the appellee against the appellant for damages alleged to have accrued to appellee by reason of the negligent and willful act of the appellant in driving his car against the appellee's car. The answer denied the allegations of the complaint. The appellant abstracts the testimony as follows:

J. A. Clark testified that the time of day when the collision occurred was about five o'clock. The sun was shining, and the defendant was going towards the sun, down the hill, and the plaintiff was going away from the sun, up hill. The defendant (appellant) testified that "the sun was a little bit bad about 5:30 in the afternoon, but I could see the street very well ahead. I could not see as well as if there were no sun in my face." The witness was asked the following questions:

"Q. Weren't you figuring on that as a defense until now—because the sun was shining in your face, and it was an accident? A. No sir. Q. Mr. Bratton told you that wouldn't do, didn't he? A. No sir, I don't think he did. Q. Didn't Mr. Bratton tell you since that time that the sun business wouldn't work, or something to that effect, and you backed off of it? A. No sir; not especially. Q. Well, he said something about it, didn't he? A. Well, he said something about it, yes sir. I hadn't complained I couldn't see the street; if I had, I would have stopped, because I'll admit the sun does obstruct you some. Q. And you will further admit that you didn't see this car until you were within five or six feet of it? A. Yes sir. Q. I'll give you a foot difference. A. Yes sir."

After setting out the above testimony, the bill of exceptions contains the following statement: "This was all the testimony introduced in the trial of this cause with reference to the sun shining in the eyes of the defendant." The bill of exceptions concluded as follows: "And now comes the defendant herein and presents this as its bill of exceptions herein to the judge of the court trying said above entitled cause, and prays that the same be by the said judge signed and approved, and the judge, after examination, doth sign and approve said bill of exceptions, containing only the excerpts of certain testimony and of certain witnesses, and doth order that the same by the clerk be filed and made a part of the record herein." The bill of exceptions was signed

by the trial judge. The official court stenographer certified that "the foregoing pages of typewritten matter, numbered 1 to 13, both inclusive, contain a full, true, perfect, correct and complete transcript of all of the testimony introduced in the trial of the above entitled cause with reference to the sun shining in the face of the defendant Edwards, and a full, true, perfect, correct and complete transcript of all of the instructions given in the trial of this cause."

The fifth ground of the motion for a new trial is as follows: "The court committed error in giving instruction No. 6, wherein the court told the jury that, if the sun was shining in defendant's face and blinding him, it was defendant's duty to stop his automobile, and that, if he failed to do so, it was negligence, and that for that reason could find against him."

The sixth ground of the motion for a new trial is as follows: "Instruction No. 6, as given by the court, was not justified by the evidence in the case and is not the law applicable thereto; said instruction attempts to point out a particular circumstance which did not occur and which was not proved, and thereby mislead the jury; said instruction has no application to any part of the evidence offered by either party."

The verdict and judgment were in favor of the appellee in the sum of $150, from which judgment is this appeal.

The bill of exceptions does not show affirmatively or inferentially that it contains all the evidence. In the case of *Abbott* v. *Kennedy*, 133 Ark. 105-108, we said: "In order to make the error of the court appear, it is necessary that the appellant present here a bill of exceptions which shows either by express statement that it contains all the testimony that was adduced at the trial, or it must contain statements from which it appears 'inferentially and by natural implication' that it contains

all the evidence." This rule has been adhered to by this court in numerous cases, and we believe has never been departed from. See cases cited in the above case and also the appellee's brief.

The judgment is therefore correct, and it is affirmed.

NORTH AMERICAN PROVISION COMPANY *v.* FISCHER LIME & CEMENT COMPANY.

Opinion delivered March 2, 1925.

1. CORPORATIONS—COMPLAINT—MISDESCRIPTION OF CORPORATION.—The contention that a judgment against the Morris Packing Company, described in the complaint as an Illinois corporation, would not bind the Morris Packing Company, a Maine Corporation, was untenable where the latter corporation was the only corporation of that name doing business in the State at the time, and service of summons was had on its agent.
2. CORPORATIONS—PLACE OF ORGANIZATION OF FOREIGN CORPORATION.—In a suit against a foreign corporation, it was immaterial in what State defendant was organized as a corporation, where it was sued and served as a foreign corporation, and the complaint advised it of the nature of the action.
3. JUDGMENT—INSUFFICIENT SERVICE—MERITORIOUS DEFENSE.—Where defendant had actual notice of the pendency of a suit against it, the contention that the judgment was defective for lack of service will not be considered on collateral attack unless a meritorious defense to the suit is shown.
4. FRAUDULENT CONVEYANCES—BULK SALES LAW.—Sale of the assets of a packing company, engaged in selling meats at wholesale *held* void as against creditors of seller for noncompliance with the Bulk Sales Law; the statute being comprehensive enough to include sales by wholesale merchants.

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

STATEMENT OF FACTS.

Fischer Lime & Cement Company, a foreign corporation, brought this suit in equity against the North American Provision Company, also a foreign corporation, doing business in Arkansas, to recover the sum of

$1,352.08, alleged to be due it by the Morris Packing Company, whose property the defendant bought without complying with the requirements of our Bulk Sales law.

It appears from the record that the Morris Packing Company, a foreign corporation, duly organized under the State of Maine, and authorized to do business in the State of Arkansas, was engaged in the business of selling at wholesale at Helena, Arkansas, various kinds of meat products and some canned goods. During the year 1919 it entered into a contract with D. M. Crawford & Company to erect a business building for it in Helena, Phillips County, Arkansas. Fischer Lime & Cement Company, a corporation doing business in the State of Tennessee, furnished certain materials which entered into the construction of said building. Fischer Lime & Cement Company first gave notice that it intended to file its lien on the property for the materials furnished, and the Morris Packing Company agreed to pay the account if no lien under the statute was filed. After the time for filing the lien had expired, the Morris Packing Company refused to pay the account. On August 26, 1922, Fischer Lime & Cement Company instituted an action in the circuit court against Morris Packing Company, to recover the sum of $1,425, alleged to be the amount due and unpaid for materials used in the construction of the building for Morris Packing Company in Helena, Arkansas.

The complaint alleges that the plaintiff is a corporation organized under the laws of the State of Tennessee, and that the defendant, Morris Packing Company, is a corporation organized under the laws of the State of Illinois.

In the summons the defendant is called Morris Packing Company. The return recites that it was served by delivering a true copy of the same to J. W. Somerindyke, manager of the within-named Morris Packing Company. On May 16, 1923, judgment was rendered in

favor of Fischer Lime & Cement Company against Morris Packing Company in the sum of $1,148.67.

The judgment recites that the plaintiff appeared by its attorneys and the defendant by its attorney. In the meantime, on March 24, 1923, the North American Provision Company purchased the assets of the Morris Packing Company, a Maine corporation, and no attempt was made to comply with the provisions of our Bulk Sales law. The value of the stock of merchandise so purchased by the North American Provision Company from the Morris Packing Company exceeded by several thousand dollars the liabilities of the Morris Packing Company.

Morris Packing Company, an Illinois corporation, once did business in the State of Arkansas, but ceased to do business in this State during the year 1912. During the period of time involved in the transaction in this case the Morris Packing Company, a Maine corporation, was engaged in business in this State at Little Rock, Arkansas, and at Helena, Arkansas.

The chancellor found the issues in favor of the plaintiff, and from a decree rendered in its favor against the defendant an appeal has been duly prosecuted to this court.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

The judgment obtained by appellee was against an Illinois corporation, whereas the Morris Packing Company involved here is a Maine corporation, and it is therefore not bound by the judgment, proper service not having been had. See Freeman on Judgments, § 45, and § 50; Black on Judgments, §§ 116 and 120; 4 Ark. 423; 75 Ark. 461; 123 Ark. 455; 101 Ark. 142; 24 Ark. 574; 6 Ark. 537; 5 Ark. 410; 7 Ark. 394; 105 Ark. 5; 9 Ark. 455; 4 Ark. 199; 42 Cal. 571; 37 Cal. 346; 282 Fed. 811. No notice was given as required by § 4870, C. & M. Digest, but still appellant is not liable for the claim, as it is not one protected by the statute. See 148

Ark. 173; 159 Ark. 358; 131 Ark. 248; 136 Ark. 140. Statutes of this nature should be strictly construed. 101 S. E. 8; 203 S. W. 506; 235 S. W. 321; 112 S. E. 71; 224 Ill. App. 158; 144 Pac. 6.

Owens & Ehrman, for appellee.

The defect in service complained of should have been reached by demurrer or answer in that proceeding *Hawkins* v. *Simmons*, 165 Ark. 461. Morris & Co. was sued as a foreign corporation, which was sufficient. 152 Ark. 442. The Bulk Sales law, as construed in 123 Ark. 285, is not limited to retail merchants. See 242 U. S. 470 and 157 N. W. 1019. One who induces another to refrain from filing a lien by promise of payment is liable on contract. 146 Ark. 539.

HART, J., (after stating the facts). It is first sought to reverse the decree on the ground that the judgment obtained in the circuit court by the Fischer Lime & Cement Company was against Morris Packing Company, an Illinois corporation, and that, on this account, the Morris Packing Company, a Maine corporation, is not bound by the judgment.

In that case the defendant was named as the Morris Packing Company, and the summons was served on the duly authorized agent of the Morris Packing Company. It is true that the complaint alleges that the defendant, Morris Packing Company, was an Illinois corporation, but this did not make any difference. The defendant was sued as the Morris Packing Company, and the Morris Packing Company of Maine was the only corporation of that name doing business in Arkansas at the time. The service of summons was had upon its duly authorized agent. Thus it will be seen that the defendant had notice of the suit, and should have interposed any defense it might have had to the action, notwithstanding it was alleged to be an Illinois corporation, when in fact it was a Maine corporation.

In the first place, it is immaterial in what State the defendant was organized as a corporation. It was sued

and served as a foreign corporation, and the language of the complaint apprised it of the nature of the action. *Loose-Wiles Biscuit Co.* v. *Jolly,* 152 Ark. 442.

In the second place, Morris Packing Company had actual notice of the pendency of the suit against it in the circuit court, and does not even now claim that it had any meritorious defense to the action. In so far as the present record discloses, there was no defense whatever to the suit. In such cases, a meritorious defense must be shown in order to obtain the relief prayed for. *Renfroe* v. *Parmelee,* 143 Ark. 547, and *McDonald Land Co.* v. *Shapleigh Hardware Co.,* 163 Ark. 524.

Therefore the insistence of the defendant that the judgment in the circuit court against the Morris Packing Company was void because no service was had upon the defendant is of no avail to it in the present suit.

It is conceded by the counsel for the defendant that no attempt was made to comply with our Bulk Sales law when the defendant purchased the stock of merchandise of the Morris Packing Company, and that the property so purchased by it exceeded in value the liabilities of said company.

The sole reliance of counsel to reverse the decree on this ground is that the sale of its stock by a wholesale merchant does not come within the provisions of our Bulk Sales law. It will be remembered that the Morris Packing Company was engaged in selling at wholesale meat products and canned goods at Helena, Arkansas, when its stock of merchandise and other property was purchased by the defendant. It has been said that the practice of retail merchants in selling their stocks in bulk are the most common source of fraud with which the courts have to deal, and that such statutes were passed for the protection of wholesale merchants. A sufficient answer to this is that wholesale merchants, by selling their stocks in bulk, could practice a fraud upon manufacturers and other wholesale merchants, who are their creditors, just as successfully as retail merchants could

do in the sale of their stocks in bulk. After all, the language of the statute must be the test as to what class of merchants are embraced within its scope. It has been well said that, to determine the class of property included in Bulk Sales statutes, reference must be had to the language of the statute, which will be construed according to its common and ordinary meaning.

Thus, in *Connecticut Steam Brown Stone Co.* v. *Lewis* (Conn.), 85 Atl. 534, 45 L. R. A. (N. S.) 495, it was held that a sale of his tools and stock in trade by one who buys stone in the rough and cuts and dresses it to fill orders is not within the Connecticut statute. The act under consideration in that case provides that, when any person who makes it his business to buy commodities and sell the same in small quantities for a profit shall, at a single transaction, sell or deliver the whole or a large part of his stock in trade, such sale shall be void against his creditors, unless the provisions of the act are complied with. The court held that the act in terms applies only to sales in bulk by persons who make it a business to buy and sell in small quantities the commodities which they have purchased. Other States make their statutes on the subject apply only to the sale in bulk by retail merchants of their stock of merchandise.

The language of our statute provides that the sale in bulk of any part of the whole of a stock or merchandise or merchandise and the fixtures pertaining to the conduct of any such business, otherwise than in the ordinary course of trade, shall be void as against the creditors of the seller, unless the terms of the act are complied with. Section 4870 of Crawford & Moses' Digest, and act 374 of the General Acts of 1923. See General Acts of 1923, p. 340.

In this connection it may be stated that the only change made by the amendatory act is to prohibit the mortgage as well as the sale or transfer in bulk of the class of property embraced in the act without complying with the terms thereof.

Now it will be seen that the language of the act in its common and usual acceptation includes wholesale and retail merchants alike. The language is sufficiently comprehensive to show that the object of the act was not only to protect wholesale merchants against fraudulent sales by retail merchants, but also to protect manufacturers and wholesale merchants against fraudulent sales by wholesale merchants. *Grant* v. *Walsh* (Wash.), 78 Pac. 786; and *Niklaus* v. *Lessenhop* (Neb.), 157 N. W. 1019.

It follows that the decree of the chancellor was correct, and must be affirmed.

KING v. DICKINSON-REED-RANDERSON COMPANY.

Opinion delivered March 2, 1925.

1. JUDGMENT—MOTION TO VACATE—MERITORIOUS DEFENSE.—An application by nonresident defendants to set aside a decree of foreclosure, on the ground that the service of notice by publication of a warning order was defective in misnaming the plaintiff corporation, was properly refused when the motion failed to set up a meritorious defense.
2. JUDGMENT—PRESUMPTION FROM RECITAL OF DECREE.—Though the poof of publication misnamed the plaintiff corporation, yet where the decree recites that defendants were duly notified by publication of a warning order, it will be presumed, on motion to vacate the decree, that the court had competent evidence before it to show proper service, and amended the proof of publication accordingly.
3. MORTGAGES—FORECLOSURE—NECESSITY OF BOND.—GEN. Acts 1923, p. 551, § 1, which amends Crawford & Moses' Dig., § 6261, by making the bond required of the plaintiff in proceedings by constructive service by publication unnecessary in mortgage foreclosures, *held* to apply to mortgages executed prior to the passage of such act.

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

STATEMENT OF FACTS.

This is an appeal by nonresident defendants from an order of the chancery court refusing to set aside its decree in a mortgage foreclosure suit.

It appears from the record that Dickinson-Reed-Randerson company, a foreign corporation, brought suit in equity against P. W. King and Louella King, his wife, and Henry King and Florence V. King, his wife, to foreclose a mortgage on certain lands situated in Benton County, Arkansas.

P. W. King and Louella King, his wife, after having been served with summons, entered their appearance to the suit. An affidavit for a warning order was made as to Henry King and Florence V. King, his wife, on the ground that they were nonresidents of the State of Arkansas. The warning order was duly issued by the circuit clerk, and both the affidavit for the warning order and the warning order itself contained the proper style of the suit and the proper name of the plaintiff. The proof of publication of the warning order showed Dickinson-Reed-Henderson Company, a corporation, as plaintiff.

The decree of foreclosure, amongst other things, contains the following: "The court finds that the defendants, P. W. King and Louella King, his wife, were duly served with actual service on the 5th day of August, 1922, in Cherokee County, Iowa, as provided by law for service on defendants out of the State; that Henry King and Florence V. King, his wife, were duly notified of the nature and pendency of this action by publication of a warning order in the Benton County Democrat, a weekly newspaper of general and *bona fide* circulation in Benton County, Arkansas, printed and published at Bentonville, for the time and in the maner provided by law," etc.

After the commissioner appointed for that purpose had made his report of the sale of the lands, Henry King and wife filed exceptions to the report. Among other grounds, they asked that the decree of foreclosure be set aside because no proper service of summons by publication of warning order had been had upon them, and also that the plaintiff had not executed the bond required by § 6261 of Crawford & Moses' Digest.

On the 13th day of October, 1923, the chancery court refused to set aside its decree, and approved the report

of sale of the commissioner. It was also ordered that the commissioner execute a deed to said land to the purchaser.

As above stated, the case is here on appeal.

Rice & Rice for appellants.

The bond statute, C. & M. Digest, § 6261, *et seq.*, was enacted specially for the benefit and protection of non-resident defendants; it is mandatory, and is applicable in this case. Act 661, General Acts 1923 p. 551, amending § 6261, *supra,* is inapplicable in the case of a mortgage executed prior to its passage; but, if held to be applicable, then it is unconstitutional under art. 1, § 10, U. S. Constitution, and under our State Constitution prohibiting legislation that will impair the obligations of a contract, or injuriously affect vested rights. 6 R. C. L. 329, § 319; 40 Ark. 423; 48 Ark. 219; 94 N. C. 134; 59 Iowa 200; 50 Ala. 342; 35 Conn. 563; 84 Ky 1; 45 Md. 546; 106 U. S. 124; 62 Me. 488; 36 Cyc. 1210; 3 Ark. 285.

The means and methods provided by statute for obtaining service by publication of warning order must be strictly followed, the proceeding being in derogation of the common law. The publication and service in this case was fatally defective. 32 Cyc. 483; Art. 2, § 21, Const. Ark. 7 R. C. L. pp. 131-2, § 102; *Id.* § 41; 120 S. W. 1155.

Nance & Seamster for appellee.

The decree of the court finding that appellants were duly notified of the pendency and nature of the action etc., is *prima facie* evidence of that fact, and will be taken as true, in the absence of evidence in the record showing to the contrary. 164 Ark. 340; 126 Ark. 164; 100 Ark. 63. See also 57 Ark. 49; 144 Ark. 382; 144 Ark. 436; 149 Ark. 215; 156 Ark. 134; 160 Ark. 277; 156 Ark. 453; 129 Ark. 193; 161 Ark. 87.

There can be no vested right in a mere remedy. The act No. 661, complained of by appellants, applies to causes of action pending as well as to those thereafter brought. 141 Ark. 512. Moreover, appellants have not

asked for a retrial of the cause, and have not shown any meritorious defense. 157 Ark. 86.

HART, J., (after stating the facts). The chancery court did not err in refusing to set aside the decree of foreclosure on the ground that Henry King and wife had not been properly served by publication of warning order. The foreclosure suit was brought by Dickinson-Reed-Randerson Company, a corporation. In the affidavit for a warning order, and in the warning order itself, that corporation is named as plaintiff. The proof of publication of the warning order names the plaintiff as Dickinson-Reed-Henderson Company, a corporation. Hence it is claimed that there was no valid constructive service on the defendants. A sufficient answer to this contention is that no meritorious defense to the foreclosure suit is set up in the motion to set aside the decree. This court has expressly held that, on application by a defendant constructively summoned to set aside the decree, a meritorious defense must be shown by him. *Moreland* v. *Youngblood,* 157 Ark. 86.

Then, too, the foreclosure decree recites that Henry King and wife were duly notified of the nature and pendency of the action by publication of warning order, and the usual presumption which attaches to this finding in a decree must be had.

Because there is no statute forbidding it, parol evidence may be received to prove the publication of the warning order, and this carries with it the right of the court to hear parol testimony to amend the proof of publication. Hence it will be presumed that competent evidence was before the court to sustain the finding that Henry King and wife were duly notified of the pendency of the suit by publication of warning order.

In short, it will be presumed that the court heard oral evidence, and amended the proof of publication of the warning order to show that it had been published in the name of Dickinson-Reed-Randerson Company, a corporation, instead of Dickinson-Reed-Henderson Com-

pany, a corporation. *Fiddyment* v. *Bateman,* 97 Ark. 76, and *Wallace* v. *Hill,* 135 Ark. 353.

It is next insisted that the court erred in refusing to set aside the foreclosure decree, because the bond required by § 6261 of Crawford & Moses' Digest was not given. It is conceded that this section was amended by the Legislature of 1923, in which it was provided that such bond should not apply to a mortgage foreclosure decree. General Acts of 1923, p. 551. But it is claimed that this section could not be made to apply to foreclosure decrees where the mortgage was executed before the passage of the amendatory act. In this respect counsel liken it to the right of redemption in a mortgage foreclosure decree. In such cases it has been held by the Supreme Court of the United States that a State statute which allows the mortgagor a specified length of time after a sale under a decree of foreclosure to redeem, confers a substantial right, and thereby becomes a rule of property. The holding proceeds upon the theory that the right of redemption which exists at the time the mortgage is executed becomes a part of the contract, and that, to deprive the mortgagor of this right by a statute subsequently passed, would impair the obligation of the contract. *Brine* v. *Insurance Co.,* 96 U. S. 627, and *Parker* v. *Dacres,* 130 U. S. 43.

The giving of the bond in question did not confer any substantial right or equity upon the nonresident defendants. It was merely a method of procedure. Such statutes do not affect the substantial rights of the parties, but are intended to confer a method of procedure in dealing with existing rights. The forms of administering justice and the powers of courts in this respect are subject to the legislative will, and one Legislature cannot bind subsequent Legislatures in this respect. The requirement or non-requirement of a bond by the plaintiff in the case of a defendant constructively summoned is, in the very nature of things, remedial and not contractual.

In this respect the principle to be applied is like that in *Brown* v. *Creekmore,* 141 Ark. 512. It was there held that an act of the Legislature defining a counterclaim applied to suits pending at the time of its passage, as there can be no vested right in a mere remedy.

It follows that the decree must be affirmed.

JORDAN v. BANK OF MORRILTON.

Opinion delivered March 2, 1925.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of fact, which is not against the preponderance of the evidence, is conclusive upon the Supreme Court.
2. PAYMENT—APPLICATION.—Where a creditor had notice that money paid to him by his debtor had been furnished to the debtor upon the understanding that it should be applied to the payment of a particular debt, the money could not be appropriated by the creditor to the payment of another debt.
3. PAYMENT—APPLICATION.—Where a first mortgagee had notice that a second mortgagee lent money to his mortgagor with the understanding that it should be applied to the payment of the first mortgage debt, the first could not apply it to the payment of an unsecured debt owning to him by the mortgagor, even with the latter's consent.
4. NOTICE—FACTS PUTTING ONE UPON INQUIRY.—Notice of facts and circumstances which would put a man of ordinary intelligence upon inquiry is equivalent to knowledge of all the facts that a reasonably diligent inquiry would disclose.
5. PAYMENT—NOTICE OF INTENDED APPLICATION.—Where a check given to a first mortgagee by the mortgagor, who had received the money from a second mortgagee with the understanding that it was to be applied on the first mortgage, was marked "in full," and the first mortgagee could have ascertained that the check was given in payment in full of the first mortgage debt, the first mortgagee could not apply it to payment of an unsecured debt owing him by the mortgagor.

Appeal from Conway Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

STATEMENT OF FACTS.

This appeal is prosecuted to reverse a decree of the chancery court in directing the application of payment between two mortgagees of the same land.

On July 8, 1919, Jas. P. Turner and wife executed to D. L. Jordan a mortgage on certain land in Conway County, Arkansas, to secure the sum of $3,211.90, evidenced by two promissory notes and an open account of $1000, more or less, for merchandise to be furnished during 1920.

On the 24th day of March, 1920, Jas. P. Turner and wife executed a mortgage on the same land to the Bank of Morrilton to secure the sum of $6,340.

According to the testimony of the cashier of the bank, Turner represented that he owed D. L. Jordan a balance of $2,735.29 on his mortgage indebtedness, and the bank retained that amount of money to be applied in satisfaction of the balance of the mortgage indebtedness from Turner to Jordan. Turner expressly agreed to apply the money in this way. Turner then gave a check to D. L. Jordan for $2,735.29, dated March 25, 1920. The check was drawn on the Bank of Morrilton, and was cashed by Jordan in due course.

According to the testimony of Jas. P. Turner, the cashier of the bank knew that the check for $2,735.29 was to be used in the payment of an open account which Turner owed D. L. Jordan. Turner told the cashier of the bank that he owed an account to Jordan of at least that amount. Turner agreed with Jordan that the check should be applied towards the payment of his merchandise account, which was not secured by the mortgage.

According to the testimony of D. L. Jordan, the open account was not secured by the mortgage on the land, and, by agreement with Turner, he applied the check in question to the payment of the open account. This left the mortgage indebtedness due and unpaid.

The present suit was commenced in the fall of 1922 by the Bank of Morrilton to foreclose its mortgage, and subsequently D. L. Jordan was made a party to the fore-

closure suit, and testimony substantially as above set forth was taken to show the rights of the respective parties.

The chancellor found the issues in favor of the Bank of Morrilton, and, to reverse the decree in its favor, D. L. Jordan has prosecuted this appeal.

E. A. Williams, for appellant.

A debtor has the primary right to direct the application of the payment. 91 Ark. 458; 93 Ark. 224; 32 Ark. 645; 54 Ark. 444; 117 Ark. 260; 91 Ark. 458. The court erred in applying the payment otherwise than as directed by the debtor. 81 Cal. 56; 97 Cal. 290; 29 Ga. 142; 36 Ala. 482; 15 Conn. 437; 34 Mo. 70; 13 Vt. 15; 26 N. J. Eq. 494; 45 Ga. 565; 39 Mass. 305; 11 W. Va. 549; 21 A. L. R. Ann. 690. The right to apply payments is one existing between the original parties. 21 A. L. R. Ann. 681; 21 R. C. L. 107; 75 N. Y. 461.

Strait & Strait, for appellee.

A creditor having a lien on property for a debt cannot, even by agreement with his debtor, apply any part of the property to a debt which is not a lien upon it. 39 Ark. 349; 108 Ark. 555; 44 Ark. 507. Where money is furnished for a specific purpose, it must be applied to that purpose, and cannot be diverted to any other purpose. 96 Am. St. Rep. 54; 37 Pa. 68; 9 Pa. 475; 36 Ark. 162; 39 Ill. 312; 77 Ala. 367; 78 Ill. 17. Where a third party advances money for the payment of a debt, the debtor and creditor cannot apply it to the disadvantage of such party. 21 R. C. L. 107.

HART, J., (after stating the facts). As will be seen from our statement of facts, the cashier of the Bank of Morrilton testified that it was expressly understood between Turner and the bank that $2,735.29 of the money borrowed from the bank should be applied towards the payment of a prior mortgage given by Turner to Jordan on the same land. When Turner received the money from the bank, he left on deposit there the sum of $2,735.29 to be applied towards the payment of the Jordan mortgage. The check given by Turner to Jordan for

this sum contains the notation "in full," and was drawn on the Bank of Morrilton.

It is true that Turner testified that he told the cashier of the bank that this sum of money was to be applied towards the payment of an open account which he owed to Jordan, and which was not secured by a mortgage on the land in question. The chancellor, however, found this issue in favor of the bank on the testimony of its cashier, and it cannot be said that his finding is against the preponderance of the evidence. Therefore, under our settled rules of practice it may be treated as settled that the bank lent the money to Turner with the express understanding that the sum of $2,735.29 was to be applied towards the payment of the mortgage indebtedness of Turner to Jordan.

Counsel for Jordan seek to reverse the decree under the general rule that, at the time of making a payment, a debtor has the primary right to direct the application of payment, and may apply it to the payment of his unsecured debt. *Snow* v. *Wood,* 163 Ark. 280. Counsel for appellant claim that the exercise of the right of appropriation of payments belongs exclusively to the debtor and the creditor, and that no third person can control or be heard for the purpose of compelling a different appropriation from that agreed upon by them. Hence they contend that it does not make any difference what the cashier of the bank understood would be done with the money, as the right of the creditor and the debtor to make the application is absolute, and a third person cannot control this right.

There is a well-recognized exception to this rule, and that is, if the creditor had notice that money had been furnished his debtor upon an understanding that it was to be applied towards the payment of a particular debt, it could not be appropriated to the payment of another debt. Here, according to the finding of the chancellor, the bank lent the money to Turner with the express understanding that a specified part of it should be applied towards the payment of a debt of Turner to Jor-

dan secured by a mortgage upon the same land which he had mortgaged to the bank. If Jordan had notice of these facts, he would not be permitted, even with the consent of Turner, to misapply it. *Harding* v. *Tifft,* 75 N. Y. 461. In short, if Jordan had notice that the bank had lent the money upon the understanding that a part of it should be applied towards the payment of his mortgage debt, he could not apply it to the payment of his unsecured debt as against the bank, even with the consent of Turner. In this connection it may be stated that notice of facts and circumstances which would put a man of ordinary intelligence on inquiry is equivalent to knowledge of all the facts that a reasonable diligent inquiry would disclose. In other words, where a person has sufficient information to put him on inquiry, he shall be deemed to know what the inquiry would disclose. *Bland* v. *Fleeman,* 58 Ark. 84; *Waller* v. *Dansby,* 145 Ark. 306; and *Krow & Neumann* v. *Barnard,* 152 Ark. 99.

The check given by Turner to Jordan contained the notation, "in full," which was dated March 25, 1920. According to the testimony of Jordan himself, this did not pay the whole of the indebtedness of Turner to him. If he had made any inquiry whatever at the bank, he would have found out that the money had been lent to Turner with the understanding that the amount of the check should be "in full" of the mortgage indebtedness of Turner to Jordan. Therefore in law Jordan will be deemed to have notice that Turner had agreed to apply the amount of the check towards the payment of his mortgage indebtedness to Jordan, and Jordan had no right to divert the fund to the payment of his unsecured indebtedness.

The result of our views is that the decree will be affirmed.

SAMPLE v. MANNING.

Opinion delivered March 2, 1925.

1. APPEAL AND ERROR—TIME FOR APPEAL.—Crawford & Moses' Dig., § 2140, fixing the time within which an appeal must be taken, is jurisdictional in its nature.
2. APPEAL AND ERROR—JURISDICTION.—The Supreme Court has no jurisdiction to review or try a chancery case after the time for appeal has expired.
3. APPEAL AND ERROR—RIGHT TO HAVE APPEAL DISMISSED.—Where time for appeal in a case has expired, the prevailing party has a right to execution against the losing party, and may sue on a supersedeas bond, if given; but no useful purpose could be served by permitting the prevailing party to docket the case and have the appeal dismissed, since he could acquire no greater right thereby.

Appeal from Union Chancery Court, First Division; *J. Y. Stevens,* Chancellor; case stricken from docket.

Mahoney, Yocum & Saye, for appellant.

J. S. Townsend, for appellee.

HART, J. John Manning filed in this court a duly certified copy of a decree in a chancery case from Union County, Arkansas, wherein he is the plaintiff and Clark Sample is the defendant. He alleges that he obtained a decree against the defendant in the chancery court of Union County to enforce a vendor's lien for purchase money. The decree was entered of record on the 3rd day of July, 1924, and the defendant was granted an appeal to this court by the chancery court. An appeal bond was filed with and approved by the clerk of the chancery court, and a supersedeas bond issued thereon in conformity with the statute.

Manning filed a certified copy of the decree in this court more than seven months after the decree was rendered in the chancery court, and moved the court to dismiss the appeal. The defendant resisted the motion on the ground that it showed on its face that this court is without jurisdiction in the case, because the appeal was never perfected within the time prescribed by statute.

Our statute provides that an appeal shall not be granted except within six months next after the rendi-

tion of the decree appealed from, unless the party applying therefor is under certain disabilities, which do not affect the decree in this action. Crawford & Moses' Digest, § 2140.

The time within which an appeal must be taken being fixed by statute, it must be taken within the time designated. The provision which limits the time is jurisdictional in its nature. *Spratlin* v. *Haller,* 69 Ark. 289.

In order to give this court jurisdiction, it is necessary to file with it a copy of the record in the court below, because it is the source from which the court obtains its knowledge of the facts in the case and of the questions upon which it is its duty to pronounce judgment. *Robinson* v. *Arkansas Loan & Trust Co.,* 72 Ark. 475. Thus it will be seen that a bar is fixed by law as to appeals from decrees which are appealable. After the time fixed for an appeal has expired, the appellate court has no jurisdiction to review or to try the case *de novo.* No useful purpose could be served by permitting the prevailing party in the court below to file a certified copy of the judgment or decree of the court below for the purpose of dismissing the appeal which had been granted to the losing party, and which he had lost by not perfecting within the time allowed by law. The dismissal of an appeal removes the case from the appellate court and places the parties in the same conditions as they were before the appeal was taken. *Ashley* v. *Brasil,* 1 Ark. 144, and *Burgess* v. *Poole,* 45 Ark. 373. So it will be seen that, if the appeal should be dismissed, the parties would be just where they were before, and no useful purpose could be served, except to tax one or other of the parties with the trouble and expense of the appeal.

Inasmuch as the prevailing party in the court below could obtain no greater rights by docketing the case here and then having the appeal dismissed than he already had, no useful purpose can be served by allowing such a course, and the better practice would have been for the clerk to have refused to allow the appeal to be filed because it was not perfected within the time allowed by law.

It is claimed, however, that this practice is contrary to that adopted in *Gross* v. *State*, 89 Ark. 482. In that case the Attorney General filed a certified copy of the judgment of conviction in a misdemeanor case, and moved this court to affirm the judgment on account of the failure of Gross to prosecute his appeal. The court denied his motion to affirm the judgment, but dismissed the appeal "with directions that the judgment of dismissal be certified down to the circuit court of Perry County, to the end that the judgment may be enforced, and that the prosecuting attorney may institute proceedings on the supersedeas bond, if so advised."

Thus it will be seen that the relief asked in that case was to affirm the judgment. This was for the manifest purpose of enabling the State to have execution issued in this court on the supersedeas bond. This relief was denied by the court and the appeal dismissed, which, when tested by the directions given, amounted to no more than to strike the case from the docket. This is far from holding that the docketing of an appeal and a motion to dismiss is the proper practice, in cases where the time for appeal has elapsed.

Here the case was docketed for the very purpose of dismissing the appeal, and, as we have already seen, the dismissal would leave the parties in exactly the same condition as they were if the appeal had not been docketed in this court. Hence it is apparent that no useful purpose can be served by adopting such a course. If such a practice was adopted, it would be useless and expensive, for the parties acquire no greater rights than they already possessed. This is made perfectly clear by the directions given in the Gross case.

To sum up: in cases where the time for appeal has expired, the party recovering judgment in the court below has the right to have execution against the losing party. If a supersedeas bond has been given, he may sue on it. He could acquire no greater rights if we should hold the better practice to be to allow him to docket the appeal in this court for the very purpose of dismissing it.

Therefore we conclude that the better practice would have been for the clerk to have refused to have docketed the appeal in this case, and, in conformity with this view, the cause will be ordered stricken from the docket of this court.

McCULLOCH, C. J. (dissenting). The decision of the majority has overturned a rule of practice which has been adhered to in this court for a great many years, and which found expression in the opinion of the court in *Gross* v. *State,* 89 Ark. 482. The effect of that decision, however, is brushed aside by the majority with the statement that it amounted to no more than an order dropping the case from the docket. Such was not the decision of the court. In that case the appellant had obtained an appeal from the lower court and had superseded the judgment, with bond, but failed to perfect the appeal within the time prescribed by statute, and the Attorney General filed the transcript here with a motion to affirm the judgment. We declined to affirm, on the ground that the court was without jurisdiction to hear and determine the cause, but we dismissed the appeal and ordered the judgment certified down to the circuit court for enforcement. We said nothing about merely striking the transcript from the docket. If that was the proper rule in a criminal case, certainly it is proper in a civil case in order that the appeal may be brought to an end and the judgment of the lower court enforced.

The cases cited by the majority and many other decisions of this court hold that where an appeal is not perfected by the filing of the transcript with the time prescribed by law it becomes the duty of this court to dismiss it. This is the universal rule of all courts. 4 C. J. p. 566. "It results from the doctrines stated that if an appeal is not perfected by doing all that the law commands within the time fixed the court should dismiss it, and so the authorities declare." Elliott on Appellate Procedure, § 524.

In testing the jurisdiction of an appellate court to dismiss an appeal on account of failure to perfect it with-

in the time prescribed by law, it is unimportant which of the parties files the transcript. If the transcript is filed with the court and a motion is made to dismiss it, then the jurisdiction of the court to render a decision upon the motion is complete. The views of the majority overlook, I think, the distinction between the jurisdiction of this court to hear and determine a cause and jurisdiction to dismiss an appeal. Upon the filing of the transcript at any time the court has jurisdiction to determine whether or not the appeal has been properly taken and perfected, and, if it decides that the appeal was not properly taken and perfected, it has power to render a judgment dismissing the appeal. In other words, the court always has the power to decide a question relating to its own jurisdiction, and, for the purpose of determining whether or not it has jurisdiction, it may decide whether or not an appeal has been properly taken and dismiss an appeal which has not been properly taken and perfected. But the majority say that it is a useless proceeding for the appellee to file a transcript here and procure a dismissal of the appeal, and that it is not essential to the enforcement of the judgment appealed from. I think the majority is incorrect in the assumption that it is unnecessary to dispose of the appeal before the judgment of the lower court can be enforced. A supersedeas bond suspends the execution of the judgment, and the judgment remains suspended until the appeal is set aside or the judgment affirmed. Mere lapse of time does not remove the suspension of the judgment, and it requires an order of the court to do that. Therefore it is proper and necessary for this court to make an order dismissing an appeal before the suspension is removed so that the judgment may be enforced. "The mandate of the appellate court remitting the cause to the lower court," says 2 R.C.L. p. 287, "is the official mode of communicating its judgment to the inferior tribunal." Until the lower court is officially notified of the dismissal of an appeal, there is no method for the ascertainment of that fact. If an appellee applies to the clerk of the trial court for an execution

after the expiration of the time for perfecting an appeal, what evidence can he furnish to the clerk, other than the mandate of this court, that the appeal has been abandoned or dismissed? Or, if the appellee sues on the bond, what evidence can he furnish that the appeal has not been perfected?

I am of the opinion, therefore, that the majority have not only overturned a long-settled practice which has been observed in all courts, but have established an awkward practice with respect to the remedy of an appellee after an appellant has failed to prosecute an appeal.

Mr. Justice SMITH agrees with me in this dissent.

PALMER v. TAYLOR.

Opinion delivered March 2, 1925.

1. BUSINESS TRUSTS—FRAUD.—Inconsistent recitals in a declaration of a common-law trust stating on one page that the subscriptions were paid for and on another page that they were paid with notes *held* not to show that the whole scheme was fraudulent or that the trustees practiced a fraud upon the Bank Commissioner to secure a permit to do business.
2. BUSINESS TRUSTS—FRAUDULENT REPRESENTATION.—Evidence and declaration of trust filed with the Bank Commissioner as a public record, under Crawford & Moses' Dig., § 764, *held* not to support a finding that subscriptions to a common-law trust were secured by fraudulently representing, that the organization was in fact a corporation.
3. BUSINESS TRUSTS—AUTHORITY TO DO BUSINESS.—Trustees under a common-law trust may do business in this State under general statutes other than those regulating limited partnership and corporations.
4. BUSINESS TRUSTS—AUTHORITY TO SELL STOCK.—Whether a business trust formed to manufacture automobiles should be allowed to sell stock in the State *held* to be within the discretion of the Bank Commissioner.
5. BUSINESS TRUSTS—SALE OF STOCK—FRAUD.—Sale of stock in a business trust for anything other than cash was not evidence of fraud where the Bank Commissioner's permit did not require cash payments.

6. BUSINESS TRUSTS—POWERS AND LIABILITIES OF TRUSTEE.—Under a declaration of a common-law trust, the trustees are principals and not merely agents of the stockholders, and they are personally liable for the indebtedness growing out of transactions relating to the trust estate.

7. BUSINESS TRUSTS—STOCK SUBSCRIPTIONS.—Subscriptions to stock in a common-law trust are not gifts but investments of which the trustee takes title as owner.

8. BUSINESS TRUSTS—FRAUD.—A provision in a declaration of a common-law trust that a shareholder shall not have the right to call for a partition or division or dissolution of the trust, or an accounting, *held* not fraudulent as entitling the trustees to convert the assets of the company or to render them immune from accounting therefor, but only to preclude a suit for partition or division, or for an accounting, from operating to dissolve the trust.

9. BUSINESS TRUSTS—FRAUD.—Authority conferred by a declaration of trust to expend 30 per cent. of the proceeds of the sale of stock *held* not to show a fraudulent intent in organizing the trust.

10. BUSINESS TRUSTS—FRAUD.—Payment by a common-law trust of 30 per cent. of the proceeds of stock subscriptions for commissions to sales agents pursuant to authority conferred by the declaration of trust *held* not a fraud on prospective investors.

11. BUSINESS TRUSTS—SUBSCRIPTION—RESCISSION.—A subscription to stock in a common-law trust will not be rescinded because the trustees failed to perform fully a printing contract given to the subscriber in consideration of his purchase of stock where it appeared that the contract might have been fully performed if the trust had not failed.

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

Gannaway & Gannaway and *E. G. Shoffner,* for appellants.

The whole scheme was inherently fraudulent. 159 Ark. 621; 162 Ark. 90; 110 U. S. 630; 98 N. E. 391; 52 N.Y. 492, 497; 3 N. Y. Supp. 392-93 W. Va. 324; 112 S. E. 579; 144 S. W. 158; 209 Pac. 36.

The stock sales were void because the permit was secured by violating the penal provisions of the Blue Sky law. 129 Ark. 416; Act No. 242, Acts 1915 § 885, title; Cowan's Manuel of Securities Laws, 1923; 147 Ark. 408;

C. & M. Dig. §§ 751, 753, 754, 756, 757, 762, 764, 766, 770; 147 Ark. 252; 6 R. C. L. 833, § 223; 236 S. W. 694; 104 Cal. 473, 38 Pac. 102; 168 Minn. 386, 134 N. W. 482; 172 N. W. 620; 187 N. W. 874; 50 Pa. St. 399; 144 S. W. 158.

False representations to the Bank Commissioner constituted a fraud upon him and upon all subsequent purchasers of stock. 162 N. W. 753; Thompson on Corporations, 1922 Supp. 718, § 4150.

Particular false representation to, and breaches of contracts with, plaintiffs justify rescission. 112 S. E. 579; 122 N. E. 634; 189 Pac. 116; 52 N. Y. Supp. 139; 98 N. E. 391. Failure to disclose material facts constituted fraud upon the plaintiffs. 98 N. E. 391; 131 Ark. 382.

The chancellor erred in refusing relief under the alternative prayer for a receiver and an accounting 150 Ark. 398.

Mehaffy & Mehaffy, for appellees.

There is no proof in the entire record of any fraud on the part of the appellees. The cases cited by the appellants have no application here, and, on the facts, the findings of the chancellor will not be disturbed unless found to be clearly against the preponderance of the evidence. 158 Ark. 641; 157 Ark. 600; 156 Ark. 473; 153 Ark. 56; *Id.* 133; 155 Ark. 305.

SMITH, J. George E. Palmer, J. H. Parkin and J. T. Goyer, appellants here, filed separate suits in the Pulaski Chancery Court against Charles E. Taylor, C. F. Bizzell, A. W. Sloss and H. W. Anderson. The basis of the complaint in each case was that the defendants were the promoters and trustees of the Curtis Motor Car Company, which had been organized under a declaration of trust, and it was alleged that, for various reasons, the entire organization was invalid, and that the sales of stock which had been made by the trustees were in violation of law, and were void.

These plaintiffs alleged that certain material misrepresentations had been made to them to induce them to purchase stock, and that these misrepresentations constituted a fraud upon them, and they prayed a rescis-

sion of the contracts of sale of the stock made to them, which they alleged was worthless, and there was an alternative prayer that, if the validity of the sales of stock was upheld, the defendants, as officers and trustees of the company, be required to make an accounting to the stockholders of the funds and property of the trust estate. A tender of the stock to defendants was made, and judgment was prayed for the amounts paid therefor.

The general allegations of misrepresentation and fraud will be set out and discussed. In addition to these allegations common to all three complaints, Palmer alleged that he was induced to buy stock by reason of a promise made to him that he would be, and later had been, made a member of a board of associate directors, and still later that he had been made a member of the advisory board of the company, when there was, in fact, no such board. Parkin alleged that he had agreed to buy a thousand dollars of stock in consideration of an agreement on the part of the trustees to buy from him two thousand dollars' worth of printing and printing supplies, whereas the trustees bought only fifteen hundred dollars' worth of supplies, of which a thousand dollars had been paid in stock and the balance in cash. Goyer alleged that he had been induced to buy stock in consideration of an agreement that he should be made a member of the advisory board, and he alleged, as Palmer had done, that there was no such board.

The cases were consolidated for trial in the chancery court, and, upon final hearing, were dismissed as being without equity, and they have been consolidated here and briefed as a single case.

The general allegations of fraud are that authority to do business was secured from the Bank Commissioner on October 13, 1919, by reason of false statements in regard to the assets which had been assigned to the trustees by the parties making the declaration of trust, in that it was represented that the company had sold 163 shares of stock, and had on hand in actual cash

$1,545.65, and $6,603.35 in notes, which statements were false, and that, after authorization to do business and to sell stock had been obtained, misrepresentations were made to prospective purchasers of stock in advertising matter which the defendants had caused to be published and circulated over the State as to the character of the organization, it being represented that the organization was in effect a corporation and was doing business as such, and had an authorized capital of two million dollars, when it was not a corporation at all. That the defendants represented to the Bank Commissioner that they had each invested a thousand dollars in cash in the company, when they had, in fact, invested nothing. That it was falsely represented to the State Bank Commissioner that three persons, to-wit: E. Audigier, A. S. Maddox and Ben Q. Adams, had, for themselves and for all others who might become interested, transferred certain money and personal property to the trustees, whereas they had not, in fact, transferred to the trustees either money or personal property. That the declaration of trust contained the provision "that the shareholders shall not have the right to call for a partition or division or a dissolution of the trust, or an accounting," and that these provisions evinced a fraudulent intent. That the provisions of the declaration of trust allowed the trustees to expend thirty per cent. of the proceeds of all stock for commissions in selling stock and for promotion purposes, and that this itself so impaired the capital of the concern as to render it fraudulent. That a prospectus was prepared by the trustees on the faith of which plaintiffs purchased the stock; that in this prospectus it was represented that there was no preferred stock, and that every shareholder had equal rights and privileges, and that the company would be controlled by a board of trustees or directors who were selected by the shareholders themselves, when, in fact, the trustees had already been chosen, and their appointment was for life, and no shareholder had any voice in the management of the company, as the management

was entirely in the hands of the trustees. And that there were certain false representations in regard to operating expenses.

Upon these allegations a large amount of testimony was taken, which we shall only summarize, and, stated in a chronological order, it is as follows:

In March or April, 1919, defendants Sloss and Bizzell conceived the idea of organizing a company to manufacture and sell automobiles, trucks and tractors in Little Rock. Neither of them had ever had any experience in operating factories or in the automobile business, and neither appears to have had any considerable capital to invest in the business. After deciding that there were wonderful possibilities in the enterprise, they enlisted the interest of Charles E. Taylor, who was about to retire from the office of mayor of Little Rock, but who, like themselves, was without experience in operating factories, and who had no considerable capital to invest. These three men made an extensive investigation of the automobile industry, and obtained figures showing some of the great fortunes which had been made in this industry on small investments. At that time money was plentiful, credit was easy, and the manufacturers of automobiles had a demand for cars which they were unable to supply. These gentlemen pursued their investigations in Detroit and in eastern cities, and became convinced that the necessary capital was the only thing required.

They were advised that a number of industries had been started by trustees under the common-law declaration of trust whereby the trustees assumed permanent control of the project and sold stock entitling the holders thereof to a proportionate part of any profits earned. Among other concerns of this kind to which their attention was called was a company in Dallas, Texas, known as the Texas Motor-Car Company, and they went to Texas and, after investigation, they decided to organize as that concern had done, and to this end they secured a copy of the declaration of trust under which the Texas company was operating, and, after making a few com-

paratively unimportant changes in the instrument to meet local conditions, they submitted their plans to the State Bank Commissioner, who was persuaded that the scheme was feasible, and who stated that he would grant authority for it to do business in the State and to sell stock.

As a part of the preliminary plans, Audigier, Maddox and Adams were interested in the project and induced to become parties thereto and to subscribe for stock, and their names were used in the declaration of trust as the promoters of the scheme, and it was recited that they had transferred "certain moneys and personal property with the intention that same shall be held upon the trust hereinafter expressed concerning said properties so transferred."

Adams had, at the time, subscribed for $100 in stock, of which $30 had been paid at the time the declaration of trust was filed with the Bank Commissioner. The balance of $70 was later paid. Similar subscriptions were obtained from Audigier and Maddox, and similar payments were made by them.

The declaration of trust named Taylor, Sloss and Bizzell as trustees, and they had each subscribed for a thousand dollars of the stock, and so also had H. W. Anderson, who, although not named as trustee, had been employed by the trustees to assist in promoting the scheme.

It is earnestly insisted that the statement in the application for a permit to do business in regard to these subscriptions shows that the whole scheme was fraudulent, because authority to do business was obtained as a result of the false representation made to the State Bank Commissioners in regard to these subscriptions, in this, that it was recited in the application for a permit that said parties had each subscribed for a thousand dollars in stock and had paid cash therefor, when they had only given their notes for their stock.

It is true that, on one page of the application for a permit there was a recital that these four persons had

paid for their stock, but on another page, it was shown that they had only given notes, and these parties, as witnesses, testified that they did not observe this discrepancy, and that they treated their notes as payments for the stock, and it was shown in the application how the payments were made by them.

It must be conceded that this was indeed a small beginning for what was intended to be a two-million dollar concern, but it had to begin, and, as counsel for appellees say, no one had the right to expect another to donate the capital for the concern to operate on. When one views the wreck of the enterprise, it does appear now that the scheme was visionary; but we must view the undertaking from the perspective of the promoters, for the question is not whether it was visionary—a fact which now certainly appears—but is rather, whether it was fraudulent, and we have reached the conclusion that it was not.

We do not think any fraud was practiced on the State Bank Commissioner to secure his permit to do business. The very instrument which shows the erroneous, and therefore false, statement of the company's assets, also shows the truth in that respect.

Departing, for the moment, from the chronological order of the statement to further discuss the notes executed by the appellees for their stock, it may be said that appellants insist that these notes were never paid, and were never intended to be paid, and that the fraudulent character of the whole scheme was thus shown. Appellees insist, however, and so testified, that these notes were paid, and that payment was made in the performance of necessary services which the declaration of trust contemplated should be rendered by them to the company.

We do not stop to inquire whether the notes could have been legally paid in this manner. If they could not, this was a proper matter for the chancery court to have considered in winding up the affairs of the company, as was done by that court in the receivership which was later ordered. If these notes were not in fact paid, they

were a part of the assets of the company, to be distributed by the chancery court in winding up the company's affairs, and the appellants would have had no right to wholly appropriate the proceeds thereof to the satisfaction of the demands they are here seeking to assert. Indeed, this is not a suit to collect these notes, but is one to hold appellees, as trustees, liable for stock which appellants say they were induced to buy by reason of false and fraudulent representations made them.

In this connection, it may be said that appellees contend that they had already rendered, at the time the notes were executed, services of a greater value than the face of the notes, and had incurred large personal expenses in their preliminary travels and investigations, exceeding the face of the notes, which inured to the benefit of all subsequent subscribers for stock. It is unnecessary to decide here whether these promoters had the right to charge these expenses to the company or not, and we do not do so. It is only necessary to decide whether the giving of these notes shows a plan to defraud, and we have concluded that this fact does not show any such intention, and we have also concluded that there were no such representations in regard to assets contained in the application for the permit as would warrant a finding that the Bank Commissioner's permit was obtained through fraud practiced on that official.

We do not think the testimony supports the contention of appellants or warrants the finding by us that subscriptions for stock were secured by the representation that the company was, in fact, a corporation. It is true that the advertising matter circulated by the sales agents in making sales of stock referred to the trustees as president, vice president, secretary and treasurer, respectively; but these titles only indicated the functions which the respective trustees performed.

The declaration of trust, which, when filed with the Bank Commissioner, became a public record (§ 764, C. & M. Digest), disclosed the nature of the enterprise, and

there was nothing about it to indicate an intention to leave or to create the impression that the concern was in fact a corporation, and it appears from various bits of correspondence in the record that, when the question of its character was involved, it was plainly stated.

The enterprise was not an unlawful one, however ill-considered it may have been.

In the recent case of *Coleman* v. *McKee*, 162 Ark. 90, we held, as we had previously done in the case of *Betts* v. *Hackathorn*, 159 Ark. 621, that the trustees under a common-law trust may do business in this State under general statutes other than those regulating limited partnerships and corporations.

As to whether or not such authority should have been given in this case, was a question calling for the exercise of a discretion vested at that time in the State Bank Commissioner, and, in fairness to that official, it may be said that this discretion was exercised at a time when, according to the testimony, money was plentiful and the apparent demand for automobiles was insatiable.

It is next insisted that the fact that stock was sold for anything except cash paid, at the time, was an evidence of fraud, as that action was not authorized by the State Bank Commissioner. The indorsement on the application for a permit to do business was: "Examined, and sale of shares at par for $50 each authorized." The declaration of trust had stated that the shares would be $50 each, that is, any one investing $50 would be entitled to a receipt, called a share, showing that fact. But this was not a corporation, and the Bank Commissioner did not impose the requirement that the full amount of the subscription should be paid when made.

It is insisted that the provision of the declaration of trust, "that the shareholders shall not have the right to call for a partition or division or a dissolution of the trust or an accounting," on its face evinced a fraudulent intent.

We do not think the presence of this recital in the declaration of trust proves fraud. Its purpose was to

give permanency to the trust thus created. Under agreements of this character the trustee is principal, and it is not a mere agent for the *cestui que* trust who invests, and it is upon this theory that he is held personally liable for the indebtedness growing out of transactions in relation to the trust estate. *Betts* v. *Hackathorn, supra.*

We do not construe the language quoted as giving the trustees the right to convert or otherwise misappropriate the assets of the concern or to have immunity from accounting therefor. It could not be said that the trustees were asking or had been granted any such power if any other construction could be given the language. This was not a gift, but was supposed to be an investment, of which the trustees took the title as owners, and we think the fair and proper construction of the language is that no suit for partition or division or for an accounting should operate to dissolve the trust.

There was at least no false representation about this language, for it appeared in the declaration of trust upon which the permission to do business was asked, and was existent when all the stock purchases in question were made.

It is next urged that authority to expend thirty per cent. of all sums collected so operated necessarily to impair the capital of the concern as to doom it to failure from the beginning, and was therefore fraudulent. What we have said about the provision in regard to a dissolution or an accounting is equally applicable to this contention.

It appears, further, that it was contemplated that a large part of the thirty per cent. was to be paid, and was in fact paid, to sales agents for selling stock. It does appear to be a large per cent., but there was no proof that it was unusually large for an enterprise of this kind. A very large amount of money must necessarily have been raised to have made the enterprise a success, and we cannot say judicially that this was a fraud on prospective investors. It is not denied that authority was conferred to charge it.

The prospectus was filed with the Bank Commissioner in connection with the other papers in the case, and in this prospectus it was stated: "There is no preferred stock or bonds. Every shareholder has equal rights and privileges, and all shares have equal earning capacity. This company will be controlled by a board of trustees or directors who are selected by the shareholders."

This does not appear to have been a candid statement of the facts; but we presume the Bank Commissioner considered it in connection with the recitals of the declaration of trust which he had before him when his permit was issued, and he knew, of course, that the concern would be controlled by the trustees who were therein named.

There were no preferred stocks or bonds, and the shareholders did have equal rights and privileges.

The concern was to be controlled by the trustees, who acquired their power as such under the declaration of trust, which became effective after the application for a permit was approved. This recital was intended to advise the Bank Commissioner how the concern would operate if the permit was granted, and the same thing may be said of other recitals in the prospectus filed with the Bank Commissioner in regard to the protection of shareholders and savings to them.

In regard to the specific allegations of misrepresentations which appellants testified were made to them, it may be said that Palmer and Goyer were, in fact, selected by the trustees as associate directors, and Palmer was selected a member of what was designated as an advisory committee. Palmer and Goyer were given certificates showing that they had been selected as associate directors, but there was nothing in these certificates to indicate that the original trustees did not have the title to and control of the property. These certificates recited what the duties of the associate directors would be, to-wit: (1) To advise with the officers of the company concerning local investments; (2) to give the com-

pany such information as it may desire concerning the financial responsibility of prospective subscribers for stock living in Little Rock and vicinity; (3) to assist, by proper and consistent means, the officers and authorized representatives of the company in the sale of its shares until same had been disposed of.

The certificate given Palmer appointing him a member of the advisory committee was of similar purport.

These appointments ceased to be of value because the enterprise failed and was abandoned.

Parkin testified that he was induced to buy a thousand dollars of the stock by the promise that printed matter amounting to two thousand dollars would be purchased from him. As a matter of fact, the company did order printing matter from him amounting to $1,497, which paid for his stock, and the balance was paid him in cash. But this is not a suit on his part for damages for a breach of this contract, but one for its rescission, and we do not think this shows any fraud or misrepresentation which warrants rescission. The contract contemplated that the company would continue in business, and had it done so the balance of the order might have been filled.

We have discussed the principal allegations and testimony in support thereof, which appellants contend show that the enterprise was fraudulent and entitle them to a rescission of their contracts for the purchase of the stock, and have concluded, upon the whole case, that the chancellor's finding that the complaints are without equity is not clearly against the preponderance of the evidence.

The testimony shows that the trustees were men of good standing, and that they devoted about two years of their time in an earnest but unsuccessful effort to launch the enterprise. Stock subscriptions totaling $178,900 were received, of which $21,800 were canceled, and $107,500 were actually paid in for stock.

A statement showing the expenditure of this money was furnished Palmer, and was made an exhibit to his

testimony. Much evidence was offered in regard to the items there shown which we will not discuss. It suffices to say that the company incurred and discharged large expense in preparing to manufacture or to assemble automobiles. The company purchased a patent on a tractor, which, after investigation and experiment, was believed to be one which could be manufactured and sold profitably. Actual operation of a plant was begun, and, after large expense had been incurred, about twenty-six four-cylinder cars were put on the market, as well as one six-cylinder car. But, about the time the trustees had expected to begin operations, the panic following the war, which brought ruin to so many people, came, and no more stock could be sold, subscriptions for stock were canceled by some and others refused to pay the balance due on subscriptions, and most of the sales of automobiles which were made were effected by accepting old cars in payment of new ones, and the enterprise ended in a receivership.

Much stress is laid on the fact that, at one of the last meetings held by the trustees, they entered an order on their records appropriating to themselves certain second-hand cars in payment of alleged balances due them from the company, and the good faith of this transaction was called into question. It suffices to say, in answer to this contention, that, if this action was unauthorized, it did not warrant the rescission of the contracts for the sale of the stock.

Summarizing this testimony, we have concluded, after carefully considering it, that the testimony does not establish the contention of appellants that the project was a fraudulent one.

In addition to the facts herein stated, there are two other outstanding facts which lead to the conclusion that the trustees were acting in good faith in soliciting subscriptions for stock. One is that they paid the debts of the concern as they went along, and the second is the comparatively small amount the three trustees received for about two years' work. They did receive a very

large per cent. of the amount of the subscriptions paid, but the testimony shows that this was largely paid to sales agents for selling stock. If we charge the trustees with all amounts which, according to appellants, they must have received, they did not receive compensation at all indicative of dishonesty.

It follows, from what we have said, that the chancery court properly dismissed the suits for rescission, and that finding also inures to the benefit of Anderson. In addition, it is shown that Anderson was not a trustee, but a mere employee who had no control of the business.

Affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. NORTH ARKANSAS HIGHWAY IMPROVEMENT DISTRICT.

Opinion delivered March 2, 1925.

1. EVIDENCE—HEARSAY.—Testimony of a railroad demurrage inspector that demurrage was due by defendant road district on certain cars of gravel was hearsay where he had no personal knowledge of the time of arrival of the cars or of the alleged delay in unloading them, but drew his information from records required to be kept by the station agent.
2. BILLS AND NOTES—RIGHT TO STOP PAYMENT OF DRAFT.—Where defendant bank issued a draft on a correspondent bank in favor of plaintiff upon the supposition that its depositor had ordered a claim to be paid to plaintiff, upon learning that this was a mistake the bank had a right to stop payment of the draft, without becoming liable therefor, where the draft was not certified and delivered to an innocent purchaser.

Appeal from White Circuit Court; *E. D. Robertson*, Judge; affirmed.

Thos. B. Pryor and *H. L. Ponder*, for appellant.

A preponderance of the evidence shows both the authority of the engineer to make the settlement, as well as the ratification thereof later by the commissioners. It was therefore error to direct a verdict, as the evidence

was conflicting. The court can only direct a verdict where from the evidence only one conclusion could be reached. 147 Ark. 206; 144 Ark. 229; 126 Ark. 427; 132 Ark. 97; 132 Ark. 508. The bank was liable after it accepted the demurrage bills and issue its draft to appellant. 7 C. J. 705-707; 54 Am. Rep. 50; 17 Am. Ref. 305; 160 Fed. 642; 116 Ark. 1; 10 Wall (U. S.) 604; 217 Mass. 441; 85 Mo. 173; 120 Pac. 886; 6 Jones & S. (49) 190; 9 A. L. R. 960.

Brundidge & Neely, for appellee.

The check in question was not a certified one, nor accepted by the bank upon which it was drawn, and still was in the hands of the original holder. No rights of third parties had intervened, and, as the check was given through mistake, the bank had the right to stop payment. 7 C. J. 709 and 710; 31 N. E. 386; Ann. Cas. 1914 A. 1302; 9 A. L. R. 1069.

Smith, J. The appellant railroad company brought suit to recover the sum of $201 alleged to be due it for demurrage on shipments of gravel to Higginson, Arkansas, to appellee road district, which was engaged in building a hard-surface road in White County.

The original complaint alleged that there was a settlement of the amount claimed for demurrage between appellant and appellee, and that $201 was agreed upon as the amount due appellant. Later appellant filed an amended complaint making the People's Bank of Searcy, a party defendant, it being further alleged that, after a voucher had been given by the road district in payment of the demurrage, the agent of appellant company surrendered the voucher to the People's Bank, the depositary of the district, and that the bank took up said voucher and gave its draft on a bank in St. Louis for said amount. That appellant received the St. Louis exchange for said sum in full settlement of all amounts due it by the road district, and thereafter the bank stopped payment of the exchange, without cause. It was also alleged that the defendant bank was also liable to appellant by reason of the exchange given appellant.

At the conclusion of all the testimony the court directed the jury to return a verdict in favor of the defendants, and from the judgment pronounced thereon is this appeal.

For the reversal of the judgment it is first insisted that the road district was bound by reason of the settlement of these items made between its agent and the engineer of the district. It was shown that the company's agent and the engineer of the district went over the files and waybills of the railroad company, and it was agreed by the engineer that the district owed the railroad $201 by way of demurrage on cars of gravel which the district had failed to unload within the time allowed for that purpose, and that, after this settlement was made, the engineer of the road district directed the cashier of the bank to pay the amount agreed upon, and that this was done by issuing to the order of the railroad St. Louis exchange.

There was no testimony, however, that the engineer of the district possessed the authority to thus bind the road district. Upon the contrary, the undisputed evidence shows that he did not possess any such authority, and, when the commissioners of the district were advised what had been done, they immediately repudiated the settlement made by the engineer, upon the ground that the district did not owe and would not pay the demurrage claimed, and both the engineer of the district and the cashier of the bank were notified that, if the St. Louis draft was paid, either the engineer or the bank would have it to lose. The payment of the draft on St. Louis was thereupon stopped by the bank.

It is insisted that the court should at least have submitted to the jury the question whether there was any demurrage due the railroad.

The only testimony, however, to support the claim for demurrage was that of a demurrage inspector for the railroad company, who lived in Little Rock, and he had no personal knowledge of the time of arrival of any of the cars of gravel or of the alleged delay in unload-

ing them. He could only testify what the records of the station agent at Higginson showed. He testified that the station agent was required to keep such records. His only knowledge of the facts was based on the showing thus made. We think this testimony was hearsay, and did not establish the fact that the district was liable for any demurrage. The agent who made these records might have used them to refresh his recollection, and might have testified that the records were correct when made, but the testimony offered amounted to no more than a detailed showing as to what the records disclosed. However, the witness admitted that he knew nothing about any of the cars except what the records showed.

The testimony offered on behalf of the district was to the effect that there was no demurrage due the railroad.

It is next insisted that the bank was liable after it accepted the demurrage bills and gave its draft to the railroad company, and cases are cited as to the binding effect of the certification of the draft by the bank.

We think, however, that those cases do not apply to the facts of this case. The exchange drawn by the defendant bank was not a certified check, nor had it been accepted by the bank upon which it was drawn, nor had it passed into the hands of an innocent third party.

The defendant bank issued the check to the railroad upon the assumption that the road district had directed that the claim for demurrage be paid. But this was shown to be a mistake. The road district did not desire any part of its funds held by the bank as its depository to be appropriated to the payment of this claim, and there was therefore no consideration to support the check drawn by the defendant bank on its St. Louis correspondent, and it had the right to stop its payment without becoming liable for the amount thereof on that account.

The case of *Taylor* v. *First National Bank of Minneapolis,* 138 N. W. 783, Ann. Cas. 1914A, 1302, was one in which the drawer of a check had ordered payment stopped on the ground that the payee had obtained it

from the drawer by fraud and without consideration. It was there insisted that, inasmuch as a check is a *pro tanto* assignment of the funds of the drawer on deposit with the drawee bank, the drawer could not stop payment or revoke the authority of the bank to pay, and that, so far as the drawer is concerned, the money belongs to the payee. After pointing out that the court was not considering a check which had been transferred to a *bona fide* holder for value, it disposed of the contention stated by saying: "We do not think the decisions of this court point to the conclusion contended for by appellant, nor do those of any other court committed to the doctrine that a check is an assignment *pro tanto* of a depositor's funds, unless it be that of Illinois."

The court further said that it saw no good reason for a rule of business or of law which would throw upon the bank upon which a check was drawn the duty of determining, at its own peril, who is entitled to the funds represented by a check, after notice from the depositor that the instrument by which the payee claims the fund is for some reason invalid.

This case is extensively annotated, and many cases are cited which support the conclusion announced by the Supreme Court of Minnesota.

In the case of *Tremont Trust Co.* v. *Burack,* 9 A. L. R. 1067, 126 N. E. 782, it was said by the Supreme Judicial Court of Massachusetts that, "by the great weight of authority, the drawer of a check retains the right to countermand its payment at any time before it is paid or is certified and delivered to a *bona fide* holder for value."

We conclude therefore that defendant bank was not liable for the amount of the check on St. Louis by stopping its payment, as it had the right to do so after being notified that there was no consideration to support it.

No error was committed in directing a verdict for the defendants, and the judgment is affirmed.

Missouri Pacific Railroad Company v. Henry.

Opinion delivered March 2, 1925.

1. Carriers—negligence of passenger.—Where a passenger entered the caboose of a local freight train, and, while the train was switching in the yard, was told by the trainmen that when they got through switching they would stop at the depot, it was not negligence for him to debark and wait for the train at the depot.
2. Carriers—negligence in boarding train.—Whether a passenger attempted to board a train at the depot or at a distance beyond the platform *held* for the jury under conflicting testimony.
3. Carriers—negligence in boarding train.—Whether a passenger was negligent in attempting to board a moving train *held* for the jury where the evidence was conflicting as to whether the train was moving slowly or rapidly.
4. Carriers—presumption of negligence.—Where a passenger is injured by a moving train, it is *prima facie* evidence of negligence on the part of the railroad company, under Crawford & Moses' Dig., § 8562.
5. Carriers—junction of railroads.—Under Crawford & Moses' Dig., § 960, requiring all passengers trains to depart from a depot "at all junctions where two or more trains connect," the word "junction" means a place where two or more tracks of same or different railroads meet or cross.
6. Costs—attorney's fee.—Under Crawford & Moses' Dig., allowing an attorney's fee to the successful plaintiff in an action against a railroad for "violation of any law regulating the transportation of freight or passengers," the allowance of an attorney's fee under this statute is in the nature of a penalty, and should be restricted to suits based exclusively upon a violation of some statute, and not applied to suits involving the issues of negligence and contributory negligence.

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

Thomas B. Pryor and *H. L. Ponder,* for appellant.

The court should have directed a verdict for appellant. This is entirely unlike that in 110 Ark 232, relied on by appellee in the trial court. Appellee was guilty of contributory negligence and not entitled to recover in that he attempted to board a fast moving train, which was an

obviously dangerous thing to do. 5 R. C. L. 680; 43 L. R. A. 297; 9 L. R. A. (N. S.) 848; 56 S. E. 748; 100 Mo. 194; 114 N. W. 571; 36 Ark. 867; 5 Am. Rep. 109; 92 Am. Dec. 322; 23 N. E. 973. 61 Am. Dec. 214. Instruction No. 1 was error. The fact that appellee was injured by a moving train was not *prima facie* negligence on the part of appellant. 75 Ark. 479. Before there could be a presumption of negligence on the part of the appellant, the plaintiff must prove that he was in the proper place. 163 Fed. 106; 40 Ark. 298; 69 Ark. 380; 82 Ark. 522; 131 S. W. 958. Instruction No. 3, based on § 960, C. & M. Digest, was erroneous, as that statute imposes a penalty fine. 110 Ark. 367.

Geo. M. Booth and *Tom W. Campbell,* for appellee.

Appellee had the right to leave the train for exercise and air, and in so doing did not lose his character as a passenger. 153 Ark. 77; 88 Ark. 225; 82 Ark. 393. It is a question for the jury to determine whether or not it constituted contributory negligence to board a slowly moving train. 110 Ark. 232; 153 Ark. 77; 82 Ark. 393. Proof that injury was caused by the movement of a train makes a *prima facie* case of negligence against Company. 119 Ark. 179; 88 Ark. 12; 73 Ark. 548; 105 Ark. 180. Knobel was a junction, such as is referred to in § 960 C. & M. Digest, and it was proper to give instruction No. 2. Contributory negligence would not defeat recovery, but only diminish it. 153 Ark. 77. Plaintiff was entitled to an attorney's fee under § 851, C. & M. Digest.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Randolph County to recover damages in the sum of $3,000 on account of an injury received while attempting to board its mixed freight and passenger train at Knobel, en route to Peach Orchard. The complaint alleged, in substance, that, on the 5th day of October, 1923, appellee was at Knobel, a junction station on the line of appellant's railroad, and that he purchased a ticket at Knobel for Peach Orchard, entitling him to ride as a passenger on the local freight

train running between said towns; that, at the time, said train was switching at Knobel, and that he was informed by those operating the train that, after they got through switching, they would stop at the depot for passengers; that said train passed the depot without stopping, and, while same was moving slowly, he attempted to board the caboose, and was jerked by the train, thrown to the platform, and injured.

Appellant filed an answer denying the material allegations of the complaint, pleading contributory negligence and assumption of the risk by appellee in attempting to board the train.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a verdict and consequent judgment against appellant for $2,000, from which is this appeal.

The first insistence of appellant for a reversal of the judgment is that the court erred in refusing to instruct a verdict for it, because appellee left the caboose after purchasing his ticket and boarding the train; second, that appellee was not at the depot when the local freight train came by, and that he attempted to board the train 150 feet north of the station platform; and, third, that appellee attempted to board the train when it was moving fifteen miles an hour, and, in doing so, was guilty of such contributory negligence as precluded him from recovering for the injury.

(1). The undisputed testimony shows that appellee arrived at Knobel on an incoming train at 1:30 o'clock P. M.; that he immediately purchased a ticket and boarded the mixed train, then switching in the yard, for Peach Orchard, the point to which he was going; that it was not very light in the caboose, and, after ascertaining that the train would stop at the depot for passengers and would not leave for forty-five minutes, he got out of the caboose and went up to the depot to await its arrival. We do not think it was incumbent upon appellee to remain in the caboose while the train was being switched about in the

yard. It was his right and privilege to debark and wait for the train at the depot. This court held in the case of *St. L. I. M. & S. R. Co.* v. *Glossup,* 88 Ark. 225, that "a passenger is not compelled to continuously remain aboard the train until he reaches his destination. He may, at regular stopping places, leave the train for refreshment, exercise, or other matters of convenience or necessity, provided he exercises proper care." The same doctrine was announced in the recent case of *Missouri Pacific Railroad Co.* v. *Kennedy,* 153 Ark. 77.

(2). The second reason assigned by appellant in support of its contention that it was entitled to a peremptory instruction is not tenable, for the testimony is in sharp conflict as to whether appellee attempted to board the caboose at the depot. The testimony most favorable to appellee upon the point is that he attempted to board the train almost in front of the depot, and where passengers usually get on the train.

(3). The third reason assigned by appellant in support of its contention that it was entitled to an instructed verdict is likewise not sound, because the testimony is in conflict as to whether the train was moving slowly or rapidly when appellee attempted to board the caboose. The testimony most favorable to appellee upon the point is that the train failed to stop at the depot for passengers, and that, when he attempted to board the caboose, the train was moving not to exceed four or five miles an hour. This court has held in several cases that the question of whether or not an attempt by a passenger to board a slowly moving train constitutes contributory negligence, is one for the jury. *Arkansas Cent. Rd. Co.* v. *Bennett,* 82 Ark. 393; *St. L. I. M. & S. R. Co.* v. *Green,* 110 Ark. 232; *Mo. Pac. Rd. Co.* v. *Kennedy,* 153 Ark. 77.

The second insistence of appellant for a reversal of the judgment is because the court instructed the jury to the effect that, if a passenger is injured by a moving train, it is *prima facie* evidence of negligence on the part of the railroad company operating the train. The instruction is based upon § 8572 of Crawford & Moses'

Digest, and is correct. *Barringer* v. *St. L. I. M. & S. R. Co.*, 73 Ark. 548; *St. L. I. M. & S. R. Co.* v. *Fambro*, 88 Ark. 12; *Huckaby* v. *St. L. I. M. & S. R. Co.*, 119 Ark. 179.

The third insistence of appellant for a reversal of the judgment is because the court gave the following instruction:

"You are instructed that the law of Arkansas requires that all railroad companies operating railroads in this State shall, at all junctions where two or more trains connect, require that all trains carrying passengers departing from such junctions shall depart only from the station-house or depot at such junction."

The instruction is based upon § 960 of Crawford & Moses' Digest, and, as given, conforms to the language of the statute. The testimony reveals that the Missouri Pacific Railroad Company owns two lines of railroad connecting at Knobel, one being the main line of the Missouri Pacific, and one a branch line known as the Paragould and Nettleton road. Learned counsel for appellant argues that a junction within the meaning of the statute is where main lines of different roads cross. We think "junction" as used in the statute means a place where two or more tracks of a railroad or railroads meet or cross, regardless of whether the tracks are owned by the same or different railroad companies. The language of the statute is "at all junctions where two or more trains connect."

The fourth insistence of appellant for a reversal of the judgment is that the court erred in giving instruction No. 3. It is suggested that the instruction is fatally defective because it left out entirely the requirement that appellee should have exercised ordinary care for his safety, and because it was argumentative. We have read the instruction carefully and find that it fully covers the question of contributory negligence; and, while very long, it is not argumentative, but simply states the facts necessary to sustain a finding for appellee. We do not commend the form and length of the instruction, but

find no inherent error in the subject-matter contained therein.

We do not regard the other suggestions of error contained in appellant's brief as well grounded, so shall proceed to discuss the claim of appellee on his cross-appeal for the allowance of a reasonable attorney's fee. The trial court overruled appellee's motion for the allowance of an attorney's fee. The claim is based upon § 851 of Crawford & Moses' Digest, which is as follows:

"In all actions at law or suits in equity against any railroad company, its assignees, lessees or other person or persons owning or operating any railroad in this State (or) partly therein, for the violation of any law regulating the transportation of freight or passengers by any such railroad, if the plaintiff recover in any such action of suit, he shall also recover a reasonable attorney's fee, to be taxed up as a part of the costs therein, and collected as other costs are or may be by law collected."

The allowance of an attorney's fee under this statute is in the nature of a penalty, and should be restricted to suits based exclusively upon a violation of some statute and not to suits involving issues of negligence and contributory negligence. This suit involves other issues than a mere failure to stop the train at the depot in Knobel to receive passengers, as required by § 960 of Crawford & Moses' Digest.

The judgment is therefore affirmed upon both the direct and cross-appeal.

NORRIS AND HAMLETT v. STATE.

Opinion delivered March 2, 1925.

1. CRIMINAL LAW—ACCESSORY.—Mere silence, in the absence of a duty to act, will not constitute one an accessory before or after the fact.

2. CRIMINAL LAW—CONCEALMENT OF CRIME.—Whether a State's witness who concealed his knowledge of defendants' commission

of crime of murder, while he was a member of the coroner's jury investigating it, was an accessory before or after the fact, so as to require corroboration of his testimony *held* for the jury on proper instruction, as it was his duty to use all proper means to ascertain the murderer's identity.

3. CRIMINAL LAW—ACCOMPLICE.—An accessory before or after the fact is an accomplice, on whose uncorroborated testimony the accused cannot be convicted.

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

Norwood & Alley, for appellant.

H. W. Applegate, Attorney General, *John L. Carter* and *Darden Moose,* Assistants, for appellee.

HUMPHREYS, J. These are companion cases, each appellant having been indicted, tried, and convicted in the circuit court of Polk County for the crime of murder in the first degree, and, as a punishment for the crime, each was adjudged to serve a life term in the State Penitentiary. Each prosecuted an appeal to this court, and the cases were abstracted and briefed separately, but one opinion will suffice in the two cases, as the convictions are for the same crime. The two appellants and Emmett Norris, brother of Wood Norris, were charged with killing Smith Wilcox and his wife, Nannie Wilcox, on the night of April 30, 1924, at their home in said county.

On Thursday afternoon , May 1, 1924, Smith Wilcox and his wife were found dead in their home, it appearing from their surroundings that they had been brutally murdered by robbers. The murder was perpetrated and robbery effected on Wednesday night. Immediately after the discovery of the dead bodies, a coroner's jury was impaneled. Lee Crawford, upon whose evidence the appellants were convicted, served as a member of the coroner's jury, but concealed the information he possessed relative to the commission of the crime by appellants, according to his subsequent testimony. Appellant Ted Hamlett was suspected of having been implicated in the crime, and was arrested the following Sun-

day. He was interrogated by the prosecuting attorney, and released on Tuesday. On the day of his release, Emmett and Wood Norris were charged with the crime, and they, together with appellants, who had been rearrested, were held in custody, subsequently indicted, and convicted on the testimony of Lee Crawford. He testified, in substance, that he was making his home with Emmett Norris before and at the time of the murder; that, two or three weeks before the crime was committed, Wood and Emmett Norris discussed the robbing of Mrs. Nannie Wilcox, in the presence of appellant himself and Mrs. Norris, at her home, and that appellant expressed a willingness to help commit the crime; that Mrs. Norris remarked that it would be an easy job; that witness declined to assist, stating that he was not mean enough to undertake it; that, on Wednesday evening prior to the crime, Wood Norris came to the home of Emmett Norris, and asked Emmett if he was ready to go help get that money, and Emmett said that he would go; that witness was again invited to go, but declined on the ground that the old people had got their money honestly; that Wood Norris said that appellant was to meet them at Jim Hill lane on the way to the home of Wilcox; that witness went to bed between eight and nine o'clock, and slept soundly until he was called to breakfast the next morning; that, before witness was summoned on the jury, Wood Norris and appellant came to him, at the southwest corner of Wilcox's garden, before the coroner's inquest, and told him that they had killed the old folks to get their money; that they both cautioned him not to say anything about it; that the reason he did not reveal the information he had concerning the crime to the jury was that he was afraid of the boys; that he had as much protection when on the jury as he had when he later revealed the information.

The main contention of appellants for a reversal of the judgment is the refusal of the court to instruct the jury that one charged with a felony cannot be convicted on the uncorroborated testimony of an accomplice, and

that the corroboration is not sufficient which merely shows the commission of the offense and circumstances thereof. The argument is made by appellants that the evidence tends to show that Lee Crawford was an accessory both before and after the fact, and, this being the case, the court erred in holding as a matter of law that Lee Crawford was not an accomplice. On the other hand, learned attorneys for the State make the argument that the undisputed evidence reveals that all Lee Crawford did was to conceal the fact that a felony was about to be committed, and later to conceal the fact that appellants had committed the crime of murder, and that such concealment was not to shield appellants, but through anxiety for his own safety. It is true that mere silence in the absence of a duty to act will not constitute one an accessory before or after the fact. As a member of the coroner's jury, however, a duty rested upon Lee Crawford to use all proper means to ascertain who murdered Smith Wilcox and Nannie Wilcox. He claims to have known at that time who planned the robbery, and the physical conditions surrounding the dead bodies indicated that the murders resulted from an attempt to rob Smith and Nannie Wilcox. The failure to perform his duty as a juror shielded, for the time being, appellants from arrest and prosecution. The jury might have reasonably inferred from the statements that he withheld the information for the purpose of shielding his confederates, and not through fear for his own safety. The jury might also have reasonably inferred, from his failure to perform his duty as a juror, when considered in connection with the fact that he slept soundly with the full knowledge that the robbery was to be committed in the neighborhood, that he was also an accessory before the fact. Such an inference might have been drawn from his conduct and close association with appellants. Since such inferences might have been drawn from the testimony, the issue became one of mixed law and fact, and it was the duty of the court, under proper instruction, to submit the issue of whether Lee Crawford

was an accessory before or after the fact to the jury for determination. *Melton* v. *State,* 43 Ark. 367; *Edmonson* v. *State,* 51 Ark. 115; *Green* v. *State,* 51 Ark. 189. It is the law that an accessory before or after the fact to a felony is an accomplice. *Stevens* v. *State,* 111 Ark. 299; *Murphy* v. *State,* 130 Ark. 353.

Many other alleged assignments of error have been argued relating to the refusal of the court to continue the cause, the selection of the jury, and the admissibility of the testimony, which will not likely arise on a new trial of the cause, and for that reason it is unnecessary to discuss them.

All other instructions given by the court were substantially correct, and fully covered the cases.

On account of the error indicated the judgments are reversed, and the causes are remanded for new trials.

STOLZ v. PATEE.

Opinion delivered March 9, 1925.

APPEAL AND ERROR—DISMISSAL FOR NONJOINDER OF PARTY.—Crawford & Moses' Dig., § 2144, requiring all parties against whom judgment is rendered to join in an appeal *held* not to require dismissal of an appeal joined in by two only of three defendants, where time for appeal by the third defendant had expired, as the intent of the statute was to protect the winning party from successive appeals.

Appeal from Union Chancery Court, First Division; *J. Y. Stevens,* Chancellor; motion to dismiss appeal overruled.

McNally & Sellers, for appellants.

Henry Stevens, for appellee.

PER CURIAM. Appellee instituted this action in the chancery court of Columbia County to recover on a promissory note executed to him by A. L. Meisner as principal, and appellant A. H. Stolz as indorser or surety, and also against Hattie W. Meisner, wife of

said A. L. Meisner, to procure the setting aside of a deed alleged to have been made in fraud of A. L. Meisner's creditors. On the hearing of the cause all the relief prayed for in appellee's complaint was granted. A personal decree was rendered against A. L. Meisner and appellant Stolz for the amount of the note. The deed to appellant Hattie W. Meisner was set aside as a fraud on her husband's creditors, and the lands thus conveyed were decreed to be subject to a lien for appellee's debt. Appellants A. H. Stolz and Hattie W. Meisner prayed an appeal, and have properly perfected the appeal by filing the transcript here within the time prescribed by law. A. L. Meisner did not appeal, and his time for appeal has expired.

Appellee filed a motion to dismiss the appeal on the ground of the nonjoinder therein of the other defendant, A. L. Meisner. Appellee invokes the operation of the statute (Crawford & Moses' Digest, § 2144 *et seq.*) which provides in substance that all persons against whom a judgment may have been rendered shall join in the appeal, except where it may be otherwise provided by law, and that, if they are omitted, the appeal "shall be dismissed on motion of the appellee upon due proof of the fact, unless one or more of such persons be allowed by the court to proceed." The statute further provides (§ 2145) that, where appellants show an excuse for not joining the other parties in the appeal, the court shall make an order directing the person so refusing to appear in court within such time as may be reasonable, and join in the appeal; and in another section (2150) the statute provides that, if the person named in the order does not appear and join in the appeal, "the default of such person shall be entered, and he shall thereby be forever precluded from bringing any appeal or writ of error on the same judgment, and the cause shall proceed in the same manner as if such person had been named in such appeal and the proceedings thereon." It is obvious from the language of the statute that it was intended merely to protect the successful party in a

judgment or decree from separate appeals prosecuted by losing parties, where there is more than one of them. It is not the purpose of this statute to cut off the right of appeal of either of the losing parties, either separately or jointly. As long as the right of appeal exists as to all of the unsuccessful parties, the successful party has a right to compel them all to join in the appeal, and it imposes upon either one of the appealing parties the duty of joining the others in the appeal, or at least bring them before the court so that they can be barred of an appeal unless they prosecute one.

Appellants have responded in the present case by showing that they requested said A. L. Meisner to join in the appeal, but that he refused to do so. The time within which an appeal could be taken has expired, and it would serve no useful purpose for the court to require that A. L. Meisner be brought into court to determine whether or not he desired to appeal, for the two appellants have an absolute right to appeal, and, as we have already seen, the statute does not make that right conditional upon the prosecution of an appeal by other unsuccessful parties in the decree. The purpose of the statute has been served now, or, rather, its operation is inapplicable for the reason that the time for the other party to appeal has expired, and the appellee is in no danger of being subjected to another appeal.

The motion to dismiss is therefore overruled.

MISSOURI PACIFIC RAILROAD COMPANY v. BODE.

Opinion delivered March 9, 1925.

1. RAILROADS—KILLED AT CROSSING—EVIDENCE OF NEGLIGENCE.—In an action against a railroad company for negligently killing plaintiff's intestate at a crossing, evidence that defendant's trainmen failed continuously to sound the bell and whistle until after the crossing was reached *held* to sustain a finding that defendant was negligent.

2. Negligence—comparative negligence a jury question where.—Evidence *held* insufficient to show that plaintiff's intestate killed at a railroad crossing was, as matter of law guilty of contributory negligence as matter of law in a degree equal to that of defendant railroad, so as to preclude recovery under Crawford & Moses' Digest, § 8575.

3. Railroads—instruction as to negligence in failing to give crossing signal.—An instruction that it was the duty of trainmen to sound the crossing signal continuously from a point at least 80 rods from the crossing, and that, if this was not done, and the intestate "was fatally injured because it was not done," then the defendant was negligent in causing said injury, *held* not erroneous.

4. Trial—refusal of instructions—matters not in issue.—Refusal of requested instructions as to keeping of outlook and discovered peril was not error where those matters were not in issue.

5. Negligence—instruction as to comparative negligence.—Though intestate's contributory negligence was admitted, it was nevertheless proper to charge the jury as to that defense, to enable them to determine the extent of intestate's negligence and to compare it with defendant's negligence in fixing the amount of recovery if any, under Crawford & Moses' Dig., § 575.

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

Thos. B. Pryor and *H. L. Ponder,* for appellant.

A traveler approaching a railroad crossing is bound to exercise such care and prudence as an ordinarily prudent man would exercise under the circumstances, in looking and listening for approaching trains. 138 Ark. 589; 101 Ark. 321; 45 Ark. 431; 65 Ark. 235; 69 Ark. 135; 76 Ark. 225; 78 Ark. 355; 105 Ark. 183; 100 Ark. 527. White, Personal Injuries, § 1009. Where there is nothing in the traveler's approach to the crossing which would excuse him from the absolute duty of looking and listening, the failure to give signals cannot be considered upon the question of contributory negligence. 110 Ark. 166; 104 Ark. 38; 96 Ark. 643; 103 Ark. 374; 101 Ark. 316. A traveler must also take notice of the fact that a railroad crossing is a place of danger. 136 Ark. 249; 117 Ark. 457; 137 Ark. 7; 125 Ark. 163; 288 Fed. 502.

Pope & Bowers and *Tom W. Campbell,* for appellee.

The cases cited by counsel for appellant on the question of the duty of travelers at railroad crossings are not applicable. Contributory negligence on the part of a person injured by a train at a railroad crossing will not defeat a recovery for damages, unless his negligence is as great as that of the company. C. & M. Dig. § 8575. And that is a question for the jury to determine. 147 Ark. 28; 151 Ark. 34. An instruction is not erroneous because it does not cover every phase of, or all the issues in, the lawsuit. 88 Ark. 524; 83 Ark. 61; 80 Ark. 19; 88 Ark. 433; 144 Ark. 641; 147 Ark. 302; 141 Ark. 280.

McCULLOCH, C. J. Appellee's intestate, F. C. Bode, was killed in a collision between an automobile which he was driving and one of appellant's passenger trains at the village of O'Kean, in Randolph County, Arkansas, and this is an action instituted by appellee to recover damages for the benefit of the estate and of the next of kin.

The collision occurred at one of the street crossings in the village during the afternoon of August 14, 1923. The deceased was crossing the railroad track from east to west, and the train with which the automobile collided was coming from the north. It was charged in the complaint that the men operating the engine were guilty of negligence in failing to give the statutory signals by bell or whistle, and in failing, after discovering the perilous position of deceased near the track, to exercise ordinary care to prevent the collision. Both of the charges of negligence were denied in the answer, and contributory negligence of the deceased was also pleaded.

After the conclusion of the introduction of testimony, and before the court's instructions were given to the jury, counsel for appellee expressly withdrew all claim of liability based on discovered peril, and also expressly conceded that deceased was guilty of contributory negligence in failing to look and listen for

approaching trains. The case went to the jury on instructions on the issue as to negligence of the employees of appellant in failing to give the statutory signals and upon the issue whether the negligence of deceased was equal or greater in degree than the alleged negligence of such employees. The jury returned a verdict in favor of appellee, awarding damages in the sum of $5,000.

According to the testimony adduced, Mr. Bode, the deceased, was a merchant and farmer, residing at O'Kean. His storeroom fronted the railroad in the village, and his residence fronted on a street a block away from the railroad. About 3:30 o'clock in the afternoon in question, deceased got in his car at his residence and drove northwesterly to a street which crosses the railroad track at right angles, and when he reached that street he turned west and attempted to cross the main track, when his automobile was struck by a southbound passenger train.

There was a sidetrack about forty feet east of the main track, and, according to the testimony of one of the witnesses, the whistle of the train was blown about a quarter of a mile north for the station, and deceased was then within about sixty feet of the track. He was seen by numerous witnesses, and they all testified that, when he crossed the sidetrack going in the direction of the main track, he appeared to be unconscious of the approach of the train from the north, and had his head turned towards the south, as if looking in that direction. The way was clear towards the north, and he could have seen the train approaching if he had looked in that direction. The witnesses testified that, just as he was about to drive up on the main track, he turned his head to the north, and apparently saw the train coming, but it was too late for him to get out of the way. The testimony also shows that he slowed down his car just before he went on the main track, but did not stop.

There is a conflict in the testimony about the giving of the statutory signal. All of the witnesses testified that the whistle was blown north of the station, but there

is a conflict as to whether or not the bell was rung or any signal given after the first blast of the whistle.

The evidence warranted a finding that the men in charge of the train did not, as required by statute, continue to sound the bell or whistle until after the crossing was passed. It is earnestly insisted by counsel for appellant that the verdict of the jury is not supported by legally sufficient evidence, and that the court should have taken the case away from the jury by a peremptory instruction. We cannot agree with counsel, for we are of the opinion that the evidence was sufficient to sustain the verdict.

It is conceded that deceased was guilty of contributory negligence, but, under the statutes of the State now in force, that is not an absolute bar to recovery. The statute on this subject reads as follows:

"Section 8575. In all suits against railroads for personal injury or death, caused by the running of trains in this State, contributory negligence shall not prevent a recovery where the negligence of the person so injured or killed is of less degree than the negligence of the officers, agents or employees of the railroad causing the damage complained of; provided, that where such contributory negligence is shown on the part of the person injured or killed, the amount of recovery shall be diminished in proportion to such contributory negligence." Crawford & Moses' Digest, Acts 1919, p. 143.

It is argued, too, that it ought to be said in this case that the undisputed evidence shows that the negligence of the deceased was, as a matter of law, at least equal to that of the servants of appellant in charge of the train, and that for that reason there can be no recovery, but we cannot agree with counsel in this contention. The collision occurred in the light of day, and the track and right-of-way were free of obstructions. Either party, deceased or the trainmen, could have discovered the danger and might have avoided it by the exercise of proper care. Deceased should have looked to the north, and was guilty of negligence for not doing so. On the other hand, the men operat-

ing the engine should have given the statutory signals until the crossing was passed, and, if they had done so, the collision may have been averted. Nearly all of the witnesses testified that deceased appeared to be intently looking towards the south, as if he expected danger in that direction, and the jury could have found that he did not hear the whistle of the engine coming from the north. This did not excuse the deceased from looking towards the north, but it was worthy of consideration as showing that deceased was making an honest, if misguided, effort to avoid danger, in determining the degree of his negligence as compared with that of the men operating the engine in failing to give the statutory signal. At any rate, we are unable to say that the negligence of the deceased was, as a matter of law, equal to or greater than that of the men in charge of the engine, and we think that it was a question to be properly submitted to the jury under the circumstances of the present case.

There are numerous objections to the court's charge to the jury and in refusing to give instructions requested by appellant. Among other things, there is an objection to the following instruction:

"37. It was the duty of the employees of the railroad company, in this case, not only to ring the bell or sound the whistle at a distance of at least eighty rods from the crossing, but also to keep the bell ringing or the whistle sounding continuously from a point at least eighty rods before the crossing was reached, or until the train passed the crossing, and, if this was not done, and the said Fred C. Bode was fatally injured because it was not done, then the defendant railroad company was negligent in causing said injury."

It is contended that this instruction was objectionable because it confines the issue to the negligence of appellant's servants in failing to give the statutory signals. We do not think, however, that the instruction is open to that objection, for it does not state that the failure to give the statutory signal renders the appellant liable in damages in this case, but merely states that the omission

to give the signal would constitute negligence in causing the injury, and this was coupled with the further statement, leaving it to the jury to determine whether or not the failure to give the signal caused the injury.

Appellant requested the court to give certain instructions relating to the questions of liability for failure to keep a lookout and on the ground of discovered peril, but these matters were not issues in the case at the time of the submission to the jury, and therefore it was unnecessary for the court to give instruction on those subjects. Notwithstanding the admission by appellee's counsel of contributory negligence on the part of deceased, it was proper for the court to instruct the jury in regard to the duty of a traveler in crossing the track, so that the jury could determine the extent of the negligence and compare it with the negligence of the railroad employees. This was done by the court, and the question of contributory negligence was properly submitted for the purpose indicated above, notwithstanding the concession as to contributory negligence.

We fail to find any error in the proceedings, and the judgment is therefore affirmed.

HUMPHREYS v. STATE.

Opinion delivered March 9, 1925.

1. INTOXICATING LIQUORS—SALE—EVIDENCE.—Evidence *held* to sustain a conviction for selling intoxicating liquor.
2. INTOXICATING LIQUORS—SALE—EVIDENCE.—Evidence of the intoxicated condition of persons at defendant's house and coming from there *held* competent and relevant on a charge of selling liquor.
3. CRIMINAL LAW—INSTRUCTION AS TO REASONABLE DOUBT.—In a prosecution for selling intoxicating liquors, an instruction that if any fact or element necessary to constitute the crime has been established to the jury's satisfaction beyond a reasonable doubt by either direct or circumstantial evidence, or both, such fact or element was sufficiently proved; and that if the jury believe beyond a reasonable doubt from either direct or circumstantial

evidence that the defendant was guilty, it was its duty to so find, *held* proper.

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

Isgrig & Dillon and *T. D. Wynne,* for appellant.

H. W. Applegate, Attorney General and *John L. Carter,* Assistant, for appellee.

WOOD, J. The appellant was indicted and convicted in the Dallas Circuit Court of the crime of selling alcoholic, vinous, malt, spirituous or fermented liquors, and sentenced by the judgment of the court to one year's imprisonment in the State Penitentiary, from which judgment he duly prosecutes this appeal.

The night marshal of the city of Fordyce, Arkansas, and a deputy sheriff of Dallas County, Arkansas, testified substantially as follows: They went to the home of the appellant one night during the month of July and found a large bunch of negroes there. They saw appellant pour something out of a fruit jar into a glass and hand it to a negro, and the negro gave appellant some money. Appellant made the change, and put the money in his pocket. The liquid in the fruit jar was about three inches deep. The officers then walked back away from the house, and saw appellant and another negro come out of the house and go into a little shed at the back of the house, and come back carrying something. The appellant and the negro saw the officers, and asked them who it was. The officers did not reply. The other negro ran in the house. The officers ran to the back door, and appellant came out with his Winchester gun, and one of the officers grabbed the gun and arrested the appellant. The gun was loaded. The other negroes in the house were all running, trying to get away. One of the officers searched as many of them as he could, and went back in the house. Four empty fruit jars were found—two absolutely empty, and two lying on their sides with some whiskey in them that would not pour out. The floor was wet, and the whole place smelled very strongly of whiskey. There were some soda-water bottles in the house;

some sitting up and others in the case. When they started to take the appellants to town, he went in the room where his wife was and pulled a lot of money out of his pockets and piled it on the bed, and his wife took it. One of the officers took one of the jars that was turned on its side and had a little whiskey left in it, and brought it away with him—it had corn whiskey in it. Appellant was in the habit of having these suppers at his home every Saturday during the summer of 1924. They were always well attended. The night the officers were out there there were about 150 negroes there. They were sometimes pretty noisy. On several occasions one of the officers had arrested "drunks" coming from there, and at one time the officer arrested a man who had a half-gallon fruit jar about two-thirds full of whiskey.

On the night the officers were out there, the crowd seemed pretty jolly. One of the officers was asked "what was the condition of their conduct, as to whether they were quiet or noisy in the neighborhood?" The appellant objected to the question, and the court overruled the objection, and the witness answered: "Sometimes they were noisy and other times were not so bad—you know about how a bunch of negroes with whiskey in them will act." This all occurred in Dallas County, Arkansas.

The testimony adduced on behalf of the appellant tended to show that appellant was selling cold drinks and lunches, and did not sell any whiskey on the occasion testified to by the witnesses for the State. At the conclusion of the testimony, the appellant prayed the court to direct the jury to return a verdict in his favor, which prayer the court refused, and to which ruling the appellant duly excepted.

The appellant contends that the evidence was not sufficient to sustain the verdict, and that therefore the court erred in not instructing the jury to return a verdict in his favor. Even if there were no direct testimony tending to show that the appellant was guilty of the crime charged, the circumstances detailed by the witnesses were, of themselves, sufficient to justify the jury in find-

ing appellant guilty. The weekly Bacchanalian feasts at appellant's home, where whiskey flowed freely, and where, as one of the witnesses testified, "the negroes were pretty happy, having a good time, acting like a bunch of 150 or 175 negroes who had killed some four or five half-gallon jars of whiskey," could not have occurred unless the master of the house was selling or giving away alcoholic liquors, and thus violating the law in such cases made and provided. The circumstances were alone sufficient to sustain the finding of the jury, but there was also direct evidence tending to show that the appellant was selling whiskey, as he was seen to have poured liquid from a fruit jar into a glass and take money in exchange therefor, and the fruit jars were shown by positive testimony to have contained whiskey. The testimony as to the conduct of the revelers at the home of the appellant, as well as the testimony tending to prove that several drunk men were seen coming from that direction, was competent and relevant to the issue. This testimony tended to prove circumstances from which the jury was justified in concluding that the appellant was guilty of the crime charged. See Blakemore on Prohibition, p. 154, § 45, and cases cited.

The court correctly charged the jury that "if any fact in the case or any element necessary to constitute the crime has been established to your satisfaction beyond a reasonable doubt, by either direct or circumstantial evidence, or by both kinds, then such fact or element has been sufficiently proved, and if the jury believe beyond a reasonable doubt, from either or both direct and circumstantial evidence, that the defendant is guilty, it is your duty to so find."

The record presents no error, and the judgment is therefore affirmed.

POE v. STATE.

Opinion delivered March 9, 1925.

1. CRIMINAL LAW—CONSOLIDATION OF CHARGES—ELECTION.—Where defendant, separately indicted for manufacturing intoxicating liquors, making mash, and keeping a still, agreed to a consolidation of cases, he cannot complain of the court's refusal to require the State to elect between the charges.
2. CRIMINAL LAW—NECESSITY OF MOTION FOR NEW TRIAL.— Error cannot be predicated on the rulings of the trial court not assigned as error, in the motion for new trial.
3. INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to sustain a conviction for making mash fit for distillation and for possessing a still.
4. INTOXICATING LIQUORS—INDICTMENT.—Under an indictment for possessing a still and still worm, a conviction for possessing a still will be sustained.
5. INTOXICATING LIQUORS—POSSESSING STILL—INSTRUCTION.—An instruction that if the jury found that the apparatus in evidence was home-made or a substitute still, defendant could not be convicted of possessing a still was properly refused where the apparatus was in fact a still.
6. CRIMINAL LAW—VENUE—EVIDENCE.—Evidence *held* sufficient to establish the venue of the offense charged against defendant.

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

E. M. Ditmon, for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

HART, J. Clifford Poe was indicted for manufacturing intoxicating liquor, for making mash fit for distillation, and for keeping in his possession a stillworm and a still.

Separate indictments were returned, and the three cases were consolidated for trial by agreement with the defendant. He was acquitted of the charge of manufacturing intoxicating liquors, but was convicted of making mash and possessing a still. His punishment was fixed at one year in the State Penitentiary on each charge, and it was ordered that the sentences run concurrently.

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

The first assignment of error relied upon by the defendant for a reversal of the judgment is that the trial court erred in refusing to require the State to elect upon which of the charges it would stand.

The record shows that the defendant agreed that all three cases should be consolidated and tried together. The facts in the three cases were practically the same, and, the defendant having expressly consented to trying them together, he cannot be now heard to complain of the action of the court in doing so. *Halley* v. *State,* 108 Ark. 224, and *Setzer* v. *State,* 110 Ark. 226.

Moreover, the alleged error of the court in allowing the cases to be tried together was not made one of the grounds for a new trial, and, under our rules of practice, will be treated as abandoned here. It is well settled in this State that error cannot be predicated on the rulings of a trial court which were not assigned as erroneous in the defendant's motion for a new trial. *Lambdin* v. *State,* 150 Ark. 580; *Franklin* v. *State,* 153 Ark. 536, and *Clayton* v. *State,* 159 Ark. 592.

It is next insisted that the judgment should be reversed because the evidence is not legally sufficient to support the verdict in either case.

According to the testimony of the witnesses for the State, officers went to the residence of the defendant, in the Fort Smith District of Sebastian County, Arkansas, on September 20, 1924, for the purpose of searching his house for intoxicating liquors, for mash used for making such liquors, and for a still or stillworm. The officers had been informed that there was a still there, and they had obtained a search warrant to search his house. They found a keg of mash which could be used for the purpose of manufacturing liquor. They also found a copper vessel which could be used in boiling the mash, a copper stillworm, and a tin vessel into which the liquor could run after it had been boiled in the copper kettle and run

through the stillworm. The officers said that this could be used in manufacturing intoxicating liquors.

Our statute makes it illegal to make a mash, wort, or wash fit for the distillation of alcoholic liquors. *Rinehart* v. *State,* 162 Ark. 520. Hence the evidence was legally sufficient to warrant a conviction on this charge.

The evidence was also sufficient to show that the defendant had in his possession a stillworm and a still without registering the same, within the rule laid down in *Hodgkiss* v. *State,* 156 Ark. 340, and *Moore* v. *State,* 154 Ark. 13.

It is next insisted that the verdict is contrary to law, for the reason that the indictment charged the defendant with having a still and a stillworm in his possession.

This assignment of error is not well taken. An indictment for setting up and keeping and possessing a still and stillworm without registering the same has been held to charge the single offense of setting up a still for the purpose of producing distilled spirits. *Wright* v. *State,* 155 Ark. 169.

The jury found the defendant guilty of having a still in his possession, and the evidence fully warranted the finding under the ruling in the cases cited above. Thus it will be seen that he cannot be again tried and convicted for having in his possession a stillworm upon the evidence which was introduced in this case.

It is next insisted that the court erred in refusing to give instruction No. 3, which reads as follows:

"The defendant requests the court to instruct the jury, if they find from the evidence that the apparatus introduced in evidence is a home-made still, or a substitute still, you cannot convict the defendant of having a still in his possession under the present indictment."

There was no error in refusing to give this instruction. The apparatus found at the defendant's house was a copper vessel which could be used in boiling the mash, and a copper stillworm which could be used in carrying the vapor from the copper vessel through a cooling process into the tin vessel which could be used to

receive the distilled liquor as it came from the stillworm. This apparatus constituted a still, within the meaning of our decisions cited above and several other decisions which might be cited.

Finally, it is insisted that the venue was not proved by the State. The sheriff of the county testified that the taxbooks showed that the defendant was a resident of the Fort Smith District of Sebastian County. Another witness for the State testified that he knew where the defendant's place was situated, and that, while it was close to the line, it was within the Fort Smith District of Sebastian County. This testimony, if believed by the jury, was sufficient to prove the venue.

It follows that the judgment will be affirmed.

YATES v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered March 9, 1925.

1. NUISANCE—WHAT CONSTITUTES.—The doing of an act in itself lawful constitutes a nuisance where it is done in a place where it disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him.
2. NUISANCE—BURNING OF CARCASSES NEAR PLAINTIFF'S RESIDENCE.—Evidence that railroad employees burned the carcasses of animals killed by the railroad trains near plaintiff's residence during a period of four days, that the weather was hot and the smell offensive, and the wind blowing towards plaintiff's residence required the closing of doors and windows, *held* to sustain a verdict for plaintiff.
3. NUISANCE—PUNITIVE DAMAGES.—In an action against a railroad company for damages from offensive odors resulting from burning the carcasses of animals near plaintiff's residence where there was no evidence that defendant acted in wilful disregard of plaintiff's rights, it was error to submit the question of punitive damages to the jury.

Appeal from Hot Spring Circuit Court; *Thos. E. Toler,* Judge; reversed.

STATEMENT OF FACTS.

W. A. Yates and Gordon Buie brought separate suits against the Missouri Pacific Railroad Company to

recover damages for negligently burning the carcasses of two cows near their residences.

The defendant filed a separate answer in each case, and denied the material allegations of the complaint. The cases were consolidated and tried together.

According to the evidence for the plaintiffs, the residence of Gordon Buie was situated 234 feet and the residence of W. A. Yates 500 feet from the point where the railroad company burned the carcasses of the two cows on its right-of-way. The cows were killed by a train operated by the defendant, and its servants commenced to burn the carcasses some time Sunday morning, on July 15, 1923. They continued to burn them until late the following Wednesday evening. The weather was pretty hot, and the smell was very offensive. The plaintiffs and their families were made sick, and could not eat with any comfort. They could not eat or sleep without closing the doors and windows of their houses. The carcasses did not burn continuously, because there came up a rain once or twice and put out the fire. The fire was then rebuilt. The wind was coming in the direction of the plaintiffs' houses during most of the time of the burning. One of the cows was not cut up very much, and both of them could have been moved to another place for the purpose of burning their carcasses.

According to the evidence for the railroad company, the fire was started Sunday morning and the carcasses were burned up by the following Monday evening. One of the cows was so cut up that its carcass could not be moved. The smell of the burning carcasses was not very offensive, and there was no negligence in the burning.

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

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

D. E. Waddell, for appellee.

HART, J., (after stating the facts). It is earnestly insisted that the evidence is not sufficient to warrant the verdict. The evidence shows that the plaintiffs lived in rented houses, and that the servants of the railroad company began to burn the carcasses on Sunday morning and continued to burn them until late the following Wednesday evening. The wind, for the most part, was blowing in the direction of the plaintiffs' houses, and caused them and their families extreme discomfort, and also made them sick to a certain extent.

It is true that our statute provides that, when any horse, cow, or other animal named in the section shall die from disease or accident, it shall be the duty of the person having possession thereof to immediately cremate said animal. Crawford & Moses' Digest, § 365. So, when the defendant, in the operation of one of its trains, killed the two cows, it became its duty to burn their bodies.

The right of the defendant to burn the carcasses on its right-of-way may perhaps not be denied, but it is equally true that it would be responsible for all results occasioned by the burning in such a negligent manner as to constitute a nuisance. The maxim, "use your own property so as not to injure another," is peculiarly applicable in nuisance cases. If one does an act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive. 2 Lewis' Blackstone's Com., * p. 218.

In discussing the question in *Baltimore & Potomac Rd. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, Mr. Justice Field, who delivered the opinion of the court, said: "That is a nuisance which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-

doer, and, when the causes of annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance."

This rule was quoted and approved by this court in *Junction City Lbr. Co.* v. *Sharp,* 92 Ark. 538. The maxim above quoted and the principle of law laid down ought to have admonished the defendant that negligently burning the carcasses of the cows for the time and in the manner established by the evidence would materially disturb the comfort of the plaintiffs and their families and thereby become a nuisance. One must make a reasonable use of his own property, and a reasonable use can never be construed to include those uses which produce noxious smells that result in a material injury to the comfort of the owner of adjacent property and his family. So, under the facts proved by the plaintiffs, the jury might have returned a verdict for them. They might have believed that it was practical for the defendant to have hauled the carcasses further away from the homes of the plaintiffs and to have burned them much more quickly. Therefore we think the evidence was legally sufficient to warrant a verdict in favor of each plaintiff.

It is next insisted that the court erred in instructing the jury on the measure of damages. The court instructed the jury that, in actions like this, discomfort to the plaintiff and his family living with him, and whom he is bound to support, is a proper element of damages. Counsel point to the fact that such an instruction was held erroneous in the case of *Junction City Lbr. Co.* v. *Sharp,* 92 Ark. 538. The instruction was held erroneous in that case because the plaintiff was the owner of the property occupied by him, and the nuisance was of such a continuing nature that it was permanent. Therefore the court properly held that the diminished value of the property was the proper measure of damages. In cases where the property is rented by the plaintiff and the nuisance is of a continuing character, the damages would

be the depreciation in the rental value of the property during the term of the lease.

In cases like this, where the nuisance only lasted for a few days, the plaintiff is entitled to recover because of the inconvenience and discomfort to himself and family. *Baltimore & Potomac Rd. Co.* v. *Fifth Baptist Church,* 108 U. S. 317; *Daniel* v. *Ft. Worth & R. G. Ry. Co.,* 96 Tex. 327; 72 S. W. 578; and *Pierce* v. *Wagner* 9 Minn. 355, 13 N. W. 170.

Finally, it is insisted that the court erred in submitting to the jury the question of punitive damages, and in this contention we think counsel for the defendant are correct. In cases of this sort recovery for punitive damages should only be allowed where there is willful or flagrant violation of the rights of another. Joyce on Law of Nuisances, §§ 258 and 503, and *Yazoo & Miss. Valley Rd. Co.* v. *Sanders,* 87 Miss. 607, 40 So. 163, 3 L. R. A. (N. S.) 1119, and case note.

There is nothing in the evidence from which a jury might legally infer that the defendant acted in willful or flagrant disregard of the rights of the plaintiffs in burning the carcasses.

Therefore, for the error in instructing the jury on punitive damages, the judgment must be reversed, and the cause will be remanded for a new trial.

MASSEY *v.* STATE USE PRAIRIE COUNTY.

Opinion delivered March 9, 1925.

1. STATUTES—REPEALS.—A statute may be repealed by implication as well as in direct terms.
2. STATUTES—REPEAL OF SPECIAL BY GENERAL ACT.—Where a subsequent general act is repugnant to a prior special act, the general act, without any repealing clause, operates as a repeal of the special act.
3. STATUTES—IMPLIED REPEAL.—Where two acts passed at different times are not in terms repugnant, yet if it is clearly evident that the last was intended as a revision or substitute for the first, it

will repeal the prior act to the extent that it is revised or substituted.

4. BANKS AND BANKING—LIABILITY OF STOCKHOLDERS FOR MISUSE OF PUBLIC FUNDS.—As it was the evident purpose of the Legislature, in enacting Gen. Acts 1923, p. 515, to cover the whole subject of banking by exempting stockholders from liability for misuse of public funds by a bank, such act impliedly repealed the special act of 1915 (Acts 1915, p. 126) providing for a depository of public funds for Prairie County and imposing on stockholders liability for wrongful conversion of such funds by a bank.

Appeal from Prairie Circuit Court Southern District; *George W. Clark*, Judge; reversed.

STATEMENT OF FACTS.

On February 15, 1924, the State of Arkansas for the use of Prairie County, and V. O. Purvis, as sheriff of said county, instituted this action in the circuit court against J. E. Massey and other stockholders of the New Bank of Hazen, Arkansas, to recover the sum of $36,947.79 and the accrued interest belonging to said county and deposited in said bank pursuant to law.

On January 19, 1924, the New Bank of Hazen closed its doors on account of insolvency, and the State Bank Commissioner took charge of it for the purpose of liquidation under our State banking law. J. E. Massey and thirty-one others of the defendants bought stock in said bank on December 26, 1923, and were stockholders at the time the State Bank Commissioner took charge of said bank for the purpose of winding up its business. These new stockholders did not know that the bank was insolvent at the time they purchased their stock. Certain of the old stockholders of the bank are also made defendants to this action, but it appears that they are insolvent.

The record shows that the collector of the county had deposited county funds in said bank to the amount of $36,947.79. The New Bank of Hazen had been selected as the county depository of Prairie County at the April term, 1923, of the county court of said county. The selection was made pursuant to a special act of 1915, providing that the public funds should be deposited

with the bank or trust company making the highest bid for the payment of interest on the funds as required by the terms of the act. The New Bank of Hazen was designated as a depository under the terms of the act, by the county court, and gave bond for the true and proper performance of all the duties and obligations devolving by law upon it, and for the prompt payment of all funds deposited by the county treasurer or the county collector.

The court directed a verdict against the defendants, and from the judgment rendered the defendants have duly prosecuted an appeal to this court.

Gregory & Holtzendorff, Trimble & Trimble and *Chas. A. Walls,* for appellants.

In so far as relates to the liability of the stockholders, the act No. 627 Acts 1923, section 8, repealed section 4 of act No. 45, Acts 1915, pp. 126-136. The same subject-matter was taken up by the general act, the intention of which act was to eliminate stockholders from liability in the handling of public funds, and to fix liability on the bond or elsewhere as set forth in the banking law. 130 Ark. 128.

Emerson & Donham, for appellant L. W. Judd.

On the question of whether a general act on a subject repeals a special act, see 88 Ark. 327.

Bogle & Sharp, for appellants Sims, Zike and Johnson.

W. J. Waggoner, Prosecuting Attorney, *Cooper Thweatt, John D. Thweatt* and *Chas. B. Thweatt,* for appellee.

Repeals by implication are not favored. There is no invincible repugnancy, nor inconsistency, between the two acts, and, therefore, the general act does not repeal the special act. 109 Ark. 24; 93 Ark. 629; 36 Cyc. 1090; 50 Ark. 137; 142 Ark. 411; Sutherland, Statutory Construction, 530, 535.

HART, J., (after stating the facts). The record shows that the public funds of Prairie County were deposited

in the New Bank of Hazen pursuant to the provisions of an act of the Legislature of 1915 providing for a depository for the State, county, and other public funds of Prairie County. Acts of 1915, p. 126. The act in question provides for the public funds of Prairie County to be deposited in a bank or trust company in said county, and that the bank or trust company agreeing to pay the highest rate of interest on said funds shall be designated by the county court as such depository. The act also prescribes that a bond shall be given by the successful bidder for the true and proper performance of all the duties and obligations devolving by law upon such depository.

Section 4 of the act provides that all stockholders of any such bank or trust company shall be liable for all public funds that such bank or trust company shall fail to pay over on demand to the person entitled to receive the same. When the bank became insolvent, and failed to pay over public funds deposited with it pursuant to the terms of the act, the court held the stockholders of the bank liable under the provisions of § 4 of the act just referred to.

It is the contention of counsel for the defendants that this section of the act had been repealed by implication by § 8 of an act of the Legislature of 1923, amending a former act for the regulation and control of banks and trust companies. General Acts of 1923, p. 515.

Section 8 of this act amends § 2832 of Crawford & Moses' Digest with regard to the liability of corporations misusing public funds.

Section 2832 of Crawford & Moses' Digest was enacted March 17, 1903, and amended the section of the Digest relating to the deposit of public funds. Among the provisions of the act was one allowing collectors of taxes and other officers to deposit public funds in their custody in incorporated banks for safekeeping. It further provided that the officers and sureties on their official bonds, as well as the bank and the stockholders thereof, should be liable for all such funds that the bank

should fail to pay to the person entitled to receive the same.

Section 8 of the act of 1923 referred to above expressly repeals so much of the former act as made the stockholders of the bank liable for the misuse of the public funds.

A statute may be repealed by implication as well as in direct terms. It is well settled in this State that, where a subsequent general act is repugnant to a prior special act, the general act, without any repealing clause, operates as a repeal of the special act; and where two such acts, passed at different times, are not in terms repugnant, yet if it is clearly evident that the last was intended as a revision or substitution of the first, it will repeal the first to the extent in which its provisions are revised or substituted. *Hampton* v. *Hickey,* 88 Ark. 324; *Sanderson* v. *Williams,* 142 Ark. 91; *Creamery Pkg. Mfg. Co.* v. *Wilhite,* 149 Ark. 576; and *Bank of Blytheville* v. *State,* 148 Ark. 504.

In the case last cited it was insisted that § 2832 of Crawford & Moses' Digest was repealed by the general banking law passed by the Legislature of 1913.

Section 2832 contains a provision similar to that referred to in § 4 of the special act of 1915, providing for a depository of the public funds of Prairie County. In each case it is provided that, where there is a misuse of the funds by the bank, both the bank and its stockholders should be liable to the person entitled to receive said public funds. The court said that the banking act of 1913 did not deal with the particular subject, and therefore did not repeal by implication § 2832, providing that the bank and its stockholders should be liable for public moneys intrusted to such bank and wrongfully converted by it.

In the case before us a new element is added. It is conceded that the business of banking, by reason of its intimate relation to the financial affairs of the people, is a proper subject of legislative control, and strictly within the police power of the State. When the Legis-

lature of 1913 enacted our banking law and placed the control and examination of banks under a bank commissioner appointed for that purpose, it did not see fit to make a part of that act our former statute relating to the misuse of public funds by a bank or other corporation and fixing the liability of such corporation and their stockholders for such misuse. Not having taken up this subject at all, it is manifest that it intended for the general law on the subject to remain as it was. Hence, if a special act like the one in question, which was in general terms like the general act regulating the misuse of public funds by a depository, had been in force when the banking act of 1913 was passed, such special act would not have been impliedly repealed, because its provisions did not come in conflict with the general act for the regulation of banks.

Now the Legislature of 1923 made § 2832 a part of it. The section was amended so as to omit stockholders from the liability imposed upon banks for the wrongful conversion of public funds intrusted to it. The Legislature declared in express terms that § 2832 of the Digest, as amended, was a part of our general act for the regulation and control of banks and trust companies. Section 2832, in so far as it made the stockholders liable for a misuse of public funds by the bank, was expressly repealed. The act of 1915 was a special depository act for Prairie County, and contained a provision similar to § 2832 with regard to the liability of stockholders.

The act of 1923 just referred to also made many other important changes in our general banking act. Thus it will be seen that the subject was taken up, and the public policy of the State was declared in the amendatory act. It was the evident purpose of the Legislature to intrust the whole subject to the State Bank Commissioner, under such regulations as were enacted to aid him in the premises. It cannot be supposed that the Legislature intended that Prairie County should be exempted from the general policy of the act. The General Assembly having elected to take up this subject and

legislate upon it, we think they intended that the general act should repeal all special acts which were repugnant to its provisions and inconsistent with it.

It results from our views that the general act of 1923, amending the general banking act of 1913 and exempting stockholders from liability for the misuse of public funds by a bank, impliedly repeals the special act of 1915 for a depository of public funds for Prairie County, and providing that the stockholders of such bank should be liable for the wrongful conversion of such funds by the bank. This holding is conclusive of the present case, and no useful purpose could be served by discussing or determining the other interesting questions argued in the briefs. Our decision that the special act of 1915 was repealed by the later general act of 1923 relating to the same subject relieves the defendants from liability as stockholders in the case before us.

The judgment will therefore be reversed, and the cause of action remanded for further proceedings according to law and not inconsistent with this opinion.

MINICK v. RAMEY.

Opinion delivered March 9, 1925.

1. APPEAL AND ERROR—PREJUDICE AS GROUND FOR REVERSAL.—Judgments will be reversed only for errors prejudicial to the rights of the party appealing.
2. JUDGMENT—MOTION TO SET ASIDE DEFAULT—DEFENSE.—A party moving to set aside a default judgment or decree must not only state his defense thereto but must make a *prima facie* showing of merit, in order that the court may determine whether he was injured by not being permitted to have the benefit of it.
3. JUDGMENT—RELIEF AGAINST.—Equity will not set aside a decree until it has been found and adjudged that the defendant has made a *prima facie* showing of a valid defense; and if it finds a partial defense, it will modify the decree to that extent.
4. MORTGAGES—RELIEF AGAINST DEFAULT DECREE.—Refusal to set aside a default mortgage foreclosure decree for insufficiency of service was not error where defendant did not show or offer to show

by evidence his alleged defense that the decree was for an amount in excess of his indebtedness to plaintiff.

5. MORTGAGES—AMENDMENT OF REPORT OF SALE.—Where a successful bidder at a mortgage foreclosure sale understood that the amount bid included the amount of two prior mortgages, when in fact the land was sold subject to such mortgages, so that he bid a sum which included the prior mortgage indebtedness, it was not error to permit the commissioner to amend his report to show the correct amount of the intended bid.

Appeal from Carroll Chancery Court; *J. S. Maples,* Special Chancellor; affirmed.

STATEMENT OF FACTS.

This appeal involves the correctness of an order of the chancery court refusing to set aside a decree of foreclosure on the ground that two of the defendants were not served with summons, and also in confirming the report of sale made by the commissioner under the foreclosure decree.

On January 1, 1921, J. H. Minick executed a mortgage on 158 acres of land in Carroll County, Arkansas, to secure an indebtedness to R. C. Ramey for the sum of $2,000, subject to two other mortgages on the same land to secure an indebtedness respectively of $1,500 and $1,000, and amounting in the aggregate to $2,500 and the accrued interest.

On the 22d day of May, 1923, R. C. Ramey brought a suit in equity against J. H. Minick and Mertie Minick, his wife, and J. W. Karnes and Mary Karnes, his wife, to foreclose said mortgage for $2,000 and the accrued interest. A decree of foreclosure was duly entered of record, and it recites that the defendants had been duly served with summons and had made default. The court further found that Ramey was entitled to judgment against J. H. Minick and Mertie Minick, his wife, in the sum of $2,117.96, and a commissioner was appointed to sell the land described in the mortgage in satisfaction of this amount, subject to two other mortgages on the same land, respectively, for the sums of $1,500 and $1,000 and the accrued interest.

The commissioner appointed to make the sale reported that he had sold the same subject to the two prior mortgages above referred to, and that R. C. Ramey had bid the sum of $3,625.50 for said land, and that the same had been struck off to him for that sum.

Ramey filed exceptions to the report of sale, in which he stated that he had only bid $700 for said land, and that the same was sold to him for that sum, subject to the two mortgages above referred to.

The court, after hearing evidence on the exceptions filed, ordered the commissioner to amend his report to show that the land was sold to R. C. Ramey for $700, subject to the two mortgages above mentioned, and that this made the total amount that he would have to pay for said land the sum of $3,626.50. The chancellor ordered the commissioner to amend his report accordingly, and confirmed and approved the report as amended. The testimony on this branch of the case will be stated and referred to in detail in the opinion.

The defendant, J. H. Minick, filed exceptions to the report of the commissioner, and asked that the decree of foreclosure be set aside on the ground that he had not been served with summons in the case. He further alleged that judgment was rendered against him in the foreclosure decree for approximately $1,000 in excess of the amount he owed Ramey on the mortgage sought to be foreclosed.

The return on the summons showed that it had been served upon J. H. Minick and Mertie Minick by delivering a copy of the same to them. The deputy sheriff who served the summons and made the return on it stated that he delivered copies of the same to Mrs. Mertie Minick, the wife of J. H. Minick, and thought that he was delivering the same to her at her usual place of abode. On this point Mrs. Mertie Minick testified that her husband and herself had broken up housekeeping, and that she was visiting her mother at the time summons was served upon her. She stated further that her

husband at the time was working in the State of Missouri.

The chancellor found the issues in favor of the plaintiff, Ramey, and from a decree in his favor the defendant, J. H. Minick, has prosecuted this appeal.

Festus O. Butt, for appellant.

Service of summons was not legally had upon John Minick. 142 Ark. 101; 2 Ark. 149; 136 Ark. 546.

C. A. Fuller, for appellee.

The judgment of a court will not be vacated until it is adjudged that there is a valid defense to the action in which the judgment is rendered. 135 Ark. 308; 54 Ark. 539; 102 Ark. 252; 136 Ark. 546; 49 Ark. 397; 54 Ark. 539. The findings of the chancellor will not be set aside by this court unless they are clearly against the preponderance of the evidence. 130 Ark. 465; 138 Ark. 408.

HART, J., (after stating the facts). J. H. Minick first seeks to reverse the decree of the chancery court on the ground that it erred in not setting aside the foreclosure decree because he had not been served with summons in the case. Conceding that the evidence in the record overcomes the *prima facie* case of service by the recitals of the decree, we do not think that the court erred in refusing to set it aside. It will be noted that the motion of J. H. Minick to set aside the decree alleges that a decree was rendered against him for approximately $1,000 in excess of the amount due by him to Ramey. No proof whatever to sustain this allegation was offered.

It is well settled in this State that judgments or decrees will only be reversed for errors prejudicial to the rights of the party appealing. Therefore, a party moving to set aside a judgment or decree must not only state his defense thereto, but must make a *prima facie* showing of merit in order that the court may determine whether he was injured by not being permitted to have the benefit of it.

The rule is that a court of equity will not set aside a decree until it has been found and adjudged that the defendant had made a *prima facie* showing of a valid defense to the suit; and, if it finds a partial defense, it will modify the decree to that extent. *Robinson* v. *Arkansas Loan & Trust Co.,* 74 Ark. 292; *Citizens' Bank of Lavaca* v. *Barr,* 123 Ark. 443; *Montague* v. *Craddock,* 128 Ark. 59; and *Davis* v. *Ferguson,* 164 Ark. 340. Thus it will be seen that the court was right in refusing to set aside the decree, because no showing whatever was made or offered to be made by Minick to establish the alleged fact that a decree had been rendered against him for any amount in excess of the indebtedness which he owed to Ramey.

The next ground relied upon for a reversal of the decree is that the chancery court erred in ordering the commissioner to amend his report of sale to show that Ramey only bid $700 for the land sold under the foreclosure decree. On this point Ramey testified that he only bid $700 for the land, and that the same was sold subject to two prior mortgages; that the amount of his bid of $700, added to the principal and interest of the two prior mortgages, amounted to $3,625.50; that the land was not worth more than this amount, and that he would take for it now the amount of money which he has invested in it.

It is true that the commissioner making the sale and a son of J. W. Karnes, one of the defendants, testified that R. C. Ramey bid $3,625.50 for the land; but it is evident that Karnes misunderstood the bid. As we have just seen, Ramey testified that the amount of his bid, together with the amount of the two prior mortgages, amounted to $3,625.50. While the commissioner states that Ramey bid the sum of $3,625.50, his whole testimony on the subject shows that he understood that this amount included the two prior mortgages on the land. The commissioner stated that the land was sold and cried for sale subject to the two prior mortgages; that, before the sale, Ramey came to his office and said

that he was going to bid $700 subject to the prior mortgages, and that, when Ramey afterwards bid, he believed that he only intended to bid $700 subject to the prior mortgages.

Under this state of the record the chancery court properly ordered the report of the commissioner to be amended and approved, and confirmed it as amended.

The result of our views is that the decree was correct, and it will be affirmed.

ACME BRICK COMPANY v. SWIM.

Opinion delivered March 9, 1925.

1. DISMISSAL AND NONSUIT—EFFECT AS TO CO-DEFENDANTS.—In a materialman's action against a surety found in the county of the venue, process being served on co-defendants in another county, dismissal of the complaint as to the surety will discharge the co-defendants, as they could be held liable in the county only on the theory of a joint liability with the surety.
2. MECHANICS' LIENS—TIME FOR ESTABLISHING.—On a contractor's bond given for the benefit of persons who may establish a lien against the owner for material or labor, a materialman can sue without first procuring a lien against the property, but he must bring suit thereon before the time during which he could establish a lien has expired.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

Buzbee, Pugh & Harrison, for appellant.

HUMPHREYS, J. This suit was brought on the 5th day of January, 1924, by appellant against appellees in the circuit court of Pulaski County to recover a balance of $609.51 for brick sold by it to Swim & Weaver, contractors, for use in the construction of a theatre and office building in Camden, Arkansas, for Dr. J. S. Rinehart. The action against the National Surety Company was based on the following clause of the surety bond executed by it in behalf of the contractors to the owner, Dr. J. S. Rinehart, for the construction of said theatre

and office building in accordance with plans and specifications prepared for the construction thereof, to-wit:

"This bond is made for the use and benefit of all persons, partnerships, firms or corporations who may establish a lien against said Dr. J. S. Rinehart for any material furnished or labor performed for or on account of said contractor or any of his subcontractors under the laws of the State of Arkansas, now in force or hereafter enacted, and they and each of them are hereby made obligees hereunder, the same as though their own proper names were written herein as such, and they and each of them may sue hereon."

It was alleged in the complaint that appellant furnished brick to said contractors on open account in the total sum of $1,609.51 to construct said theatre and office building, upon which $1,000 had been paid, leaving a balance due of $609.51. Appellant attached an itemized verified account for the brick furnished to the complaint, and made same a part thereof. The last item consisted of a car of brick furnished on September 10, 1923, of the value of $168.

Service was had upon the National Surety Company in Pulaski County, and a branch writ was served upon the contractors, J. J. Swim and E. L. Weaver, in Jefferson County.

A demurrer was filed to the complaint by the National Surety Company upon the alleged ground that the complaint had not stated sufficient facts to constitute a cause of action against it, which was sustained by the court. Appellant refused to plead further, whereupon the court dismissed its complaint, from which judgment of dismissal an appeal has been duly prosecuted to this court.

The effect of the dismissal of the complaint was to discharge the contractors, as, under the service of the branch writ, they could only be held on the theory of a joint liability with the National Surety Company.

Appellant contends for a reversal of the judgment upon the theory that, under the language of the bond, it

was not necessary to establish a lien against the improved property before it could recover on the bond. We agree with learned counsel for appellant that any obligee in the bond might recover from the bondsmen for materials furnished or labor performed without first having established a lien. The words "may establish a lien," used in the clause of the bond quoted above, means one entitled to establish a lien under the lien laws of the State, and not necessarily one who has established a lien. In other words, we do not think the intention of the obligor and obligees in the contract was to make the procurement of the lien a prerequisite or a basis for a suit upon the bond. This interpretation of the bond, however, cannot benefit appellant in the instant case. It is apparent from the itemized statement of account which appellant incorporated as part of its complaint that appellant's right to establish a lien had expired at the time this suit was instituted. The last item on the account was furnished on September 10, 1923, and this suit was instituted on January 5, 1924, more than 90 days after the brick was furnished. The materialman has only 90 days after the last item was furnished to establish his lien under the laws of this State. The complaint should have alleged that appellant was entitled to establish a lien when the suit was commenced. No such allegation appeared in the complaint, and hence no cause of action was stated therein against the National Surety Company. For this reason the demurrer was properly sustained to the complaint.

The judgment is affirmed.

McCoy v. Wilson.

Opinion delivered March 9, 1925.

Vendor and purchaser—waiver of forfeiture for non-payment.—Proof that a vendor under contract of sale agreed to apply rents as payments on the remainder of the purchase-money notes, that he placed long-time mortgages on the lands thus preventing the purchaser from borrowing money with which to make payments, and that he transferred the purchase-money notes without offer to redeem them, *held* to sustain a finding that the vendor waived a forfeiture of the contract for non-payment of the purchase-money notes.

Appeal from Conway Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

Edward Gordon, for appellant.

There is no testimony on the part of the appellee showing any willingness to perform, or any offer to perform, the contract, yet it is undisputed that the fourth note, though past due, and the fifth note are unpaid. 5 Pomeroy, Equity Jurisprudence, 2nd Ed., p. 4982, § 2331; 118 Ark. 283; 6 Pomeroy, Eq. Jur, 805, § 809, 142 Ark. 530.

Strait & Strait, for appellee.

Equity does not favor forfeitures, and this is especially true where the major portion of purchase money has been paid. It is a settled principle of law, also, that one cannot claim or enforce a forfeiture of a contract caused or superinduced by misconduct on his own part. 85 Ark. 599; 102 Ark. 157; 87 Ark. 600; 100 Ark. 565; 38 Ark. 285; 75 Ark. 410; 83 Ark. 524; 59 Ark. 405. See also 73 Ark. 415; 95 Ark. 567; 98 Ark. 328 86 Ark. 489.

Humphreys, J. The only question presented on this appeal for determination is whether, under all the facts and circumstances in the case, appellant waived his right to declare a forfeiture under an executory contract for the sale and purchase of 200 acres of land in said county by appellant to appellee, Joe Wilson.

This suit was brought in the chancery court of Conway County by said appellee on December 13, 1921, to prevent appellant from declaring a forfeiture of the sale and purchase of said land, and after his death the cause was revived and proceeded to a hearing upon the testimony introduced by the respective parties, from which the court found and decreed the contract to be in full force and effect, and retained jurisdiction for the purpose of adjusting the equities between the parties.

The contract price for said lands was $2,000, payable in five annual installments of $400 each, evidenced by five promissory notes due serially on December 1, 1917, 1918, 1919, 1920 and 1921. It was provided in the contract that, "in case of default in the payment of either of said notes at maturity, then all the remaining unpaid notes shall become due and payable at once, at the option of the said T. K. McCoy. Provided also that, in case the said Joe Wilson shall fail to comply in full with the terms of the contract, then the amounts, if any, paid by him shall apply as rents on said lands. It being hereby agreed and understood that, in case of such failure on the part of the said Joe Wilson, the said T. K. McCoy shall be entitled to rent to the amount of one-third of all grain crops and one-fourth of all cotton crops grown on said lands each year during the life of this contract, and that this instrument shall operate as a lien on said crop to secure said rents; then in that event this contract shall be null and void."

Appellee made the payments for 1917, 1918, and 1919, with the interest, in the total sum of $1,385. In the year 1920 the crops failed, and no payments were made. The time for making the other payments was extended. In the year 1921 appellee paid $200 rent on the land. He became ill in the fall of that year, and died of tuberculosis on April 1, 1922. His widow and children continued to reside on the property, and paid $200 rent thereon in the fall of the year 1922. Appellee's widow testified that the rents were paid with the understanding between her

husband and appellant that they should be treated as payments on the land. She also testified that, in the fall of 1922, appellant rented the lands to other parties, thereby compelling her and the children to move. She also testified that the unpaid purchase money notes were assigned to the Morrilton Bank by appellant, and that he never offered them or the contract back to her husband or herself.

Appellant and his son testified that appellee was unable to keep up the payments, turned the land back, and thereafter rented same.

G. M. Conley testified that appellant told him, in 1922, that he had agreed with appellee in 1920 to grant him more time; that he said the Bank of Morrilton had agreed to carry him and that he had agreed to carry appellee. Witness asked appellant why he declared a forfeiture of the contract if he agreed with appellee to extend the time, and his reply was, "A verbal contract don't amount to nothing."

Appellant's contention for a reversal of the decree is that appellee breached the contract by failing to make the last two payments, and he had an absolute right to declare a forfeiture, apply the payments made of $1,385 as rent, and to keep the land. His right to do this was, perhaps, absolute unless he had waived such right by his acts and conduct, when considered in the light of all the facts and circumstances in the case. We think the instant case is covered by the following rule of law announced in the case of *Little Rock Granite Co.* v. *Shall,* 59 Ark. 405, and reaffirmed in the cases of *Land* v. *May,* 73 Ark. 415; *Cherokee Construction Co.* v. *Bishop,* 86 Ark. 489; *Cooley* v. *Lovewell,* 95 Ark. 567; *Kampman* v. *Kampman,* 98 Ark. 328.

"Where there has been a breach of a contract sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives it, equity will relieve the defaulting party from the forfeiture."

While the testimony of appellant and his son was to the effect that appellee surrendered his right as a pur-

chaser under the contract in the fall of 1920, the testimony of appellee's widow and G. M. Conley was to the effect that he waived his right to declare a forfeiture, and agreed to apply the rents to be paid after 1920 to the last two payments. In view of the fact that $1,385 of the purchase money had been paid by appellee, and that appellant had placed long-time mortgages upon the land, which had the effect of preventing said appellee from borrowing money with which to make the last payments, it is reasonable and probable that further time was given to make the last payments, with the understanding that the rents should be treated as payments on the purchase money notes. In addition, the fact exists that appellant transferred the purchase money notes to the bank and never redeemed or offered to redeem them and tender them and the contract back to appellant. This fact strongly corroborates the testimony of Mrs. Wilson and Mr. Conley. We cannot say that the finding of the chancellor was contrary to the weight of the evidence. On the contrary, we are of the opinion that, according to the weight of the evidence, appellant waived a forfeiture of the contract.

The decree therefore is affirmed.

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

Opinion delivered March 16, 1925.

1. RAILROADS—FAILURE TO SIGNAL—FINDING.—In an action for death at a railroad crossing, conflicting evidence as to whether any signals were given by the trainmen after the signal at the whistling post, *held* sufficient to sustain a finding that such signals were not given.
2. RAILROADS—FAILURE TO KEEP LOOKOUT—EVIDENCE.—In an action for a death at a railroad crossing, evidence that the fireman was not keeping a lookout but was firing the engine, and that the engineer, with a straight track ahead, failed to see deceased in time to give warning, *held* sufficient to show a negligent failure to keep an efficient lookout, and to sustain a finding that such negligence was the proximate cause of the injury.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—Under Crawford & Moses' Digest, § 8568, contributory negligence is no defense in case of a failure to keep a lookout where, if such lookout had been kept, the trainmen could have discovered the peril of the person injured in time to have prevented the injury.
4. NEGLIGENCE—COMPARATIVE NEGLIGENCE—JURY QUESTION.—In an action for death at a railroad crossing, though deceased was negligent in failing to keep a proper lookout, yet, in view of deceased's youth and inexperience, it can not be said, as matter of law, that his negligence was equal to or greater than that of the trainmen.
5. NEGLIGENCE—DEGREE OF NEGLIGENCE A JURY QUESTION.—The legal sufficiency of evidence, or the question of the degree of negligence, must be tested by the state of the testimony presented in a given case, and is ordinarily a question of fact for the jury to determine.
6. NEGLIGENCE—COMPARATIVE NEGLIGENCE—INSTRUCTION.—In an action for a death at a railroad crossing, an instruction permitting recovery unless deceased's contributory negligence was the sole and proximate cause of the injury was erroneous, under Crawford & Moses' Dig., § 8575, which provides contributory negligence shall not bar recovery if it is of less degree than the negligence of the trainmen.
7. TRIAL—CONFLICTING INSTRUCTIONS.—It was error to give an instruction that was self-contradictory and in conflict with other instructions given.
8. NEGLIGENCE—INSTRUCTION AS TO DUTY OF TRAVELLER AT CROSSING.—In an action for death at a railroad crossing, an instruction that the duty of deceased was merely to exercise reasonable care, instead of a specific duty to look and listen, was erroneous, though his contributory negligence was admitted, since it was for the jury to determine the decree of negligence of each party.
9. EVIDENCE—PHOTOGRAPHS.—Photographs of the scene of the accident, though not affording an accurate test of distance, were admissible in evidence where they were of some value in placing before the jury other surroundings of the injury, accurate measurements having been taken of the distances.

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

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

John W. Nance, for appellee.

McCULLOCH, C. J. Two young men or boys, named Paul Spittler and Hubert Mills, were both killed in a

collision between a tractor on which they were riding and a passenger train of appellant's, while the tractor was being driven across the railroad track along a public highway in Benton County. Mills was driving the tractor, and Spittler, a boy sixteen years of age, was riding on the fender over the rear left wheel of the tractor. The railroad track runs north and south at that place, and the highway crossing was at right angles. The tractor was, at the time of the collision, being driven across the railroad track from east to west. The highway was lower than the track, and there was a five per cent. grade between the level of the railroad track and the highway at a distance of sixty feet from the crossing. The crossing in question is about three-quarters of a mile south of the town of Lowell, and, according to the undisputed evidence, the track is straight from the railroad crossing northward to the whistling post, which is 1,418 feet from the crossing, and for a further distance of 87 feet north of the whistling post, at which point a curve begins. In other words, the track is perfectly straight for a distance of 1,505 feet northward from the crossing. There is a slight conflict in the testimony as to the distance a train could be seen from the highway as the crossing was approached. It is undisputed, however, that a person riding on a tractor could, within 85 feet of the railroad track, discover the approach of a train at a very considerable distance.

This is an action instituted by appellee as administrator of Spittler's estate to recover damages for the benefit of the next of kin.

The evidence shows that Spittler was instantly killed as the result of the collision. The charge of negligence on the part of appellant's servants is in failing to keep a lookout and in failing to give the statutory signals. Appellant answered, denying the allegations of negligence, and pleading contributory negligence on the part of deceased equal to or greater in degree than the alleged negligence of appellant's servants.

There was a trial of the issues, which resulted in a verdict in favor of plaintiff for the recovery of $3,000 for the benefit of the mother of deceased as next of kin. It is insisted that the evidence does not sustain the verdict. Our conclusion is, after careful consideration of the evidence, that it is legally sufficient to support a finding that the men in charge of the operation of the engine failed to give the statutory signals, and also that they were guilty of negligence in failing to keep a proper lookout, and that the injury would not have occurred if a proper lookout had been kept.

It is undisputed that the crossing signal was given at the whistling post with the customary four blasts of the whistle, but there is, we think, a substantial conflict in the testimony as to whether or not any signals were given thereafter. The engineer and fireman both testified that the bell was kept ringing from the whistling post down to the crossing, and the engineer testified that the whistle was sounded again after passing the post and before reaching the crossing. But there is substantial testimony from which the jury might have found that there were no signals given, either by bell or whistle, after the whistle was sounded at the post. It is contended by learned counsel for appellant that the testimony on that point is merely negative, but we are of the opinion that the testimony is of more force than that. Witnesses testified that they did not hear the bell, and the jury might have found that the bell was not rung, otherwise the witnesses would have heard it.

The testimony was also legally sufficient to justify the submission of the issue whether or not there was negligence in failing to keep an efficient lookout and whether or not such negligence was the proximate cause of the injury. The engineer testified that he was at his post on the engine, keeping a lookout, but that, as he came around the curve, he could not see from his side of the engine objects on the right-of-way near the crossing, on account of the obstruction of the front of the engine. But the jury might have found from the evidence that,

with a straight track ahead, the engineer could have seen the tractor as it approached the crossing in time to have given an additional warning, and thereby avoided the collision. The testimony is undisputed that the fireman was not keeping a lookout at all, but was engaged in working with the fire in his engine. We cannot say, under these circumstances, that the jury was not warranted in finding that an efficient lookout was not being kept. Nor can it be said from the undisputed evidence that the negligence in this respect, as well as with regard to the failure to give signals, was not the proximate cause of the injury.

It is undisputed, we think, that both of the men on the tractor were guilty of negligence in failing to discover the approach of the train in time to avoid the collision. The negligence of the driver is not imputed to appellee's intestate, but the testimony shows that the latter was guilty of contributory negligence in not exercising care for his own safety. He could have seen the approaching train, if he had looked to the north, and could have warned the driver of the danger, or could have leaped from the tractor and thus escaped injury himself. The tractor was driven in low gear, according to the undisputed evidence, and could easily have been brought to a full stop while the train was approaching, and, as before stated, appellee's intestate as well as the driver was guilty of negligence which contributed to the injury.

The "lookout statute" (Crawford & Moses' Digest, § 8568) absolutely excludes the defense of contributory negligence in case of a failure to keep a lookout "where, if such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after discovery of such peril." The jury may or may not have found that a lookout was not kept, and may have based the verdict on a finding upon that issue. If so, there is sufficient evidence to sustain the verdict.

On the other hand, the jury might have found that the employees kept an efficient lookout, but failed to give the statutory signals, and that the contributory negligence of the deceased was not equal to or greater in degree than the negligence of the employees of appellant in failing to give the signals. The statute in regard to contributory negligence in actions based on negligence other than that of failing to keep a lookout reads as follows:

"Section 8575. *Personal injury or death—contributory negligence.* In all suits against railroads for personal injury or death, caused by the running of trains in this State, contributory negligence shall not prevent a recovery where the negligence of the person so injured or killed is of less degree than the negligence of the officers, agents or employees of the railroad causing the damage complained of; provided, that where such contributory negligence is shown on the part of the person injured or killed, the amount of recovery shall be diminished in proportion to such contributory negligence." Crawford & Moses' Digest.

It is earnestly insisted that we ought to say that, under the circumstances of this case, it is undisputed that the negligence of appellee's intestate was at least equal in degree to that of the servants of appellant in failing to give the signals. We do not, however, think that this should be said as a matter of law, but that, under the circumstances of the case, it was a question to be left to the jury. It is true that appellee's intestate had abundant opportunity to avoid the injury if he had taken the pains to look both ways for the approach of a train, and he was guilty of negligence in failing to do so, but, in testing the degree of his negligence when compared with that of the negligence of the servants of appellant in failing to give the statutory signals, the youthfulness and inexperience of Spittler must be given consideration. Another circumstance in the case worthy of consideration is the fact that Spittler was on the left-hand or south side of the tractor, and may have devoted

his attention to looking in that direction, depending to some extent upon the driver of the tractor to be more diligent in looking both ways. Now, this did not excuse him, and, as before stated, he was guilty of negligence, but these circumstances should have been considered as compared with that of the servants of appellant, and we cannot say that as a matter of law his negligence was equal in degree or greater than that of appellant's servants.

We have not failed to give consideration to the decision, cited by counsel for appellant, of the United States Circuit Court of Appeals for the Eighth Circuit in *Bradley* v. *Missouri Pacific Railroad Co.*, 288 Fed. 484, where that court held that, upon the undisputed facts of the case, the contributory negligence of the injured traveler equaled or exceeded in degree the negligence of the trainmen. Each case must, of course, be considered upon its own peculiar facts, and the legal sufficiency of the evidence on the question of degree of negligence must be tested, the same as in other cases, by the state of the testimony presented in a given case. In other words, it is ordinarily a question of fact for the determination of the jury, but there may, as in other cases, be presented a question for the decision of the court as to the legal sufficiency of the evidence. In the present case we are of the opinion, however, as already stated, that the facts presented made a question for the jury to determine the comparative degrees of negligence.

There are numerous assignments of error in regard to the court's charge to the jury, and several of these assignments are of sufficient importance to discuss.

One of the assignments relates to the following instruction, No. 5, which was given by the court over the objection of appellant:

"If you find from the evidence that the persons in charge of the train failed to either sound the whistle or ring the bell in the manner defined in instruction No. 2, which I have given you, or that the persons in charge of said train failed to keep and maintain a constant and

efficient lookout for persons and property upon or near the track, as defined in instruction No. 1, which I have given you, and such failure was the proximate cause of the injury to and death of the deceased, Paul Spittler, then your verdict should be for the plaintiff, unless you further find from a preponderance of the evidence that said deceased negligently failed to look and listen for the approach of the train, and that such negligence was the sole and proximate cause of his injury."

There were several specific objections made to the instruction, one of which objections relates to the concluding words, "unless * * * such negligence was the sole and proximate cause of his injury." The use of this language puts the instruction directly in conflict with the terms of the statute, *supra,* which provides that contributory negligence shall not bar recovery if it is of less degree than the negligence of the servants of the railroad company. The test under the statute is not whether the contributory negligence is the sole and proximate cause of the injury, but whether or not it is equal to or exceeds the negligence of the servants of the company. Under this instruction the jury might have found that the negligence of Spittler was equal to that of the servants of the company but was not the "sole and proximate cause of his injury," and might, under that finding, have based a verdict for appellee. Hence the instruction was not only erroneous but may have been prejudicial.

The same question arises on instruction No. 6, requested by appellee and modified and given by the court. The first part of the instruction, as requested by appellee, told the jury in substance that the failure on the part of the deceased to look and listen would not bar recovery unless it was found that his negligence "was of a greater degree than the negligence of the defendant's employees in charge of the train." The latter part of the instruction, and the modification made by the court, made a conflicting instruction—one that was conflicting in itself as well as being in conflict with

other instructions. It may have been prejudicial, as much so as instruction No. 5, hereinbefore referred to. The giving of these two instructions calls for a reversal of the judgment.

The court also erred in giving instruction Nos. 4, 7, and 9, in stating the duty of the traveler merely to exercise reasonable care, instead of saying that there was a specific duty to look and listen for the approach of trains. All three of the instructions mentioned contain that error, and No. 7 reads as follows:

"I charge you that the deceased, Paul Spittler, and his companion, Hubert Mills, each had a lawful right to drive the tractor upon and across defendant's railroad track, subject only to a duty that the law imposed upon them to exercise reasonable care to discover the approach of trains on said track, and by reasonable care I mean such care as a person of ordinary prudence would exercise under similar circumstances."

The duty of a traveler in this respect has been announced in so many decisions of this court that it is scarcely necessary to cite authorities. It is true that, in the present case, the contributory negligence of Spittler is undisputed, and it was unnecessary to submit that issue to the jury except in determining the degree of negligence as compared with that of the servants of the company, but appellant was entitled to have the jury correctly instructed as to the duty of the travelers in making the crossing, so that they would have some guide in comparing the negligence in that regard with the conduct of those in charge of the train. They were entitled, in other words, to have the jury told what the duty of the traveler was with respect to looking and listening for the approach of trains, as it was a question for the jury to determine the degree of negligence of each party.

We deem it unnecessary to discuss other portions of the court's charge. In view of the reversal, however, there is one other question that may arise, and should be discussed. That is in regard to the assignment of error in the ruling of the court in permitting photographs to be

introduced by appellee. A photographer was introduced by appellee as a witness, who testified that he had taken kodak pictures of the railroad crossing in question and the surroundings, and that the pictures were enlarged by photographs taken from the originals. The photographer testified that the pictures were accurate, but admitted on cross-examination that the distances from the crossing to other points on the track could not be accurately gauged merely by looking at the pictures. The photographs were introduced in evidence over objections of counsel for appellant, and the ruling of the court in admitting them is now assigned as error. The contention is that the proof is undisputed that these photographs do not afford accurate tests of distances, and that it was error to let them go before the jury. The photographer testified that the pictures were absolutely accurate and that they truly portrayed the scene of the injury, but, as before stated, he admitted that a person merely looking at the pictures could not tell the distance from the highway crossing to a point up the track. This did not, we think, destroy the value of the photographs as evidence. Various witnesses testified about the distances, and, while the photographs may not have afforded information on that subject, yet they were of some value in placing before the jury the other surroundings of the injury. Moreover, it is difficult to see how any prejudice could result from the introduction of these photographs, because the testimony is undisputed with respect to the situation along the highway and the railroad track at the point of intersection. Accurate measurements were taken, and witnesses testified without dispute as to the height of the railroad and of the highway and its approaches to the track, and also the distance northward from the highway crossing along the railroad track to the whistling-post and to the curve.

For the error in the instructions hereinbefore indicated the judgment will be reversed, and the cause remanded for a new trial. It is so ordered.

JOHNSON v. POLK.

Opinion delivered March 16, 1925.

1. JUDGMENT—RES JUDICATA.—The right of a grantee to recover damages for the grantor's failure to remove a mortgage incumbrance was barred by the decree in a former action involving the same parties, and in which the same relief was sought.
2. COVENANTS—BREACH OF WARRANTY.—There was no breach of warranty in a conveyance by reason of a mortgage on the land where the grantor discharges same before delivering the deed.
3. COVENANTS—BREACH.—An action does not lie for breach of a covenant against incumbrances unless the grantee has suffered an eviction under paramount title or been forced to remove the incumbrance.

Appeal from Clay Circuit Court, Western District; *G. E. Keck,* Judge; affirmed.

McCULLOCH, C. J. This is an action instituted by appellant against appellee to recover damages for alleged breach of a covenant in connection with the sale of a tract of land in Clay County. The material facts of the case are undisputed, and the trial court gave a peremptory instruction to the jury in favor of appellee.

The parties entered into a contract in the year 1919 whereby appellee sold and agreed to convey to appellant by warranty deed the tract of land in question, for the price of $4,600, payable $1,000 cash, $1,000 September 15, 1919, which was subsequently paid, and the balance of $2,600 at the end of two years, with interest. Appellee had purchased the land from J. A. Dudgeon, subject to a mortgage given by Dudgeon to the Maxwell Investment Company to secure a loan of $1,500. Appellee agreed, in his contract with appellant, to pay off the debt to the Maxwell Investment Company and thereby remove the incumbrance. Appellant executed to appellee notes for the $2,600 balance of the purchase money, and these notes were assigned by appellee to the Corning Bank & Trust Company. Appellee executed a deed of conveyance to appellant, with full covenants of warranty, and delivered the same to the Corning Bank & Trust Company for delivery to appellant on payment of the notes. Subse-

quently appellant executed a mortgage to the bank to secure the payment of the notes. Appellee later paid off his debt to the bank, and the notes of appellant were reassigned to him by the bank. Appellant also executed a mortgage to the First National Bank of Corning to secure a debt. Appellant failed to pay his notes to appellee, and also failed to pay his debt to the First National Bank.

The Maxwell Investment Company instituted an action in the chancery court against the heirs of J. A. Dudgeon, deceased, to foreclose the mortgage on the land, and the parties to this action as well as the First National Bank were made parties as junior lienors and claimants. Appellee answered the complaint, admitting the prior lien of the Maxwell Investment Company, and filed a cross-complaint against appellant asking for a foreclosure of the mortgage executed by appellant to the Corning Bank & Trust Company to secure the balance of the purchase money debt. The First National Bank appeared and filed a cross-complaint against appellant, and asked for a foreclosure of its mortgage, subject to the prior liens of the Maxwell Investment Company and appellee.

Appellant answered the cross-complaint of appellee, making his answer a cross-complaint, setting forth a contract of purchase from appellee and alleging the latter's failure to discharge the incumbrance of the Maxwell Investment Company, alleging that he (appellant) had been damaged in the sum of $1,000 by reason of his inability to procure a loan on the land, and that the failure to obtain the loan was caused by appellee's omission to pay the debt to the Maxwell Investment Company. The prayer of appellant's cross-complaint was that appellee be compelled to "satisfy, pay and settle the mortgage of the plaintiff herein against said lands, and that this defendant be allowed a reasonable time thereafter for the satisfaction of said debt," and that appellant be given judgment against appellee for $1,000 damages.

The Maxwell Investment Company dismissed its action, but the cause proceeded to a final decree in favor of appellee against appellant for the foreclosure of the mortgage executed by appellant to the Corning Bank & Trust Company, and also the foreclosure of the mortgage to the First National Bank of Corning.

There was a decree against appellant on his cross-complaint against appellee, and that decree was pleaded below in the present action in bar of appellant's right to recover damages for the alleged breach of covenants.

Appellee paid off the debt to the Maxwell Investment Company, thus removing the incumbrance on the land, and, shortly after the decree in the original action, appellee delivered to appellant the warranty deed which had been formerly executed and placed in the hands of the Corning Bank & Trust Company. In the present action appellant alleges that appellee failed to pay off the mortgage debt to the Maxwell Investment Company and thereby prevented him from procuring a loan on the land with which to pay the purchase money debt. He claimed damages to the same amount and on the same ground as in the former action.

We are of the opinion that the court was correct in its peremptory instruction to the jury in favor of appellee. If appellant sustained any damage by reason of the failure of appellee to remove the incumbrance on the land, his rights were forever barred by the decree in the original action, to which both appellee and appellant were parties, and in which appellant asserted the same right of action and prayed for the same relief as in the present action. But appellant contends that the decree in the original action was not a bar to the present action, for the reason that this one is to recover on account of a breach of the covenants of warranty contained in the deed, which was not delivered until after the former decree was rendered. The answer to that contention is that there has been no breach of the covenants of warranty in the deed itself. This is so because, according to the undisputed evidence, appellee paid the

debt to the Maxwell Investment Company and thereby discharged the incumbrance. It is also true because of the fact that appellant has not suffered an eviction under paramount title, nor has he been forced to remove the incumbrance, and no cause of action for breach of the covenants of warranty in the deed has arisen. *Dillahunty* v. *Railway Co.*, 59 Ark. 629; *Seldon* v. *Dudley E. Jones Co.*, 74 Ark. 348; *Crawford County Bank* v. *Baker*, 95 Ark. 438.

The original decree against appellant was for the recovery of his own debt, and not for recovery on a prior incumbrance, hence he is not entitled to any relief from that burden. So, in any view of the case, appellant has shown no right of action, and the court's ruling against him was correct.

Affirmed.

BRADLEY COUNTY ROAD IMPROVEMENT DISTRICTS NOS. 1 AND 2 *v.* WILSON.

Opinion delivered March 16, 1925.

1. HIGHWAYS—PRELIMINARY WORK—ATTORNEY'S FEES.—An attorney employed by a board of commissioners to perform legal services for a road improvement district, on the subsequent repeal of the act creating the district, is entitled to recover on a *quantum meruit* for services performed in good faith in the preliminary work, and the fact that he co-operated with those in favor of carrying out the scheme of improvement is not ground for refusing compensation to him.
2. HIGHWAYS—ATTORNEY'S FEE.—An allowance of $1250 for services of an attorney for two road improvement districts in preliminary work will not be held to be inadequate, though the testimony of witnesses would have justified a larger sum, in view of the chancellor's discretion and the fact that the questions involved and work done in both districts were the same as if done for one district.
3. HIGHWAYS—EXPENSES OF CHAIRMAN FOR PRELIMINARY WORK.—The chairman of the board of road commissioners was not entitled to compensation for services performed and expenses incurred on his own initiative in giving his services outside of attendance on board meetings and without authority from the board of commssioners.

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

R. W. Wilson, and *J. C. Clary,* for appellants.

R. E. Wiley, for appellees.

McCULLOCH, C. J. The two appellants are road improvement districts in Bradley County, created by special acts of the General Assembly of the year 1919. Each district covers a large area, and was formed for the purpose of improving extensive roads at a very considerable cost. Each of the acts creating the districts are in the customary form, providing for a levy of taxes on benefits to pay the cost of the improvement, and authorizing the commissioners to borrow money and issue bonds and to employ engineers, attorneys, and other agents. The board of commissioners in each case employed appellee, a practicing attorney at the bar of that county, as attorney to represent the district. A contract was made with a firm of engineers to do the engineering work. Appellee performed services very considerable in extent, according to his contention. He acted as counsellor for the districts throughout the preliminary work, and conducted important litigation involving the question of the validity of the organization of the districts. There were three different cases, which were bitterly contested, all of which litigation appellee conducted for the two districts. The cases were tried in the lower court and appealed to this court. Part of the preliminary engineering work was done, but, before that was completed, the opposition among the taxpayers of the county became so pronounced that all of the preliminary work of every kind was halted, and the General Assembly of 1921 enacted statutes repealing the former special statutes creating these districts, and authorizing the affairs of the districts to be wound up in the chancery court and the preliminary expenses paid. Pursuant to the statutes, appellee filed his claim in the chancery court for allowance, which claim was resisted. Appellee claimed the sum of $1,500 from each district as actual compensation for his services, making a total of

$3,000, and expenses incurred, amounting to $1,460.64. He presented an itemized account of his expenses, containing very numerous items for traveling expense, telegrams and telephone, stenographic work, certified copies of records, and various other kinds of expenses. The case was heard by the chancery court on testimony adduced by each side, and the court rendered a decree allowing appellee a fee of $625 against each district as actual compensation for his services, and the sum of $1,027.13 for his expenses, making a total allowance of $2,277.13. The cases were consolidated and tried together, but separate allowances were made against each district, and there has been an appeal from each of the allowances. Appellee cross-appealed, and contends that the amount of the chancellor's allowance as compensation for his services was not sufficient.

The claim of F. S. Edrington, one of the commissioners of the district, and the chairman thereof, was involved, and the chancellor allowed him the sum of $25, and he has prosecuted an appeal.

The testimony adduced in the case took a very wide range, and there was a great volume of it directed to matters which we do not deem material—that is, the controversy which arose between appellee and others interested in the districts, with dissatisfied taxpayers. In this testimony there are criminations and recriminations and charges of bad faith. But we have reached the conclusion, in the consideration of this testimony, that it has little or no bearing whatever upon the present controversy, for appellant is only claiming compensation for services actually rendered the districts and his expenses—nothing for services rendered after it was determined that the work should be halted until the Legislature could have an opportunity to repeal the statutes.

The law of the case is very well settled by decisions of this court, and, according to those decisions, appellee is entitled to recover for services performed in good faith, not upon his contract (for he had no separate con-

tract for the performance of preliminary services), but on the *quantum meruit.* *Sain* v. *Bogle,* 122 Ark. 14; *Thibault* v. *McHaney,* 127 Ark. 1. In the case last cited we summed up the law as to the rights of an attorney to recover for services as follows:

"It must be remembered that, under our former decision, the compensation to be allowed narrows down to expenses which were necessary to ascertain the feasibility of the plan. Of course, it was proper to have the services of attorneys in the proceedings to that extent, but no compensation could be claimed for services which related to the completion of the improvements for which the organization of the district was designed. The work of preparing the original bill and presenting it to the Legislature, and urging it before the committees of that body, was not service which was chargeable against the district. Neither were the services performed in opposition to the effort of taxpayers to secure the dissolution of the district chargeable against the district. The services thus performed by the attorneys for and against the scheme were in the interest of the individuals who were favoring or opposing the creation or continuation of the district, and not of the district itself. In other words, those services were performed in promoting the scheme and not in carrying out the purposes of the organization itself. Of course, the fees for conducting the litigation which involved the very life of the district should properly be allowed as a claim against the district, as we held in the former opinion; so would any other service performed looking to the ascertainment of the feasibility of the plan."

It is contended by counsel for appellants that appellee acted in bad faith in promoting the projects over the protests and opposition of taxpayers, and that he is not entitled to any compensation. They rely, in support of their contention, on the case of *Kern* v. *Highway District,* 154 Ark. 107. We do not think that the case just cited has any application, for it involved the right of an engineer to recover compensation for a sur-

vey made in the face of actual knowledge that the project was wholly without feasibility and could not be accomplished within the limits of cost prescribed by the statute, and that it would be impossible to conform to the plans which he outlined. In the present case, appellee was employed to perform legal services for the board, and, so far as concerns those services, he had nothing to do with the controversy between the taxpayers. His services do not relate to that subject, nor can he be denied compensation because he participated in the controversy. The most that was shown in regard to that matter is that there was a controversy between factions, and that appellee cooperated with the one which was in favor of carrying forward the work of improving the roads. If it be conceded that he was on the wrong side of the controversy, this is not sufficient to afford grounds for denying compensation for his services performed by authority of the board of commissioners of the districts.

There is scarcely any question about appellee being entitled to the amount of compensation which the chancery court allowed—that is to say, compensation for actual services rendered. This fact is established by the testimony of eminent lawyers who were introduced on both sides of the controversy, whose testimony, without disagreement, establishes the reasonableness of the fees allowed by the chancellor, if appellee be found to be entitled to recover anything at all.

There is a question involved as to the proper allowance to be made on appellee's expense account. The chancellor eliminated a considerable portion of the account, and we are unable to say that the finding of the chancellor is against the preponderance of the evidence, or that the items were not proper charges against the districts.

There is a still more serious question presented by appellee's cross-appeal as to the amount of fee allowed, but we are unable to say that the chancellor's finding on that question was incorrect. The testimony of the lawyers justified a larger allowance, but the chancellor had

some discretion in weighing this testimony and applying it to the peculiar facts of this case, and we think it was very important to consider the fact that the two districts were operated, in their preliminary work, coordinately, and that appellee was attorney for both, and that the same questions were involved in all the litigation. In fact, it appears that the work was done for the two districts the same as if it was all involved in a single employment. Under those circumstances we are unable to say that the chancellor should have allowed more than $1,250 for the work.

The chancellor allowed Mr. Edrington the sum of $25, which was the statutory allowance of five dollars per day for five days—it being shown that this appellant attended five board meetings. The testimony shows, however, that Mr. Edrington devoted a great deal of time to this district, and in his account he claimed the statutory allowance for sixty-one days and for use of his automobile at four dollars per day. He concedes that he only attended five meetings of the board of commissioners, but the other meetings were devoted to business of the district in traveling around with the attorney and attending lawsuits, and in furnishing his automobile for the use of himself and the engineers of the district. This feature of the case is ruled by our decisions in *Gould* v. *Toland,* 149 Ark. 476, and *Holcombe* v. *Kennedy,* 158 Ark. 585. Mr. Edrington may have performed the services in good faith—there is nothing in the evidence that shows to the contrary—but he acted on his own initiative in giving his services outside of attendance on board meetings, and it does not appear that he had any authority from the board of commissioners to perform those services or to furnish an automobile. In fact, the board could not make a valid contract with him for the performance of such services. See cases *supra.* The expenses he claims were not incurred by authority of the board, and, for that reason, he is not entitled to recover.

Our conclusion is that the decree of the chancery court is correct, and the same is therefore affirmed.

ROBERTSON v. LAIN.

Opinion delivered March 16, 1925.

1. EXCHANGE OF PROPERTY—RESCISSION.—Evidence *held* to sustain the chancellor's finding that there had been a mutual rescission of a contract for the exchange of standing timber for an automobile.
2. FRAUDS, STATUTE OF—ORAL RESCISSION OF DEED TO TIMBER.—An oral agreement to rescind a contract, whereby an owner of land conveyed by deed the standing timber on the land together with a note for an additional sum in exchange for an automobile, *held* not in contravention of the statute of frauds where the automobile was returned prusuant to the agreement to rescind, and where the grantee had never taken possession of the timber.

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

STATEMENT OF FACTS.

J. N. Robertson brought this suit in equity against King Lain and Minnie Lain, his wife, to quiet his title to a certain tract of land in Cleveland County, Arkansas, and to restrain the defendant from interfering with him in cutting and removing the timber from said land.

J. N. Robertson was a witness for himself. According to his testimony he exchanged an automobile, which he valued at $775, with King Lain for the timber on a forty-acre tract of land owned by him, and for $375 evidenced by the note of Lain. Lain executed a deed to the timber on said land to J. N. Robertson.

King Lain was the principal witness for himself. He admitted making the trade testified to by Robertson. According to his testimony, however, Robertson was to put the automobile in first-class condition, and failed to do it. After keeping the automobile two or three weeks, Lain made an agreement with Robertson whereby the latter was to take the car back and give Lain back his note and timber deed. Robertson took the car back, but failed to surrender the timber deed or to convey the timber back to Lain. Subsequently Robertson sent a man to cut the timber from the land, and Lain stopped him from

cutting it. The timber on the land was of little value, but was valued in the trade at $400.

Wallace Hobson, an automobile mechanic, was also a witness for the defendants. According to his testimony, he heard the parties say that Robertson had traded the car to Lain for some timber and the balance to be evidenced by a promissory note. Robertson was to fix the car, but failed to do it. After the trade, the car was brought to the shop, and stayed there two or three weeks, and then Robertson took the car back. He heard the parties say that, as he expressed it, they were going to rue back because Lain was not satisfied with the car.

W. L. Overton, Jr., was another witness for the defendants. He testified that Lain kept the car eight or ten days, and it was understood that Robertson was to have the car repaired. Robertson failed to have the car repaired, and the witness spoke to Lain about buying it. Lain refused to make a price on the car on the ground that he had let Robertson have it back. The witness then asked Robertson what he wanted for the car, and Robertson said $700.

The chancellor found the issues in favor of the defendants, and from a decree in their favor the plaintiff has duly prosecuted this appeal.

George Brown, for appellant.

Woodson Mosley, for appellee.

HART, J., (after stating the facts). The decision of the chancellor on the facts was sustained by a preponderance of the evidence, and, under the settled rules of this court, it will not be set aside upon appeal.

The defense of Lain to the suit was that the original contract, whereby he conveyed to Robertson some timber for the automobile, was rescinded. On this point Robertson denied that the contract had been rescinded, and stated that he took the car back because, on account of short crops, Lain was unable to pay the difference between the agreed value of the car and the timber which he sold to Robertson.

On the other hand, Lain testified positively that they agreed to rescind the contract in whole, and that, pursuant to this agreement, he gave the car back to Robertson, and the latter agreed to give him back his timber deed. Lain said that the reason the trade was rescinded was because Robertson had refused to make certain repairs on the car which he had agreed to make.

Lain's testimony is corroborated by that of the automobile mechanic where the automobile was delivered by Lain to be repaired. The repairs were not made as had been agreed upon, and Robertson then took the car back in two or three weeks.

Another witness testified that Lain told him that he had delivered the car back to Robertson, and could not sell it to him. Robertson admitted that he had received the car, and proposed to sell it to this witness for $700. Therefore a preponderance of the evidence on this point is in favor of the defendants, and the chancery court correctly held that the parties had rescinded the contract.

The plaintiff contends, however, that the rescission, if made, was an oral one, and therefore void under the statute of frauds. Counsel for the plaintiff contends that the conveyance of timber by the timber deed was a conveyance of an interest in the land, and that the land could not be reconveyed to Lain by Robertson by an oral contract. Hence they contend that the court erred in not finding for the plaintiff under the rule laid down in *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 445.

This would be true if the plaintiff had entered into the possession of the land before the oral contract of rescission had been made. In that event the contract would have been fully executed, and it would have required a deed to have reconveyed the land to Lain.

The record shows, however, that Robertson never entered into possession of the land or took possession of the timber on it. The oral contract for a rescission was made, and the automobile was delivered by Lain to Robertson pursuant to the contract of rescission. Because of this fact, and for the further reason that Robertson

had never taken possession of the land, Lain would be allowed to defend this suit under the principles announced in *Atkinson* v. *Thomas,* 138 Ark. 47.

It follows that the decree will be affirmed.

WATTS v. ENGLAND.

Opinion delivered March 16, 1925.

1. VENDOR AND PURCHASER—EXECUTORY CONTRACT.—An agreement to sell land is preliminary to a sale, but is not the sale itself, and it may be rescinded by agreement among the parties.
2. VENDOR AND PURCHASER—OPTION DEFINED.—An option, as distinguished from a sale of or agreement to sell land is a contract by which the owner agrees with another that he shall have the right to purchase the land at a fixed price within a certain time.
3. VENDOR AND PURCHASER—EXECUTORY CONTRACT.—An executory contract to purchase land is distinguishable from an option in that the latter does not bind the optionee to purchase the land.
4. VENDOR AND PURCHASER—CONTRACT CONSTRUED.—A contract reciting that the vendor has contracted to sell land to the purchaser, and to execute a warranty deed on payment of all the notes, and providing that the contract should be void if any note should not be paid when due, is an executory contract, and not an option.
5. VENDOR AND PURCHASER—CONTRACT CONSTRUED.—The fact that notes given for the purchase of land recite that they are given for the rent of land does not operate to change the contract from an executory contract of sale to an option to purchase, if the contract considered as a whole was intended as a contract of sale.
6. MINES AND MINERALS—CONVEYANCE OF OIL AND GAS.— A conveyance of oil or gas in its natural state is a conveyance of an interest in land.
7. MINES AND MINERALS—ASSIGNMENT OF LEASE.—An oil and gas lease containing no convenant against assignment is assignable.
8. MINES AND MINERALS—VALIDITY OF OIL AND GAS LEASE.—After an oil and gas lease was executed by a purchaser under an executory contract and recorded, it could not be affected by a subsequent agreement of the vendor and purchaser to rescind their agreement without the lessee's consent.
9. MINES AND MINERALS—FORFEITURE OF LEASE.—An oil and gas lease executed by a purchaser under an executory contract of pur-

chase was not forfeited by a failure to pay rent due by the lessee after filing of a suit by the vendor, after rescission of the contract of purchase, to quiet title as against the lessee, in view of the fact that a tender is not required where it is evident that it will not be accepted.

10. MINES AND MINERALS—RIGHTS OF LESSEE.—Rights of a lessee in an oil and gas lease, executed by a purchaser of land under an executory agreement to purchase and filed for record before rescission or of such executory agreement, *held* to entitle the lessee to protect his interest by paying off the balance of the purchase price.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellees to cancel an oil and gas lease to certain land in Nevada County, Arkansas.

Appellants are the widow and heirs-at-law of T. J. Watts, who died intestate in Ouachita County, Arkansas, on the 16th day of December, 1922. On the 26th day of March, 1917, T. J. Watts and Charlie Haynie entered into an agreement as follows:

"That T. J. Watts, party of the first part, has this day contracted to sell to Charlie Haynie, party of the second part, the following described land: North half of the northeast quarter of section 7, northeast quarter of the northwest quarter of section 7, all in township 14 south, range 20 west, containing 120 acres, more or less; all in the county of Nevada, State of Arkansas, on the following terms: Eight notes of $150 each, due and payable each successive year, beginning October 1, 1917, the last note being payable October 1, 1924, with interest at the rate of 10 per cent. per annum from due date until paid, which were this day executed by Charlie Haynie to said T. J. Watts. Upon the payment of each note, and the maturity of the last note, due October 1, 1924, with interest thereon, if any, T. J. Watts, party of the first part, agrees to grant Charlie Haynie, party of the second part, a warranty deed to the above described land, reserving

and excepting timber as specified in deed given T. J Watts by Bank of Prescott and Westmoreland Bros. Should any one or all of these notes not be paid when due, this contract is void.

"Signed this 26th day of March, 1917.

"CHARLIE HAYNIE."

On the same day Charlie Haynie executed eight notes of $150 each, due respectively on October 1, 1917, to October 1, 1924, inclusive. The notes were signed by Charlie Haynie and made payable to T. J. Watts for $150 "as rent for 120 acres of land known as the Westmoreland Place."

Charlie Haynie entered into possession of said land, and paid the two notes falling due respectively on October 1, 1917, and 1918. Charlie Haynie made default in the payment of the notes falling due respectively on October 1, 1919, 1920 and 1921. On or about the 1st day of September, 1922, Charlie Haynie being unable to make further payments on said land, agreed with said T. J. Watts to surrender and deliver to him the contract above quoted.

On the 29th day of December, 1922, Charlie Haynie executed a note payable on or before October 1, 1923, to the order of T. J. Watts in the sum of $100. The note recites that it was given for the rent of the land described in it, which is the same land involved in this action.

On the 16th day of July, 1919, Charlie Haynie and wife executed to C. M. Martin a certain oil and gas lease to said land. Said lease was duly acknowledged and filed for record in the office of the circuit clerk of Nevada County, Arkansas, on July 28, 1919. J. E. England, Jr., trustee, is now by proper assignment the owner of said lease.

The amount of rent due under the contract above quoted, except the rent due on July 16, 1923, was deposited by the lessee or his assignee to the credit of Charlie Haynie in the Bank of Waldo, Waldo, Arkansas, before the 16th day of July in each year. This suit

was filed on June 18, 1923, and the rent due July 16, 1923, was not tendered to appellants or to Charlie Haynie before it was due.

T. J. Watts had no notice of the existence of the oil and gas lease until after November 1, 1922, other than that the law might charge him with by reason of the filing for record of said lease.

The chancellor found the facts generally in favor of appellees, and further found that J. E. England, Jr., trustee, in order to protect his rights under said oil and gas lease, had in equity the right to pay appellants the balance due them on the purchase price of said land by Charlie Haynie and to redeem said land from the forfeiture made by said Haynie, by depositing the balance of said purchase price and the costs in the registry of the court.

Appellants refused to accept the amount so tendered them, and it was decreed that their complaint be dismissed for want of equity.

The case is here on appeal.

T. J. Gaughan, J. T. Sifford, J. E. Gaughan and *Elbert Godwin,* for appellants.

W. T. Saye and *J. N. Saye,* for appellees.

HART, J., (after stating the facts). It has been well said that there may be a sale of land, an agreement to sell land, and what is generally called an option. An actual transfer of title from the grantor to the grantee by deed, or other instrument in writing, is an executed contract. A contract to be performed in the future, which, if fulfilled, results in a sale, is an executory contract. In other words, an agreement to sell is preliminary to a sale, and is not the sale itself. It may be rescinded by agreement between the parties, and the contemplated sale may never take place.

An option is distinct from a sale of land, or an agreement to sell land. An option, in the proper sense, is a contract by which the owner of property agrees with another that he shall have the right to purchase the same at a fixed price within a certain time. 39 Cyc. 1232.

One of the distinguishing features between an executory contract to sell land and an option is that the latter does not bind the second party to purchase the land. *Indiana & Arkansas Lumber & Manufacturing Co.* v. *Pharr,* 82 Ark. 573. On the other hand, a contract in which the second party binds himself unconditionally to pay the purchase price is often, for that reason, held to be a contract to purchase. *Vance* v. *Newman,* 72 Ark. 359, and *Bonanza Mining & Smelter Co.* v. *Ware,* 78 Ark. 306.

When the contract is considered as a whole, we think that it is an executory contract for the sale of land, and not merely an option. The contract recites that T. J. Watts has contracted to sell to Charlie Haynie certain described lands for an amount evidenced by eight promissory notes for $150 each, due October 1, 1917, to October 1, 1924, inclusive. The contract further recites that, upon the payment of each note and the maturity of the last note, T. J. Watts agrees to grant to Charlie Haynie a warranty deed to said land.

While the contract was only signed by Charlie Haynie, it will be seen that it imposed obligations upon Watts as well as upon Haynie. By the language of the contract Haynie promised to pay the notes as they fell due, and Watts promised to give Haynie a warranty deed when the last note was paid. By the terms of the agreement, Watts bound himself to execute a warranty deed to Charlie Haynie upon the payment of the purchase price, and Haynie bound himself to pay the purchase price in the time and in the manner specified in the contract. It is true that the contract contained a provision that, should any one or all of the notes not be paid when due, the contract should be void.

The purpose of this provision, however, was to insure the prompt and faithful performance of the contract by the purchaser, and might be enforced or not at the election of the vendor. It was the undoubted intention of both parties, by inserting this clause, to provide a penalty to insure the prompt performance of the contract

by the purchaser. If Haynie paid the purchase money, no discretion in the matter was left to Watts. On the other hand, if he did not pay the purchase money, he left the option with the other party to avoid the contract or not. Hence, there was no lack of mutuality. Compliance on the part of the purchaser vested him with the power to compel specific performance if the vendor failed to respond to the obligations imposed upon him by the contract. *Dana* v. *St. Paul Investment Co.* (Minn.) 44 N. W. 55, and cases cited, and *Griffith* v. *Stewart*, 31 App. D. C. 29.

It is true that the notes recite that they are given for the rent of the land. Therefore it is insisted that the contract is a lease of land for the time, and for the price specified in the contract, with the option on the part of the lessee to purchase the land during the life of the lease. Such construction as this would give no effect whatever to the language of the contract when considered in its usual and ordinary acceptation. We are of the opinion that, when considered as a whole, the contract was an executory contract for the sale of the land.

As we have already seen, the contract itself was one for the purchase of real estate. The notes in question were executed pursuant to the provisions of the contract, and we do not think that the contract could be changed from an executory contract of sale to an option merely by the recital that the notes were for the rent of the land. *Trieschmann* v. *Blytheville Steam Laundry*, 148 Ark. 237, and other cases cited by counsel for the plaintiff, have no application, because the contracts in those cases, by their express terms, were option contracts, and not executory contracts for the sale of land.

This brings us to a consideration of the rights of J. E. England, Jr., trustee. The record shows that in September, 1922, Charlie Haynie and T. J. Watts agreed to rescind the contract. The record also showed that, on the 16th day of July, 1919, Haynie and wife had executed to C. M. Martin an oil and gas lease to said land, which was duly filed for record on the 28th day of July,

1919. J. E. England, Jr., trustee, became, by proper assignment, the owner of this lease.

A conveyance of oil or gas in its natural state is a conveyance of an interest in land. *Osborn* v. *Arkansas Territorial Oil & Gas Co.,* 103 Ark. 175.

The lease in question contained no covenant against assigning it, and could therefore be assigned to J. E. England, Jr., trustee. *Lawrence* v. *Mahoney,* 145 Ark. 310.

After the oil and gas lease had been executed and filed for record, neither the lessee nor his assignees could be affected by the subsequent agreement of Watts and Haynie to rescind the contract, without their consent.

It is next claimed that the oil and gas lease was forfeited because the lessee failed to pay the rent due on July 16, 1923. This suit was filed on June 18, 1923. The filing of the suit was notice to J. E. England, Jr., trustee, that Charlie Haynie had parted with his interest in the land, and was not entitled to receive the rent. No useful purpose could have been served by tendering the rent to the plaintiffs in this case. Their whole conduct showed that they would not have received it. A tender is not required where it is evident that it will not be accepted. The law does not require vain and useless things. *Dickinson* v. *Atkins,* 132 Ark. 84.

The rights acquired by England under the assignment of the lease to him gave him the right to protect his interest by paying off the balance of the purchase money due by Haynie. The record shows that the oil and gas lease was executed and filed for record before Watts claimed any forfeiture under the terms of the original contract.

The result of our views is that the decree of the chancery court was correct, and will be affirmed.

BAUER v. NORTH ARKANSAS HIGHWAY IMPROVEMENT DISTRICT NO. 1.

Opinion delivered March 16, 1925.

1. CONSTITUTIONAL LAW—RELEASE OF LIABILITY OF PUBLIC OFFICERS.—The Legislature may relieve a public officer and his bondsmen from liability for loss of public funds, not occasioned by the officer's fault, since individual taxpayers have no vested interest in such funds, and there is no impairment of the obligation of contracts.
2. CONSTITUTIONAL LAW—DEPOSITARY OF IMPROVEMENT DISTRICT—ACT RELIEVING BONDSMEN FROM LIABILITY.—Special Acts 1923, p. 227, relieving sureties on a bond given to indemnify a road improvement district against loss of funds in a depositary bank, *held* invalid, as impairing the vested rights of taxpayers in such district.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—On appeal a verdict is conclusive if supported by evidence of a substantial character.
4. DEPOSITARIES—INDEMNIFYING BOND—EVIDENCE AS TO SIGNATURES.—Evidence *held* to support a finding that defendants signed a bond to indemnify a road improvement district against loss of funds in a depositary bank.
5. TRIAL—REPETITION OF INSTRUCTION.—It was not error to refuse to give an instruction covered by one already given.
6. PARTIES—SUBSTITUTION.— Where the commissioners of an improvement district abandoned a suit brought by them to enforce the liability of indemnitors to the district, it was proper to permit taxpayers of the district to be substituted as plaintiffs.
7. INDEMNIFYING BOND—LIABILITY OF SIGNERS.—Where defendants signed an instrument without reading it, thinking it was a petition when in fact it was an indemnifying bond, their negligence will not relieve them from liability where the bond was accepted without knowledge of their mistaken belief.
8. INDEMNIFYING BOND—EFFECT OF FORGERY OF ONE SURETY'S NAME.—In an action by a road improvement district against several defendants as sureties on an indemnifying bond, where their defense was that none of them signed the bond, an instruction that the fact that the signatures of one of the defendants was forged would relieve the other defendants from liability was properly refused, though, under Crawford & Moses' Dig., § 8283, such forgery would diminish the liability of the other defendants by an amount equal to that which would have been contributed by the defendant whose name was forged.

Appeal from White Circuit Court; *E. D. Robertson*, Judge; affirmed.

STATEMENT OF FACTS.

On June 22, 1920, North Arkansas Highway Improvement District No. 1 of White County, Arkansas, by its commissioners, instituted this action in the circuit court against J. A. Bauer and others to recover the sum of $20,400, alleged to be due by them as sureties on a bond to said road improvement district to indemnify it against any loss by reason of depositing any funds by the commissioners with the First National Bank of Judsonia, Arkansas. The suit was defended on the ground that the sureties had been released from liability on the bond by special act of the Legislature.

The record shows that the names of all the defendants are signed to the bond. The bond was dated January 7, 1920, and the body of it is as follows:

"We, the undersigned, are hereby held and firmly bound to the above-named district in the sum of $30,000, to indemnify said district against any loss by reason of depositing any funds by the commissioners of said district in the First National Bank of Judsonia; that said bank being selected by the commissioners of said district in pursuance to act 213 of the General Assembly of the State of Arkansas for the year 1917."

Subsequently said bank became insolvent, and, according to the proof, a large sum of money belonging to the road district was on deposit there. After the affairs of the bank were wound up and the creditors paid pro rata, there still remains due and unpaid the sum of $6,120 belonging to said road district.

The plaintiffs introduced proof tending to show that the defendants signed the bond. On the other hand, the defendants testified that they did not sign it, and other evidence was introduced to corroborate their testimony.

Other facts will be stated under appropriate headings in the opinion.

From a verdict and judgment in favor of the plaintiffs the defendants have duly prosecuted an appeal to this court.

John E. Miller, C. E. Yingling, John D. DeBois, and *P. R. Andrews,* for appellants.

Brundidge & Neelly, for appellee.

HART, J., (after stating the facts). The main reliance of the defendants for a reversal of the judgment is that they were released from liability on the bond by reason of a special act of the Legislature. The Legislature of 1917 passed an act creating North Arkansas Highway Improvement District No. 1. Acts of Arkansas, 1917, vol. 2, p. 1149.

Section 22 of the act provides that the commissioners shall select such solvent banks as depositories for the funds of the district as they may deem for the best interest thereof. The section further provides that said depositories shall be required to give bond in such amount as the commissioners shall fix, equal to or in excess of the largest amount of deposits that such depositories are expected to have, conditioned that all funds of the district placed in such depositories shall be kept and preserved by them and repaid only on the lawful orders of the board of commissioners.

Pursuant to this act, the commissioners deposited a large amount of the funds of the district with the First National Bank of Judsonia and took a bond from the bank, as required by the statute. When the bank became insolvent and its affairs were wound up, it was ascertained that there remained due and unpaid of the funds of the district $6,120. The Legislature of 1923 passed an act to release the stockholders and bondsmen of the First National Bank of Judsonia, Arkansas, from liability to the North Arkansas Highway Improvement District No. 1 of White County, Arkansas. Special Acts of Arkansas, 1923, p. 227.

It is the contention of the defendants that this act is constitutional, and that the circuit court erred in not

so holding. They base their contention on the general rule laid down by this court and various other courts of last resort to the effect that the Legislature possesses the power to cancel liabilities of officers for money lost by them, when such loss was not occasioned by their wilful misconduct. *Pearson* v. *State,* 56 Ark. 138; *McSurely* v. *McGrew* (Iowa), 118 N. W. 415, 132 Am. St. Rep. 248; and *Miller* v. *Henry* (Ore.), 124 Pac. 197, 41 L. R. A. (N. S.), 97.

The syllabus of the Arkansas case reads as follows:

"The Legislature is not precluded from passing an act to release a county treasurer from liability for school and county funds stolen by burglars, without fault on his part, from a safe furnished him by the county, by reason of the provision of § 3, art. 14, of the State Constitution, which ordains that no school tax shall be appropriated to any other purpose than that for which it was levied, nor by the provisions of the State and Federal Constitutions that prohibit legislation divesting property rights or impairing the obligation of contracts."

All of these cases are based on the theory that the Legislature's power over taxation is only restricted by the limitations placed upon it by the Constitution, and therefore that it may relieve public officers from the loss of funds collected by general taxation where such loss is occasioned through no fault of the officer or his bondsmen. In all these cases, where the money is collected by general taxation, the individual property owners acquire no vested rights in the premises, and therefore there is no impairment of the obligation of a contract as prohibited by the Constitution of the State and by that of the United States.

A careful consideration of these cases leads us to the belief that this case does not fall within the general rule, and that the Legislature has no right to relieve the officer and his bondsmen from liability, unless the funds lost were raised by general taxation, and they must have

been raised by taxation on the political subdivision of the State to be charged with the burden.

In cases where a county treasurer, a county collector, or other county or township officer having charge of public funds, loses the same by theft, or by insolvency of a bank in which he has lawfully deposited such funds, the Legislature, by its control over taxation, may relieve such officer from liability occasioned by the loss, and place the burden upon the people to replace the lost funds. Because the funds are public funds, in which no person has any vested right, the Legislature may release the claim, though legally due, if, in its opinion, it would be unjust and oppressive to collect it.

It is true that the commissioners of an improvement district are public agencies intrusted with duties to the landowners of said district, but the funds which come to their hands are not collected by general taxation, and such commissioners are not officers of any political subdivision of the State. On the other hand, improvement district taxes are special taxes levied on the theory that the landowner receives a corresponding benefit. In short, improvement district taxes can only be levied to the extent that the benefits conferred are equal to or exceed the amount of the special taxes levied. Therefore, so far as improvement districts are concerned, we conclude that the individual landowners have vested rights which cannot be impaired by subsequent legislative enactment. To illustrate: Suppose the commissioners should let a contract for a public improvement where the amount was not greater than the benefits assessed, the contract would be valid, and the contractor and the landowners would both have vested rights in it. If the assessments of benefits amounted to $100,000, and the total cost of the improvement, including the overhead charges, was the same amount, it is evident that no loss of funds could be suffered without disturbing the private rights of some one. If the money collected by the levy of these local assessments was deposited in a bank and lost by the bank's

insolvency, either the contractor who constructed the improvement must lose a part of the fruits of his contract, or the landowners must be assessed more than the benefits received to make up such loss.

This court has repeatedly held that local improvement districts for constructing improved public roads may be created by the Legislature and commissioners may be appointed to construct such improvements. Contracts made by them for the construction of said roads, when made in conformity with the statute, have been uniformly upheld, and the landowners have been held to be bound by the final assessment of benefits.

The theory is that the commissioners are the authorized agents of the landowners, and, throughout the whole proceeding, act for them. The legal theory is that, when the district is formed and the assessment of benefits becomes final, the property owners have consented to the burden imposed upon their property by the act creating the district, and thereby become legally bound to pay the assessments. This gives them a private interest or vested right in the premises, and the imposition of additional assessments to meet losses occasioned by the funds being dissipated by the failure of a bank in which they are deposited, would impair the vested rights of the landowners.

As bearing on the question, and sustaining this view, we cite a decision of the Supreme Court of California reported in 144 Cal. 329, 77 Pac. 937, under the style of *Merchants' Nat. Bank of San Diego* v. *Escondido Irr. Dist.*

It is also insisted that the evidence is not legally sufficient to sustain the verdict. On this point but little need be said. It is our duty to view the evidence in the light most favorable to the plaintiffs, and to uphold the verdict if there is any evidence of a substantial character to support it. It is true that each of the sureties on the bond testified that they did not sign the bond. It is equally true that each of them testified that the signatures very much resembled their own genuine signatures.

Then, too, most of the defendants testified that they signed some kind of a paper which they thought was a petition of some sort.

On the other hand, three experts on handwriting compared the signatures to the bond with the admittedly genuine signatures of the defendants, and testified that, in their opinion, the signatures to the bond were genuine. There were seventeen names signed to the bond. When we consider the difficulty of forging this number of names to one instrument, in connection with the testimony of the expert witnesses to the effect that the signatures were genuine, and the further fact that most of the defendants testified that they signed some kind of written instrument, we are of the opinion that the evidence was sufficient to warrant the verdict. *Miller* v. *Jones,* 32 Ark. 337, and *Hughes* v. *Gardner,* 144 Ark. 282.

It is next claimed that T. H. Beals is not liable, because he denied signing the bond in his answer, and did not testify in the case, and no admittedly genuine signature of Beals was introduced in evidence. While this is true, one of the expert witnesses testified that, in his opinion, the signatures to the bond were genuine. This included the signature of Beals. The expert witness was a local banker in the county, and the jury might have inferred that he was familiar with the signatures of Beals without examining other signatures of Beals admitted to be genuine. Therefore we conclude that the evidence was legally sufficient to support the verdict as to Beals.

It is next insisted that the court erred in not giving an instruction which placed the burden of proof upon the plaintiffs. While the court did not give the instruction requested by the defendants on this point, we think that instruction No. 3, given at the request of the plaintiffs, covers this phase of the case. Instruction No. 3 reads as follows:

"You are instructed that none of the defendants are liable to the plaintiffs by reason of their being stockholders or officers of the First National Bank, and,

unless you find by a preponderance of the evidence that the defendants signed the bond as alleged in the complaint, then your verdict should be for the defendants.

It is next insisted that the court erred in allowing certain taxpayers to become parties plaintiff to this action.

After the Legislature of 1923 passed the special act releasing the sureties on the bond from liability, the commissioners passed a resolution to dismiss the case, and attempted to do so, on the theory that the special act was valid. Certain taxpayers objected to the suit being dismissed, and asked to be made parties plaintiff in their stead. The presumption is that the commissioners acted in good faith, but their action amounted to a refusal to carry on the suit and thereby protect the interests of the landowners, for whom they were agents. The commissioners were the trustees of the landowners in the management and in the application of the funds of the district. If, for any reason, they abandoned the suit for the recovery of the money, the taxpayers had a right to be substituted in their place. This principle is clearly recognized in *Russell* v. *Tate*, 52 Ark. 541, and other cases decided by this court.

The next assignment of error is that the court instructed the jury in substance that, if it should find from the evidence that some of the defendants signed the bond sued on, and were told by the officers of the bank that it was a petition, and signed it with that belief, still if it should find that they had the bond before them and failed to read it, the plaintiffs would be entitled to recover.

All the defendants except one testified that they signed a petition at the request of one of the officers of the banks, and denied that they signed the bond sued on. The names of the defendants appear as signers of the bond, and, if they signed it without reading it, under the belief that it was a petition of some sort, this would not relieve them from liability on the bond. The rea-

son is that they could all read, and could not relieve themselves from liability in signing an instrument by their negligence in failing to read it.

The commissioners of the district had no knowledge that they had signed the bond under the belief that it was a petition of some sort. Therefore the instruction falls within the principles announced in *Hardy* v. *Ouachita Nat. Bank of Monroe,* 165 Ark. 532, and there was no error in giving it.

It is next insisted that the court erred in rendering judgment against the defendants because counsel for the plaintiffs conceded that there was not sufficient testimony to warrant a judgment against the defendant J. H. Orr. In other words, the effect of the admission of counsel for the plaintiffs during the trial of the case was that the signature of J. H. Orr was not his genuine signature. No judgment was taken against Orr on the bond, and it is claimed that the admission that his signature was not genuine released the other defendants from liability on the bond.

This contention is contrary to the provisions of § 8283 of Crawford & Moses' Digest. Under that section the liability of the other signers to the bond could only be diminished by an amount equal to that which would have been contributed by Orr to discharge the common liability. Therefore there was no prejudice in refusing to instruct the jury that the fact that Orr's signature was forged would relieve the other defendants from liability on the bond. See *Johnson* v. *T. M. Dover Merc. Co.,* 164 Ark. 371.

It follows that the judgment must be affirmed.

SHOFNER v. DOWELL.

Opinion delivered March 16, 1925.

1. COUNTIES—APPROPRIATION FOR STREET IMPROVEMENT.—Though a resolution of a county quorum court appropriating money for street improvement in aid of an improvement district recited that the necessity for the appropriation arose from the State's failure to bear its share of the proposed improvement, this was a mere expression of the court's opinion as to the State's duty, and the appropriation was proper, as the streets to be improved were part of the county highway system.
2. COUNTIES—LENDING OF COUNTY'S CREDIT.—Const. art. 12, § 5, prohibiting counties from lending their credit to any corporation, association, institution or individual, does not prevent a county from making an appropriation to aid in building a proposed street improvement.
3. COUNTIES—BRIDGE FUND—AVAILABILITY FOR ROAD PURPOSES.—A sum appropriated by the quorum court as a "bridge fund," under Crawford & Moses' Dig., § 1982, authorizing appropriations for building and repairing public roads and bridges, is available for constructing roads as well as bridges, and an allowance from such fund in aid of a street improvement is not invalid under Const, art. 16, § 11, forbidding tax money levied for one purpose to be used for any other purpose.
4. COUNTIES—VALIDITY OF ALLOWANCE.—An allowance by the county court for a street improvement out of a special bridge fund on hand is not invalid by reason of the fact that the county court agreed to make additional allowances out of the revenues of future years.
5. COUNTIES—CONTRACT TO PAY HALF OF STREET IMPROVEMENT.—An agreement by the county judge with an improvement district on behalf of the county to pay one-half of the cost of a street improvement is binding on the county on performance by the district, though it will require the revenues of future years to pay the county's share.
6. COUNTIES—VALIDITY OF WARRANTS PAYABLE IN FUTURE.—County warrants to be paid from future appropriations for road and bridge purposes, given pursuant to a contract made by the county court to pay for one-half of a street improvement, *held* binding and not invalid because future appropriations would be required for their payment, in view of special act of June 30, 1924, validating such warrants.

Appeal from Washington Chancery Court; *Sam Williams*, Special Chancellor; affirmed.

John Mayes and *W. N. Ivie,* for appellants.

Nance & Seamster and *Geo. A. Hurst,* for appellee.

SMITH, J. Appellants, who were plaintiffs below, are residents and taxpayers of Washington County, and, for their cause of action, alleged that, at the regular session of the quorum court of that county, an illegal appropriation was made and an illegal tax levied.

It was further alleged that, at the meeting of the quorum court, a member thereof offered a resolution which recited that the city of Fayetteville had for several years been endeavoring to have the streets around the University of Arkansas campus paved—that the adjacent property owners had petitioned for an improvement district to be formed for that purpose, but there was an insufficient valuation under the law. It was further recited, in the resolution offered in the quorum court, that the General Assembly of the State had been appealed to to pay for the State's part of the streets embraced in the improvement district, but this request had been denied, and therefore the improvement district could only be formed by Washington County bearing the State's part of the expense of said improvement district.

The record of the quorum court further recites that, "after due deliberation and consideration had thereon, it was moved by Justice A. B. Terry and seconded by Justice Ben F. Wood, that a sum of money, not exceeding $30,000, be and the same is hereby appropriated out of the special bridge fund of said county, payable as follows: The sum of $10,000 from the collection of taxes made in the year 1924, the sum of $10,000 from the collection of taxes made in the year 1925, and any sum necessary, not exceeding $10,000, from the collection of taxes made in the year 1926, to pay the State of Arkansas' part, or one-half of the paving of the following streets adjacent to the University of Arkansas property, in the city of Fayetteville, Arkansas, to-wit: (Thereafter follows a description of the streets to be improved). And the county judge is hereby authorized to issue warrants in

keeping herewith when the owners of property along and on the opposite of said streets or parts thereof pave their one-half thereof." This motion was unanimously adopted by the quorum court.

The complaint further alleged that, on or about January 1, 1924, the county judge allowed and ordered paid a claim against the county by the commissioners of the improvement district in the sum of $24,536, to be paid with three separate warrants, two payable in 1924 and 1925, for $10,000 each, and one in 1926 for $4,536 (these three payments equaling one-half of the total cost of the improvement), and, pursuant to this order, county warrants were drawn conforming thereto, payable to the improvement district.

That the warrant payable in 1924 was presented to the county treasurer on January 7, 1924, and was paid by that official to the commissioners of the district, it being alleged that this was done, although "there had been no part of said levy for said special bridge fund for Washington County collected at the time said warrant was paid by the county treasurer for the year 1924; that the county collector had paid into the county treasury more than $7,000 for the purpose and in furtherance of the conspiracy to permit the said defendant, H. C. Evans, as commissioner, to cash said warrant, but as to where said collector obtained said money, and from what funds, are to the plaintiffs unknown, but the same was not a part of the collection of said two-mill levy for the special bridge fund for the year 1924, as none of said fund had been collected at that time."

It was alleged that the warrants had been illegally issued, and that payment of one of them had been made in violation of law.

Plaintiffs therefore prayed, for the benefit of themselves and all other taxpayers similarly situated, that the county judge, the sheriff and collector, the county treasurer, and the commissioner of the improvement district, who were all made defendants, be enjoined from attempting to enforce the illegal order or appropriation of the

quorum court, and that the county judge be enjoined from issuing any warrants upon said illegal appropriation, and that any warrants issued be canceled, and that the county treasurer be enjoined from paying any of said warrants, and that the collector be enjoined from paying to himself any money he had advanced and paid into the county treasury to the credit of the county's bridge fund, and that the improvement district be enjoined from cashing any warrant which may have been issued it, and that it be required to refund the sum of $10,000 it had received in payment of the $10,000 warrant.

The defendant demurred to the complaint upon the grounds (1), that the complaint did not state facts sufficient to constitute a cause of action against either of the defendants; and (2), that the court had no jurisdiction of the persons of the defendants or of the subject of the action.

Upon the hearing the court overruled "that part of said demurrer as to the jurisdiction of the court, to which action the defendants excepted, but sustained the other grounds in said demurrer, to which the plaintiffs excepted and declined to plead further; whereupon this cause is dismissed at plaintiffs' cost." This appeal is from that decree.

It is first insisted that the entire appropriation is invalid, for the reason that it appropriates county funds for a State purpose. It is true that the resolution adopted by the levying court recites the failure of the State to pay its part of the cost of the improvement, and that the improvement could not be made unless the county would assume the State's part of the cost. But this is a mere expression of the court's opinion as to the State's duty in the premises. The resolution did not change the facts in the case. The streets to be improved are a part of the county's highway system, and it was entirely appropriate and proper for the county to improve them or assist in doing so, notwithstanding the

members of the court were of opinion that the State should have made an appropriation for this purpose.

It is next insisted that the appropriation is invalid as violating § 5, article 12, of the Constitution, which provides, among other things, that no county shall loan its credit to any corporation, association, institution, or individual.

This court has held, however, in a number of cases, that improvement districts are not invalid because the street improvements contemplated cannot be constructed without the aid of the county in which they are located.

In the case of *McDonnell* v. *Imp. Dist.*, 97 Ark. 304, it was contended that the proposed street improvement could not be constructed with the tax which could be collected on the betterments assessed in the district, and that it would be a futile thing to waste money to begin an improvement which could only be completed with aid from the county, and that the county might withhold this aid, although it had been pledged. This court held, however, that this contingency did not justify a court of equity in stopping the work of the improvement. Had it been thought that an appropriation could not be made by the county on account of an inhibition of the Constitution to the contrary, the holding would have been otherwise.

The power of a county to make such contribution was expressly recognized in the later cases of *Deane* v. *Moore*, 112 Ark. 254, and *Mullins* v. *Little Rock*, 113 Ark. 590; *Mullins* v. *Little Rock*. 131 Ark. 67.

In the case of *Greenburg Iron Co.* v. *Dixon*, 127 Ark. 470, it was contended that the county court had no authority to expend the road fund in constructing a bridge in a city or town; but this contention was disposed of by saying that the court had held to the contrary in the case of *Texarkana* v. *Edwards*, 76 Ark. 22.

It is next insisted that the appropriation violates § 11, article 16, of the Constitution, which provides that "no moneys arising from a tax levied for one purpose shall be used for any other purpose." It is pointed out

that, in making the annual appropriation, the levying court had levied a special bridge tax of two mills on the dollar, and it is insisted that contracts for the construcion of bridges only could be made.

Section 1982, C. & M. Digest, provides the procedure for the quorum court in levying taxes for county purposes, and in paragraph 6 thereof specific items are mentioned for which appropriations shall be made, and sub-paragraph 6 thereof provides that appropriations shall be made "to defray the expense of building and repairing public roads and bridges and repairing and taking care of public property."

This special bridge tax of two mills was obviously voted pursuant to sub-paragraph 6 of paragraph 6 of § 1982, C. & M. Digest, and we think the money thus voted was available for the construction of roads as well as bridges.

In the case of *School Dist. of Hartford* v. *West Hartford Special School Dist.*, 102 Ark. 261, a tax of seven mills had been voted for school purposes, of which four mills had been voted for the construction of a schoolhouse and three mills for the payment of teachers. It was there contended that the tax voted for building purposes could not be appropriated for any other purpose than that of erecting a schoolhouse, but the court said: "We cannot agree with that contention. The section of the Constitution in question provides that the General Assembly may by general laws authorize school districts to levy, by a vote of the qualified electors of such district, a tax not to exceed a certain rate. This is for all school purposes, and the particular rate which can be levied or used for the purpose of constructing schoolhouses in the several school districts is not designated. Evidently, then, the section of the Constitution in question did not intend to place any restrictions on the use of school funds, other than that they should be used for school purposes. If it had, appropriate language to effectuate that intent would have been used. If the framers of the Constitution did not divide the school fund into

separate classes, but, on the contrary, did provide a maximum rate which might be levied for all school purposes, how can it be said that such fund is appropriated to another purpose when it is designed and intended to be used for any of the purposes for which it might be levied? The Constitution places no restriction upon the use of school funds other than that they must be devoted to the purposes for which they were levied."

We conclude therefore that an appropriation of the quorum court, pursuant to the statute, for bridge purposes authorized the county court to make contracts for the improvement of streets to be paid for out of that appropriation.

It is insisted that the appropriation is void because it attempts to appropriate the revenues of future years; that it was contemplated that the cost to the county would exceed the sum appropriated for the then current year, and the county could not pay the part of the cost which it assumed out of the revenues appropriated for the then current year. In other words, it is insisted that the authorization to construct the improvement was void because its cost exceeded the appropriation for the current year, and the improvement could only be paid for by subsequent appropriations to be thereafter made.

In the case of *Watkins* v. *Stough,* 103 Ark. 468, the county court entered into a contract to build a bridge, and the clerk of the court, on behalf of himself and other citizens as taxpayers, appealed from the order of allowance made by the county court in payment of the work. It was contended that the contract was void for the reason that no specific appropriation of funds had been previously made by the levying court to pay for bridges of the class of the one in question, although there had been an appropriation by the levying court generally for bridge purposes. In disposing of this contention the court said: "The statute expressly authorizes the county court to enter into contracts for the construction of bridges of any description needed, and the only limitation of that power is that found in the statute which pro-

vides that 'no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor and is wholly or in part unexpended.' Kirby's Dig., § 1502. This statute applies to bridge contracts as well as all others made by the county. *Fones Hdw. Co.* v. *Erb,* 54 Ark. 645. The general appropriation for 'bridge purposes,' if wholly or in part unexpended, was sufficient to authorize the county court to enter into contracts for bridges of any class. We do not understand the statute to mean that the levying court must first signify its 'favorable judgment' for the construction of a particular bridge by making a specific appropriation for that purpose. When the levying court makes an appropriation for the purpose of building bridges, the statute authorizes the county court to make contracts for its expenditure and to continue to make such contracts as long as the fund remains unexpended, in whole or in part. *Fones Hdw. Co.* v. *Erb, supra.* There is no proof that the funds appropriated had been wholly expended at the time the contract with appellee was entered into, and, in the absence of such showing, we must not presume that the county court exceeded its authority in making the contract. *Howard County* v. *Lambright,* 72 Ark. 330."

In the instant case there was an appropriation which authorized the county court to contract for the improvement of the highways of the county.

In the case of *Hilger* v. *Chrisp,* 98 Ark. 490, it was said that, under the Constitution, the full court, composed of the county judge and the justices, is the tribunal for the purpose of levying taxes, but that the county court, composed of the county judge alone, is authorized to proceed to make contracts for the expenditure of the money appropriated.

Here the levying court made an appropriation which contemplated a particular improvement, not to exceed $30,000 in cost. Pursuant to this authority, the county court made a contract which involved the expenditure

of $24,536 of this money. It is true only $10,000 was available under the appropriation made out of the funds of the current year, but this limitation did not deprive the county court of its jurisdiction to contract for an expenditure exceeding the appropriation available for the year in which the contract was made. An appropriation had been made, and it had not been wholly expended, and the county court had the authority to make the contract.

In the case of *Greenberg Iron Co.* v. *Dixon, supra,* the county judge and the city authorities of Bentonville had decided to build a bridge on one of the streets of that city and to apportion the cost between the city and the county. No appropriation had been made by the levying court of the county to build the bridge, and it was insisted that a county warrant which had been issued by the county court in payment of the part which the county had agreed to assume was invalid on that account, and the circuit court so held. In reversing the judgment of the circuit court we said: "The judgment of the circuit court was wrong. It has been held that, under our statute, the county court has no power to let a contract to construct a bridge without some appropriation made for building bridges by the levying court. *Fones Hardware Co.* v. *Erb,* 54 Ark. 645. It cannot be determined from the record whether or not there was an appropriation for building bridges in Benton County for the year in question. It is true, the record recites that there was no appropriation for building this particular bridge, but this was not necessary. Upon the authority above recited, if there was an appropriation for building bridges, the county court had the power to act, and is not limited to the amount appropriated. When the levying court appropriated any sum for building bridges, that indicates its judgment that the work should be done, and the county court, in contracting for the construction of bridges, is not limited to the amount appropriated."

We think the agreement of the county judge to pay one-half the cost of the proposed improvement has all

the attributes of a contract, and was a contract which the court had the right to make, and, upon the performance of the contract by the other contracting party by improving the streets, the county became and is liable for the balance which it agreed to pay. We therefore decline to hold the orders of the court set out above to be void.

We are unwilling also to order the cancellation of the unpaid warrants. These warrants evidence the contract on the part of the county. Provisions for their payment must be made by future appropriations by the levying court, but it does not follow that they are invalid because future appropriations will be necessary for their payment. They represent a contractual demand against the county, which the holder thereof may enforce against the county in the same manner that any other creditor of the county would proceed to enforce a valid demand, and will no doubt be paid in the same manner.

The fact that the order of the county court contributing to the proposed improvement contemplated that the county would incur an obligation which could not be discharged out of the revenues collected in the year in which the contract was made, did not render it invalid.

In the case of *Hilliard* v. *Bunker,* 68 Ark. 340, the court said: "In such an expensive matter as the building of a courthouse and jail, it is not, of course, expected, under ordinary circumstances, to cover the whole amount by the levy for one year, and in fact this cannot be done, since, together with the ordinary expenses of the county, the levy for erecting these buildings must not exceed in one year the rate of five mills. The amount and number of the annual installments necessary to cover the whole cost of the structure must be and is left to the discretion of the levying court, to be exercised so as to accomplish the result intended in a reasonable time."

In this connection, it may be said that these warrants evidencing this demand were validated by act No. 3 of the Acts of the Special Session of the 1924 General

Assembly, approved June 30, 1924, page 46 of the Special Acts of 1924.

The county has entered into a valid and enforceable contract, and we think the court below was correct in refusing to cancel the evidence thereof which had been given to the party with whom the county contracted, and that decree is therefore affirmed.

The CHIEF JUSTICE and Mr. Justice HART dissent from that part of the opinion which relates to warrants payable in future years—1925 and 1926.

DISSENTING OPINION.

McCULLOCH, C. J. I agree fully with the majority that it was within the power of the county court to make contributions from county road funds to the improvement district to aid in paving a street, and that the warrant payable during the year for which an appropriation was made was valid, but I dissent from that portion of the opinion which holds that warrants payable in future years are valid.

The case contains no element of contractual relation between the county and the improvement district. The power of the county court over public highway does not arise out of any contractual relation, but is derived from the Constitution, and the power is exercised as a public function. The county court may contract with an individual or a corporation with reference to the construction or improvement of the public highways, but it has no authority under the Constitution to enter into a contract with another public agency with reference to the cost of improving highways. The county may, as before stated, make donations in aid of the work being done on the highways by an improvement district or by a municipality, but it is not bound by a mere agreement to share the expense. Eliminating, therefore, all element of contract, the only thing that the county court could do was to make appropriations of the county funds and, when collected, make such contributions out of those funds as the county court saw fit. There could be no contributions

from the funds until the same had been regularly appropriated by the quorum court, and that court has no authority to appropriate funds except for one year. If the quorum court can appropriate funds for two or more years, it can do so for a dozen years. The Constitution (art. 7, § 30) contemplates that the quorum court shall meet annually for the purpose of levying taxes for the ensuing year and making appropriations of the revenues thus raised.

My conclusion is that the warrants payable during the years 1925 and 1926 are invalid, and that the relief prayed for should have been granted.

Mr. Justice HART agrees with me in these views.

GRIFFIN *v.* CHESNEY.

Opinion delivered March 16, 1925.

1. CONTRACTS—PARTY COMMITTING FIRST BREACH.—The party who commits the first substantial breach of contract cannot maintain an action against the other contracting party for a subsequent failure to perform.
2. INJUNCTION—BREACH OF CONTRACT.—A party is not entitled to enjoin the breach of a contract by another, unless he has performed what the contract required of him so far as possible; if he is in default or has given cause for nonperformance by the defendant, he has no standing in equity.

Appeal from Benton Chancery Court; *H. L. Pearson,* Special Chancellor; affirmed.

A. L. Smith, for appellant.

McGill & McGill, for appellees.

SMITH, J. The parties to this litigation entered into a written contract on the 10th day of February, 1917, whereby they agreed, according to our interpretation of the contract, as follows: Chesney, who was a local fire insurance agent representing four companies, sold his agency to Griffin for $500 cash, which was paid upon the

transfer of the agency for these four insurance companies from Chesney to Griffin. Chesney reserved the right, at his option, to solicit insurance business for Griffin, and was to be paid for any business written by him as follows: For all new business Chesney was to receive the entire premium, whether the policy was for a year or for a term of years, and new business was defined to mean not renewals of old policies, but business not on the books of Chesney at the time of the sale of his agency. From the commissions thus earned a deduction of twenty-five cents for each policy issued by Griffin was to be made for a period of twelve months, dating from the date of the sale.

When Griffin desired Chesney to assist in securing renewals of existing policies, that service was to be rendered by Chesney, and one-half of the commission thus earned was to be paid him for this service.

Chesney also agreed that he would not enter into the fire insurance business in Siloam Springs, Arkansas, where his agency had been located, for himself, or in connection with any other agent, so long as "the party of the second part (Griffin) shall remain continuously and directly from the date of this contract in such business in this city, and not violate the terms of this contract."

The contract contained certain other provisions which need not be stated, as they are not involved in this litigation.

Suit was brought by Griffin, who alleged that Chesney had breached the contract by reentering the insurance business in Siloam Springs, and that Chesney sought to defend his action in so doing by falsely claiming that plaintiff Griffin had previously breached the contract. There was a prayer that Chesney be enjoined from continuing in the business of writing fire insurance in the city of Siloam Springs.

Chesney filed an answer admitting the execution of the contract, and admitted that he had reentered the fire insurance business, but he alleged that plaintiff had first breached the contract in several respects, and his obliga-

tion under the contract to stay out of the insurance business had thereby been annulled.

By way of cross-complaint, the defendant Chesney alleged that Griffin had failed to properly account to him for the commissions he had earned on insurance he had written, and he prayed that an accounting be had between them.

It would serve no useful purpose to set out the testimony offered by the litigants in support of their respective allegations. The court found the fact to be that there was no equity in either the complaint or the cross-complaint, and dismissed them both as being without equity, for the reason that the plaintiff had violated the contract from the beginning by secretly withholding a portion of the commissions to which defendant was entitled; and defendant had violated the contract by secretly giving a portion of his business to other insurance agents, and upon this express finding the court assessed half of the costs against each of the parties.

We are unable to say that this finding is clearly against the preponderance of the evidence; in fact, the finding is virtually supported by the admissions of the parties.

There is more uncertainty about who committed the first breach, and this appears to be the principal question of fact in the case. Cases are cited holding that the party who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform. This is, of course, a well settled principle of the law.

Without undertaking to decide who committed the first breach of the contract, it may be said that the testimony shows that each party had breached the contract before the other was aware of the fact that the other had also breached it. Indeed, the plaintiff alleged in his complaint that it had come to his knowledge, since the institution of this suit, that defendant had never in good faith complied with the contract, and, while the plaintiff alleged and testified that he had never breached the

contract himself, we think, as we have said, that the chancellor's finding to the contrary is not clearly against the preponderance of the evidence.

As we have said, appellant (plaintiff) brought suit to enjoin defendant from engaging in the insurance business in the city of Siloam Springs, and we think the court was warranted in denying him the relief prayed because of his own breach of the contract. There is no cross-appeal by appellee, and we do not consider what relief, if any, he might have had by way of damages had he cross-appealed. The question presented by appellant's appeal is whether he is entitled to enjoin appellee from reentering the insurance business in the city of Siloam Springs, and, as we have stated, this relief was properly denied him because of his own breach of the contract upon which he predicates his cause of action.

In 32 C. J., p. 192, § 290 of the chapter on Injunctions, it is said: "A party is not entitled to enjoin the breach of a contract by another, unless he himself has performed what the contract required of him so far as possible; if he himself is in default, or has given cause for nonperformance by defendant, he has no standing in equity."

Under the circumstances we think appellant has not made a case entitling him to equitable relief, and the decree of the court below is therefore affirmed.

GARRETT v. EDWARDS.

Opinion delivered March 16, 1925.

1. LANDLORD AND TENANT—PURPOSE OF UNLAWFUL DETAINER ACTION.—The action of unlawful detainer merely decides the right to the immediate possession of lands and tenements, and not the right or title of the parties to or in them.
2. LANDLORD AND TENANT—ESTOPPEL.—A tenant cannot dispute the title of his landlord while he remains in possession under him, nor acquire possession from the landlord by lease and then dispute his title, but must first surrender possession.

3. LANDLORD AND TENANT—UNLAWFUL DETAINER—ANSWER.—Where a landlord sued for possession, an answer of the tenant that after he received possession certain third persons claimed to own the premises and rents, and that thereafter defendant deposited the rents in a bank awaiting settlement of the question of ownership of rents, with prayer that such third party be made defendant and required to litigate the question of ownership of rents, *held* demurrable.

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

Edward Gordon, for appellant.

Eades & Eddy, for appellee.

SMITH, J. Appellee brought an action of unlawful detainer to recover from appellants the possession of a lot in the town of Blackwell, which he alleged that he had rented them on November 10, 1922, for a monthly rental of $10, to be paid at the end of each month; that default was made in the payment of the rents, and a notice in writing to vacate was served on defendants. Judgment for rents and possession was prayed.

Defendants filed an answer admitting the tenancy, but alleging the fact to be that, shortly after they went into possession of the property, they were notified by..... Maus and.....Berkemeyer, trading and doing business as Maus & Berkemeyer, that they were the owners of the property and were entitled to the rents; that thereafter defendants deposited the rents in a bank, awaiting a settlement of the question as to who was entitled to the rents. There was a prayer that Maus & Berkemeyer be made parties defendant and required to litigate with plaintiff the question of ownership of the rents.

A demurrer was sustained to this answer, and, as defendants declined to plead further, judgment was pronounced on the pleadings in favor of the plaintiff.

The demurrer to the answer was properly sustained. In the case of *Dunlap* v. *Moose*, 98 Ark. 235, it was said: "The action of unlawful detainer is only to decide the right to the immediate possession of lands and tenements, and not to determine the right or title of the parties to or in them. A tenant cannot dispute the title of his

landlord while he remains in possession under him, nor acquire possession from the landlord by lease and then dispute his title, but must first surrender possession and bring his action." See also *Burton* v. *Gorman,* 125 Ark. 141; *Montgomery* v. *Massey,* 145 Ark. 336; *Morris* v. *Griffin,* 146 Ark. 439.

The judgment of the court below is therefore affirmed.

BELOATE v. CARRUTHERS MOTOR COMPANY.

Opinion delivered March 16, 1925.

1. TROVER AND CONVERSION—LIEN OF AUTOMOBILE REPAIRMAN.—In a suit by the owner of an automobile against a repairman, in which each presented an account against the other, plaintiff for professional services and defendant for repairs to the automobile, since defendant was entitled to a lien on the car for repairs, under Crawford & Moses' Dig., § 6866, the court properly refused to submit the question of conversion.
2. TROVER AND CONVERSION—RETENTION OF AUTOMOBILE FOR REPAIR CHARGES.—An automobile repairman was not guilty of conversion in retaining a car on which he had made repairs where the owner failed to pay or tender his charges.

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

W. P. Smith, for appellant.

H. L. Ponder, for appellee.

SMITH, J. Appellant sued appellee for the alleged conversion of an automobile, delivered to appellee in February, 1922, to be repaired, and of which appellee retained possession until May, 1923.

On May 26, 1923, appellant delivered to appellee the following letter:

"Walnut Ridge, Ark., May 26, 1923.

"Carruthers Motor Co., Walnut Ridge, Ark.

"Owing to the fact that you have permitted certain parts of the engine and two casings, rims and other parts to be removed from my Paige car, engine No. 7D68701, which was delivered to you in February, 1922, for repairs,

I have been unable to get same removed by other garage men for repairs.

"This is to notify you to place said car in the condition it was when you received it by June 10, or I will take it that you desire to convert same, and will sue you for the value of the car."

After the expiration of the time limited by the letter this suit was brought.

Appellant asked two instructions, the first of which directed the jury to return a verdict in his favor for the value of the automobile at the time it was delivered to appellee, and the other instruction was to the same effect substantially, only it required the jury to find that possession of the car was not delivered to appellant within the time limited in the letter set out above.

The testimony on behalf of appellant was to the effect that appellee kept his car without excuse and without repairing it, and failed to repair or return it after repeated requests so to do. The testimony on behalf of appellee was to the effect that the car was about worn out when it was delivered at the garage for repairs, such repairs were made as were authorized, and appellant was advised of that fact, and was further advised that the car was ready for delivery, with the exception that it needed casings and a new battery, and that, when the battery was furnished, the car was "ready to be tuned up and to go," and, according to the testimony in appellee's behalf, appellant was responsible for the delay.

There was testimony on the part of appellant that certain parts of the car had been removed or lost; but appellee was not responsible for this loss, according to the testimony in its behalf.

Each party presented an account against the other, one for repairs to the car, the other for professional services.

The issue of facts thus raised was submitted in an instruction reading as follows: "The burden is on the defendant to establish the items of his cross-complaint, and the burden is upon the plaintiff to establish the value

of his services. As to the possession of the car in this action or as to the value of it, the jury in this case has nothing to do with that. There is nothing in this lawsuit but for you to try to strike a balance between these two accounts under the evidence in the case."

It appears from this instruction that the court refused to submit the question whether there had been a conversion of the car; indeed, the court stated to the jury that the testimony presented no such question, and the only question submitted to or passed upon by the jury was the state of the account between the parties. The jury returned a verdict in favor of the appellee for $25, and this verdict is conclusive of the fact that the sum due defendant for repairs exceeded the sum due plaintiff for professional services by $25.

Under the judgment pronounced on this verdict appellant would have been entitled to the possession of the car by paying the sum found due appellee for work done on it.

We think the court properly refused to submit the question of conversion of the car to the jury. The car may have been retained by appellee for an unreasonable length of time, although, as we have said, the testimony on appellee's part tended to excuse this delay. But, at any rate, there is no question of conversion in the case. Appellant's ownership of the car was never questioned, and his right to its possession would apparently not have been questioned, had appellee's charges been paid. The verdict of the jury is conclusive of the fact that there were charges which should have been paid, and appellee was entitled to a lien on the car so long as these charges remained unpaid. Section 6866, C. & M. Digest.

It will be observed that, in the letter set out above, there was no tender by appellant of the charges, nor, indeed, was there any reference to them, and we think the court below was correct in holding that the mere failure to surrender the car within the time limited for that purpose did not constitute a conversion of it.

The judgment of the court below is therefore affirmed.

CHAMBERS v. STATE.

Opinion delivered March 16, 1925.

1. CRIMINAL LAW—INFORMATION—FORMALITY.—In prosecutions for misdemeanors on information, no formality is required, either in the affidavit charging the offense or in the warrant of arrest describing same.
2. CRIMINAL LAW—PROOF OF VENUE.—Proof that an offense was committed in and near Fort Smith was sufficient to prove that the offense occurred in the Fort Smith District of Sebastain County.
3. CRIMINAL LAW—PERMITTING WITNESS TO REMAIN IN COURT.—Though the court put the other witnesses under the rule, it was not an abuse of discretion to permit the mother of the prosecutrix in a contributory delinquency case to remain in the court room during the trial.
4. INFANTS—DELINQUENT.—In a prosecution for contributing to the delinquency of a minor, evidence *held* to show that the minor was a delinquent.
5. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Refusal of erroneous instructions or instructions covered by those given was not error.
6. INFANTS—CONTRIBUTORY DELINQUENCY.—One may be guilty, under Crawford & Moses' Dig., § 5754, for contributing to the delinquency of a minor if he either encourages or contributes to her delinquency.

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

T. S. Osborne, E. M. Ditmon, for appellant.

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appellee.

HUMPHREYS, J. Appellant was tried and convicted in the circuit court of the Fort Smith District of Sebastian County, on appeal from the municipal court of Fort Smith, for contributory delinquency, and, as punishment therefor, was adjudged to pay a fine of $500 and to serve one year in the county jail, from which judgment he has prosecuted an appeal to this court.

The information was based upon § 5754 of Crawford & Moses' Digest, and is as follows: "On the 21st day of August, 1924, J. Sam Wood filed before me his affidavit charging Elza Chambers had, in the county of Sebastian,

on or about the ..... day of June, 1924, committed the crime of contributing to the delinquency of Gertrude Lee, a minor."

A demurrer was filed to the information, which was overruled by the court, and appellant questions the sufficiency of the affidavit. In prosecutions upon information for misdemeanors no formality is required either in the affidavit charging the offense or in the warrant of arrest describing same. The purpose of the affidavit or warrant is to bring the offender into court, and, once there, it is within the province of the court to try and punish him for any misdemeanor triable by the court, which he has committed. Section 5784 of Crawford & Moses' Digest, under which appellant was tried, specifically provides that the crime is a misdemeanor. *Mayfield* v. *State,* 160 Ark. 474, and cases cited therein to this point.

Appellant also questions the sufficiency of the proof to establish the venue of the court. The record reveals that the sexual intercourse between appellant and Gertrude Lee occurred in or near Fort Smith, and that their association was confined largely to that immediate locality. This court judicially knows that Fort Smith is in the Fort Smith District of Sebastian County, Arkansas.

Appellant also contends for a reversal of the judgment because the court permitted the mother of Gertrude Lee, who was a witness, to remain in the courtroom while the other witnesses were testifying. It is true the court put the witnesses under the rule, at the request of the State, but it is in the court's discretion to excuse special witnesses from the rule. We know of no good reason why the court abused this discretion in permitting the mother, who was a witness, from sitting with her daughter, Gertrude Lee, who was the prosecutrix in the case. We are unable to determine from the record that appellant was prejudiced on this account.

Appellant next contends for a reversal of the judgment upon the alleged ground that the instructions given

by the court were erroneous declarations of law as applied to the facts in the case. We have read them carefully, and do not think the two main objections made to them are tenable. The objections are that there was no testimony tending to show that the crime was committed in the Fort Smith District of Sebastian County, and none tending to show that the prosecutrix herself was a delinquent under § 5754 of Crawford & Moses' Digest. There is positive evidence in the record to the effect that appellant, a married man, had sexual intercourse with the prosecutrix, who was only seventeen years of age, within the city limits and in the suburbs of Fort Smith. The record also reflects that the prosecutrix remained out late at nights with appellant and other men, and attended dances and other public places without protection. She was out with appellant and other men nearly every night. The statute defines a delinquent child as a female under eighteen years of age who knowingly associates with immoral persons. We do not think the instructions were abstract.

Appellant's next and last contention for a reversal of the judgment is that the court erred in refusing to give certain instructions requested by him. Such instructions as were not given were either covered by other instructions or were erroneous because they conveyed the idea that, before appellant could be guilty, it was necessary for him to have contributed to Gertrude Lee becoming a delinquent, whereas, under the statute, he might be guilty if he encouraged or contributed to her delinquency. Courts are not required to repeat their instructions nor to give instructions which are incorrect.

No error appearing, the judgment is affirmed.

RINEHART v. WHEELER.

Opinion delivered March 16, 1925.

1. EXECUTORS AND ADMINISTRATORS—AUTHENTICATION OF DEMAND.—A claim for damages against an estate, when presented to the administrator for allowance, or when suit is brought thereon, must be authenticated as required by the statute (Crawford & Moses' Dig., § 101).
2. EXECUTORS AND ADMINISTRATORS—FORM OF AFFIDAVIT.—An affidavit that the facts were true and correct is not a substantial compliance with Crawford & Moses' Dig., § 101.
3. EXECUTORS AND ADMINISTRATORS—TIME FOR EXHIBITING AFFIDAVIT.—The affidavit authenticating a claim against an estate of a decedent, required by Crawford & Moses' Dig., § 101, must be exhibited within one year from the appointment of the administrator.

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

Oscar H. Winn, for appellant.

Rowell & Alexander, for appellee.

HUMPHREYS, J. This suit was brought on March 15, 1923, by appellants against appellees in the circuit court of Jefferson County to recover $25,000 in behalf of Ollie Nelson Rinehart and $15,000 in behalf of Hervey Bost, a minor, against the estate of Daniel Nelson, deceased. Ollie Nelson Rinehart was the daughter and Hervey Bost the grandson of the deceased. Daniel Nelson died on April 1, 1922, owning a large estate. On the twelfth day of April, 1922, joint letters of administration of his estate were issued to C. K. Wheeler and Ollie Nelson Bost, widow, who, prior to the institution of this suit, married a man by the name of Rinehart. It is stated in the amendment to the complaint that the suit is for damages growing out of both contract and tort. The contract seems to have been set out by way of inducement, the gist of the action being the contraction by appellants of tuberculosis from the deceased in his lifetime. It was alleged in the complaint that Mrs. Rinehart, *née* Bost, disposed of her home in Conway County and moved with her children to her father's plantation in

Jefferson County for the purpose of keeping house for him and assisting in the management of his plantation, with the understanding that he would give her his property at his death; that her father had tuberculosis, but withheld this information from her; that, as he became weaker from the disease in the later years of his life, it became necessary for her and her son Hervey to sleep in the room of her father at nights in order to wait upon him, which resulted in both of them contracting the disease. The prayer in the complaint and amendment thereto was for damages on account of the negligence of the deceased in causing them to contract the disease. There was no prayer in the complaint for a performance of the contract. As we construe it, the action is one for tort.

The administrator, C. K. Wheeler, filed a demurrer to the complaint and also a motion to enter a nonsuit, for the reason that the claims were not authenticated in the manner required by law when presented to the administrators, and when suits were brought thereon. The court heard testimony upon the motion to enter a nonsuit, and sustained it, from which is this appeal.

Appellant first contends for a reversal of the judgment because it was unnecessary to authenticate a claim for damages against an estate when presented to an administrator for allowance, or when suit is brought thereon. Appellant is in error in this contention, for the term "demand," as used in the statute requiring all claims to be authenticated against estates, includes all claims capable of assertion against an estate of a deceased person. *Hayden* v. *Hayden,* 105 Ark. 95; *Davenport* v. *Davenport,* 110 Ark. 222; *Keffer* v. *Stuart,* 127 Ark. 499.

Appellant's next contention for a reversal of the judgment is that the authentication met the requirements of the statute. The form of affidavit used in authenticating the claim was that the facts were true and correct. This did not substantially meet the requirements of § 101 of Crawford & Moses' Digest. That sec-

tion requires that a claimant shall state "that nothing has been paid or delivered toward the satisfaction of the demand except what is credited thereon, and that the same demand, naming it, is justly due. Such affidavit is a prerequisite to the right of action, and must be exhibited within one year from the appointment of the administrator. *Chapman* v. *Railroad Co.*, 97 Ark. 300.

No error appearing, the judgment is affirmed.

SMITH v. STATE.

Opinion delivered March 23, 1925.

1. CRIMINAL LAW—CONFESSION.—A confession of guilt, in connection with proof of the commission of the crime, is sufficient to support a conviction, under Crawford & Moses' Dig., § 3182.
2. CRIMINAL LAW—ASSIGNMENT OF ERROR NOT CARRIED FORWARD IN MOTION FOR NEW TRIAL.—An assignment of error in refusing to exclude evidence, not carried forward in a motion for new trial, cannot be considered on appeal.
3. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—The refusal to give a requested instruction covered by one given *held* not error.

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

McCULLOCH, C. J. Appellant is a young man under twenty-one years of age, and he and another young man named Taylor were separately indicted for the crime of robbery. Appellant was convicted, and has prosecuted an appeal to this court. The first contention of his counsel is that the evidence is not sufficient to sustain the verdict.

The two boys who were robbed, Will Little and Bob Harper, testified that they were asleep in an automobile on the night of September 30, 1924, when two men woke them up, and forcibly took from them a watch and three dollars in money. Neither of the accused persons were identified, but the State proved by two witnesses a subsequent confession by appellant to the effect that he and

Taylor committed the robbery. There was evidence tending to show that appellant was induced to make the confession by promises of a juvenile-court officer, who had him in his custody, to the effect that the officer would render such help as he could in lessening the punishment of appellant if he would disclose the facts in regard to the crime. The court submitted to the jury the question whether or not the confession was voluntarily made. We are of the opinion that the evidence was sufficient to sustain the verdict, for an admission of guilt, in connection with proof of the commission of the crime, is sufficient, under the statute, to support a conviction. Crawford & Moses' Digest, § 3182.

It is contended that the court erred in admitting proof of appellant's alleged confession, it being contended that the evidence showed that the confession was not voluntary. Appellant moved to exclude the testimony of the witnesses concerning the confession, and exceptions were duly saved, but the assignment was not carried forward in the motion for a new trial, therefore we cannot consider it.

Appellant requested the court to give the following instructions:

"1. The court instructs the jury that evidence of a confession has been admitted against the defendant, but, before you can convict the defendant upon any evidence of confession, you must find from the evidence that such statements, if any, were freely and voluntarily made; and if such statements were made upon any hope, promise or actions on the part of any officer, such as to lead the defendant to believe that he would obtain liberty or leniency, then such statements cannot be considered by you as evidence upon which to convict the defendant.

"2. Confessions not voluntarily made are inadmissible against accused, he being protected by law against confessions obtained by duress or through hope or fear."

The court gave instruction No. 1, but refused to give instruction No. 2, and that ruling is assigned as error.

It is easily seen that the subject-matter of instruction No. 2 was fully covered in instruction No. 1, which was given, and there was manifestly no error in the refusal to give No. 2.

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

BOYD v. OZARK TRAIL ROAD IMPROVEMENT DISTRICT.

Opinion delivered March 23, 1925.

HIGHWAYS—CHANGES IN ASSESSMENTS—RIGHT TO COMPLAIN.—Where a general assessment of benefits in a road improvement district was made in 1921, and a year later the board of commissioners made some changes lowering a few assessments to correct obvious errors, but no general reassessment was made, taxpayers who made no complaint of the 1921 assessment within the time allowed are in no position to complain of the 1922 changes, if the taxpayers whose assessments were lowered were not made parties.

Appeal from Poinsett Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

Little, Buck & Lasley, for appellants.

J. G. Waskom, for appellees.

McCULLOCH, C. J. Appellants are the owners of real property within the boundaries of a road improvement district organized by special act of the General Assembly of 1919 (Road Acts 1919, vol. 1, p. 1130), designated as the Ozark Trail Road Improvement District of Poinsett County, Arkansas, the authority conferred by the statute being to improve, by hard-surfacing, a public road running southeasterly from Marked Tree to the Crittenden County line, a distance of about nine miles. The statute is in the usual form, providing for the organization of the commissioners with authority to employ necessary agents, to form plans, borrow money, issue bonds, levy taxes on assessed benefits, and construct the improvement. There is a specific provision as to the method of assessing benefits and giving notice thereof, so that property owners could have an opportunity to be heard. Authority to reassess benefits was

conferred in a section of the statute which reads as follows:

"Section 7. The commissioners may, not oftener than once a year, reassess the benefits in said district; but, in the event the district shall have incurred an indebtedness or issued bonds, the total amount of assessed benefits shall never be diminished."

Plans were formed and bonds were issued, and there was partial construction under this statute, but the General Assembly of 1921 enacted another special statute (Special Acts 1921, p. 1000) consolidating this district with another one designated as Road Improvement District No. 2, or rather authorizing this district to construct the road formerly authorized to be constructed by the other district, and also authorizing this district to improve two laterals, one of which is known as lateral 2-A. The last mentioned statute contains the following provision with reference to assessment of benefits:

"Section 4. The commissioners of the Ozark Trail Road Improvement District are hereby authorized to revise their plans, after determining what roads they desire to construct and how such roads shall be improved, including the roads of Road District Number Two of Poinsett County, and to file said plans with their secretary at their office at Marked Tree; that they then may make a reassessment of all lands in the district so as to set forth the benefits and damages which will accrue to all lands in the district by the carrying out of the completed and entire plans adopted by the commissioners, and this reassessment shall be made and equalized in the manner provided by § 6 of the act creating said Ozark Trail Road Improvement District, and the determination of the commissioners at the hearing provided herein shall be final, unless suit is brought in the chancery court within thirty days thereafter to review it. The total amount of benefits, as finally equalized, shall never be less than the present combined assessment of benefits of the Ozark Trail Road Improvement District and of Road Improvement District Number Two of Poinsett County."

In conformity with the provisions of the last-mentioned statute, the commissioners proceeded to reassess the anticipated benefits on all the lands in the original district, as well as the lands added thereto from Road Improvement District No. 2, and said assessment was completed and duly confirmed on November 28, 1921. No action was taken by appellants or any other taxpayers to set aside or question the correctness of those assessments. However, the board of commissioners, in November, 1922, undertook to change the assessments on tracts of land owned by certain persons other than the appellants, and, after making the corrections, gave notice thereof in the manner provided by the original statute. No changes were made in the assessments of property of appellants as made by the commissioners upon the general reassessment in November, 1921, but appellants contend that the assessments on their property are unjust and not in conformity with other assessments in the district, for the reason that their lands are not adjacent to the hard-surface road, but lie near lateral 2-A, which was improved merely by grading and draining, without putting a hard surface thereon, and appellants allege that they have to use this unsurfaced lateral in order to get out to the hard-surfaced main road.

It is shown that the commissioners issued additional bonds to a large amount and constructed the improvement by building a hard-surface main road in accordance with the original statute, and by constructing the lateral as a drained and graded road, but not hard-surfaced. The contention of appellants is that, by reason of the fact that the lateral is not hard-surfaced, their assessments are too high, and should be reduced, and they claim that the action of the board in 1922 was a general reassessment under the statute, and that they have a right to attack its correctness and to have their assessments lowered.

This is an action commenced by appellants against the commissioners in the chancery court of Poinsett County, and was commenced within thirty days after

the alleged reassessment made by the board in November, 1922. The commissioners answered for the district, denying that there was any reassessment made in 1922, and pleaded that the confirmed assessment of November, 1921, was conclusive of the rights of appellants.

On a careful review of the record in the case we are of the opinion that the contention of appellee is correct. The chancellor so held. It does not appear from the record that the commissioners undertook to make a general reassessment under the statute. The minutes of the board, as well as the oral testimony in the case, show that all the commissioners did was to correct obvious errors in the assessment of a very limited number of tracts of land. Section 4 of the act of 1921, *supra,* does not confer continuing power upon the board of commissioners to reassess benefits. It merely authorized one reassessment after the passage of that act, for the purpose of determining the benefits to accrue from the whole of the improvement as added to by the last statute. Authority for continuing power to make reassessments must be found in § 7 of the original statute, *supra.* That section, as we have already seen, provides for a reassessment not oftener than once a year, and provides that, after the district shall have incurred indebtedness or issued bonds, "the total amount of the assessed benefits shall never be diminished." The statute conferred no authority on the commissioners to correct errors *ad libitum,* but the authority is to make a general reassessment not oftener than once a year, and, as before stated, the testimony shows that the commissioners did not attempt to do so. Appellants therefore are bound by the original reassessment made in November, 1921, as they failed to complain of it. The validity of the corrections made by the board of commissioners on tracts of land owned by other persons is not involved in the present litigation, for those owners have not been made parties.

The chancery court was correct therefore in dismissing appellants' complaint for want of equity, and the decree is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. WRIGHT.

Opinion delivered March 23, 1925.

1. RAILROADS—FAILURE TO MAINTAIN LOOKOUT.—In an action for injuries received in a collision between a railroad train and an automobile at a crossing, it was error to submit to the jury the issue of a failure to keep a lookout, both because there was no allegation of negligence in this regard, and because it was undisputed that the view was obstructed so that the trainmen could not see any one approaching in time to avoid a collision.
2. APPEAL AND ERROR—SUBMISSION OF IMPROPER ISSUE—PREJUDICE.—In an action for injuries at a railroad crossing the error of submitting an issue as to a failure to keep a lookout was prejudicial where the evidence on other issues was conflicting, there being no way to determine what effect the error had on the jury.
3. TRIAL—REPETITION OF INSTRUCTIONS.—Refusal to give an instruction fully covered by another instruction given was not error.

Appeal from Pope Circuit Court; *J. T. Bullock*, Judge; reversed.

Thos. B. Pryor and *Vincent M. Miles*, for appellant.

Ward & Caudle, for appellee.

McCULLOCH, C. J. While appellee was driving an automobile along a public highway across the railroad track in the city of Russellville, the car collided with the engine of a freight train, and appellee received severe personal injuries, in addition to having his car demolished. He sued the company for damages, alleging in his complaint that the men in charge of the engine failed to give signals by bell or whistle, and that there was also negligence in failing to keep ringing an automatic bell on a post near the crossing. Appellant in its answer denied the allegations of negligence, and pleaded contributory negligence on the part of appellee. There was a trial of the issues before a jury, and the verdict was in appellee's favor, assessing damages in the sum of $500.

Appellee testified that he was a rural mail carrier on a route running out from Russellville, and that, early in the morning in question, he started to drive across the railroad track, first passing over the sidetrack

between box-cars on each side, and that, as he emerged from behind the box-cars, he saw the train coming, and attempted to put on the brakes, and, when he discovered that he could not stop the car, he turned to the right, in the direction the train was going, but the car moved onto the track and was struck by the engine. He testified that there was a space of between twenty and twenty-five feet between the ends of the two box-cars on each side of the track at the crossing, and that he could not see up and down the track until he passed from between these box-cars. He further testified that there was an obstruction up the track, so that the train could not be seen as he approached the crossing. He said he was driving from six to eight miles an hour, and also stated that the automatic bell on the post was not ringing, and that there were no signals given from the engine.

There was a conflict in the testimony as to whether or not signals were given, and the evidence was sufficient to warrant a finding either way on that issue. The engineer testified that he saw appellee and his car as he came from behind the box-cars, and that he threw on the emergency brake and attempted to stop, but it was too late. The engineer testified that the bell on the engine was being constantly rung.

The court, over appellant's objection, submitted the issue, not only as to negligence in failing to give the signals, but also in failing to keep a lookout. Appellant requested the court to give an instruction excluding from the consideration of the jury the question of failure to keep a lookout, and the court refused to give the instruction, which ruling of the court is assigned as error. We are of the opinion that the court erred in submitting the question of failure to keep a lookout. In the first place, there was no allegation in the complaint as to negligence in that regard; and, in the next place, the uncontradicted evidence shows that, if there was in fact a failure to keep a lookout, it was not the cause of the injury. It is undisputed that appellant drove

between the two ends of the box-cars on each side of the track, and that there were other cars on both sides which completely obstructed the view, so that appellee could not see the approaching train until he was about to cross the main track and that the operatives of the train could not see appellee's car in time to prevent injury. The only negligence in the case, if there was, in fact, any negligence, was the failure to give the signal so as to warn appellee and prevent his attempting to cross at that time. Appellee passed between the box-cars, according to his own statement, at a speed of six or eight miles an hour, and the distance was too short for him to stop his car without going on the track, hence he turned to the right and tried to escape in that way, but the car went onto the track and was struck by the engine.

The error of the court in submitting this issue necessarily calls for a reversal of the judgment, because we have no means of ascertaining what effect it had upon the jury. *St. L. I. M. & S. Ry. Co.* v. *Kimbrell*, 111 Ark. 134. There was a sharp conflict in the testimony as to the giving of the statutory signals, and the jury may have found that the signals were given. Besides that, there was a conflict as to whether or not appellee was guilty of contributory negligence and as to the comparative degree of his negligence with that of the trainmen in failing to give the signals. Therefore it was important that a correct instruction be given, and the jury may have been misled by this instruction which submitted the issue of failing to keep a lookout.

The court gave correct instructions submitting the question of appellee's own negligence in comparison with that of the trainmen. In one of those instructions the jury were told that it is the duty of a person approaching a railway crossing to "look and listen for the approach of a train, and, if the situation is such that ordinary care requires him to stop in order to effectively hear or see the train, to stop his car before going on the track." Appellant insists that the court erred

in refusing to give another instruction on this subject, but we think that the instructions given were complete and fully covered the issues in the case. However, for the error in submitting the issue of failure to keep a lookout, the judgment will be reversed, and the cause remanded for a new trial. It is so ordered.

HART and HUMPHREYS, JJ., dissent.

SULLIVAN v. WILSON MERCANTILE COMPANY.

Opinion delivered March 23, 1925.

1. LANDLORD AND TENANT—SUFFICIENCY OF DESCRIPTION IN LEASE.—A description of pasture land in a lease *held* sufficient to let in parol proof to identify the land leased.
2. LANDLORD AND TENANT—UNEXECUTED AGREEMENT—CONSIDERATION.—A mere unexecuted agreement of a lessee to consent to a sale of the leased land by the lessor, *held* not to bind the lessee, where no consideration passed to him.
3. VENDOR AND PURCHASER—NOTICE OF LEASE.—A purchaser buying land with notice of a lease and of the lessee's actual possession at the time of purchase *held* not an innocent purchaser.
4. VENDOR AND PURCHASER—OCCUPANCY OF LESSEE.—The actual control and use by a lessee of inclosed pasture lands for any purpose at the time the land is sold by the lessor constitutes actual occupancy.
5. INJUNCTION—EFFECT OF DISMISSAL OF SUIT.—The dismissal of the complaint in a suit in which a temporary injunction had been granted at plaintiff's request *held* in effect a dissolution of the injunction.
6. INJUNCTION—DISSOLUTION—RESTITUTION.—In a suit to restrain a lessee from trespassing on land purchased by plaintiff, in which a temporary restraining order was granted, and a cross-bill filed alleging defendant's right to possession and wrongful deprivation thereof, dismissal of the cause as to both parties, without granting restitution of possession to defendant and damages for deprivation of the land, *held* error under Crawford & Moses' Dig., §§ 5822, 5825.

Appeal from Randolph Chancery Court; *Lyman F. Reeder*, Chancellor; reversed.

David L. King, for appellant.

George G. Dent, for appellee.

McCULLOCH, C. J. This appeal involves a controversy between appellant and appellee over the right of possession of certain farm land. Both parties assert the right of possession from a common source. The land is a part of a farm in Randolph County, known as the Goss Farm, situated on Spring River, near the town of Imboden. There is a bridge across Spring River at Imboden, and Goss Farm runs up to the river at the bridge. The lands were formerly owned by J. J. Brooks and his wife, Nora, and appellant claims under a written lease, which reads as follows:

"This December first, 1922. Imboden, Arkansas.

"This contract entered into between J. J. and Nora V. Brooks and E. N. F. Sullivan. The parties of the first part agree to rent to E. N. F. Sullivan, the party of the second part, the described land as follows: To all of the alfalfa and Bermuda grass land, commencing on the north at the cross fence, running west to cross fence on big bank; then running south to river; thence east to bridge. E. N. F. Sullivan of the second part does agree to pay to the parties of the first part $10 (ten dollars) per acre, and land to be measured. It is further agreed that the amount to be paid on the land note for the term of three years, 1923, '24, and '25, to be paid each year. This land is on what is known as the Goss land in Randolph County. Witness our hands."

Appellee purchased the land from Brooks and wife on February 14, 1923, and instituted this action against appellant in the chancery court of Randolph County on March 28, 1923, alleging that appellant was interfering with the possession of appellee by trespassing on the land and preventing appellee from enjoying peaceable possession. The prayer of appellee's complaint was that appellant be perpetually restrained from interfering with the possession and from trespassing on the land. Appellee obtained a temporary restraining order at the commencement of the action.

Appellant filed a cross-complaint setting up his right of possession under the lease from Brooks and wife. He also filed a cross-complaint in which he alleged that he had taken possession of the land under his lease prior to the alleged purchase of the land by appellee from Brooks; that he was in possession at the time of the commencement of this action, and had been wrongfully deprived of the possession under the injunction issued in the case. He set forth damages, and prayed for a decree for the recovery of them.

On the final hearing of the cause the court dismissed both the complaint of appellee and the cross-complaint of appellant, and apportioned the costs of the action between the two parties. The decree contained no formal dissolution of the injunction, and there was no assessment of the damages claimed by appellant. The cause was heard upon depositions and oral testimony submitted to the court. The court found, in the first place, as the foundation for the decree dismissing the cross-complaint, that the lease contract to appellant did not contain a sufficient description of the land in controversy. We think that the court was not correct in the conclusion reached on that subject, for the description in the contract, when aided by extrinsic evidence, was proper and sufficient to identify the land. It describes the land as a part of "the Goss land in Randolph County," and refers to it as "all of the alfalfa and Bermuda grass land." It also describes the land as "commencing on the north at the cross fence running west to cross fence on big bank; then running south to river, thence east to bridge." The identification of the land as "all of the alfalfa and Bermuda grass land" on the Goss farm in Randolph County contiguous to the bridge and river was, we think, sufficient to let in proof as to what particular land answered this description.

It is contended by appellee, in support of the court's decree, that appellant waived his lease by consenting to the subsequent sale of the land to appellee, but we

are of the opinion that the testimony does not support this contention. There is a conflict in the testimony as to just what took place between appellant and Brooks in regard to the subsequent sale of the land, but, even at the utmost of Brooks' contention in this respect, appellant only agreed that he would consent to some arrangement and "do what was right." Appellee knew that appellant was holding under a lease, and that Brooks was endeavoring to get the consent of appellant to a sale of the land. There was no consideration passed to appellant to support a surrender of the lease and possession of the premises, hence a mere unexecuted agreement on the part of appellant that he would consent to a sale did not bind him. Appellee was not in any sense an innocent purchaser, for, as before stated, the undisputed evidence shows that it had notice of appellant's lease and was aware that appellant was in actual possession at the time of the purchase from Brooks.

There is a conflict as to the extent of appellant's possession, it being contended that it is not sufficient to constitute actual possession. It is true that the proof shows that appellant was only using the land at the time for pasturage purposes, but the proof shows that this part of the land covered by the lease was under fence and that appellant was using it to pasture his cows. Appellee concedes that, at the time it made the purchase from Brooks and attempted to take possession, appellee was grazing two cows on the land. The fact that the lands were actually inclosed and were being controlled and used by appellant for any purpose at all was sufficient to constitute actual occupancy. The purchase of the land by appellee from Brooks was therefore subordinate to appellant's rights as lessee, and the court was correct in dismissing the complaint of appellee for want of equity. No appeal has been prosecuted from that part of the decree, but appellant complains that the court erred in not awarding him damages for being put out of possession and kept out during the pendency of the action. The reason given by the court for denying this

relief was that the description in appellant's lease was insufficient, but, as we have already seen, the court erred in that regard. If appellant's cross-complaint had been an independent action for damages, his remedy was complete at law, and he could not have invoked the jurisdiction of a court of equity; but, in the present action instituted by appellee, in which an injunction was obtained and which deprived appellant of substantial rights, the latter was entitled, under the statute, to a restitution of the possession of which he had been deprived by the injunction and an assessment of damages sustained by reason thereof. Crawford & Moses' Digest, §§ 5822, 5825. The effect of the dismissal of appellant's complaint was to dissolve the injunction, and appellant was entitled to the relief afforded under the statute. The court erred in dismissing the cause without granting relief, for appellant's cross-complaint was tantamount to a prayer for the restitution of possession and for assessment of damages.

The decree is therefore reversed, and the cause remanded with directions to the court to make an order of restitution, and proceed to the assessment of damages in accordance with the terms of the statute. It is so ordered.

HUNT v. ROAD IMPROVEMENT DISTRICT NO. 12.

Opinion delivered March 23, 1925.

1. HIGHWAYS—GROUNDS FOR SETTING ASIDE ASSESSMENTS.—Where plans were formed, benefits assessed and money borrowed for a road improvement, the fact that the anticipated benefits were not realized or that the available funds were insufficient to complete the improvement does not afford grounds for cancelling the assessments which were made and taxes thereon levied to pay outstanding obligations.
2. HIGHWAYS—IMPROVEMENT DISTRICT—REASSESSMENT.—In a suit by taxpayers against a road improvement district to cancel assessments, and eliminate plaintiffs' lands from the district, wherein plaintiffs did not ask for a reassessment nor state facts sufficient to show the necessity for a reassessment in conformity with

the statute, a decree ordering a reassessment of benefits *held* unwarranted.

3. HIGHWAYS—REASSESSMENT WARRANTED WHEN.—Under the statute creating a road improvement district, a reassessment of the benefits assessed in a road improvement district is not justified unless it can be made without diminishing the total amount of assessments.

Appeal from Woodruff Chancery Court, Southern District; *A. L. Hutchins,* Chancellor; affirmed.

Jonas F. Dyson, for appellant.

W. J. Dungan, for appellee.

McCULLOCH, C. J. This appeal involves two consolidated actions in the chancery court of Woodruff County—one instituted by appellee road improvement district against certain delinquent taxpayers to enforce taxes on betterments, and the other instituted by certain other taxpayers to restrain the road district from attempting to enforce assessments, and praying also for a decree canceling the assessments on their lands. In both cases there is an effort to cancel the assessments of benefits on the alleged ground that the part of the road to be improved contiguous to the lands of appellants was not in fact improved at all, and that, on account of the omission to compete the improvement as originally planned, the lands of appellants will receive no benefit. The two cases were, as before stated, consolidated, and heard by the chancery court as one case upon the following agreed statement of facts:

"That Road Improvement District No. 12 of Woodruff County was created under act 402 of the General Assembly of 1919. That, pursuant to the authority contained in the act, the board of commissioners of said road district proceeded to assess the benefits to the lands embraced in the district that would accrue by reason of the improvement contemplated in the act. That the lands described in the complaint are embraced in the district, and the benefits alleged in the complaint were assessed in the amounts and for the years named in the complaint. That thereafter a tax levy was made

by the county court of Woodruff County on said land, and taxes thereafter were collected as alleged in the complaint, in the amounts, or at the rates, and for the years as alleged. That the said assessed benefits above described constitute a lien on all of the lands in the district. That, pursuant to the authority contained in act 402, the board of commissioners issued and sold to third persons bonds of the district in the sum of $585,000, these being interest-bearing bonds, the interest on same maturing semi-annually. That of said bonds $545,000 are now outstanding and unpaid. That the benefits assessed on the lands stand as security for the payment of said indebtedness. The total assessed benefits as filed by the board of commissioners in Road Improvement District No. 12 of Woodruff County is $979,590.37.

"We further agree that the board of commissioners undertook the construction of the road and laterals provided by the statute, and spent all of the money derived from the sale of the bonds above mentioned in such construction, but said board did no work toward the construction of that part of the road described in the complaint as 'beginning at the intersection of the old military road with the St. Francis and Woodruff County lines and running in a southwesterly direction to the town of Hunter, in section 17, township 5 north, range 1 west,' and agree that the construction of said part of the road is not under contemplation by the board of commissioners. That the engineer's work was terminated and his connection with the board of commissioners ended on July 1, 1922."

The court found against appellants as to the validity of the assessment of benefits, and denied relief by cancellation, and, on the contrary, decreed the enforcement of the delinquent taxes, and also decreed that the commissioners should make a reassessment of benefits in the district, pursuant to the statute creating it. Road Acts, 1919, vol. 2, p. 1693. Appellants have duly prosecuted an appeal from that part of the decree refusing to cancel the assessments and enforcing the liens for

delinquent taxes, and appellee has cross-appealed from that part of the decree ordering a reassessment.

We are of the opinion that the chancellor was correct in refusing to cancel the assessments and in enforcing delinquent taxes. The only ground upon which appellants base their claim is that the funds borrowed for the construction of the road have proved insufficient to complete the improvement. This does not, however, afford legal grounds for setting aside the assessments. It is not contended that the statute was not complied with as to the formation of plans for an improvement, to cost not exceeding the amount of the benefits, but, on the contrary, it is admitted that the plans were formed and benefits were assessed and money was borrowed, and that there are outstanding bonds. The fact that the anticipated benefits were not realized from the improvement or the fact that the available funds were insufficient to complete the improvement does not afford grounds for cancelling the assessments which were made and taxes thereon levied to pay outstanding obligations. *Salmon* v. *Board of Directors,* 100 Ark. 366; *Road Improvement District* v. *Morris,* 153 Ark. 635.

Counsel for appellant relies on the decisions of this court in *Phillips* v. *Tyronza & St. Francis Road District,* 145 Ark. 487, and *House* v. *Road Improvement District,* 158 Ark. 263. In the Phillips case, *supra,* there was an attempt to change the plan by eliminating a lateral road provided in the statute as a part of the authorized improvement, and we held that there was no authority to thus change the statutory plan and depart from it. In the House case, *supra,* the same principle was announced. In the present case there was no change of plan—no attempt at substantial departure from the statutory scheme—but there was merely a failure to complete the improvement according to plans. It there had been an attempted departure from the terms of the statute, landowners had the right to prevent the issuance of bonds

and the levy of assessments, as in the Phillips case, *supra,* but that was not done. On the contrary, under the plans adopted, assessments were levied, money was borrowed and bonds issued. No relief can be afforded merely because the funds proved to be insufficient.

Our conclusion, however, with respect to the other feature of the case is that the court erred in ordering a reassessment. There were no sufficient grounds shown in the pleadings or the proof for such a decree. The sole efforts of appellants in the present litigation were to cancel the assessments and eliminate their lands from the district. They did not ask for a reassessment, nor did they state facts sufficient to show that a reassessment should be made in conformity with the statute; that is to say, a reassessment which would not diminish the total amount of benefits as originally assessed. The statute expressly forbids a diminishing of the total amount of assessments, and, unless there are facts stated sufficient to justify granting relief without diminishing the assessments, there are no grounds for ordering a reassessment.

Counsel for appellants rely on the decision of this court in *Road Improvement District* v. *Morris, supra,* but we do not think that the case supports that view. In that case the action was brought for the express purpose of compelling the board of commissioners to make a reassessment pursuant to statute, and it was alleged that demand had been made on the commissioners for that purpose, and refused. The question decided was whether or not the chancery court had jurisdiction to order a reassessment, and the court answered that question in the affirmative. There is no question here about the jurisdiction of the court, but the difficulty is that the court exercised jurisdiction and granted a decree compelling a reassessment without a showing of sufficient facts to justify it.

That part of the decree ordering a reassessment is therefore reversed, and the remainder of the decree is affirmed. The cause will be remanded, with directions to enter a decree in accordance with this opinion. It is so ordered.

MOYER v. ALTHEIMER.

Opinion delivered March 23, 1925.

1. MANDAMUS—COMPELLING COUNTY COURT TO ALLOT ROAD FUNDS.—Mandamus is the remedy provided by Special Acts 1923, p. 370, § 5, to compel the Pulaski County Court to appropriate the minimum amount per square yard for aid to road improvement districts building hard surface roads of concrete or asphalt with concrete base, as the county court has no discretion as to allowance of the minimum.

2. MANDAMUS—LEGISLATIVE CONTROL OVER REMEDIES.—Special Acts 1923, p. 370, § 5, providing for allotment of a portion of the road funds to road improvement districts in Pulaski County, so far as it provides for enforcement of its provisions by mandamus, was within the power of the Legislature, which has complete control of the forms of remedies, so long as it does not invade the constitutional jurisdiction of the courts.

3. HIGHWAYS—ALLOTMENT OF ROAD FUNDS.—Special Acts, 1923, p. 370, requiring the Pulaski County Court to appropriate a portion of the road funds derived from the three-mill road tax, the gasoline tax, the per capita tax, the automobile tax, and "any other tax now or that may hereafter be levied and collected for use on the roads and highways of Pulaski County," *held* to refer only to taxes of similar character to those enumerated, and not to the general revenue of the county, and not to be invalid as an invasion of the jurisdiction of the county court over the highways and of the disbursement of the county revenues.

4. HIGHWAYS—APPROPRIATION OF FUNDS—DISCRIMINATION.—Special Acts, p. 370, §§ 1, 2, requiring the apportionment of funds to road improvement districts *held* not void as discriminating between rural and urban districts and between improved roads of different types, as the control of the Legislature over the tax is supreme, and the rule of uniformity of distribution does not apply.

5. HIGHWAYS—PRESUMPTION AS TO CHARACTER OF ROAD.—Although the record fails to show the character of the road for which a distribution of county road funds is sought, it will be presumed that the improvement district was legally organized and that the road improved is a public highway.

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

W. H. Donham and *Lee Miles,* for appellant.

R. E. Wiley and *Gray, Burrow & McDonnell,* for appellee.

McCULLOCH, C. J. Appellees are the commissioners of a road improvement district in Pulaski County, designated as Little Rock-Levy and Park Hill Paving District No. 4, created by special act of the General Assembly, and they instituted this action in the circuit court of Pulaski County to compel appellant, the county court, by peremptory mandamus, to apportion to said improvement district its alleged share of road funds prescribed by statute. They alleged in their petition for mandamus that they had filed an application, or petition, with the county judge asking for a distribution of funds, and that the county judge denied the petition and refused to apportion any funds to the district. Appellant demurred to the petition of appellees, which was overruled, and then answered, and, upon the facts stated in the pleadings, the court awarded the writ as prayed for in the petition of appellees.

The statute which forms the basis of the proceeding was enacted by the General Assembly of 1923, and is applicable only to Pulaski County. Special Acts 1923, p. 370, section 1 of the statute, reads as follows:

"The county court of Pulaski County shall set aside from time to time, into what shall be known as a 'fund for building permanent roads,' a sum that shall be one-half of all road funds of every class and kind that may come into the hands of the county court for use by the county court on the roads of Pulaski County, which shall include 50 per cent. of the county court's portion of any of the following taxes: three-mill road tax, gasoline tax, per capita tax, automobile tax, or any other tax now or that may hereafter be levied and collected for use on the roads and highways of Pulaski County."

Section 2 provides that an improvement district organized upon the petition of property holders "for the purpose of building roads, highways or public thor-

oughfares, where the improvement contemplated shall provide for a paved road surface of concrete or asphalt pavement on a concrete base, shall, on filing of plans thereof, have the right to petition the county court of Pulaski County for aid out of said 'funds for building permanent roads,' in an amount that will not exceed one dollar per square yard for the pavement that the district proposes to build, as shown by plans and specifications filed," and that "it shall be the duty of the county court to make and enter an order allowing such district such aid as the county court may deem wise and expedient, taking into consideration the importance of the road seeking aid, however, not less than fifty cents nor more than one dollar for each square yard of concrete pavement or asphalt type pavement laid on concrete base, that the district proposes to build, shall be allotted any such district."

There are other sections of the statute not deemed pertinent to this controversy, except the concluding sentence of § 5, which reads as follows: "Any provision of this act may be enforced by mandamus by any taxpayer of Pulaski County."

It is further contended by counsel for appellant, as grounds for reversal, that the remedy sought by appellees is not available, and that there should have been an appeal from the judgment or ruling of the county court in refusing to make the distribution of funds. Counsel invoke the rule, often announced by this court, that remedy by mandamus cannot be made a substitute for an appeal or writ of error (*Basham* v. *Carroll*, 44 Ark. 284), and that the remedy cannot be adopted to control a judicial act or the exercise of discretion by a public officer, either judicial or ministerial. *Rolfe* v. *Spybuck Drainage District*, 101 Ark. 29. These principles have been often announced by this court, but there are exceptions to the rule, equally well settled, that mandamus is available as a remedy to compel the performance of purely ministerial acts not involving discretion, and also

to compel public officers, either judicial or ministerial, to act—not to control the exercise of discretion or judgment, but to compel action. Examples of this exception are found in cases where the county court was compelled to levy taxes to pay certain debts, the court having refused to act in the matter (*Lee County* v. *State,* 36 Ark. 276; *Hempstead County* v. *Graves,* 44 Ark. 317), and in cases where the county court has refused to levy taxes on benefits in a road district (*Carl-Lee* v. *Road Improvement District,* 157 Ark. 137), and in cases where the county judge refused to proceed with the designation of a county depository (*Robertson* v. *Derrick,* 113 Ark. 40). In the last-mentioned case it was said: "Judicial discretion, in those matters committed to the county court, will not be controlled by writ of mandamus, but, even in those matters where the court fails or refuses to act at all, it can be set in motion by mandamus." The present statute expressly confers the remedy of mandamus, and, since the Legislature has complete power in prescribing the form of remedies which do not invade or exceed the constitutional jurisdiction of courts, there is no reason for holding that the designation of this remedy in the present instance was beyond the power of the Legislature. Here we have a case where the lawmakers prescribe a definite action for the county court in the distribution of funds. A minimum and a maximum amount are designated, and the county court has no discretion save in fixing the amount between the minimum and maximum. The judgment of the circuit court in awarding the mandamus is that the court be compelled to allot to appellees the minimum amount prescribed by the statute, and this is not an attempt to control the discretion of the county court, for it has no discretion in the matter as to the allowance of the minimum prescribed by the statute.

It is contended that the statute providing for the distribution of funds is unconstitutional and void, first, for the reason that it constitutes an invasion of the jurisdiction of the county court over highways and the dis-

bursement of revenues of the county. Prior decisions of this court settle that question against the contention of counsel. *Texarkana* v. *Edwards,* 76 Ark. 22; *Sanderson* v. *Texarkana,* 103 Ark. 529; *El Dorado* v. *Union County,* 122 Ark. 184; *Adkins* v. *Harrington,* 164 Ark. 280. In those cases it was decided that the Legislature could control the distribution of road funds other than those derived through the general revenues of the county. The distinction between the power to distribute the county general fund, fixed by the Constitution, and other funds raised for road purposes, is pointed out in the case of *El Dorado* v. *Union County, supra.* In the recent case of *Adkins* v. *Harrington, supra,* there was involved the constitutionality of a special statute which required distribution to a specified street improvement district in Little Rock of all the revenues derived from the three-mill road tax imposed on real property situated within the district, and the court upheld the validity of that statute. The controlling force of that decision cannot be escaped in the present controversy. In each of the foregoing cases there was involved a legislative allotment of funds to a municipality for street purposes, but none of the decisions turned on that feature. The distinction was made solely on the kind of funds to be distributed, and not on the character of the public agency which was to receive the funds. But it is contended that the present statute does not fall within prior decisions, and that the statute is void for the reason that it embraces not only the three-mill tax, the gasoline tax, the per capita tax and the automobile tax, but also "any other tax now or that may hereafter be levied and collected for use on the roads and highways of Pulaski County." It is argued that this language embraces general revenues appropriated for road purposes. We do not think the statute is fairly open to that interpretation. The rule of *ejusdem generis* is applicable, and this language only applies to taxes which may be levied of a similar character to those enumerated. Furthermore, this

language does not apply to general revenues for the reason that the road funds appropriated by the quorum court out of the general revenue fund do not constitute taxes "levied and collected for use on the roads and highways." The fund thus collected is not a levy for road purposes, but it constitutes a levy for general revenue purposes, and this is not altered by the fact that the quorum court distributes it by appropriation to roads as well as to other purposes of the county. All of the taxes specified in the statute are those over which the Legislature has complete control, according to the decisions cited above, and we think that the contention that this is an invasion of the jurisdiction of the county court is entirely unfounded.

It is contended that the views now expressed, as well as the holding of the court in the cases cited above, are in conflict with the decision in the case of *State* v. *Berry,* 158 Ark. 84. We do not think, however, that the case just cited has any bearing on the present question or that it is in conflict with prior decisions. In that case we dealt with a statute which levied a county privilege tax, pursuant to the constitutional authority delegating to counties the power to tax privileges. Such a tax, whether levied directly by the county or by the Legislature for the county, was a county tax, and the funds were necessarily general revenue funds of the county, which fell within the constitutional jurisdiction of the county court. We merely decided in that case that the Legislature could not take away from the county court jurisdiction over this fund and delegate the authority to a board composed of commissioners of the various road districts of the county. We held in the cases cited *supra* that the three-mill road tax is not a part of the revenues committed absolutely to the control of the county court, and it follows that other taxes levied, not as general revenue funds of the county, fall within the same category. The statute is not therefore void on the grounds stated above.

It is further contended that the statute is void because it discriminates between rural road districts and districts within the city of Little Rock, and also between improved roads of different types. The answer to this contention is that the control of the Legislature over the tax is supreme, and the rule of uniformity in the distribution of revenues raised by such taxation does not apply. *Sanderson* v. *Texarkana,* 103 Ark. 534.

Finally, there is a bare suggestion in the brief of counsel for appellant, without extended argument, that the record fails to show that the road improved by the district in question was a public highway, and that it does not fall within the terms of the statute under consideration. It has been held by this court that improvement districts cannot be organized to improve roads other than public highways (*Glover* v. *Improvement District,* 89 Ark. 513), and the statute under consideration must be interpreted to refer only to roads which were public highways at the time the improvement was to be made. On examination of the record we fail to find any reference to the character of the road as to whether or not it was a public highway at the time it was to be improved, but we must indulge the presumption, until it appears to the contrary, that the improvement district was legally organized, and that it was a public highway.

It was a district organized by order of the county court on petition of a majority of the owners of property, and the presumption is conclusive that the road to be improved was established as a public highway.

This disposes of all the questions raised on the appeal, and, since we have reached the conclusion that the statute is valid, and that the judgment of the circuit court thereunder was correct, it follows that the judgment must be affirmed, and it is so ordered.

WOOD and HART, JJ., dissent.

BROWN v. KAMMERMAN.

Opinion delivered March 23, 1925.

1. LOGS AND LOGGING—SALE OF TIMBER.—A contract whereby the owner of land agreed to sell the merchantable timber thereon, to be cut and removed by a certain date, the consideration being certain work to be done by the grantee by a certain date, and upon his failure to do the work the grantee to pay $4 per acre, *held* to be a sale of timber, and not a mere contract of employment.
2. LOGS AND LOGGING—TITLE TO TIMBER CUT.—Where timber was cut under a contract of sale, and left on the land by agreement of the owner, the title was in the purchaser, and the owner of the land had no title to convey to a purchaser of the land, though the latter had no notice of the sale of the timber.
3. EVIDENCE—MARKET VALUE OF TIMBER.—In replevin for logs or their value, testimony as to their value at the nearest market was admissible upon proof that they had no market value at the place from which they were taken.
4. REPLEVIN—MARKET VALUE OF CONVERTED TIMBER.—Where the owner of timber was prevented from receiving it by the purchaser of the property on which the timber was lying, under claim of ownership, the market value at the time the action of replevin was brought, and not at the time defendant claimed the timber was recoverable.
5. TRIAL—NECESSITY OF SPECIFIC OBJECTION TO INSTRUCTION.—In replevin for timber of its value an instruction that if the jury found for plaintiff they should find for him the value of the logs at the time the suit was brought, though not as full and accurate as it might have been, was not inherently erroneous or prejudicial in the absence of specific objection.

Appeal from Clay Circuit Court, Western District; *G. E. Keck*, Judge; affirmed.

C. T. Bloodworth, for appellant.

Oliver & Oliver, for appellee.

WOOD, J. On the 14th of January, 1922, D. Hopson and W. A. Kammerman entered into a contract whereby Hopson agreed to sell to Kammerman all the merchantable timber on the north half of a certain tract of land, the timber to be cut and removed by May 1, 1922. In consideration of the contract, Kammerman agreed to slash and cut all the timber before May 1, 1922, and he

was to have all of the timber so cut by him. If he failed or refused to cut and slash all the timber before that date, he was to pay Hopson the sum of $4 per acre for the timber on the land. Kammerman entered upon the performance of the contract and cut all the timber on the tract, with the exception of a few trees, by the 26th day of April, 1922. Kammerman told Hopson, the other party to the contract, that he wanted to leave some of the logs on the land until he could conveniently get them off, and Hopson said, "That will be all right." After May 1, 1922, Kammerman left on the land certain cypress logs containing 11,575 feet. On October 25, 1922, Hopson sold to D. A. Brown the tract of land on which the cypress logs cut by Kammerman were situated. After Brown purchased the land, Kammerman undertook to remove the logs, and Brown objected, and Kammerman instituted this action in replevin against Brown to recover the logs or their value.

Brown denied that Kammerman was the owner and entitled to the possession of the logs. In addition to the above, there was testimony on behalf of Kammerman tending to prove that there were 11,575 feet of cypress logs on the land, worth from fifteen to eighteen dollars per thousand feet. There was also testimony to the effect that the logs were damaged, and that four or five dollars per thousand feet would be a reasonable market value of the logs on the land at the time Brown purchased the same from Hopson. Brown testified to the effect that, at the time he purchased the land from Hopson, Hopson told him that Kammerman's time for cutting the logs was out, and exhibited to Brown the contract he had with Kammerman. Witness told Kammerman that he could have all the logs that he had cut and left on the land, except the cypress. All the logs except the cypress were on the land still. Witness hauled the cypress logs and scaled them, there being something over 10,000 feet. At the time he bought the land from Hopson there were 35 or 36 big trees standing on the

land, and there was a strip that lacked 20 or 30 feet of being all slabs. Other witnesses corroborated Brown's testimony to the effect that there was a strip left on the land that had not been slashed in the fall of 1922, about 20 or 30 yards wide. Hopson corroborated the testimony of Kammerman to the effect that, after the time for the slashing of the timber under the contract had expired, he agreed with Kammerman to extend the time. At the time he sold the land to Brown he showed Brown witness' contract with Kammerman and told him about the extension. Witness didn't know, when he sold the land to Brown, that any logs were left there. If Kammerman said anything about logs being there, witness didn't remember it. When Brown was negotiating with the witness to buy the land, he asked witness if he was buying everything that was there, and witness told him, "Yes." At the time Brown bought the land witness didn't consider his contract with Kammerman had anything to do with it, except to show Brown the time that it expired. Hopson further testified that, at the time he sold the land to Brown, he didn't claim title to the logs that had been cut on the land.

Kammerman testified in rebuttal that Hopson's foreman inspected the work witness had done in slashing the land, and told witness that it was all right.

The court told the jury, in its instruction No. 4, that "if you find for the plaintiff, you find for him the value of the cypress logs at the time the suit was brought." The appellant duly excepted to the giving of this instruction. The defendant asked the court to instruct the jury to the effect that, if they found for the plaintiff, they should find for him in such sum as they believed from a preponderance of the evidence was the fair and reasonable market value of the logs at the time the claim was made to them by the defendant, and that the reasonable market value would mean the value at the time of the taking as they lay on the ground where they were claimed by the defendant, and didn't mean the value of

the lumber which might be cut from the logs. The court refused the defendant's prayer, to which ruling the defendant duly excepted. The jury returned a verdict in favor of the plaintiff below in the sum of $100. Judgment was entered in plaintiff's favor against the defendant for that sum, from which is this appeal.

1. The appellant contends that the contract under which the appellee claims title to the logs in controversy did not evidence a sale of timber to the appellee, but was a mere contract of employment, and therefore appellee had no title to the logs and no right to remove the same after May 1, 1922. We do not agree with learned counsel in this construction of the contract. The contract expressly provides: "Hopson has agreed to sell to the said Kammerman all the merchantable timber on the north half of SW¼, section 4, T. 21 N, R. 4 E., * * * such timber to be cut and removed by May 1, 1922." True, the contract specified that the consideration for the sale was certain work to be performed by Kammerman by a certain day, and, in the event the work was not performed within that time, then the grantee, Kammerman, could pay to the grantor, Hopson, as an alternative consideration, the sum of $4 per acre for the timber on or before the date mentioned.

The undisputed evidence in the case shows that the appellee, the grantee, had paid the purchase price, or consideration, for the timber in controversy to his grantor, Hopson, by his labor, and that Hopson, the grantor, had accepted this consideration before he sold the land to the appellant Brown. The timber in controversy, as we understand the testimony, was felled by the appellee before May 1, 1922, but was not removed until after that time. But the grantor, Hopson, agreed with the appellee to extend the time so far as the removal of the timber was concerned. Thus the contract for the sale and purchase of the timber between the grantor and the grantee was completed before the land on which the timber was situated was sold to the appellant Brown.

At the time Hopson sold the land to Brown, Hopson had no title to the timber in controversy which he could convey to Brown. At that time the timber had been felled by the appellee. It was personal property, and appellee had paid the consideration, which had been accepted by the vendor of the timber, and an extension of time granted by him to the appellee to remove the timber after May 1, 1922.

In *Indiana & Arkansas Mfg. Co.* v. *Eldridge,* 89 Ark. 361-367, we said: "In this case the contract of sale must be construed as an entire instrument, and we think that the words 'cut and remove' in the connection in which they are used, mean a severance from the soil. It necessarily follows that, when severed from the soil by the grantee, the timber becomes its personal property, and subject to the law concerning personal property."

In *Griffin* v. *Anderson-Tully Co.,* 91 Ark. 292, we held (quoting syllabus): "Under a contract for the sale of growing timber, whereby the grantee is authorized to cut and remove timber within a certain period of time, the title to timber cut by the grantee within such period, but not removed from the land, passes to such grantee, together with a right for a reasonable time thereafter to remove the timber."

Here, as we have seen, the time was extended by mutual agreement between the grantor and grantee for the removal of the timber beyond the time specified in the written contract. Under the doctrine of the above cases, the title to the timber in controversy was unquestionably in the appellee.

2. The appellant next contends that the court erred in the admission of testimony and in its rulings on prayers for instructions concerning the value of the logs in controversy. The testimony on behalf of the appellee was to the effect that the logs in controversy had no market value at their location when replevied. But there was testimony tending to show that they had a market value when removed from the lands and taken to

the nearest market to be sawed into lumber. The court did not err in permitting the testimony as to such market value.

In *Clear Creek Oil & Gas Co.* v. *Bushmaier,* 165 Ark. 303, we said: "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." As the appellant refused to allow the appellee to remove his logs, and thus compelled the appellee to institute suit against him, the court did not err in instructing the jury that they should find for the appellee the value of the logs at the time of the institution of the suit, and did not err in refusing the prayer of appellant for instruction on the issue of value.

While instruction No. 4 given by the court was not as full and accurate as it should have been, yet it was not inherently erroneous, and there was no specific objection made to it. In the absence of such objection, there was no prejudicial error in giving it. In view of the undisputed evidence on the subject of value, it could not have misled the jury. There was ample testimony to sustain the amount of the verdict as fixed by the jury.

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

HOME LIFE & ACCIDENT COMPANY *v.* BECKNER.

Opinion delivered March 23, 1925.

1. INSURANCE—INDEMNITY POLICY—FORFEITURE.—Under a clause in an indemnity policy requiring the employer to give the insurer immediate written notice of any injury to an employee and of any suit instituted by the latter, the giving of such notice is

not a condition precedent, unless it is made so by express terms or by necessary implication, nor does failure to comply therewith constitute ground of forfeiture of the policy.

2. INSURANCE—INDEMNITY POLICY—DUTY TO GIVE NOTICE OF INJURY. —While a clause in an indemnity policy requiring the employer to give immediate written notice of any injury to an employee is not a condition precedent, such provision is valid, and there can be no recovery against the indemnitor unless there is a compliance therewith within a reasonable time.

3. INSURANCE—INDEMNITY POLICY—DELAY IN GIVING NOTICE OF INJURY.—Where an indemnity policy required immediate written notice of an injury to or suit by an employee, notice of an injury given one year, seven months and two days after the injury and ten months after suit brought was unreasonable delay, preventing recovery.

4. INSURANCE—INDEMNITY POLICY—EXCUSE FOR FAILURE TO GIVE NOTICE.—Where an indemnity policy required the insured employer to forward immediately any summons or other process in any suit by an injured employee against the employer, the fact that delay of 10 months in forwarding summons was occasioned by the advice of the employer's attorney that the insurer was not liable, *held* not to excuse the delay.

Appeal from Dallas Circuit Court; *Turner Butler*, Judge; reversed.

T. D. Wynne, for appellant.

James D. Head, Jones & Jones, McDonald & Jones, for appellee.

WOOD, J. On October 14, 1914, the appellant, a corporation of Arkansas, issued a policy in favor of the Pine Belt Lumber Company, a corporation of Oklahoma, to idemnify the latter for a term of one year against loss from liability arising out of damages not in excess of $10,000 on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period covered by the policy, by any employee of the lumber company while on duty within the factory, shop, or yards of the lumber company. The policy contained, among others, the following provisions:

"This insurance is subject to the following conditions: * * * *

"G. The assured, upon the occurrence of any accident, shall give immediate written notice thereof,

with the fullest information obtainable at the time, to the head office of the company at Fordyce, Arkansas, or to the agent countersigning this policy. He shall give like notice, with fullest particulars, of any claim that may be made on account of such accident, and shall at all times render to the company all cooperation and assistance in his power.

"H. If, thereafter, any suit is brought against this assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend it against such proceedings in the name and on behalf of the assured, unless it shall elect to settle the same or to pay the assured the indemnity provided for in clause 'A' as limited herein."

On the 25th of June, 1915, one Clifford Riggs, while in the employ of the lumber company, received a personal injury. On March 25, 1916, Riggs instituted an action against the lumber company in the Oklahoma District Court, and recovered judgment in that court for $6,000, which judgment was afterwards affirmed by the Supreme Court of Oklahoma. The lumber company paid this judgment in full on the third day of January, 1921, amounting, with interest at the time of the satisfaction, to the sum of $7,368.05. The lumber company, through its trustees, the appellees, instituted this action against the appellant to recover on the policy above mentioned the amount of that judgment. It was alleged in the appellees' complaint that the lumber company had complied with all the terms and provisions of the contract, and that the appellant refused to indemnify it as provided by the terms of the policy. The appellant defended on the ground that the lumber company had not complied with the provisions of the policy set out above.

The facts on the issues joined are substantially as follows: The injury to Riggs occurred, as above stated,

on June 25, 1915. On February 17, 1916, Riggs' attorney wrote to the lumber company, notifying it that they had been employed to represent Riggs' interest in his claim for damages against the company. They stated in this letter that the injuries were received as "a result of a train running away, over which the lumber company had control; that Riggs was riding on the engine by virtue of a pass that the lumber company had issued to him, permitting him to ride at his own risk."

McDonald, one of the attorneys for the lumber company, testified to the effect that, in his opinion, under the terms of the letter received by the lumber company from Riggs' attorneys, the insurance company was not liable because the letter showed that the relation between Riggs and the lumber company at the time of Riggs' injury was that of passenger and carrier, and not that of employer and employee. On January 24, 1917, one year, seven months and two days after the injury to Riggs, McDonald & Jones, attorneys for the lumber company, wrote to the appellant, stating in effect that Riggs had instituted a suit against it on March 26, 1916, claiming that he was injured while he was in the employ of the lumber company, and inclosing a copy of Riggs' complaint. In this letter the attorneys stated that it was the contention of the lumber company that Riggs was an independent contractor and not an employee, but that was a matter to be established in the court upon trial of the case; that, if Riggs were found to be an employee, then the lumber company would contend that it was within the protection of the insurance against liability under the terms of its policy, and therefore the lumber company was giving the insurance company notice of the action in order that the latter company might come in and defend same or take such steps as it deemed proper to protect its interests, and stating that the case would likely be set for trial on March 5, 1917. To this letter the insurance company replied, stating that it had no suggestions to make with reference to the defense of the

suit, for the reason that there was no obligation on its part to interest itself in the matter; that the injury was not reported to the appellant insurance company, and for that reason it declined to interpose. The cause, by consent, was heard by the trial court sitting as a jury, and the court found generally the facts and law in favor of the appellees, and rendered judgment in their favor in the sum of $7,368.05, with interest from the date of the judgment at the rate of six per cent. per annum from January 3, 1921. From that judgment is this appeal.

In the case of *Hope Spoke Co.* v. *Maryland Casualty Co.*, 102 Ark. 1, the policy under review contained the provision that "immediate notice of any accident and of any suit resulting therefrom, with every summons or other process, must be forwarded to the home office of the company, or to its authorized representatives." In that case the company issuing the policy received actual notice of the injury thirty-two days after it occurred, and it appeared that the company was not injured by reason of the fact that notice was not given earlier. The company made a full investigation in due time of the injury. We held, under the facts of that case, that the language of the policy above quoted was not a condition precedent to recovery on the policy, and said: "The contract of insurance does not, in express terms, make the provision with reference to giving notice of an accident a condition upon which liability of the insurer depended. The absence of language indicating an intention to make compliance with that provision a condition of recovery is noticeable. It does not, in express terms, declare a forfeiture of the insured's right to recovery upon failure to give notice, nor can it be fairly implied, from the language of the contract, that the provision was intended as a condition precedent to the right to recover. On the contrary, the form of the policy and the language employed in it indicated a contrary intention." While the clause of the policy under review in the case of *Hope Spoke Co.* v. *Md. Casualty Co., supra,*

is somewhat different from the language of the policy under review in the case at bar, there is no essential difference in principle. Whatever may be the rule in other jurisdictions, this court is committed to the doctrine that failure to give notice under a clause in a policy similar to that under review "does not operate as a forfeiture of the right to recover, unless the policy, in express terms, or by necessary implication, makes the giving of the notice within the time specified a condition precedent to recover." See also *Shafer* v. *U. S. Casualty Co.*, 90 Wash. 687, 156 Pac. 61; *Md. Cas. Co.* v. *Robertson & Co.*, (Tex.) 194 S. W. 10140. There is no such express provision in the policy under consideration and no language making the provision as to immediate notice the essence of the contract.

We therefore cannot concur in the view of the learned counsel for the appellant, that the clause of the policy for construction in the case at bar makes the failure of the assured to comply with the provisions of the policy in regard to the giving of immediate notice of the accident and of any suit instituted by the injured party against the assured conditions precedent and grounds of forfeiture of the policy. We do, however, fully agree with the counsel for appellant in his contention that there must be at least a *bona fide* compliance on the part of the assured with these provisions of the contract before he is entitled to a recovery. The assured, in other words, cannot wholly ignore the requirements of the policy as to notice of the occurrence of the accident and as to the claim of the assured on account thereof, and likewise the provision requiring notice of any suit brought by the injured party against the assured for damages on account of the accident. These provisions in an insurance policy are valid. They are intended for the protection of the insurer, in order that he may investigate the circumstances of the injury and determine the course that he will pursue with reference to any claim that may be asserted against the

assured by reason of such injury, either before or after suit. Even though not a condition precedent and not a ground for forfeiture of the policy, the insurer has the right to insist that the insured comply with the obligations of his contract. This court did not hold, in the case of *Hope Spoke Co.* v. *Md. Cas. Co., supra,* that such provisions of the contract of insurance could be disregarded on the part of the insured. On the contrary, we there held that there was a compliance with such provisions of the contract. As we view the authorities, the courts generally hold that there can be no recovery unless there is a compliance with these provisions of the policy. 4 Cooley's Briefs on Insurance, p. 3571; 67 L. R. A. 275.

This brings us to the question as to whether there is any substantial testimony tending to support the finding of the court that the appellees had complied with their contract to give immediate notice of the accident, and whether the lumber company immediately forwarded to appellant the summons served on the insurance company in the suit by Riggs against such company. Mr. Cooley says: "The condition requiring 'immediate notice' or 'notice forthwith' of injury to employees, means written notice within a reasonable time, under the circumstances of the case. * * * The question as to what would be a reasonable time, under the varying circumstances of each particular case, would seem primarily to be a question for the jury, under proper instructions by the court." Cooley's Briefs, pp. 3572-3575, and cases there cited.

The accident resulting in the injury to Riggs occurred on June 25, 1915. The manager of the company and also its attorney knew of the accident and injury to Riggs on that day. McDonald, attorney for the lumber company, was of the opinion, from the statement of how the accident occurred by the manager of the company, that the insurance company would not be liable under its policy. The lumber company did not notify

the insurance company of the accident until January 24, 1917. Riggs, through his attorneys, notified the lumber company of his claim for damages against it on February 17, 1916, and on the 25th of March, 1916, Riggs instituted a suit in a district court of Oklahoma against the lumber company to recover damages for his injury. But the lumber company did not notify the appellant insurance company of the filing of this suit until January 24, 1917. These facts are undisputed, and there is therefore no testimony to sustain a finding of the court that the appellant had notice of the accident and of the suit within a reasonable time. The court should have declared as a matter of law, upon the undisputed testimony, that the lumber company did not comply with the provisions of the contract concerning the notice to be given appellant of the occurrence of the accident and of the institution of the suit by Riggs against the lumber company. The failure of the lumber company to notify the appellant of the occurrence of the injury for a period of one year, seven months and two days after its date, is an unreasonable and inexcusable delay. Likewise, the failure on the part of the lumber company to forward the summons against it, thus notifying the insurance company of the suit that had been instituted against the lumber company by Riggs, for a period of ten months, was an unreasonable delay within the terms of the contract of insurance. The appellant is in no manner bound by the opinion of the lumber company's attorneys to the effect that the appellant, under the circumstances of the injury, was not liable to the lumber company under the policy. This opinion of the attorneys was not sufficient in law to justify it in failing, for a period of ten months, to forward notice to the appellant of the suit that had been filed against it.

Mr. Cooley says: "The courts, without regard to the question whether reasonableness of the time is a matter for the court or the jury, have held unexcused delays of varying length unreasonable *per se*," and sev-

eral cases are cited in support of the text, where failure to give notice for a less time than ten months was held to be unreasonable delay. 4 Cooley's Briefs on Law of Insurance, p. 3573.

The trial court erred in failing to find as a matter of law that the lumber company had not complied with its contract, and that it was therefore not entitled to recover. The judgment is therefore reversed, and the cause will be dismissed.

McCULLOCH, C. J., (concurring). My concurrence in the reversal of this case is based entirely on other grounds than those stated in the opinion of the majority, for I think that a double mistake has been made by the majority in holding that the giving of immediate notice of injury and of the commencement of an action was not a condition precedent to the performance of which operated as a forfeiture, and in holding that failure to comply with these requirements operated as a forfeiture without the same being treated as conditions precedent. My view of the case is that the requirements with respect to notice were conditions precedent, and that there was a forfeiture on account of failure to perform those conditions. It seems to me that the majority have misconceived and misapplied the decision of our court in *Hope Spoke Co.* v. *Maryland Casualty Co.*, 102 Ark. 1. The policies involved in the two cases are radically different. The policy in the case cited did not, either in express words or by necessary implication, declare the requirement with respect to notice to be a condition. The policy merely stated the requirement, but did not make it a condition, nor declare that a forfeiture would result from non-compliance. On the other hand, the policy in the case now before us states that it "is subject to the following conditions," and then proceeds to state the requirements in regard to notice. It does not state the requirement as a condition precedent, but does state it as a condition, and the necessary result is that it is a condition precedent. In the opinion in the case cited we recognized that the question involved was a very close one, and that the

terms of the policy came very close to the line of distinction in the authorities on the subject. We followed the line of authorities holding that "failure to give notice within a specified time, in accordance with the terms of the policy, does not operate as a forfeiture of the right to recover unless the policy in express terms or by necessary implication makes the giving of notice within the specified time a condition precedent to recovery." In the present case the policy does, in express terms, declare the giving of notice within the time specified to be a condition. If it is a condition at all, it is a condition precedent to the right of recovery on the policy.

The majority is also in error, I think, in holding that, if the requirement was not a condition precedent, the failure to give notice in this case worked a forfeiture. The correct rule is that, unless the requirements of the policy constitute conditions precedent to recovery, or all rights under the policy are forfeited by failure to comply with the requirements, then the omission is not a defense to a suit on the policy unless some injury resulted from such omission. That is precisely what we decided in *Hope Spoke Co.* v. *Maryland Casualty Co., supra.* In that case we held that the requirement of notice was not a condition precedent, and that failure to strictly comply with the requirement was not a defense because no injury was shown to have resulted. See also *Frank Parmelee Co.* v. *Aetna Life Insurance Co.*, 166 Fed. 741, where the court said: "In contracts of this kind, to escape liability, the insurer must show that the breach is something more than a mere technical departure from the letter of the bond—that is, a departure that results in substantial prejudice and injury to its position in the matter."

In the present case there was no attempt to show that any injury resulted to appellant from the failure of appellee to give notice of the injury and of the institution of the action by the injured employee. But, for the reasons stated above, I concur in the reversal.

Mr. Justice SMITH agrees with me in the views here expressed.

KUSIN v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Opinion delivered March 23, 1925.

CARRIER—FILING CLAIM OF LOSS WITHIN STIPULATED TIME.—A requirement in a bill of lading that claims for loss, damage or delay should be presented within a stipulated time is not complied with nor waived where the shipper notified the carrier of the loss of goods, to which the carrier responded that it was doing everything possible to bring the claim to a settlement.

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

Jean & Jones, Little Rock; *Geo. J. Ginsberg*, Alexandria, La., of counsel, for appellant.

George B. Pugh, Little Rock, for appellee.

WOOD, J. This action was instituted by the appellant against the appellee for the loss of a shipment of machinery shipped by the appellant to Smith & Furbush Machine Company at Philadelphia, Pennsylvania, over appellee's line of railway and connecting carriers. The shipment was delivered to the appellee's local agent at Little Rock, Arkansas, on March 23, 1920, on which date the agent delivered to appellant a bill of lading evidencing the contract of shipment. The appellant alleged that the machinery had never been delivered by the appellee and its connecting carriers to the consignee, and that same was lost. The appellant specified the articles shipped and their value, amounting in the aggregate to the sum of $1,010.85, for which he prayed judgment.

The appellee denied the material allegations of the complaint, and set up, among other things, in defense the following clause in the bill of lading: "As a condition precedent to recovery, claims must be made in writing to the originating, or delivering, carrier within six months after delivery of the property; or, in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Where claims for loss, damage or delay are not filed, or suits not instituted thereon, in accordance with the foregoing

provisions, the carriers will not be liable, and such claims will not be paid."

The testimony on behalf of the appellant tended to show that the machinery was delivered to the appellee at Little Rock, Arkansas, for shipment to Smith & Furbush Machine Company at Philadelphia, on March 23, 1920. Under the testimony, the shipment should have been delivered not later than June 23, 1920. On June 24, 1920, the appellant notified the local agent of appellee at Little Rock, by letter, that the machinery had not been delivered to the consignee. The letter to the local agent gave the description of the machinery, the names of the consignor and consignee, the point of delivery, and stated that the appellant was very much in need of the goods. Again, on October 25, appellant wrote the local agent a similar letter. On October 29, 1920, at the appellee's request, the bill of lading was forwarded to appellee's local freight agent. On November 6, 1920, the appellee's local freight agent wrote the appellant to the effect that the shipment had gone forward over the appellee's connecting carrier at Memphis. Inclosed in the letter was the freight bill showing the delivery to the connecting carrier. The appellant also wrote, before December 23, 1920, a letter to the connecting carrier's local freight agent at Memphis, concerning the shipment; and again, on January 17, 1921, appellant wrote a letter to the local freight agent of the connecting carrier at Memphis. The purport of these letters was to notify the local agent that the machinery had not been delivered and that the appellant was needing the same, and urging the railway companies to see that the machinery was delivered. The appellee did not file a written demand or claim for the loss of the machinery, giving the items and the value thereof, until February 7, 1922. On that day appellant did file its claim showing the value of each article of machinery lost, amounting in the aggregate to $1,010.85. On April 13, 1922, appellee's superintendent of freight claims wrote the appel-

lant a letter in which he stated: "In reply to your favor of April 6, 1922, relative to your claim, amounting to $1,010.85, * * * we assure you that we are doing everything possible to bring same to a speedy close;" and again, a similar letter on May 23, 1922, in which the appellee, among other things, stated: "We assure you that we are doing everything possible to bring this claim to a prompt settlement, and would thank you to wait just a little longer until the papers are returned."

On February 3, 1923, appellee wrote appellant a letter as follows: "With further reference to your claim, dated February 7, 1922, amount $1,010.85. * * * After a lengthy investigation we find that the shipment was delivered to the consignee at destination, they acknowledging receiving the entire shipment in six boxes, although the bill of lading called for seven; * * * therefore we are returning all papers in support of your claim, respectfully declined."

The appellant asked the court to instruct the jury in effect that the correspondence constituted proper notice provided for in the bill of lading, and that the appellee was estopped by its correspondence from setting up in defense the insufficiency of the alleged notice or claim or the mode or manner in giving same; that it should be presumed that the appellee had waived the stipulation in the bill of lading sued on respecting the notice of, or claim for, the alleged lost shipment. The court refused to so instruct the jury, to which ruling the appellant duly excepted. The appellee asked the court to instruct the jury to return a verdict in its favor, which request the court granted, and to which ruling the appellant duly excepted. The jury returned a verdict as directed, and from a judgment rendered in favor of the appellee is this appeal.

In *Chicago, Rock Island Ry. Co.* v. *Williams,* 101 Ark. 436, this court had under consideration a provision

in a bill of lading similar in all essential particulars to that under review here. In that case we said: "In the present case the requirement is not merely for notice to the carrier that damage has resulted, but it is that the claim for the 'loss, damage or delay' shall be presented within the stipulated time. The purpose of the requirement is to give the carrier timely opportunity to investigate the claim for damage after the same has been presented. This involves the right to investigate the contents of lost packages and the value of lost articles, as well as the facts bearing upon the question of its liability. The distinction is clearly pointed out by Judge RIDDICK in the opinion of the court in *Western Union Tel. Co.* v. *Moxley,* 80 Ark. 554, and we are of the opinion that that decision is conclusive of the present case. It was held in that case that, where the contract required the presentation of claim for damages within a specified time, this requirement was not satisfied merely by giving notice of the negligence of the company's servants. This court has in several cases held that a provision of this kind is reasonable and enforceable where sufficient time is given for presenting the claim or notice."

In the recent case of *Davis* v. *Henderson,* 266 U. S. 92 (Arkansas case), the Supreme Court of the United States held (quoting syllabus): "A tariff rule, approved by the Interstate Commerce Commission, providing that orders for cars given the carrier's local agent must be in writing, cannot be waived by the carrier through the agent's acceptance of oral notice from the shipper." In the opinion the court said: "There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff." See cases there cited. Also, *C. P. Blackburn & Co. et al* v. *Ann Arbor Railway Co. et al,* 56 I. C. C. Reports 439; Traffic Law Service

Series 1921, § 2019, p. 317-318; Consolidated Freight Classification No. 4, p. 37. *

The judgment is therefore correct, and it is affrmed.

RUSSELL v. WOOTEN.

Opinion delivered March 23, 1925.

JUDGMENT—ASSIGNMENT OF DOWER—RES JUDICATA.—Where the probate court, in assigning dower, determined the extent and value of the defendant's homestead set apart to the widow, such judgment was conclusive upon the heirs who were parties to the proceeding and made no objection to the judgment.

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

H. F. Roleson and *C. W. Norton*, for appellant.

D. S. Plummer, for appellee.

WOOD, J. The appellees instituted this action on the 7th day of January, 1920, in the Lee Chancery Court, against the appellants. They alleged in substance that they and the appellant, James Lee Grimes, were the only heirs at law of J. M. Grimes, who died intestate on the 8th of August, 1912; that the appellees and appellant, James Lee Grimes, as the heirs of J. M. Grimes, were the owners of the NW¼ of section 31, township 1 north, range 3 east, containing 160 acres, subject to the homestead in eighty acres of the same in the widow, Mrs. Mollie Grimes, now Mrs. Mollie Russell; that the homestead had never been set apart and had never been claimed by her as a homestead; that, since the death of their father, the appellants had collected all the rents of the 160 acres and had not accounted to the appellees for rents on the eighty acres belonging to the appellees and James Lee Grimes. They prayed that

Reporter's Note:

*The case of *Adams Express Company* v. *Van Pelt* was decided by the Supreme Court of the United States on April 13, 1925, subsequent to the rendition of the decision in the present case; and the question of validity of the stipulation in the bill of lading concerning claim for damages was not raised in the present case.

Mrs. Mollie Russell be required to select her homestead, and that she and appellant James Lee Grimes be required to account to the appellees for five-sixths of the rents collected on the land above described, amounting in the aggregate to the sum of $2,520, and that the lands be sold for partition.

The appellants answered and set up, in substance, that, at the May term, 1914, of the Lee probate court, Mrs. Russell, in her own behalf as widow of J. M. Grimes, and in behalf of the heirs of J. M. Grimes, deceased, applied to the probate court for an allotment of dower and homestead in the lands described; that all of the appellees were parties to that proceeding, in which it was finally adjudged that the lands above described were the homestead of the widow and minor heirs of J. M. Grimes, deceased; that no appeal was taken from the judgment of the probate court, and appellants pleaded the same as *res judicata* of the present action. Appellant also set up that the appellees had received their part of the rent and profits of the tract of land above described continuously since the judgment of the probate court, and were estopped thereby from asserting that the same was not the homestead of the appellants.

The records of the probate court were in evidence, which show that, at the May term of that court, 1914, Mrs. Mollie Russell, widow of James M. Grimes, deceased, petitioned the court for assignment of her dower in his lands, and the following are the excerpts from the record that are pertinent to this action:

"It appearing to the court that J. M. Grimes, at the time of his death, lived upon and occupied as his homestead the northwest quarter of section 31 township 1 N., R. 3 east, which remains the homestead of the widow and minor children, * * * the court grants the petition, and directs that all of the heirs of J. M. Grimes be summoned to show cause, if any they have, against such assignment." Again:

"On this day comes on for hearing the petition of Mrs. Mollie E. Grimes (now Mollie E. Russell), widow

of J. M. Grimes, deceased, for dower in the lands of said estate, which said petition was heretofore filed herein, and, it appearing to the court that due notice has been given to all of the heirs of J. M. Grimes, and no objection or other pleas being filed against the same, the court, being fully advised, doth grant said petition. It appears to the court that said J. M. Grimes at the time of his death was the owner of the NW¼ of section 31, township one north, range three east, which was his homestead, and which is now occupied by the widow and minor children.

"The court finds that she is entitled to dower to an undivided one-third in value of said lands, and, for the purpose of laying off and assigning such dower, N. M. Blair, Tom Wooten and Nat Ramey are appointed as commissioners to lay off the same, and they will report their proceedings herein to the next term of this court. In assigning said dower said commissioners will find the value of all the lands, including the homestead, and will then lay off to said widow an amount of lands outside of the homestead equal in value to one-third of the whole." And again:

"On this day come the commissioners heretofore appointed for the assignment of dower in the lands of this estate to the widow, Mrs. Mollie E. Grimes (now Mrs. Mollie E. Russell), and file their report herein, which is as follows, to-wit: Come the undersigned, heretofore appointed for the assignment of dower of Mrs. Mollie E. Grimes (now Mrs. Mollie E. Russell) widow of the deceased, do respectfully report that, in compliance with the order of this court, we have viewed and appraised the homestead, the same being the NW¼ of section 31, township one north, range three east, and find the value thereof to be $40 per acre, being a total of $6,400.

"We have also viewed and appraised the W½ SE¼ and the SE¼ SE¼ of section thirty-four, township one north, range two east, the other lands belonging to said estate, and have assessed the same in the sum of $25 per

acre, being the sum of $2,800, making the entire valuation of the lands of the said estate the sum of $9,200. We have assigned to the widow as dower the said W½ of SE¼ and the SE¼ SE¼ of section thirty-one, township one north, range two east, the same being less than one-third value of the entire lands of said estate.

"And it appearing to the court that the assignment of dower so made by the commissioners was in all things legal and equitable, it is ordered by the court that the said assignment of dower so made be and the same is hereby approved and confirmed."

The commissioners appointed by the probate court to assign dower made their report at the February term of that court, 1915, and at that term the court rendered its final judgment approving and confirming the report of the commissioners, as above set forth.

In this action the trial court found that the appellants were not entitled to homestead in the south 74.75 acres of the NW¼ of section 31, T. 1 N., R. 3 E.; that they were only entitled to homestead in the north eighty acres of that quarter section; that the appellees were entitled to five-sixths of the net rent of the 74.75 acres for the years 1920, 1921, 1922, and 1923, with adjustment of taxes, upkeep, etc.; that the 74.75 acres not awarded to appellants as a homestead were subject to partition between the appellees and the appellant James Lee Grimes. The court entered a decree in accordance with its findings, from which both parties have prosecuted an appeal.

In *Horton* v. *Hilliard,* 58 Ark. 298, there was an application by the widow for an assignment of dower. The commissioners appointed to assign the dower laid off the dower without taking into consideration the existence of the right of homestead. The widow objected to the report of the commissioners, and moved to amend the petition for dower so as to set up her homestead rights. The trial court refused to allow the amendment, and confirmed the report of the commissioners. On appeal by the widow to this court, among other things, we said: "Every person dealing with the estate was bound to take

notice of the homestead. * * * The fact that the petition for dower did not mention the homestead did not affect that right. The commissioners could not lay off the homestead, but were bound to take notice of it, whether mentioned in the petition or not. Their duty was to assign dower. The dower could not be legally assigned without recognizing the existence and location of the homestead. The existence of the homestead, then, was properly before the probate court on approval of the report of the commissioners, and was before the circuit court on trial of the appeal."

In the petition for the allotment of dower by the appellant, Mrs. Mollie Russell, the widow of J. M. Grimes, the existence of her homestead rights as to the extent of its boundaries, as well as the value thereof, was necessarily involved. Under the doctrine of the above case, this was necessarily an issue between the widow and heirs of J. M. Grimes in the proceeding in the probate court for the allotment of her dower. The report of the commissioners shows that they took both into consideration in allotting the dower, for they viewed and appraised the homestead and designated it as the NW¼ of section 31, T. 1 N., R. 3 E., and fixed its value at $40 per acre, being a total value of $6,400. It was the duty of the appellees, if they desired to call in question the right of the appellants to the homestead as therein designated, to have done so in that proceeding. If they conceived that they were aggrieved by the judgment of the probate court designating the homestead right of the appellant in the entire quarter section, instead of the north eighty acres thereof, their remedy was to object to the report of the commissioners thus designating the homestead, upon confirmation of that report by a judgment of the probate court, and to appeal to the circuit court. Not having done so, they are concluded by the judgment of the probate court in that proceeding. The appellants, under the facts of this record, are entitled to invoke the familiar doctrine of *res judicata* in defense of the appellee's action against them.

As quoted by us in *Ederheimer* v. *Carson Dry Goods Company,* 105 Ark. 485, 493, from 23 Cyc. 1295, 1296: "'The rule is often stated in general terms that a judgment is conclusive, not only upon the question actually determined, but upon all matters which might have been litigated and decided in that suit; and this is undoubtedly true as to all matters properly belonging to the controversy, and within the scope of the issues, so that each party must make the most of his case or defense, bringing forward all his facts, grounds, reasons, or evidence in support of it, on pain of being barred from showing such omitted matters in a subsequent suit.'' See also *Morgan* v. *Kendrick,* 91 Ark. 394; *Fourche River Lbr. Co.* v. *Walker,* 96 Ark. 545; *Pulaski County* v. *Hill,* 97 Ark. 456; *McDaniel* v. *Richardson,* 141 Ark. 453; *Gordon* v. *Clark,* 149 Ark. 173; *Shaw* v. *Polk,* 152 Ark. 18.

The trial court therefore erred in its decree, and the same is reversed, and the cause is remanded with directions to enter a decree dismissing the appellees' complaint, and for such other and further proceedings as may be necessary according to law and not inconsistent with this opinion.

BROCK v. STATE.

Opinion delivered March 23, 1925.

1. RAPE—ASSAULT WITH INTENT TO RAPE—EVIDENCE.—Evidence *held* sufficient to support a conviction for assault with intent to rape.
2. RAPE—INSTRUCTION.—In a prosecution for assault with intent to rape, an instruction that defendant would be guilty of assault with intent to rape if the prosecuting witness rejected his advances, or if he made such advances in a lascivious way without her consent, was erroneous, since to convict, the jury must find that he intended to overcome her resistance by force or intimidation.

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

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

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appellee.

HART, J. Bert Brock was convicted before a jury of the crime of assault with intent to rape, and his punishment fixed at three years in the State Penitentiary. The case is here on appeal.

The first assignment of error of appellant is that the evidence is not legally sufficient to support the verdict.

Bessie Dobbs was the prosecuting witness, and was eighteen years of age at the time she claimed that Bert Brock made the alleged assault upon her in Crawford County, Arkansas. According to her testimony, in November, 1923, she was carrying the mail from Rosedale to Evansville, in Crawford County, Arkansas. She said that she knew Bert Brock and Clay Cusick. We quote from her testimony the following:

"Q. They are charged here with making an assault upon you about the 5th of November; tell the jury what happened. A. I carried the mail. When I got back to Odell, Bert and Clay were standing out there, and when I stepped back to the door they were going off down the road, and when the postmaster got the mail fixed up, I took it and went out and put it on the horse and started on. I got down the trail; they were both sitting there on a log, and when I saw them I started to run by them, and Bert run and caught the horse's rein, and Bert said, 'Get off of there, and I said, 'I won't do it,' and he said, 'Get off of there and jazz,' and I hit him, and he hit me just as hard as he could on the leg, and turned me loose, and I told him I was going to tell on them, and they said they did not give a damn what I told. Q. Tell the jury how he took hold of you. A. He tried to pull me off. Q. Did he try to pull you off? A. He just told me to get off and jazz with him. They had a gun. Q. What kind of a gun was it? A. Some kind of a shotgun. Q. You hit him with a switch? A. Yes sir. Q. Was it then he turned you loose? A. He turned the horse

loose when he was pulling on me, but Clay had hold of the reins. Q. Was anybody with you? A. I was by myself."

Howard White, a boy fourteen years old, testified that he knew Bert Brock and Clay Cusick. He was on the porch of the building in which the postoffice was kept at Odell, at the time it is charged that they made an assault upon Miss Bessie Dobbs. He heard them say that they were going down the road and hold the girl up.

This testimony, if believed by the jury, was sufficient to warrant the verdict. Our statute provides that whoever shall feloniously, wilfully and with malice aforethought assault any person with intent to commit rape shall, on conviction, be imprisoned in the penitentiary not less than three nor more than twenty-one years.

In construing this statute this court has held that a conviction for an assault with intent to commit rape will be set aside where the evidence fails to show that the accused did an act which was the beginning or part of the contemplated crime. *Anderson* v. *State*, 77 Ark. 37, and *McDonald* v. *State*, 160 Ark. 185.

The testimony of the prosecuting witness tends to show that Bert Brock and his companion had a gun, and that Brock stopped and attempted to drag her from her horse. She hit him with her whip, and he hit her just as hard as he could on the leg. He had demanded that she get off of her horse and "jazz" with him.

The jury might have inferred from this testimony that he was guilty of something more than an intent or preparation to commit the alleged crime. The circumstances detailed showed the beginning of an attempt to rape the prosecuting witness, and that the unlawful attempt was coupled with the present ability to do the injury. Therefore the assault was complete.

The next assignment of error is that the court erred in giving instruction No. 3 to the jury, which reads as follows:

"If he put his hands upon her, and she objected or rejected his advances, or if he did it in a lascivious way,

without her consent, then he would be guilty of assault. The first thing you have to determine is whether he is guilty of assault to rape, and then for you to determine whether he is guilty of any grade of assault."

In instruction No. 2 the court had gone into the ingredients necessary to constitute the crime. A specific objection was made to instruction No. 3 on the ground that it tended to leave the impression on the jury that, if Bert Brock laid his hands on the prosecuting witness in a lascivious way, without her consent, they might find him guilty of an assault with intent to rape.

We think the instruction is open to the construction placed upon it, and necessarily constituted prejudicial error to the rights of appellant. In a prosecution for assault with intent to rape, force is a necessary element of the crime. It is necessary for the jury to find that the accused intended to use whatever force was necessary to overcome the prosecuting witness and have sexual intercourse with her, and that he intended to use as much force as would be necessary to accomplish that purpose and overcome her resistance. *Paul* v. *State,* 99 Ark. 558; *Kindle* v. *State,* 165 Ark. 284. Of course, if the circumstances of the case show that the woman was put in fear of death or bodily harm to such an extent that she was unable to resist, this would be equivalent to force.

This instruction was erroneous because it told the jury that the defendant would be guilty of assault with intent to rape if the prosecuting witness rejected his advances, or if he made such advances in a lascivious way without her consent. This left out of consideration the question of force.

Therefore, for the error in giving instruction No. 3 over the specific objections of appellant, the judgment must be reversed, and the cause will be remanded for a new trial.

DAVIDSON v. EDWARDS.

Opinion delivered March 23, 1925.

1. FRAUDS, STATUTE OF—PAROL AGREEMENT.—A mere refusal to perform a parol agreement, void under the statute of frauds, is not of itself fraud.
2. TRUSTS—MISREPRESENTATION.—The misrepresentation which will create a trust *ex maleficio* must be made before or at the time the legal title is acquired by the promisor.
3. TRUSTS—PAROL EVIDENCE.—Parol evidence to establish a trust *ex maleficio* must be clear, convincing and satisfactory.
4. TRUSTS—TRUST EX MALEFICIO.—In order to create a trust *ex maleficio*, a grantee must have promised something of advantage to the grantor in order to induce him to part with the legal title.
5. TRUSTS—EVIDENCE.—In a suit by a son to establish a trust in land owned by his deceased mother, evidence *held* insufficient to establish a trust *ex maleficio*.

Appeal from Benton Chancery Court; *G. T. Sullins*, Special Chancellor; affirmed.

STATEMENT OF FACTS

On the 22d day of May, 1922, Lottie Edwards and Belle Leonard and Willie W. Davidson filed their petition in the chancery court to quiet their title to certain town lots in the town of Gravette, Benton County, Arkansas. On May 26, 1922, Willie W. Davidson asked to withdraw his name from the petition, and filed a cross-bill to obtain a decree, declaring that Lottie Edwards and Belle Leonard held the legal title to said lots in trust for him.

According to the allegations of the cross-complaint, Willie W. Davidson was the owner of a certain tract of land in Benton County, Arkansas, on the 30th day of November, 1907. He was an unmarried man, and his mother, who was then a widow, was living with him on said land. She was growing old and feeble, and asked him to provide a home for her on the land as long as she lived. Upon her agreement that she would make a will in his favor, he conveyed the land to his mother by deed. The farm was worth from $1,500 to $2,000. About the first part of April, 1908, his mother concluded that

she would rather live in the town of Gravette, and wished to exchange the farm for certain town lots situated therein. His mother agreed that, if the exchange was made, she would make a will in favor of her son so that, when she died, the town lots would become his own under the will. Accordingly the exchange was made, and she occupied the town lots as her home until the 10th day of November, 1921, when she died intestate.

Willie W. Davidson was a witness for himself, and testified to the facts set forth in his complaint. His testimony was given on the 29th day of August, 1923. At that time he was thirty-five years of age. Mrs. N. E. Davidson, his mother, had two other children besides himself, Mrs. Lottie Edwards, about forty years old, and Mrs. Belle Leonard, about thirty-eight years old. There was no administration upon his mother's estate. There were no debts, and her children, the sole heirs at law, were all of age when she died.

Other evidence was introduced tending to corroborate the testimony of Willie W. Davidson. On the other hand, evidence was adduced in behalf of Lottie Edwards and Belle Leonard, tending to show that both the legal and equitable title in said town lots was in their mother, and that no trust therein should be declared in favor of their brother, Willie W. Davidson.

The chancellor found that Lottie Edwards, Belle Leonard and Willie W. Davidson were the owners as tenants in common of said town lots, and that each was entitled to a one-third undivided interest therein. The court further found that a division of said lots could not be made without prejudice to the owners.

It was decreed that the complaint of Willie W. Davidson to declare a trust in his favor in said lots be dismissed for want of equity, and that the lots should be sold for the purpose of partition.

The case is here on appeal.

Rice & Rice, for appellant.

Floyd & Beazley, for appellees.

HART, J., (after stating the facts). The statute of frauds with regard to trusts in real property was enacted to preserve the title to such property from the uncertainty and fraud attending the admission of parol evidence. It is well settled in this State that a mere refusal to perform a parol agreement, void under the statute of frauds, is not of itself fraud. The reason is that the jurisdiction of courts of equity in such cases is founded upon the fraud and not upon the agreement. It has been well said that the statute of frauds would be worse than waste paper if a breach of promise created a trust in the promisor, which the contract itself was insufficient to raise.

Another judge has said that to deduce the fraud from the contract and then give effect to the contract on the score of fraud is reasoning in a circle. On the other hand, it cannot be questioned that fraud in the procurement of the conveyance for the benefit of the grantor takes the case out of the statute of frauds. The reason is that a rule intended as a protection against fraud ought not, in a court of equity, to be changed into an instrument for the perpetration of fraud. The settled rule in this State is that the title must be obtained by false and fraudulent promises for the express trust agreed upon and subsequently converted to other purposes. In short, the misrepresentation which will create a trust *ex maleficio* must be made before or at the time the legal title is acquired by the promisor. *Barron* v. *Stuart*, 136 Ark. 481; *Moore* v. *Oates*, 143 Ark. 328; and *Bray* v. *Timms*, 162 Ark. 247.

It is equally well settled by these authorities that, while trusts *ex maleficio* may be established by parol evidence, such evidence must be clear, convincing and satisfactory.

The trust which Willie W. Davidson asked to be declared in his favor rests entirely in parol. According to his own testimony, Mrs. N. E. Davidson, the mother of

himself and of Lottie Edwards and Belle Leonard, resided with him on his farm in Benton County, Arkansas. The tract comprises 100 acres. His mother had no home, and was getting old and feeble. She was afraid that she might die, and, in order to secure a home for herself during the remainder of her life, she persuaded her son to convey to her by deed fifty acres of this tract, upon which was situated his residence. In consideration therefor, his mother agreed to make a will in his favor. Willie W. Davidson was about eighteen years old at the time, and the fifty acres which he conveyed to his mother for her lifetime was worth about $2,000. The deed was executed November 30, 1907. Subsequently his mother wished to move to the town of Gravette, and the son consented that she should convey the fifty acres of land in question to her son-in-law, T. E. Leonards, for certain town lots in the town of Gravette. The exchange was made, and at the time Mrs. Davidson agreed with her son that she would make a will devising to him the town lots. She then moved to the town of Gravette and resided on these lots until her death in November, 1921. She died without making a will. After her death, Willie W. Davidson joined with his sisters, Lottie Edwards and Belle Leonard, in a suit to partition the property which they inherited from their mother, including these town lots. The suit was filed on May 22, 1922, and, on the 26th day of May, 1922, Willie W. Davidson asked to withdraw from the partition suit, and filed a cross-bill claiming that his mother held the town lots in question in trust for him.

James W. Forgey was also a witness for Willie W. Davidson. According to his testimony, he lived on an adjoining farm to Willie W. Davidson and his mother. The latter intimated to him that she wanted Willie to have the farm upon her death.

Mrs. Awilda Medearis was also a witness for Willie W. Davidson. According to her testimony, she had known Mrs. N. E. Davidson for fourteen years, and they were intimate friends. At various times Mrs. Davidson

told her that, when she died, her son, Willie W. Davidson, would have the home where she lived.

According to the testimony of Ed Bullock, he heard Mrs. N. E. Davidson say that she wanted the home place for her home as long as she lived. She told him that she had an agreement with her son to convey to her the place for her lifetime, and in consideration therefor she had agreed to will it to him at her death. In addition, she told him that the town property was to take the place of the farm under the arrangement, and that it was to go back to her son after her death.

According to the testimony of Oscar Bullock, the farm was worth $1,500 or $1,600. Mrs. N. E. Davidson told him that her son Willie had deeded the place to her in order that she might have a home if he died, and that she was to make a will in his favor giving it back to him, if she died first. She stated further that she agreed to trade the farm for the Leonard and Blevins home in town, and she was to will the town property in place of the farm to her son. She thought that it might be more convenient for her to live in town than on the farm, and for that reason the farm was to be exchanged for the town property.

Willie W. Davidson admitted writing several letters, after his mother's death, to his sisters in which he offered to sell them his interest in the property for $600 or $650, but stated that he did this because his mother had not made a will in his favor, and he did not know that he had any rights in the premises, except to get his part of her estate as one of her three children. Subsequently he was informed that, if he really owned the land, and if it was conveyed to his mother in trust, he still would have his rights in the property. He denied that he ever received any consideration for conveying the property in question to his mother.

T. E. Leonard was the husband of Belle Leonard, and was a witness for the defendants. According to his testimony, Mrs. N. E. Davidson sold his wife and J. L. Blevins the fifty acres in the country for some town lots

in Gravette owned by them. The farm was valued at $4,000 and the town lots at $3,000. She was to receive $1,000 in cash, and was to pay that to her son, Willie W. Davidson, for his interest in the farm. The values named above might not have been the true values of the property, but it was recognized by the contracting parties that the farm was worth $1,000 more than the town lots.

According to the testimony of Belle Leonard, her mother took care of Willie W. Davidson, and supported him, instead of being supported by him. Her brother was dissipated, and spent about $1,500, which he received from his father's estate, in traveling about the country. Her mother first drew a pension of $12, and got a raise to $30 per month. Her mother signed notes for her son, and had to pay them. Her mother stated, just prior to her death, that she wished her property to be divided equally between her children. She never heard of her brother claiming any right to the property during her mother's lifetime.

According to the testimony of Lottie Edwards, her mother exchanged the farm for the town property because her son would not stay at home and cultivate the land. Her mother supported her son, and not the son his mother. After Mrs. Davidson died, they found some notes among her papers which she had signed for her son and which she had taken up. She never heard of her brother claiming to own the lots until after her mother's death. On the day she died her mother told her children that she wanted her property to be divided equally between all her children.

One of the daughters said that their brother was present and heard their mother tell them to divide everything equally.

Under this state of the record it cannot be said that the mother, by fraudulent promises, received a deed to the property in question and in consideration therefor agreed to will it to her son at her death. As we have already seen, a trust *ex maleficio* may be shown by parol

evidence, but such evidence must be clear, convincing and satisfactory.

All the corroboration to the testimony of the son was that of three witnesses who testified that the mother had told them that she had made an agreement for her son to deed the property in question to her for her lifetime, and she in turn was to will it back to him.

Now, in the first place, this would amount to nothing more than a naked promise, and, as we have already seen, the statute of frauds would soon become a dead letter if the mere broken promise of a trustee under a trust created by parol should be held sufficient to creat a trust *ex maleficio*. There must be some element of fraud made before or at the time the legal title is acquired. That is to say, the legal title must have been given upon the faith that the person acquiring it had done so for the purpose of doing some act beneficial to the right or interest of the party making the conveyance. Such a trust could not be created merely by a parol promise on the part of the grantee to hold it in trust for the grantor, without any other consideration. The grantee must have promised something of advantage to the grantor in order to induce him to part with the legal title.

Even if it could be said that a trust *ex maleficio* was shown by the testimony of Willie W. Davidson, it was not established by clear, convincing and satisfactory evidence. It is true that his testimony was corroborated by that of three other witnesses, who testified that Mrs. N. E. Davidson had told them that she had acquired a lifetime interest in the property by deed upon the express agreement that she would execute a will in favor of her son. The two daughters, on the other hand, testified that their mother, upon the day of her death, told them that she wished all of her property to be divided equally between her children, and one of them said that their brother was present.

The husband of one of the daughters exchanged with Mrs. Davidson the town lots in question for the farm. He denied that it was any part of their agreement that

the title to the town property was to be held in trust by Mrs. Davidson for the benefit of her son. Then, too, the attending circumstances are against the contention of the son. He was thirty-five years of age at the time his mother died, and wrote several letters to his sisters in which he offered to sell them his interest in the property. It is true that he said that he did this because he did not find any will in his favor, and supposed that this was the end of the matter. When we consider his age, however, together with the fact that he had traveled around the country a great deal, we think the fact that he tried to sell his interest in the property to his sisters without even telling them of his claim in the matter is a strong circumstance against his present contention. He also joined with his sisters in a petition to have the land partitioned, without making known his claim of a trust.

Therefore we are of the opinion that no trust was established by that character of evidence required in cases of this sort.

It follows that the decree will be affirmed.

MEEK v. CHRISTIAN.

Opinion delivered March 23, 1925.

1. HIGHWAYS—LEGISLATIVE ASSESSMENTS OF BENEFITS.—A statement in Sp. Acts 1920, No. 51, § 5, that all the land within a proposed road improvement district would be benefited to the extent of 10 per cent. of the value as assessed for State and county taxes was an arbitrary assessment, and did not authorize a contract for final plans and supervision of the work, since no local improvement can be undertaken without first ascertaining that the special benefits to the land equal or exceed the cost of the improvement.
2. HIGHWAYS—EMPLOYMENT OF DISTRICT ENGINEER—VALIDITY OF CONTRACT.—The contract of a highway district employing an engineer to make preliminary plans and estimates and to make final plans and supervise construction, for which he was to receive a percentage of the cost of improvement, was not separable, and, the preliminary work only being authorized

until by final assessment of benefits it was known that the commissioners had power to make the improvement, the contract never became effective, where no final assessment of benefits was ever made, and on abandonment of the project the engineer's recovery was limited to a *quantum meruit* for the preliminary work.

3. HIGHWAYS—PRELIMINARY WORK—CERTIFICATE OF INDEBTEDNESS.—Where certificates of indebtedness issued to a highway district engineer for preliminary work never became effective because no assessment of benefits was ever made, the assignees thereof could not recover on them on abandonment of the district.

4. HIGHWAYS—EMPLOYMENT OF ENGINEER—RIGHT OF RECOVERY.—Where engineer was employed by a road improvement district to prepare preliminary and final plans, and the contract was ineffective because it included the final plans, no assessment of benefits having been made on abandonment of the project after the preliminary plans had been accepted, the engineer was entitled to the reasonable value of his services in the preliminary work.

5. HIGHWAYS—VALUE OF ENGINEER'S SERVICES—EVIDENCE.—Evidence *held* to show that the amount of certificates of indebtedness issued by a highway district to an engineer under an invalid contract represented fair and reasonable compensation for his services in making preliminary plans and estimates.

6. HIGHWAYS—COMPENSATION OF ENGINEER—INTEREST.—In an action on a *quantum meruit* for the value of an engineer's services in making a preliminary survey under a contract which never became effective, it was error to allow interest on the certificates of indebtedness issued to him from the time of their issuance, though they were found to represent the reasonable value of his services on a *quantum meruit*.

7. HIGHWAYS—COMPENSATION OF ENGINEER—INTEREST.—Where the commissioners of a highway district and the engineer were unable to agree upon the value of his services in making a preliminary survey, and he filed a claim therefor in a proceeding to wind up the affairs of the district, he was entitled to interest on the amount allowed him from the date of filing the claim.

8. HIGHWAYS—POWERS OF COMMISSIONERS.—Improvement district commissioners exercise no powers except those expressly granted by the Legislature, and only in the manner pointed out expressly or by implication.

9. HIGHWAYS—POWER OF ROAD DISTRICT TO ISSUE NEGOTIABLE PAPER.—Acts of Sp. Sess. 1920, No. 51, § 3, giving to the commissioners of a certain road improvement district power to employ engineers to make a preliminary survey, by necessary implication

authorized them to issue certificates of indebtedness therefor, but not to issue negotiable paper.

Appeal from Miller Chancery Court; *C. E. Johnson*, Chancellor; modified.

STATEMENT OF FACTS.

Appellants prosecute this appeal to reverse a decree in favor of appellee, C. S. Christian, for services performed in surveying and making the plans, specifications and estimate of cost for a special road improvement district in Miller County, Arkansas.

The General Assembly of the State of Arkansas, at its special session in 1920, passed act No. 51 to create the South Miller County Highway District, and the act was approved February 4, 1920. The territory embraced in the act comprised the whole of the south half of Miller County, Arkansas, including the city of Texarkana and a part of the territory embraced within the boundaries of Miller County Highway and Bridge District. The roads which it is proposed to improve are described in a general way in § 1 of the act.

Section 2 provides that if any of the roads proposed to be improved have not been laid out as public roads, it is made the duty of the county court to lay out the same in accordance with our general statute relating to the establishment and change of public roads in this State.

Section 3 provides that the commissioners may employ such engineers, attorneys and agents as they find advantageous, and fix their compensation.

Section 4 makes it the duty of the commissioners to proceed as rapidly as possible with the proposed improvement, which is to improve the roads named in the act by grading and draining them and surfacing them with gravel. The section also provides that the commissioners shall form their plans for the proposed improvement, and shall file the same with the county clerk of Miller County with the specifications and an estimate of the cost. This section also gives the commissioners the power to vary the line of existing public

roads for the purpose of straightening them or for economy in the construction of the improvement. It is made their duty to report their recommendations in this respect to the county court, and it is made the duty of the county court to approve the change in the route and to lay out the new roads, if it approves the report of the commissioners.

Section 5 provides that all real property subject to taxation within the corporate limits of the city of Texarkana and all that portion of the proposed district which lies within the boundaries of the Miller County Highway & Bridge District will be benefited by the improvement to the extent of 10 per cent. of the assessed value of each parcel of said real property as assessed for State and county taxes for the year 1919.

The section further provides that it is ascertained and declared that all land within the district will be benefited at least to the extent of the cost of the proposed improvement, and that the amount of benefits to each tract of land outside of the corporate limits of the city of Texarkana and outside of that portion of the district lying within the boundaries of Miller County Highway and Bridge District will be ascertained by an assessment of benefits to be made by a board of assessors to be appointed under the act.

Pursuant to this act, the commissioners employed C. S. Christian to make a survey of the roads proposed to be improved and to prepare plans and specifications and the estimated cost of improving the same, and on the 9th day of March, 1920, entered into a written contract whereby they agreed to pay him 4 per cent. of the estimated cost of the proposed improvement for his services. The contract provides that he shall make all preliminary and final plans and supervise all the construction work. The contract provides in detail for the services of the engineer with regard to the preparation of the plans, specifications and estimate of cost of improving the roads under the act. C. S. Christian entered into

the prosecution of his work, and caused a survey of the roads proposed to be improved to be made, and prepared and filed under the provisions of the act plans, specifications, and an estimate of the cost thereof. His report is in detail, and shows that the total length of the roads to be improved is 113.214 miles; and that the total cost, including overhead expenses, is estimated to be $1,511,900.97.

The commissioners approved the report of the engineer, and on January 21, 1921, issued certificates to said engineer in the total sum of $27,489.10. The certificates bear interest at the rate of 6 per cent. per annum from date until paid. Opposition developed among the landowners to the construction of the proposed improvement, and the county court refused to approve the plans and specifications with the estimate of cost of improving said roads, and also refused to approve the changes in the roads suggested by the commissioners. In fact, the county court disapproved the act of the commissioners in entering upon the construction of the proposed improved roads. On the 26th day of September, 1922, thereafter, the commissioners passed a resolution in which they stated the advantages to be derived from the proposed improved roads, and called attention to the objections made to the construction of the same. A resolution was adopted by the board of commissioners that, under existing conditions, it would be to the best interest of the landowners for the affairs of the district to be wound up without constructing the proposed improved roads, and provisions for the payment of its outstanding obligations be made.

On the 4th day of October, 1922, the commissioners filed a petition in the chancery court for the purpose of winding up the affairs of the district, and calling upon all claimants to file their claims. On the 16th day of October, 1922, Oscar Meek and other landowners in the district were allowed to become parties to the proceeding.

C. S. Christian sold and assigned the certificates of indebtedness issued to him. On the first day of Febru-

ary, 1922, the First National Company of St. Louis, Mo., purchased said certificates from C. M. Conway for the sum of $28,161.66. On January 20, 1923, the said First National Company filed its claim against said district in the chancery court, asking that it be allowed the sum of $27,489.10, the face of the certificates, and interest thereon at the rate of 6 per cent. per annum from the date of issuance, to-wit, January 21, 1921, until paid.

On February 9, 1923, an act repealing the act creating South Miller County Highway District was approved. Special Acts of 1923, p. 126.

Evidence was introduced by the First National Company of St. Louis, Mo., to establish the validity of its claim, and the taxpayers introduced evidence tending to show that no recovery should be allowed on the certificates, and that the claim should only be allowed upon a *quantum meruit*.

The testimony on both sides on this branch of the case will be set out and reviewed in the opinion. In this connection it may be stated, however, that three assessors were appointed as directed by the act to make an assessment of benefits, but it does not appear from the record that they ever made or filed any assessment of benefits under the provisions of the act.

The chancellor made a finding that there was not sufficient evidence to impeach the justice of the allowance of $27,489.10 made by the board of commissioners to C. S. Christian. It was therefore decreed that the First National Company of St. Louis, Mo., the holder of the certificates, be given judgment against the district for the face value thereof, with 6 per cent. interest per annum from January 21, 1921, until paid. The case is here on appeal.

Jas. D. Shaver, John N. Cook and *W. H. Arnold, Jr.*, for appellants.

Henry Moore, Jr., Webber & Webber, Chauncey H. Clark, Rose, Hemingway, Cantrell & Loughborough, James D. Head and *Paul Jones*, for appellees.

HART, J., (after stating the facts). It is first sought to uphold the decree of the chancery court on the ground that the holders of the certificates issued to C. S. Christian were entitled to recover the face value thereof and the accrued interest. It is claimed that there was a legislative assessment of benefits, and that, in making the same, the lawmakers are presumed to have had before them information as to the cost of the construction of the proposed roads according to the plans and specifications within the rule announced in *Summers* v. *Cole,* 144 Ark. 494, and other decisions of this court. Therefore it is claimed that the case is brought within the principles decided in *Bowman Engineering Co.* v. *Ark. & Mo. High. Dist.,* 151 Ark. 47. We do not agree with counsel in this contention. We have given a synopsis of the provisions of the special act creating the road improvement district, so far as is necessary to determine the issues raised by this appeal. It is true that the Legislature declared that all the land within the proposed district would be benefited at least to the extent of the cost of the improvement. Conceding that the Legislature is presumed to have had before it information as to the cost of the construction of the proposed improvement, still it could not know that the land in the district would be benefited at least to the extent of this cost without making a legislative assessment of benefits. In other words, even if it should be presumed that the Legislature knew the cost of the proposed improvement, it could not know the extent or amount of the benefits to the land within the district without making an assessment thereof. Its action in declaring the benefits are equal to the costs of the improvement, without ascertaining what the benefits were, amounted to nothing more than an arbitrary finding on its part, and cannot be sustained by the court. It is well settled that no local improvement can be undertaken without first ascertaining that the special benefits to the land equal or exceed the cost of the improvement.

But it is contended that the Legislature made an assessment of benefits. Reliance is placed upon § 5 of the act, which provides that all real property in the district within the corporate limits of the city of Texarkana, and all that portion of the district which is incorporated in and lies within the boundaries of Miller County Highway and Bridge District, will be benefited by the improvement to the extent of 10 per cent. of the assessed value for State and county purposes for the year 1919 of each parcel of said property. This was only a partial assessment of benefits by the Legislature.

The record shows that the land within the boundaries of Miller County Highway and Bridge District, for the most part, includes the north half of Miller County, and the land within the South Miller County Highway District is situated chiefly in the southern part of Miller County. The city of Texarkana is included in both districts, and a part of the land within Miller County Highway and Bridge District is also included in the South Miller County Highway District. Now the assessment of benefits on the land not situated in the city of Texarkana nor in Miller County Highway and Bridge District was not included in the assessment of benefits made by the Legislature. Thus it will be seen that the greater part of the land in the proposed district is situated without the boundaries of the city of Texarkana and outside of the boundaries of Miller County Highway and Bridge District, and no assessment of benefits on it was made or attempted to be made by the Legislature.

On the other hand, the act provides that assessors shall be appointed to make such assessment of benefits. The record shows that assessors were appointed for that purpose as provided by the act, but it does not show that any assessment of benefits was ever made by them. It is certain, then, that no complete or final assessment of benefits was ever made as contemplated in the act.

The commissioners of the district made a contract with C. S. Christian to do all the engineering work for

the district. The contract, by its express terms, includes the work of making the preliminary as well as the final survey of the roads proposed to be improved under the terms of the act creating the district. The contract includes the work of making detailed plans, specifications, and an estimate of the cost of making the proposed improvement. The contract further provides that the engineer shall receive for all of his services 4 per cent. of the cost of the improvement, and that one-half of this shall be paid upon the completion of the plans, specifications and estimate of cost.

In *Morgan Engineering Co.* v. *Cache River Drainage District,* 115 Ark. 437, and other cases, we have uniformly held that contracts of this sort, providing for the payment of a specified part of the engineering fee upon the completion of the preliminary survey and the filing of the estimate of cost thereof, are only a method of payment, and do not make the contract divisible or separable. It follows from the cases cited above and other decisions of this court that the contract made by the commissioners with Christian never became effective, because no complete and final assessment of benefits was ever made, and, until this was done, it could not be known whether or not the commissioners had the power to make the proposed improvement.

Therefore the facts and circumstances of this case make it certain that the engineer could only recover on a *quantum meruit* basis for the services performed by him, and the holders of his claim against the district could acquire no greater rights than he possessed. In short, if Christian could not recover on the certificates of indebtedness issued to him, it is equally certain that the assignees of his claim could not recover on them. The reason is that the contract never became effective and the certificates of indebtedness never became valid obligations of the district, and were not negotiable.

The act provides that the commissioners might employ an engineer to make a preliminary survey of the

roads proposed to be improved, and this includes the preparation of plans and specifications showing the estimated cost of the improvement. This leaves Christian with a lawful employment, but no provision in the contract for the value and time of payment of his services. The commissioners not only employed him to do the work of making the preliminary survey, plans, specifications and estimates of cost of the proposed improvement, but they actually approved and received his report of the work done by him. Therefore he is entitled to recover the reasonable value of his services within the limits of the authority of the commissioners to employ him.

Christian had an engineering party in the field for eleven months, and the engineer in charge rendered an itemized statement of the expenses thereof, which, for the eleven months, amounted in the aggregate to $21,191.52. This aggregate amount did not include the work of making the blue-prints of the roads or preparation of the plans and specifications. During a part of this time Christian was engaged at work with the field party, and was paid at the rate of $450 per month for the time he was actually engaged at work in the field. The number of miles of final location of the proposed road was something over 113 miles. The improved roads were to be made of gravel, and the actual cost of construction was estimated to be $1,365,964.38, and the total cost, including the sodding of the shoulders of the roads and the overhead charges, amounted to $1,511,900.97. Owing to the fact that many miles of the improved roads had to be re-run for three or four times to get suitable grades, it was not practicable to give the average number of miles located each day. The roads were to be drained, graded, and surfaced with gravel. The engineer made frequent trips over the line, checking up the location and examining gravel-pits, to see whether or not they were suitable for road building. This was necessary in order to make a correct estimate of the cost of the materials which were to be used in the con-

struction of the roads. It was necessary to cross-section the roads in making a preliminary survey. This is necessary in order to determine the yardage of earth required to be moved. There were about 275,000 acres of land included in the South Miller County Highway District. This includes the south half of the county, with an overlap on the territory embraced in the Miller County Highway and Bridge District.

According to the testimony of C. S. Christian, the actual cost of the field work of making a preliminary survey of the kind and character in this case is from $200 to $250 per mile. The cost of preparing the estimates and the profits to the engineer are not included in this charge. The testimony of Christian in this respect was corroborated by that of three other engineers, who had had considerable experience in road building and who were familiar with the territory embraced in this district. One of these engineers had had several years' experience in the employment of the United States in road building, and for something more than a year before, he testified, had been State Highway Engineer for the State of Texas. He has also been engaged as United States district engineer, and, as such, was familiar with the character of hard roads built in the State of Arkansas and the kind of lands embraced in the road district in question. All three of these engineers corroborated the testimony of Christian as to the expense of making a preliminary survey in a road district of the kind in question in this case. They also testified that Christian was a high-class engineer and had had considerable experience in constructing hard roads.

According to the evidence of Christian, it was necessary to have made the preliminary survey in as much detail as he made it in order to secure Federal aid and to secure the approval of the State Highway Engineer of the State of Arkansas. The United States would not grant Federal aid unless it was approved by the State Highway Department, and unless the preliminary

survey was made in sufficient detail to enable the engineer who made it to approximately, at least, make a correct estimate of the cost of the proposed improved roads. Opposed to this evidence is the testimony of a civil engineer who thought that a preliminary survey of the proposed roads could have been made for $150 per mile. On cross-examination, he testified that it was worth 2 per cent. of the estimated cost of the improvement to make such a preliminary survey. Thus it will be seen that a preponderance of the evidence shows that the amount allowed by the court was not more than the reasonable worth of making the preliminary survey. Indeed, the taxpayers contest the allowance mainly on the ground that it was made too much in detail to constitute a preliminary survey.

We do not agree with counsel in this contention. The evidence of Christian, which is not contradicted on this point, was to the effect that it was necessary to have made the survey with as much detail as was done in order to ascertain the exact yardage of dirt to be moved, and that it was necessary to examine the road material near at hand in order to ascertain its fitness and to estimate the cost thereof. It is obvious that, if gravel would have to be hauled in from a distance, this would materially increase the cost of construction.

The act made it the duty of the commissioners to prepare plans, specifications, and an estimate of the cost of the work. They were authorized to employ engineers to assist them in doing so. It is manifest that the intention of the Legislature in requiring the plans, specifications and an estimate of the cost was to enable the commissioners to have before them definite information of the cost and entent of the proposed improvement to enable them to decide intelligently whether it should be made. Another reason would be to inform the property owners of the character and probable cost of the proposed improvement so that they might have an opportunity to remonstrate against it, if they thought that the construction of the proposed roads under the terms of

the act would prove too burdensome. Then, too, it was necessary to have a survey made of the parts of the road which it was necessary to straighten, in changing from a system of dirt roads to hard roads. This information was necessary to enable the county court to act with proper judicial discretion in approving or rejecting such changes.

We do not deem it necessary to set out in detail or to enter into a minute discussion of all the evidence in the case. It is sufficient to say that there is nothing in the record which questions either the good faith of the commissioners in contracting for the preliminary survey or in the conduct of Christian in making it. The whole record shows that the commissioners and the engineer were actuated by a desire to ascertain as nearly as practicable the cost of the proposed improvement in advance of making any contract for constructing it. It will be readily seen that a too hasty and indefinite preliminary survey would not enable the commissioners to make an accurate estimate of the cost of the roads. Of course, they could give the landowners an estimate of the probable cost of moving earth in the proposed roads, but a detailed survey would be necessary to give even an approximately correct estimate of the amount of yardage to be moved. This could not be done without proper cross-sectioning.

Under all the facts and circumstances as they appear in the record, we think that the sum of $27,489.10 was a reasonable compensation for making the preliminary survey.

This brings us to the question of interest. As we have already seen, the chancellor erred in allowing the interest provided for in the certificates of indebtedness themselves, for the reason that no recovery can be had upon them.

In the case of *Pritchett* v. *Road Improvement Dist. No. 4,* 167 Ark. 555, the engineer was allowed to recover interest at the legal rate from the date of the filing of his claim in the circuit court. Therefore the allowance of

interest on the claim of the First National Company of St. Louis, Mo., from the time of the commencement of the suit by it was proper under the case just cited.

In adhering to the rule in regard to the interest laid down in this case, we are not unmindful of the old common-law rule, which required that the claim should be liquidated or its amount in some way ascertained, before interest can be allowed. This rule, however, has been frequently modified by the courts.

In the present case, the act creating the district allowed the commissioners to make a contract with a suitable engineer for a preliminary survey of the public roads proposed to be improved. The commissioners made such a contract with Christian, but failed to provide the amount of his compensation and the time for paying him therefor. The contract was fully performed by the engineer, and the fruits thereof were accepted by the commissioners without objection. Thus it will be seen that the district owed Christian for making the preliminary survey the reasonable value of his services. The parties were unable to agree as to the value of his services. It was the duty of the engineer to file his claim in the proceedings to wind up the affairs of the district; and it could not be certainly known what price he demanded for his services until that was done. His claim was filed on the 20th day of January, 1923, and the chancellor should only have allowed the claimant interest from that date.

Therefore the decree will be modified so as to allow the claimant to recover from the district $27,489.10 with 6 per cent. interest from January 20, 1923, and, as modified, the decree will be affirmed.

HART, J., (on rehearing). Counsel for C. S. Christian earnestly insist that the court erred in not allowing him interest from the date of the completion of his services as engineer in making the preliminary survey of the roads in the district and his plans and estimates showing the cost of the construction of the improved roads. They strongly rely upon the case of *Iron Mountain &*

Helena Rd. v. *Stansell,* 43 Ark. 275. In that case there was a contract between the railroad company and the construction company for the construction of defendant's line of road from Helena to Forrest City, Arkansas. The court held that the contract was a single and indivisible contract. The railroad company issued certain certificates of indebtedness for the amount it owed the construction company, which were called change tickets, and which were held to be in violation of law. Although illegal, the court held that they might be used as evidence of the amount due on the contract, inasmuch as they were a written admission that the railroad company had received the value expressed in them. Interest was allowed when the payments became due to the construction company under the contract. Thus it will be seen that the interest was contractual and followed the ordinary rule in such cases.

The facts in this case are materially different. The commissioners made an indivisible contract with Christian to do both the preliminary and construction engineering work for the district, and, under the contract, he was to receive four per cent. of the actual construction cost of all the improved roads. The contract provided that when the engineer had filed his approved plans, specifications, and estimates, then the district shall pay him fifty per cent. of the estimated entire fee. It further provided that, if the district had no funds to make such payment, then it would execute certificates of indebtedness therefor bearing interest at six per cent.

As will be seen by reference to our original opinion, this contract never became effective because no final assessment of benefits was ever made and in consequence there could be no ascertainment that the assessment of benefits would exceed the cost of the improvement.

Improvement district commissioners exercise no powers except those expressly granted by the Legislature and can exercise the powers conferred only in the manner pointed out expressly or by necessary implica-

tion. *Altheimer* v. *Board of Directors of Plum Bayou Levee District,* 79 Ark. 229.

Section 3 of the act gives the commissioners the power to employ engineers to make a preliminary survey and to prepare plans and specifications for the construction of the improved roads. By necessary implication, this would give them the authority to issue evidence of indebtedness therefor; but not negotiable paper. *Hiter* v. *Harahan Viaduct Imp. Dist.,* 165 Ark. 351. In this connection it may be stated that no attempt was made by the district to issue negotiable interest bearing certificates of indebtedness for preliminary engineering expenses; but it distinctly shows that the certificates were issued under the contract, which was for the whole of the engineering work.

The record shows that the district first made two advance payments of $10,000 each for preliminary engineering expenses. The resolution expressly recites that the advances were made under the contract which the board of commissioners had made with the engineer. A subsequent resolution of the board of commissioners recites that certificates of indebtedness had been theretofore issued to C. S. Christian in the sum of $20,000 as advances on his 2 per cent. commission due on approval of the plans, specifications, and estimates of the roads in said district. The resolution further recites that there is now due to C. S. Christian, all told at 2 per cent. on the estimated cost of the improvement, the sum of $27,489.10, less the $20,000 in certificates held by Christian.

Thus it will be seen that the certificates of indebtedness were not issued to Christian because the commissioners had agreed with him that he was due the sum of $27,489.10 upon a *quantum meruit* for making the preliminary survey and preparing the plans, specifications and estimates. On the contrary, it is manifest from the record that these certificates were issued under the contract with the engineer for doing the preliminary surveying and the construction engineering work. It will be seen, then, that the certificates were issued under a contract

which never became effective. Therefore, Christian had no right whatever to recover on his contract, and the action of the commissioners in renewing the certificates under the contract did not constitute an admission that Christian was due that sum of money upon a *quantum meruit* basis.

The record does not show that the commissioners and Christian ever took up the matter of settling his compensation upon a *quantum meruit* basis. The entire course of their dealings show that they proceeded upon the theory that he was entitled to 2 per cent. of the entire commission under his contract with the board of commissioners. Hence, there is nothing in the record whatever to show that the commissioners ever agreed that Christian was entitled to any stipulated amount upon a *quantum meruit* basis.

In this connection it may be stated that the general rule which denies the right to interest on unliquidated damages has found very frequent application in the case of unliquidated demands for services rendered, which as a general rule do not bear interest until rendition of judgment. 33 C. J., § 72, p. 211. The cases cited show that *quantum meruit* for services rendered is within the rule. The value of services upon a *quantum meruit* can only be ascertained by an accord or by the judgment of a court after hearing proof of the value of the services. The general rule does not apply here because of the statute creating the district.

Section 23 provides that, in case for any reason the improvement contemplated by the district is not made, the preliminary expenses shall be a first lien upon all the land in the district and shall be paid by the levying of a tax thereon upon the assessed value for county and State taxation. This was a direct recognition that the preliminary work was to be undertaken by the district and that its cost must be met by the landowners. As we have already seen, the commissioners could only exercise the powers granted them expressly or by necessary implication, and, having failed to enter into a separate

contract with Christian for the preliminary surveying expenses, he was only entitled to recover upon a *quantum meruit*.

Under the statute he must file his claim in the chancery court and was not entitled to interest until he filed his claim for two reasons. In the first place, the statute did not authorize the commissioners to pay him interest for preliminary work. Of course, if the contemplated improvement had been carried out and bonds for the cost of construction had been issued as provided by § 16 of the act, the preliminary expenses would have become a part of the cost of construction and the commissioners might have issued negotiable bonds bearing the rate of interest provided by the statute.

As we have just seen, § 23 of the statute creating the district provides that, in case the improvement is not made, the preliminary expenses shall be paid by the levying of a tax on the land of the district. By fair inference this means that no interest shall be due on the claims for preliminary expenses until the same are filed as provided by the act. The mere fact that § 3 gave the commissioners the power to employ an engineer to make a preliminary survey, and to prepare estimates of cost, did not by implication authorize them to pay him interest on his claim until the claim was filed as directed by statute.

It follows that the petition to modify the decree will be overruled.

WOOD, J., dissents.

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

Opinion delivered March 23, 1925.

1. DAMAGES—PHYSICAL EXAMINATION—DISCRETION OF COURT.—Where plaintiff suing the railroad company for personal injuries had submitted to a personal examination by two railroad doctors, it was not an abuse of discretion to deny defendant's request during the trial for further examination by other doctors, including an x-ray of plaintiff's spine, such request

not being timely, and the x-ray not calculated to disprove the prediction of one of plaintiff's physicians that tuberculosis would probably develop from the injury to defendant's spine.

2. TRIAL—ASSUMPTION OF FACT.—An instruction authorizing the jury in a personal injury action to assess damages for future pain and suffering if any *held* not objectionable in form as assuming that he would continue to endure pain in the future.

3. TRIAL—INSUFFICIENCY OF GENERAL OBJECTION TO INSTRUCTION.—Objection to an instruction that it assumed that plaintiff's mental suffering would continue in the future should be specific.

4. DAMAGES—PERSONAL INJURIES—AMOUNT.—A verdict of $12,000 awarded to an experienced brakeman, earning $1,500 annually and in line of promotion, for injuries which incapacitated him to work, necessitating the amputation of three toes and permanent injuries to his spine, with probability of developing tuberculosis, *held* not excessive.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

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

Pace & Davis, for appellee.

SMITH, J. Appellee was employed by the appellant railroad company as a brakeman on a freight train, and, while climbing to the top of a car, a grab-iron or a step on the side of the car pulled loose, and he fell to the ground, and one of his feet fell under the wheels of the car, which was in motion, and his foot was crushed, and it became necessary to amputate his great toe and two adjoining toes.

In the complaint which appellee filed in his suit to recover damages to compensate the injury he had sustained as a result of his fall, he alleged that he was injured as follows: "Left foot mashed and crushed, necessitating the amputation of three of his toes, leaving his foot stiff and immobile, the tendons and ligaments thereon torn and ruptured, leaving the foot in a useless condition; injury to the spine, spinal column, and the nerves attached thereto, shocking his nervous system, leaving the plaintiff wholly incapacitated to do or perform manual labor of any kind."

At the trial, when appellee was called as a witness in his own behalf, he removed his shoes and socks from both feet, so that the jury might compare them and examine the injury. He claimed that, as a result of his injury, he had become practically club-footed by being required to walk on the side of his foot, and he exhibited the calloused condition which had developed on his foot as a result of this necessity.

Appellee was injured on March 4, 1923, and was carried the next day to the company's hospital, where he remained for thirteen or fourteen weeks, and was released in July, but he returned to the hospital for further treatment, and was finally discharged in August. He testified that his foot was still sore and pained him, and that he could not walk fast, and that his foot turned when he stepped on a rough surface. He also testified that his back was injured and continued to hurt him, and that he had become very nervous.

After appellee and two physicians who were called as witnesses in his behalf had testified, the appellant company asked that two surgeons representing it be allowed to examine appellee, and this permission was given, and appellee was examined by both surgeons, who were members of the hospital staff where appellee had been a patient.

The first physician who testified in behalf of appellee was Dr. Pettus, of Little Rock, and he testified that there was a loss of sensation over a small area inside the foot. That the big toe had been amputated close to where it joined the foot and two adjoining toes about midway of the last two joints, and that the tendons which control the foot and are attached to the big toe had been so injured that appellee walked on the side of his foot, and that, as a surgeon, he would advise amputation of the foot. Dr. Pettus also testified that appellee's spine had been injured, and that the reflexes were exaggerated, and that appellee suffered pain and would continue to do so until the cause was found and removed, and that pressure on appellee's back caused excruciating pain, and

would accelerate the pulse from a normal beat to 120 in about a minute's time; that this was a condition over which appellee had no control; and Dr. Pettus expressed the opinion that appellee's injury was permanent, and would grow worse.

Dr. Parchman, of Van Buren, was also called as an expert witness on behalf of appellee, and he too described appellee's injuries, and concurred in the opinion expressed by Dr. Pettus that appellee's condition would grow worse. In describing appellee's injuries Dr. Parchman said: "I think the man has an injured spinal column. Necrosed bone, or has become infected with tubercular bacilli."

After making this answer, the presiding judge said: "Please answer that question again. I did not just catch your answer." And the witness replied: "I said that 85 per cent. of the injuries to the spinal column result in tuberculosis, which I think is likely to occur to this man by reason of this injury."

This question and answer were objected to on the ground that there was "no allegation in the complaint that there was any such injury to his spinal column."

As has been said, appellee was examined by two surgeons who had treated him in the hospital. Appellee made no point that this testimony was privileged, and these surgeons gave a history of appellee's treatment in the hospital. They had made an X-ray picture of appellee's foot, and introduced this picture in evidence. They also testified that appellee made no complaint of injury to his back while in the hospital, and had received no treatment on that account. That they had examined his back, and could find no indication of an injured back except appellee's statement that it caused him pain, and that their examination of appellee indicated that his back was normal. After testifying that all the tests made by them indicated that appellee's back was normal and was uninjured, and that they found no indication of tubercular trouble, they testified that an X-ray is the

final test, but that they had taken no X-ray because they did not have an opportunity to do so.

Before the case was closed the company called two other physicians from Fort Smith, neither of whom had ever examined appellee. Permission was asked that these physicians from Fort Smith be allowed to examine appellee, and to have X-rays made. These physicians testified that it was no test for determining the existence of a tubercular condition of the spinal column to press on a person's back to see whether that quickened his pulse.

The trial was not concluded on the day it was begun, and, after the attendance of the Fort Smith physicians had been secured, counsel for the company stated that he would like to have appellee pull off his shoes and exhibit his foot in the presence of these doctors. Objection was made to this request on the ground that appellee had already been examined by two doctors for the company, and, in overruling this request, the presiding judge said: "I am not going to permit any further examination of this man." Counsel for the company said: "We also ask that an X-ray picture be made of his back." In overruling this request the court said: "If you had asked permission in time, I might have granted it, but I am not going to delay this case any longer." An exception was saved to the ruling and to the remark of the court.

We think no reversible error was committed in the ruling set out above. The complaint alleged that appellee's back was injured, and this was notice that damages would be asked on that account. The court directed that appellee submit to an examination at the hands of two doctors representing the company, and this examination was made, and these doctors testified that they made no X-ray examination because they had no opportunity to do so, but the request to make this last examination was not embraced in the request for permission to examine appellee.

It was not shown when or where this X-ray examination could be made, and it does not appear what delay would have been entailed in the trial on that account. The remark of the court indicates there would have been some delay, and the matter was within the discretion of the court, and we think no abuse of that discretion was shown. Besides, we think, under Dr. Parchman's testimony, read in its entirety, that it does not appear that he stated that appellee then had tuberculosis of the spine —a condition which the company's physician said would be disclosed by an X-ray—but the prognosis of the case was that tuberculosis would develop, an opinion which an X-ray picture could neither refute nor confirm.

Over appellant's objection the court gave an instruction numbered 5, which reads as follows: "If the jury find for the plaintiff, they will assess his damages at such a sum as will compensate him for the bodily injury sustained, if any, the physical pain and mental anguish suffered and endured by him in the past, if any, and that which he will endure in the future, by reason of the said injury, the effect of the injury on his health according to the degree and probable duration of the same, if any, his loss of time, if any, the pecuniary loss from his diminished capacity for earning money through life, if any, and from these, as proved by the evidence, assess such damages as will compensate him for the injuries received."

Only a general objection was made to this instruction, and the objection now urged to it is that it assumed as a fact that appellee would endure future physical pain and mental anguish by reason of the injuries received by him. We think the objection is one which should have been made specifically at the trial. We do not think the instruction assumes as a fact that appellee will continue to endure pain and anguish. On the contrary, we think the question was submitted hypothetically—as it should have been—and, if it was thought otherwise, a specific objection should have been made. *St. L. S. W. R.*

Co. v. *McLaughlin*, 129 Ark. 377; *Brinkley Car Works & Mfg. Co.* v. *Cooper*, 75 Ark. 325.

The verdict and judgment in the case was for $12,000, and it is insisted that this is excessive, and unsupported by the testimony. It appears from the facts already stated that appellee's condition was that of a man who had lost the use of a foot, and, as one doctor said, it would have been better to have amputated the foot. In addition, appellee was shown to have had a permanent injury to his spine, with the probability that the trouble would develop into tuberculosis, and that his condition was permanent. In addition it was shown that appellee was a trained and experienced brakeman, and in line soon to be promoted to a conductor. That his earnings as a brakeman were about $1,500 a year, and he had wholly lost his capacity to earn money in that employment, and could only secure such employment as a cripple could perform. Under these circumstances we cannot say the verdict is not supported by the testimony, and, as no error appears, the judgment is affirmed.

RUST v. CADDO RIVER LUMBER COMPANY.

Opinion delivered March 23, 1925.

PUBLIC LANDS—HOMESTEAD—PUBLIC POLICY.—As it is against public policy for a homesteader on government land to convey the land before issuance of a patent, where plaintiff claimed under a deed from a homesteader prior to the issuance of a patent thereto, he cannot complain that defendant's right of way was granted under a deed invalid for the same reason; the maxim "*In pari delicto potior est conditio defendentis*" applying.

Appeal from Montgomery Chancery Court; *J. P. Henderson*, Chancellor; affirmed.

Hays, Priddy & Chambers, for appellant.

McRae & Tompkins, for appellee.

SMITH, J. This suit was brought by appellant to enjoin appellee from building a private logging railroad across two tracts of land which appellant claims to own. One was a forty-acre tract, and the other was an eighty-acre tract, and they will be referred to herein as such.

It was shown that employees of appellee entered upon the forty-acre tract and commenced cutting out a right-of-way, and certain timber was destroyed. But it was also shown by the undisputed evidence that the employees of appellee entered upon this forty-acre tract by mistake, and, when the superintendent of construction saw what had been done, he immediately ordered appellee's employees off this tract, and reprimanded them for the mistake they had made. It is an undisputed fact that the entry upon the forty-acre tract was a mistake, and that the route of the railroad does not cross the forty-acre tract.

Appellee admits its intention to cross the eighty-acre tract, but alleges its right to do so under a right-of-way deed from the owner of the land.

It appears that one Ira Wheeler had entered both tracts as a homestead, but he did not complete his proof of improvements and occupation, and did not receive his patent until September 10, 1923. Prior to the issuance of this patent, Wheeler executed a right-of-way deed over the eighty-acre tract to appellee on February 16, 1923. On July 9, 1923, Wheeler executed a warranty deed conveying both tracts to A. H. and D. P. Whitsett, and the Whitsetts conveyed both tracts to appellant by a warranty deed dated September 10, 1923, this being the day upon which Wheeler received his patent.

A temporary restraining order was issued at the time of the institution of the suit, but this was dissolved on the final hearing, and the suit was dismissed as being without equity, and this appeal is from that decree.

The action of the court below in dismissing the complaint as being without equity is defended on several grounds, but we consider only one, as we find it decisive of this appeal.

It is insisted by appellant that the right-of-way deed to appellee was void because, at the time of its execution, Wheeler had not obtained a patent to the land, and, inasmuch as it is against the policy of the United States homestead law to permit the conveyance

of any part of a homestead before the entry is completed and the patent is issued, that the right-of-way deed was ineffective.

It is answered, however, that, if this be true, appellant is in no position to raise the question, for the reason that he claims under a deed from the Whitsetts, who themselves bought from Wheeler prior to the issuance of the patent to Wheeler; and such is the fact.

Wheeler had not completed his entry at the time he executed the right-of-way deed to appellee, but his deed to the Whitsetts was likewise executed to them before his entry was completed and the patent had issued.

The maxim, *In pari delicto potior est conditio defendentis,* applies. Appellant is asking affirmative relief, and he bases his cause of action on a conveyance which is open to the same objection as the one which he makes to the deed under which appellee claimed a right-of-way, and the cause of action was, for this reason, properly dismissed as being without equity. *Irons* v. *Reyburn,* 11 Ark. 378; *Cate* v. *Cate,* 53 Ark. 484; *O'Bryan* v. *Fitzgerald,* 48 Ark. 487; *Eager* v. *Jonesboro, L. C. & E. Express Co.,* 103 Ark. 288.

In affirming the decree of the court below we treat the case as one to enjoin the entry upon the eighty-acre tract alone, as appellee concedes that it had no right of entry upon the forty-acre tract, and has disclaimed any intention of doing so. There may be liability for the damage done by the mistaken entry upon the forty-acre tract, but we need not consider that question, here for the reason that this damage was done before appellant purchased the forty-acre tract, and he took no assignment of that cause of action.

The decree of the court below is therefore affirmed.

McCLASKEY v. STATE.

Opinion delivered March 23, 1925.

1. MORTGAGES—DISPOSING OF MORTGAGED CHATTELS—NECESSITY OF DEMAND.—It is not necessary, under Crawford & Moses' Dig. § 2552, to sustain a conviction of a mortgagor for disposing of mortgaged chattels, that demand should have been made on him for the debt or the mortgaged property or that he refuse payment of the debt.
2. MORTGAGES—DISPOSING OF MORTGAGED CHATTELS—CONCEALMENT.—In a prosecution for disposing of a mortgaged automobile, where it was proved that the mortgagor had placed the car in a garage, and told the mortgagee that he could not find it, it was not error to refuse to exclude testimony in regard to the car, since, if the mortgagor concealed the car so that it could not be found for the purpose of foreclosing the mortgage, this would constitute a disposition of same within the meaning of Crawford & Moses' Dig., § 2553.
3. MORTGAGES—DISPOSING OF MORTGAGED CHATTELS—VARIANCE IN DESCRIPTION.—In a prosecution, under Crawford & Moses' Dig., § 2552, for disposing of a mortgaged wagon and an automobile where the indictment described the wagon as "one 3-inch Bane log wagon," whereas the mortgaged wagon was properly described as a "3 1-4 inch Bane log wagon," *held* there was no fatal variance.
4. MORTGAGES—DISPOSING OF MORTGAGED CHATTELS—INDICTMENT.—An indictment for disposing of mortgaged property in violation of Crawford & Moses' Dig., § 2552, need not allege the name of the person to whom the property was sold or that the purchaser was unknown.
5. MORTGAGES—DISPOSING OF MORTGAGED CHATTELS—INDICTMENT.—An indictment for disposing of mortgaged property *held* sufficient to charge that there was a debt due to the mortgagee, and that disposition was made with felonious intent to defeat the holder of the mortgage in the collection of his debt.
6. MORTGAGES—DISPOSING OF MORTGAGED CHATTELS—INDICTMENT.—An indictment for disposing of mortgaged property need not allege that the mortgage had been recorded or filed, as the mortgage is good as between mortgagor and mortgagee whether acknowledged or not.
7. MORTGAGES—DISPOSING OF MORTGAGED CHATTELS—EVIDENCE.—In a prosecution for disposing of a mortgaged wagon and automobile, though certain mules embraced in the mortgage were not mentioned in the indictment, testimony in regard to their disposition was relevant on the question of the mortgagor's good faith in disposing of the wagon and automobile.

8. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Refusal to give requested instructions which were fully covered by those given by the court was not error.

9. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—In a prosecution under Crawford & Moses' Dig., § 2552, for disposing of a mortgaged wagon and automobile, argument of the prosecuting attorney that the mortgagor had misled the mortgagee in giving the mortgage, and "he is as guilty as man can be and he ought to be convicted," was a mere expression as to defendant's guilt, and was not improper.

Appeal from Craighead Circuit Court, Jonesboro District; *Basil Baker*, Special Judge; affirmed.

Roy Stigler and *T. A. Turner*, for appellant.

H. W. Applegate, Attorney General, and *Darden Moose*, for appellee.

SMITH, J. Appellant was indicted for disposing of certain personal property upon which a mortgage lien existed. Omitting the formal parts, the indictment reads as follows: "The said Otto McClaskey aforesaid, on the first day of January, 1924, did unlawfully, knowingly, and feloniously sell, barter, exchange and dispose of one 3" Bane log-wagons of the value of $150 and one Oakland automobile of the value of $150, all of the total value of $300, upon which log-wagon and Oakland automobile one J. W. McCormack had a chattel mortgage to secure the payment of $82.90 due him by the said Otto McClaskey, with the felonious intent to defeat the holder of said mortgage in the collection of the said debt secured by such mortgage."

The indictment was demurred to on the ground that it did not charge a public offense. The demurrer was overruled, and an exception was saved to that ruling.

The testimony on the part of the State was to the effect that the debt matured and was not paid upon demand, and that neither the wagon nor the automobile was available for the purpose of foreclosing the mortgage.

In the case of *Stewart* v. *State*, 139 Ark. 403, it was held that the statute under which appellant was indicted and convicted (§ 2552, C. & M. Digest) did not require,

as a condition for conviction for disposing of mortgaged property, that a demand be made on the mortgagor for the debt or mortgaged property or the refusal of payment of the indebtedness on the mortgagor's part. It is insisted that the undisputed testimony shows that appellant did not dispose of the automobile, and that reversible error was committed in not excluding from the jury any consideration of the disposition of the automobile.

The testimony shows that appellant had placed the automobile in a garage at Nettleton, which is in the district of the county in which the venue of the offense is laid, for storage and repairs. This garage was operated by a man named Edwards, and he testified that the automobile had been in his garage since the summer of 1924 (the trial occurred November 22, 1924), and that his charges for repairs amounting to $30 had not been paid. But it does not appear that McCormack, the mortgagee, was advised of the location of the automobile until that fact was developed at the trial. On the contrary, McCormack testified that appellant told him the wagon had been stolen, and that the automobile was somewhere in the county, but the witness was unable to find either. Under these facts, we think no error was committed in not excluding the testimony in regard to the automobile.

The mortgage has been executed at Bono, which was also in the district of the county in which the venue of the offense was laid, and both the wagon and the automobile had been removed from that neighborhood, and McCormack testified that he could find neither. If appellant had in fact concealed the automobile so that it could not be found for the purpose of foreclosing the mortgage, this would constitute a disposition of it within the meaning of the statute.

Appellant had been engaged in sawmilling, and owned several wagons. It was admitted that he had sold a wagon to a man named Hannah, and this wagon was present at the trial and was visible to the witnesses while testifiying in the case. It will be observed that

the indictment described the wagon as "one 3" Bane log-wagon," and the wagon sold Hannah was a 3¼" Bane log-wagon. Appellant testified that he owned a 3" Bane log-wagon, but he testified that this wagon had been stolen from him, and that the wagon sold Hannah was not the wagon covered by the mortgage.

McCormack testified, however, that the wagon mortgaged was pointed out to him, that appellant walked up to the wagon, shook it, and said it was the wagon to be mortgaged, and the witnesses identified the wagon produced at the trial and which appellant admitted he had sold Hannah as the wagon pointed out to him by appellant.

The size 3" has relation to the spindle, and a 3¼" wagon was one whose spindle was 3¼ inches, and consequently a slightly larger wagon than one whose spindle was 3 inches in size. The wagon sold Hannah by appellant was a Bane log-wagon, but its spindle was 3¼", and it is insisted that this difference makes a fatal variance in the description of the property alleged to have been mortgaged and disposed of.

Appellant asked an instruction to the effect that this difference was material and constituted a fatal variance; but the court refused to so instruct the jury, and treated this difference as immaterial, provided the jury found that appellant had in fact disposed of the wagon mortgaged with the fraudulent intent of defeating the mortgage lien.

We think no error was committed in this respect. The wagon mortgaged was a Bane log-wagon, and the one sold Hannah was a Bane log-wagon, and we think the difference between 3 inches and 3¼ inches in the size of the spindle did not constitute a fatal variance. The party who drew the mortgage testified that the description employed was furnished by appellant himself, and McCormack testified that the wagon described in the mortgage was the one which appellant had pointed out to him.

The defendant could not have been misled in the preparation of his defense, and the State could not have prosecuted him again had he been acquitted, because of this difference in description.

The rule in such cases is stated in Underhill's Criminal Evidence (3d ed.), § 80, as follows: "In determining whether a variance is material, the question to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense? If this be not so, then the variance is material, and, the State having failed to prove the crime in substance as it is alleged, the acquittal of the accused should be directed."

In the case of *Pritchett* v. *State,* 160 Ark. 233, the defendant was charged with the crime of arson, alleged to have been committed by burning a railroad bridge designated as bridge 7807, when, according to the proof, the bridge burned was designated by the railroad as No. 78.7. The indictment had further described the bridge as one owned by the railroad company and as being three miles northeast of Eureka Springs, and we held the variance was not of sufficient substance in its nature to prove fatal.

Upon the authority of the case of *State* v. *Harberson,* 43 Ark. 378, it is insisted that the indictment is defective because: (1) it does not allege to whom the sale was made or that the vendee was unknown; (2) it does not allege that the debt was unpaid; (3) it does not allege that the mortgage was acknowledged, and it therefore does not appear that the instrument was one which could be recorded; and (4), it does not allege the venue of the existing lien.

The statute construed in the Harberson case has been amended since the date of that decision, and the existing statute has been construed in later cases.

In the case of *State* v. *Crawford,* 64 Ark. 194, it was held that it was not necessary to allege the name of the person to whom the property was sold; consequently it was unnecessary to allege that the vendee was unknown.

We think it is sufficiently charged that there was a debt due the mortgagee at the time the property was disposed of, and that the disposition was made with the felonious intent of defeating the holder of the mortgage in the collection of his debt.

The indictment does not allege that the mortgage was acknowledged, and it would not therefore have been entitled to be placed of record, but it was held in the case of *State* v. *Barnett,* 65 Ark. 80, that it was not necessary for an indictment to allege that the mortgage had been recorded or filed, as it was the manifest intent of the statute to prohibit the mortgagor from removing the mortgaged property out of the county whether the mortgage was of record or not. Moreover, the mortgage was good as between the mortgagor and the mortgagee, whether it was acknowledged or not.

We think the venue was sufficiently charged and proved.

The court refused to give any of the instructions requested by appellant, but, on its own motion, gave an elaborate charge consisting of nine instructions, the third of which reads as follows: "3d. Now therefore, if you find beyond a reasonable doubt that the defendant, Otto McClaskey, did, in the Jonesboro District of Craighead County, Arkansas, on the 1st day of January, 1924, or within three years prior to the filing of the bill of indictment in court, April 15, 1924, unlawfully, knowingly, and feloniously sell, barter, exchange and dispose of one Bane log-wagon or one Oakland automobile, either one or the other, and that such property so sold, bartered, exchanged and disposed of was of the fair market value in excess of the sum of ten dollars, and that such sale, barter, exchange or disposition thereof when made was of the property that had previously been mortgaged to J. W. McCormack, and without his con-

sent thereto, and that there was an indebtedness in excess of ten dollars due or owing said McCormack secured by said mortgage covering such property as alleged in the indictment to have been sold, bartered, exchanged or disposed of, and that such sale, barter, exchange or dispositon of said property, if any was made, was made with the felonious intent to defeat the holder of said mortgage, J. W. McCormack, in the collection of said debt, if there was a debt, secured by said mortgage as covering said property, if you find that there was such mortgage, then you will find the defendant guilty as charged in the indictment."

We think this instruction correctly submitted the material issues in the case.

The defendant requested the court to instruct the jury not to consider any testimony with reference to any other property not described in the indictment. The purpose of this instruction—which the court refused to give—was to exclude the testimony of appellant himself, elicited on his cross-examination, in regard to certain mules which were embraced in the mortgage. Appellant had testified that these mules had died, and this, of course, was not a disposition of the mortgaged property within the meaning of the statute. But we think the testimony was material and relevant as bearing on the good faith of appellant in disposing of the property described in the indictment. Neither the wagon nor the automobile which were described in the indictment was available for the purpose of foreclosing the mortgage, and, while the mules were not mentioned in the indictment as having been fraudulently disposed of, the testimony in regard to their disposition was relevant on the question of appellant's good faith in disposing of the wagon and the automobile.

Appellant asked an instruction to the effect that the jury must find beyond a reasonable doubt that he disposed of the wagon with the fraudulent intent of defeating the mortgage lien; and this instruction might well have been given in the language in which he asked it,

but this declaration of law was fully covered in instruction numbered 3, set out above, and in the other instructions given, so there was no prejudicial error in refusing to multiply instructions on this point.

Other instructions asked by appellant, in so far as they correctly declared the law, were covered by the instructions given.

In his concluding argument the prosecuting attorney said: "I want to say to you that he (appellant) misled the old man (McCormack, the mortgagee) in giving that mortgage, and he is as guilty as a man can be, and he ought to be convicted."

It does not appear from this excerpt just what point the prosecuting attorney was arguing, but it does not appear that the argument was improper. It was a mere expression of the attorney's opinion as to the appellant's guilt, and we have frequently held that such arguments are not improper. *Spier* v. *State,* 157 Ark. 283.

As we find no prejudicial error, the judgment is affirmed.

WESTERN COAL & MINING COMPANY *v.* NICHOLS.

Opinion delivered March 23, 1925.

1. MASTER AND SERVANT—SAFE PLACE TO WORK—EVIDENCE.—In an action by a miner for injuries from falling rock where the complaint had been amended by striking out the allegation that the master had negligently failed to make the miner's place of work safe, it was not error to exclude testimony that it was the miner's duty to make his place of work safe.
2. MASTER AND SERVANT—DUTY OF SERVANT TO MAKE PLACE OF WORK SAFE.—Where the conditions under which a servant is working are constantly changing, so that the peril of the work depends on the manner in which the work is done, it is the servant's duty to make the working place safe, and no duty in that regard rests on the master.
3. MASTER AND SERVANT—SAFE PLACE TO WORK—JURY QUESTION.—In an action by a miner for injuries caused from falling rock, evidence that the miner, after blasting had brought down a large quantity of rock, asked for another room in which to

work but was assured by the mine foreman that the room was safe, *held* to make it a question for the jury whether it was the miner's duty to make the place safe while he was removing the rock or whether he had a right to rely on the foreman's judgment.

4. APPEAL AND ERROR—INSTRUCTIONS NOT COMPLAINED OF.—Where the instructions given by the court are not complained of, it will be conclusively presumed that the issues were submitted under instructions which correctly declared the law.

5. MASTER AND SERVANT—SAFE PLACE TO WORK—EVIDENCE.—In an action by a miner for injuries from falling rock where the complaint had been amended by striking out the allegation as to the master's negligence in failing to furnish a safe place to work, and sought a recovery solely on the ground that the foreman assured plaintiff that the room in which plaintiff was injured was safe, it was not error to exclude testimony that plaintiff was not careful in using sufficient props to make the room safe.

6. APPEAL AND ERROR—HARMLESS ERROR—DISCRETION OF COURT.—As the order of admission of testimony is largely within the trial court's discretion, permitting a witness to be called after the instructions have been read to the jury was not prejudicial where no abuse of discretion is shown.

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

Thomas B. Pryor and *Vincent M. Miles*, for appellant.

Evans & Evans, for appellee.

SMITH, J. Appellee alleged, for his cause of action, that on the 18th day of January, 1921, he was in the employ of appellant in Mine No. 6, near Denning, Arkansas, and that he was injured by a fall of rock. In the original complaint a recovery was asked on two grounds; (1), negligence on the part of the defendant in failing to furnish appellee with a safe place in which to work; (2), that, after an inspection of appellee's place of work by appellant's mine foreman, appellee was assured that the place was safe, and, relying upon this assurance, appellee continued to work, when the place was not safe, and, while so working under this assurance, a rock fell on appellee and injured him.

Appellee was severely injured, and there is no complaint that the verdict in his favor was for an excessive amount. It is insisted, however, for the reversal of the judgment, that, under the undisputed testimony, appellant was not liable for the injury to appellee, and that the court erred in admitting and in excluding certain testimony.

During the progress of the trial appellee asked and was permitted to strike from his complaint the allegation in regard to the negligence of appellant in failing to furnish appellee a safe place in which to work, and he therefore predicated liability solely on the remaining allegation of the complaint, that appellee had been assured that the place was safe, when such was not the fact.

Appellee was an experienced miner, and admitted that, while engaged in mining coal, it was his duty to make his own place safe. Appellant offered the testimony of other experienced miners to the effect that no one would know better than the miner engaged in mining coal whether the place had become unsafe, and that it was the miner's duty to make it safe. This testimony was excluded, and this action of the court is assigned as error.

We think there was no error in this action of the court, for the reason that, at the time this testimony was offered, the complaint had been amended by striking out the allegation that appellant had negligently failed to make appellee's place safe, and appellee had admitted that this was the duty of the miner. The excluded testimony related to a cause of action which had been stricken from the complaint, and would have tended to prove a fact about which no question was presented.

Appellee had placed the shots of dynamite in the room in which he had been working, and he only had worked in this room after it had been turned off the entry. The last shot fired by appellee had brought down a quantity of rock, after which appellee asked that he be given another room in which to work. Thereafter, according to the testimony of appellee and his son, Bob-

bitt, who was the mine foreman, went into the room and assured appellee that it was safe. Bobbitt denied that he had made any inspection of the room or had given any assurance of its safety, but, on the contrary, testified that, when he saw its condition, he directed appellee to place three props under the roof of the room, and further directed where the props should be placed, and he ordered one of the props to be placed at the part of the roof from which the rock fell which injured appellee.

Appellee testified that he called Bobbitt's attention to the quantity of rock which had fallen and the time which would be required to remove it, and it was then that he was assured that the place was safe, and appellee was directed to remove the rock, and was promised pay of $7 per day while so engaged. While mining coal appellee was not paid by the day. His pay depended on the quantity of coal mined by him. Appellee admitted that Bobbitt told him to place props under the roof, but he testified that this could not be done until the rock had been removed. Appellee was engaged in bursting the rock which had fallen on the floor with a hammer, and he testified that it was necessary to do this in order that he might handle the rock, and that it was necessary to remove these broken pieces of rock to prepare the floor for placing the props, and that he was preparing to place the props, as he had been directed to do, as soon as the rock could be removed, and, after being so engaged for about twenty minutes to half an hour, the rock fell from the roof of the room and injured him.

The instructions are not set out, and no complaint is made that they did not correctly declare the law. The complaint is that there was no question for the jury to pass upon.

We are unwilling to say, as a matter of law, that there was no question for the jury. Appellee was not engaged in pulling down coal at the time of his injury. The work he was doing was that of removing fallen rock. This was not work, according to the testimony in appellee's behalf, which changed the character of the

place as the work progressed and thereby delegated to appellee the duty of making his place safe as the work progressed. Appellee was put to a work for which he was to be paid by the day, and this work did not involve changes in the conditions under which he was to work. There was no hanging rock or coal to be inspected or removed, but appellee's labor was to be performed in the removal of rock which had already fallen, and he was so employed when he was injured.

This court has many times recognized and given effect to the rule that, when the conditions under which the servant is put to work are constantly changing, so that the peril of the work depends on the manner in which the work is done, it is the servant's duty to make the working place safe, and no duty in that regard rests upon the master.

But, as we have said, the actual work of mining the coal had ceased, and we cannot say, as a matter of law, that appellee was engaged in a work in which he did not have the right, in a measure at least, to rely on the judgment of the foreman as to its safety.

There was a question for the jury whether the hazard of the work so changed as it progressed that it was appellee's duty to make the place safe, and, as the instructions are not complained of, it will be conclusively presumed that this question was submitted under instructions which correctly declared the law.

If it be said that the undisputed testimony shows that Bobbitt had ordered appellee to place props under the roof, it may be answered that appellee testified that he was preparing to do this, but it was first necessary to remove the fallen rock, and that he was injured before he could obey this order in the usual and ordinary way, and we must assume that this question of fact was properly submitted to the jury. It may also be said that appellee testified that the order to put up the props was not given to support the roof but to keep the gob back, and that this work was called "gobbing," which meant to throw the rock under the timbers off the right-of-way

so the cars loaded with coal could pass, and that, before appellee had cleaned up the fallen rock, so that he could put in the three props to keep the gob back, the roof fell in and injured him.

Error is assigned in the refusal of the court to permit appellant to prove by miners who worked in the mine where appellee was injured that appellee was not careful in using sufficient props to make the room in which he worked safe. But, at the time this testimony was offered, the complaint had been amended so that appellee was seeking to recover on the ground only that Bobbitt had inspected the place and examined the roof and had assured appellee that the room was safe for the purpose of doing the work which appellee had been ordered to do, so we think there was no error in excluding this testimony.

In his direct examination as a witness in behalf of appellant, Bobbitt was asked if he had told appellee this room was safe, and he answered that he had never told appellee or any other miner any such thing. After both sides had rested and the court had instructed the jury, appellee asked to be allowed to call Simon Phillips to the stand. Appellant objected to this being done, and saved an exception to the action of the court in permitting Phillips to be called as a witness. Phillips was asked if he had ever heard Bobbitt say to other men that their places were safe, and he answered that he had—that Bobbitt had made that statement to him on one occasion.

There appears to have been no objection to the testimony itself, but the objection related to the time of its admission. The objection was made when permission was given to call the witness, and it is this action of the court which we review.

This court has many times decided that the trial court has a wide discretion in the control of the order of the admission of testimony, and that a reversal would be ordered only where an abuse of this discretion was shown, and no showing is made here that there was any

abuse of this discretion in permitting the witness Phillips to be called after the instructions had been read to the jury.

No prejudicial error appears, so the judgment is affirmed.

WISCONSIN & ARKANSAS LUMBER COMPANY v. MCCLOUD.

Opinion delivered March 23, 1925.

1. MASTER AND SERVANT—SAFE PLACE TO WORK—JURY QUESTION.—Where an employee, engaged in oiling machinery, was injured by falling through a hole in the floor of a sawmill, which was so covered over that he could not see the hole, evidence *held* to make a case for the jury whether the master was negligent in failing to furnish a safe place to work.
2. APPEAL AND ERROR—REVIEW OF EVIDENCE ON APPEAL.—In reviewing evidence to test its legal sufficiency to support a verdict, it is viewed in the light most favorable to the prevailing party.
3. MASTER AND SERVANT—SAFE PLACE TO WORK.—One employed to oil machinery had a right to assume that he had been furnished a place in which to work where there were no hidden dangers, and that if there was a place of danger that was not open and obvious he would have been warned of that fact.
4. MASTER AND SERVANT—NOTICE OF OBVIOUS DEFECTS.—One employed to oil machinery is charged with notice of a structural defect, such as a hole in the floor, if it was obvious and patent.
5. MASTER AND SERVANT—ASSUMED RISK.—Liability to injury from obvious and patent structural defects is assumed by a servant of mature years and ordinary intelligence when he enters service.
6. TRIAL—OFFICE OF INSTRUCTIONS.—Instructions should define the law applicable to issues of fact raised by the testimony.
7. MASTER AND SERVANT—SAFE PLACE TO WORK—INSTRUCTION.—An instruction that if plaintiff was injured while in the exercise of due care, and had not assumed the risk, and the injury was due to the master having negligently left a hole in the floor where plaintiff was at work, then to find for plaintiff, *held* erroneous in authorizing a finding for plaintiff on the mere fact that the master had left a hole in the floor, without regard to whether it was a hidden defect.
8. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTION.—An instruction that if plaintiff was injured by the master's negligence as alleged and "had not assumed the risk," then to find for him, was erroneous as submitting the question of assumed risk as

an abstract conclusion of law, and permitting the jury to determine the law as well as the facts.

9. MASTER AND SERVANT—ABSTRACT INSTRUCTION.—In an action by a servant for personal injury, an instruction that "the first duty of a servant is obedience to the master" is abstract and irrelevant where there was no evidence that plaintiff was acting under the specific commands of a superior.

Appeal from Grant Circuit Court; *Thomas E. Toler*, Judge; reversed.

Buzbee, Pugh & Harrison, for appellant.

D. D. Glover, for appellee.

SMITH, J. Appellee was injured while employed by the appellant lumber company, and, in support of his cause of action for damages, testified as follows: He was employed by the appellant company on the 24th day of August, 1923, at a wage of $2.50 per day, and had been working eight or nine days when injured. It was his duty to straighten lumber on a dry-chain and to oil the machinery that pulled the chains. The dry-chain consisted of three traveling chains placed about four feet apart and parallel to each other, by means of which lumber was carried from the dry-kiln to another part of the mill. The chain ran through a table about twelve feet wide, and there is a platform by the side of the table on which the men stand to work the lumber on the chain. Appellee would stand on this platform after he had finished oiling the machinery. He would oil the machinery twice a day, in the morning before the mill started and at noon before work-time. He had to go underneath the table to oil the machinery, and it was dark there on account of the shadows. He would go down to a floor below the platform on which the men stood while at work, and, in going down under the table, he went through a space about six feet wide underneath the table. The top of the table was four and one-half or five feet above the floor, and there were about eighteen boxes to be oiled under the table. He was injured by falling through a hole in the floor underneath the table. This hole was about five or six inches wide and about two feet long, and was

covered over with trash and splinters, so that he could not see it, and he stepped into this hole without seeing it or without knowing it was there. He had never been told the hole was there, and he could easily have avoided stepping in it if he had known of its existence, but the floor in which the hole existed had not been cleaned up while he worked for appellant, and he knew nothing of the presence of the hole.

Appellant defended upon the ground that, if appellee fell into the hole, it was at a place where he was not required to be in the performance of his duty, and, further, if appellee fell into the hole, it was due to his own negligence or to a risk assumed by him.

The testimony shows that the hole into which appellee fell had been cut in the floor about a year and a half before appellee went to work there, and that it had been cut by one of the employees of appellant to facilitate the work of cleaning up underneath the table, because it was easier to throw the dust and trash through this hole, where it fell to the ground, than it was to carry the dust and trash back to the end of the table to a place where it could be thrown on the ground through a large opening in the mill floor. Appellee further testified that this floor under the table was dark, but we understand he used this word in a comparative sense. He was asked: "You would not think it was light enough where you were oiling to read?" and he answered: "No sir, not early in the morning; like it is when a car is run in the door." One walking on the floor where the hole was would have to stoop forward, as the passageway was less than five feet high, and the testimony on the part of appellant was to the effect that the hole was not covered over, and, unless it was covered over with trash, one could not walk along this floor without seeing the hole, if he paid any attention whatever to his surroundings, as the presence of the hole was obvious and patent.

It is insisted that appellee's own testimony did not make a case for the jury; but we do not agree with

counsel in this contention when the testimony is viewed in the light most favorable to appellee, as we are required to view it in testing its legal sufficiency to support the verdict of the jury.

According to appellee, he was unaware of the presence of the hole, and it was so covered over that it could have been discovered only by an inspection for it. This, of course, appellee was not required to make, as he had the right to assume that he had been furnished a place in which to work where there were no hidden dangers, and that, if there was a place of danger which was not open and obvious, he would be warned of that fact. On the other hand, if this hole had been put there purposely, and not recently, it was, at most, a structural defect of the existence of which appellee would be charged with notice if its presence was obvious and patent. The liability to injury from such a defect is one of the risks which the servant assumes when he enters the service of the master, where the servant is a person of mature years and ordinary intelligence.

The court appears to have given all the instructions requested by both parties. Of these, ten were given at the request of appellee, and of these ten only one—instruction numbered 9—attempts to make any specific application of the law to the facts in issue. The other instructions were statements of the law of master and servant which would be applicable in any suit by the servant against the master for damages to compensate an injury sustained by the servant while performing the duties of his employment, and the instructions were objected to on this ground.

The instructions are open to the objection made. They were so general in their nature that the jurors were left to their own devices to apply them to the testimony. Instructions should define the law applicable to the issues of fact raised by the testimony.

Instruction numbered nine is the only instruction given on behalf of appellee which attempts to make a

concrete application of the law to the testimony in the case. This instruction reads as follows: "You are instructed that, if you find from a preponderance of the evidence in this case that the plaintiff was injured as alleged, and that, at the time of his injury, he was in the exercise of ordinary care for his own protection, and had not assumed the risk, and that the defendant company, through its agents, servants or employees, negligently left a hole in the floor where plaintiff had to work, and that its negligence in this respect was the direct and proximate cause of plaintiff's injury, as alleged in the complaint, it will be your duty and you are instructed to find for the plaintiff in this case." Objections, both general and specific, were made to this instruction, and among the specific objections were these: That the instruction authorized the jury to find for the plaintiff upon the mere fact that the company had left a hole in the floor, notwithstanding the jury should find that the hole was not covered with trash. It permitted the jury to find that the mere leaving of the hole in the floor was negligence. And it submitted the question of assumed risk as an abstract conclusion of law.

We think the specific objections to the instructions were well taken, and that the instruction did not properly submit the issues in the case to the jury. It takes no account of the question whether the hole was covered, and gives the jury no statement of legal principles from which to determine whether the mere presence of the hole was negligence. In other words, the instructions, in effect, permit the jury to determine not only the facts but the law of the case.

Instruction numbered 10 was as follows: "You are instructed that the first duty of a servant is obedience to the master." To this instruction specific objections were made that it was abstract, irrelevant and argumentative, and permitted the jury to excuse the plaintiff from the exercise of ordinary care if they found that, indirectly or remotely, he was acting in obedience to the commands of his superior, and subordinates the duty

of the servant to the exercise of ordinary care in his own behalf to the duty to obey the commands of his master; and, further, that the instruction assumes that, at the time of the injury complained of, plaintiff was acting under the direct or specific commands of his superior, whereas the evidence on this point is to the contrary.

We think the instruction is defective in the respects pointed out. Appellee was injured at the noon hour, no one was present but himself, and he was engaged in performing a duty which he had previously performed twice daily during the eight or nine days he had been employed by appellant, and this instruction could not be applied to any issue of fact in the case. The instruction was calculated to leave the impression that, if appellee was injured while engaged in a work in the line of his employment, the company would be liable for any injury he might sustain, regardless of the circumstances of the injury, which, of course, is not the law.

For the errors in giving instructions 9 and 10 the judgment of the court below is reversed, and the cause remanded for a new trial.

SPEARS & PURIFOY v. MCKINNON.

Opinion delivered March 23, 1925.

1. PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE.—In an action against two physicians for malpractice in failing to remove sponges after an operation, evidence *held* to sustain a verdict for plaintiff; the rule giving the strongest probative force to the testimony of the prevailing party requiring that all reasonable possibilities be taken into account.

2. PHYSICIANS AND SURGEONS—NEGLIGENCE—LIABILITY OF ASSISTANT SURGEON.—A surgeon, who assisted in an operation and was required to insert and withdraw sponges, could not escape liability on the ground that he was merely an assistant, if through carelessness or negligence he failed to withdraw any of them.

3. TRIAL—CONSTRUCTION OF VERDICT.—In an action against two surgeons, where the plaintiff sued for $10,000 damages for mal-

practice, a verdict which stated: "We, the jury, find for the plaintiff the sum of $3,500 against Dr. Spears and the sum of $3,500 against Dr. Purifoy," *held* a verdict for the plaintiff for $3,500 against the two surgeons jointly and not a separate verdict against each for that sum.

4. APPEAL AND ERROR — MODIFICATION OF JUDGMENT.—Where the jury, in an action against two joint tort feasors rendered a verdict for the same amount against each of them, and the court entered separate judgments for such amount against each of the defendants, the cause will not on this account be reversed, but the Supreme Court will render a joint judgment for the amount assessed against each defendant.

5. PHYSICIANS AND SURGEONS—NEGLIGENCE—LIABILITY.—Surgeons cannot relieve themselves from injury to a patient, caused by leaving a sponge in her abdominal cavity after an operation, by adopting a rule requiring the attending nurse to count the sponges used and removed, and relying upon such count as conclusive that all sponges have been accounted for.

6. PHYSICIANS AND SURGEONS—NEGLIGENCE—EXCLUSION OF EVIDENCE.—Since a custom among surgeons of making the count by the attending nurse of sponges used in an operation conclusive evidence that all sponges have been accounted for cannot relieve a surgeon from liability, the court did not err in excluding testimony tending to establish such rule or custom.

Appeal from Union Circuit Court; *L. S. Britt,* Judge; judgment modified.

J. A. Sherrill, for appellant.

W. A. Spear, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellants, practicing physicians, in the circuit court of Union County, to recover damages in the sum of $10,000 for alleged malpractice in the performance of an operation on her on March 5, 1921. The gist of the complaint is that, after the operation they performed upon her for ectopic pregnancy, at Warren-Brown Hospital in El Dorado, they left a sponge or gauze in her abdominal cavity, which dropped into the cul-de-sac, a pouch at the bottom of the abdomen lying above the uterus and in front of the colon, where the gauze began to rot the tissue and membranes between the anterior wall of the rectum and posterior wall of the vagina until it found its way to a point about five inches above the anus, where it sloughed

into and out through the rectum, December 3, 1922, having caused her much pain, suffering and injury in its process of elimination.

Appellants filed an answer denying all the material allegations in the complaint.

Thereafter the cause was submitted upon the pleadings, testimony adduced by the parties and the instructions of the court, which resulted in the following verdict: "We, the jury, find for the plaintiff the sum of $3,500 against Dr. Spears and the sum of $3,500 against Dr. Purifoy."

The court subsequently entered upon the records the following judgment: "It is therefore ordered and adjudged by the court that the plaintiff do have and recover of and from the defendants, B. N. Spears and L. L. Purifoy, the sum of $7,000; one-half, or $3,500, to be recovered from B. N. Spears, and one-half, or $3,500, to be recovered from L. L. Purifoy; together with all her costs herein laid out and expended, for which execution may issue."

An appeal has been duly prosecuted to this court from the verdict and judgment.

The three main contentions urged by appellants for a reversal of the judgment are: first, that the evidence does not warrant a verdict against either of the defendants; second, that Dr. L. L. Purifoy was an assistant surgeon in the operation, subject to the direction of Dr. B. N. Spears, the operating physician, and was not instructed by him to search the abdominal cavity for sponges; and third, that the wording of the verdict did not warrant the court in entering a judgment of $7,000 to be paid, one-half by each of the appellants, but should have been a judgment in the total sum of $3,500 against appellants jointly.

(1). The testimony, when given its strongest probative force in favor of the appellee, discloses the following facts: Appellee was operated upon March 5, 1921, at Warren-Brown Hospital in El Dorado, Arkansas, where she remained eleven days. She was then removed

to her home, and remained in bed about fifty days, under the care of Dr. Spears, during which time she cramped almost to death with pain in the lower part of the stomach. She suffered at intervals from that time until June 2, 1922, at which time she was again seized with severe pains in the lower part of her abdomen, for which she was treated by Dr. Morgan. She improved to some extent under his treatment and became able to do some housework and some work in the postoffice, as assistant, until October, 1922. At that time she again began to have cramping pains as usual. She called on Dr. Irby, and for ten days suffered as much as any one could and live with pains in the lower stomach. She recovered to some extent, and several days thereafter was seized with another spell. She remained in bed until December 22, 1922, when almost a quart of pus passed from her rectum, and on the next day two pieces of gauze passed in the same way. The first piece was about one and one-half inches long, and this passed before Dr. Irby arrived. Dr. Irby removed the other piece partly from the rectum and partly from a fistula in the wall of the rectum which opened into the abdominal cavity. The second piece of gauze was eighteen inches long and three or four inches wide. Another piece of gauze passed on December 29 in a little long roll. After the gauze passed there was no more pain or cramping, but appellee had not recovered at the time of the trial, still being unable to do housework.

The sufficiency of the evidence to sustain the verdict is challenged upon several grounds. It is said that the gauze eliminated through the rectum was different in grade and size of mesh from that used in the operation. The trial took place two and one-half years after the operation, and none of the witnesses remembered to have made a personal examination of the grade or size of the mesh used in the operation. It is true that there was some difference between the gauze which passed from appellee and that generally used in the hospital, but it may be that, on the occasion of this operation, the hos-

pital had run out of the kind it generally used and procured and used the kind which passed from appellee. From the circumstances in the case the jury might have so inferred. Again, it is argued that, if the gauze which passed from appellee had been left in her abdominal cavity at the time of the operation, it would have been stained with blood, whereas the gauze which did pass was not blood-soaked. The gauze passed out of an abscess which emitted a large quantity of pus, so it cannot be said, as a physical fact, that the blood stains would have remained upon the gauze during its passage through rotting, sloughing tissue from the abdomen into the rectum. Again, it is said that the gauze would have traveled the route of least resistance, which would have been through the wall of the vagina instead of through the wall of the rectum. As we interpret the testimony of the physicians, they all admit that the route of the passage of the gauze from the abdomen to the rectum was a possible way, but hardly a probable route. Before the verdict and judgment could be set aside upon this ground, the undisputed testimony would have to show that the route of elimination through the wall of the rectum was an impossible route. In giving the strongest probative force to the testimony of appellee, all reasonable possibilities must be taken into account. When that is done, the evidence is sufficient to support the verdict.

(2). We cannot agree with appellant's contention that, because Dr. Purifoy was assisting Dr. Spears and was not instructed by the latter to search the abdomen for sponges after the operation, he is exempt from liability if gauzes were found in the abdomen. The record reveals that Dr. Purifoy's part in the operation was to insert and withdraw the sponges. If, through carelessness or negligence, he failed to withdraw any of them, he cannot escape liability on the ground that he was an assistant. Such a rule would have the effect of acquitting one of civil liability growing out of his own negligence.

(3). This suit was against appellants jointly to recover damages against them as tort-feasors. There was only one operation and one damage. Both appellants participated in it, and, according to the verdict, both were liable. Under the testimony they were liable as joint tort-feasors, if at all, and the verdict must be construed as a finding of joint and not several liability. The only way this can be done is to construe the verdict as a joint finding against appellants for $3,500. The trial court should have so interpreted the verdict and rendered a joint judgment against appellants for $3,500. The error will not, however, work a reversal of the judgment. The judgment which the court below should have rendered upon the verdict will be rendered here.

The other contentions made by appellants for a reversal of the judgment related to the instructions which were given and refused by the court, and to the refusal of the court to admit certain testimony relative to a custom in the hospital and among physicians as to the conclusiveness of the count by the attending nurse of the number of sponges used in an operation.

It is insisted that the law applicable to the facts in the case was not correctly stated and declared by the court. The theory of appellants is that no liability rested upon them as physicians and surgeons, on account of sponges or gauze being left in the abdomen of appellee, because the duty of counting them before and after the operation was imposed upon the attending nurse who was in the employ of the hospital where the operation was performed. In other words, that it was a rule or custom of the hospital and among physicians for the attendant nurse to ascertain by count whether any sponges or gauzes had been left in the body of the patient, which count entirely relieved operating surgeons from such responsibility, and consequently from liability growing out of a failure to remove sponges and gauze from the openings or cavities in the body. The instructions given are assailed because they do not embody this idea, and the ruling of the court is questioned in his refusal to

give instructions requested by appellants which expressed this idea. We think the rule of law governing in cases of this kind is correctly stated in 21 R. C. L. p. 388, § 33. The rule there stated is as follows:

"Probably the most common instance of malpractice which is brought into the courts arises out of surgical cases where the physician or attendant has left a sponge in the wound after the incision has been closed. That this is plainly negligence there is no doubt at all, and it matters not at all that many physicians testify that the best of surgeons sometimes leave a sponge or some other foreign substance in the bodies of their patients, for this is testimony merely to the effect that almost everyone is at times negligent. Whether the particular act was negligent is for the jury to decide, after considering the circumstances of the case. Surgeons cannot relieve themselves from liability for injury to a patient caused by leaving a sponge in the wound, after an operation, by the adoption of a rule requiring the attending nurse to count the sponges used and removed, and relying on such count as conclusive that all sponges have been accounted for."

After a careful consideration of all the instructions, we think the law was correctly declared as applicable to the facts and circumstances in the case, and that no error was committed by the court in giving or refusing any one of them.

Under the rule of law announced above, no error was committed in excluding testimony offered by appellants tending to establish a rule or custom of the hospital or of physicians, making the count by attending nurse of sponges conclusive evidence that all of them used in the operation had been accounted for, and that none of them had been left in the wound or body of the patient.

The judgment is modified as indicated above, and, as modified, is affirmed.

ROACH v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

Opinion delivered March 23, 1925.

1. EVIDENCE—PAROL EVIDENCE VARYING WRITTEN CONTRACT.—Admission of parol evidence that an "Estimate and Information Sheet" containing specifications for construction of a levee was attached to and made a part of a written contract by reference does not violate the rule against varying written contracts by parol evidence.
2. LEVEES—CONSTRUCTION OF CONTRACT.—Special clauses in a contract for construction of a levee as to payment for extra work necessitated by subsidence of the foundation, *held* to govern conflicting general provisions therein.
3. CONTRACTS—INTENTION OF PARTIES.—The intention of parties must control in the construction of contracts.

Appeal from Crittenden Circuit Court; *G. E. Keck*, Judge; affirmed.

Hughes & Hughes, for appellants.

Wils Davis, for appellee.

HUMPHREYS, J. This suit is one at law brought by appellants against appellee to recover $3,913.18 for additional work required to be done in the construction of certain levees on account of the settlement of the foundation. The additional work required to be done to make the levees the proper height, on account of the subsidence of the foundation, was 13,039.9 cubic yards. The dispute between the parties arose over whether a sheet of paper entitled "approximate estimate and information sheet" was made a part of the contract for constructing the levees by reference, or whether it was an item only of the negotiations leading up to the contract.

The cause was submitted upon the pleadings which presented this issue and the evidence adduced, at the conclusion of which both parties requested a directed verdict, and the court instructed the jury to return a verdict for appellee. A judgment was rendered in accordance with the directed verdict, from which is this appeal.

The record reflects that the appellants entered into a written contract with appellee to construct certain levees for $0.42 per cubic yard, which contained the following paragraph:

"The said work is to be constructed and finished as described in the specifications and the standard Mississippi River Commission specifications hereto attached, which are hereby made a part of this contract, agreeably to the directions, from time to time, of the said engineer or his assistants, on or about the first day of January, in the year 1921."

Printed specifications of both the board of directors St. Francis Levee District and of the Mississippi River Commission were attached to the contract. The standard Mississippi River Commission specifications which were so attached contained the following provision:

"Settlement of Foundation. Should the contractor desire payment for restoration of yardage due to settling of foundation, he must apply to the contracting officer for instructions regarding the erection of structures for the determination thereof, in advance of any work on sections on which such payment should be made, and he must erect at his own expense, prior to any work thereon, such structures as may then be required by the contracting officer. Should these requirements be fulfilled, the contractor will be paid for the restoration of yardage due to settlement of foundation at the same rate as the other embankment, but he will receive no compensation for such restoration unless the instructions of the contracting officer in regard to the determination of quantities shall have been fully complied with."

The printed specifications of appellee contained no provision for payment on account of the subsidence of the foundation. H. N. Pharr, however, testified, over the objection and exception of appellants, that the "approximate estimate and information sheet" constituted a part of and was attached to the printed specifications of appellee, which were referred to and made a part of the contract at the time it was signed, and that

Mr. Stansell, one of the contractors, was informed and knew that it was attached as a part of the specifications of the levee board referred to in the contract. This "estimate and information sheet" contained a number of specifications, viz., the manner in which payments should be made, the width, slope and topping of the levee, the location of the borrow-pits, and, lastly, the clause in reference to payment in case the foundation should settle. The clause is as follows: "Any abnormal settling of levee foundation, in excess of 5 per cent. of height of levee, will be paid for by levee board at contract price per cubic yard."

Appellants contend for a reversal of the judgment upon two grounds: first, that the court erred in admitting oral testimony to the effect that the "estimate and information sheet" was a part of the specifications of appellee which were referred to and attached to the contract and made a part thereof; and second, that, if correctly admitted, the court erred in construing the contract to mean that appellants were only entitled to pay for yardage placed on account of the settling of the foundation in excess of 5 per cent. of the height of the levee.

(1). We cannot agree with appellants in their view that the "estimate and information sheet" and the oral testimony to the effect that it was attached to and made a part of the contract contravenes the rule that parol evidence cannot be admitted to contradict a written contract. According to the undisputed testimony, the "estimate and information sheet" was attached to and made a part of the contract by reference to the specifications of appellee, which specifications included the sheet. The testimony showed that appellants' attention was specially called to this specification, and that it was attached to the contract as a part thereof at the time the contract was signed. The cases of *Doniphan, Kensett & Searcy Railroad Company* v. *Mo. & N. Ark. Rd. Company*, 104 Ark. 475, and *Boston Store* v. *Schleuter*, 88 Ark. 213, cited by learned counsel for appellants in sup-

port of their contention that said sheet and the oral testimony relative thereto was inadmissible, are not in point. In the first case, a letter written in the course of the negotiations and not made a part of the contract was properly excluded, and in the second case, the written bids which were made prior to the execution of the contract and not made a part thereof by reference were also properly excluded. The difference between these cases and the case at bar is that the "estimate and information sheet" was made a part of the contract, whereas the letter and bids were not.

(2). The two clauses relating to payment for extra work caused by the settling of the foundation are in conflict. The specifications of the Mississippi River Commission provided that abormal settlement in the foundation shall be paid for by appellee, whereas the specifications of appellee provided that said appellee shall pay for that part of the work necessitated by the subsidence of the foundation in excess of 5 per cent. of the height of the levee. It is apparent that the specifications of the Mississippi River Commission in this respect were general and that the specifications on this subject in appellee's specifications were made special by the "estimate and information sheet." The attention of the parties was called particularly to this matter by the engineer of the levee board, so the detailed specific clause must govern, for it expressed the intention of the parties. The intention of the parties must control in the construction of contracts. *Mutual Reserve Fund Life Assn.* v. *Minehart,* 72 Ark. 630; *English* v. *Shelby,* 116 Ark. 212.

No error appearing, the judgment is affirmed.

QUARLES v. LITTLE CYPRESS DRAINAGE DISTRICT.

Opinion delivered March 30, 1925.

1. DRAINS—CONTRACT FOR CONSTRUCTION.—Where the engineer of a drainage district severed his connection as engineer for the district, openly and with the district's consent, after all the preliminary work had been completed, and thereafter made the lowest bid for the construction work, *held* that he violated no principle of law in doing so, and his contract of construction was valid.
2. DRAINS—RIGHTS OF SUBCONTRACTOR.—A subcontractor who has partly constructed a ditch, and the work being stopped by the district, is entitled to recover *ex contractu*, and not on a *quantum meruit*, for the work done pursuant to the contract of the principal contractor with the district.
3. DRAINS—RIGHTS OF SUBCONTRACTOR.—Where a contractor sued a drainage district for the amount due him for work done under his contract and for breach of his contract, and his subcontractor brought a similar suit against the contractor and the district, and the cases were tried together, in order to avoid a circuity of actions the subcontractor will be allowed to recover direct from the district the portion of the amount due the contractor which belonged to the subcontractor.
4. DRAINS—RIGHT TO STOP WORK.—Where a drainage district in a construction contract reserved the right to stop work and complete it itself, and a subcontract provided for the same contingency, the district is not liable to the subcontractor for stopping the work.
5. DRAINS—STOPPAGE OF WORK—RIGHT TO DEDUCT ADVANCE PAYMENT.—Where a construction contract with a drainage district provided for advance payment by the district for purchase of the equipment, and for repayment by deduction of part of the agreed price per yard, the district upon stopping the work under an option in the contract was not entitled to deduct the unpaid remainder of the advance payment as against a subcontractor.
6. DRAINS—STOPPAGE OF WORK—RIGHT TO DEDUCT ADVANCE PAYMENT.—Where a construction contract with a drainage district provided for advance payment by the district for purchase of the equipment, and for repayment by deduction of part of the agreed price per yard and further provided that this district should have the option to stop the work and complete it on the cost basis, and to employ the contractor at a fixed per centum of the cost, the district is entitled, in settling with the contractor, to charge him with the cost of the advance payment for the equipment.

7. DRAINS—RIGHTS OF CONTRACTOR.—Where a principal contractor agreed to construct a drainage ditch at the rate of 35 cents per cubic yard, which was in turn subcontracted to another at 25 cents per cubic yard, he was entitled to recover the difference between the two amounts where the district exercised its option to stop work before completion.

8. DRAINS—BREACH OF CONTRACT—DAMAGE.—Where a drainage district, having the right to stop the work under a contract and to employ the contractor on a cost-plus basis, exercised its option to stop the work, but failed to complete it under the cost-plus basis, it will be liable to the contractor for the work done under the contract and for damages caused by failure to complete the ditch under the cost-plus basis.

Appeal from Phillips Chancery Court; *A. L. Hutchins*, Chancellor; reversed.

L. C. Going, Coleman, Robinson & House and *W. G. Dinning*, for appellants.

Moore, Walker & Moore, for appellees.

McCULLOCH, C. J. Appellee is a drainage district in Phillips County, organized under a special statute, and appellant, John M. Quarles, together with his partner in the practice of the engineering profession, Mr. Hurlbutt, were employed by the commissioners to do the engineering work for the district. The engineers made the necessary surveys upon plans and specifications which were adopted by the commissioners, and an advertisement for bids was duly published. The commissioners received one or more bids, but they were unsatisfactory and were rejected. At this point of the proceedings appellant Quarles applied to the commissioners for permission to resign his position as engineer and make a bid to do the construction work. After consultation with the attorney for the district, who advised that there was no impropriety in Quarles resigning his position and bidding for the work, the commissioners permitted him to do so, and his bid was accepted and a contract was entered into with him by the commissioners. The bid was to remove the estimated amount

of 364,273 cubic yards of earth at thirty-five cents per cubic yard. There was also a specification of the price and quantity of clearing and grubbing, but there is no controversy in the present litigation over that feature of the work, hence it is unnecessary to mention it.

The contract between Quarles and the commissioners was dated October 12, 1920, and contained a stipulation to the effect that the district should advance to the contractor the sum of $25,000 in money, one-half of which was to be paid over when the dredging machinery should arrive at a certain railroad station near the work, and the other one-half when the machinery was installed and ready for operation at the place where the system of canals was to begin, and it was further stipulated that the amount so advanced should be repaid by a deduction of ten cents per cubic yard for the removal of the dirt as the work progressed. A supplemental contract between the parties contained the following provision:

"Now, I hereby agree with the commissioners of said drainage district that, at any time subsequent to the date of which I shall begin work on said system of drainage and canals, and upon five days' notice in writing given me by the said board of commissioners of said drainage district to turn over to the said board of commissioners of said district the uncompleted work, to the end that said board have complete charge thereof from that date; and I further agree to go on with the performance of said work, to superintend the same, and to cause said work to be completed under the management and direction of the said board of commissioners at their expense, and as compensation for my services, from the date that said board of commissioners take over said work, I am to receive 15 per cent. of the cost of construction of said uncompleted work, the same to be paid me on monthly estimates by the said board until said work is completed."

Quarles subcontracted the work to R. L. Cheshire under written contract dated December 1, 1920, at the

price of thirty cents per cubic yard for moving earth, and the contract, after specifying all of the other items, contains a stipulation for an advancement of $25,000 for the cost of installation of the machinery, and also the following stipulation:

"The party of the first part agrees that, in event the board of commissioners of the Little Cypress Drainage District takes over the contract on cost-plus basis (as provided in contract executed between the commissioners and the party of the first part), that the party of the first part agrees to pay to the party of the second part an amount to equal all expenses that the party of the second part has paid out for securing equipment, which covers cost of plant, dismantling, transportation, erecting, and all other expenses by installation of equipment. Should the commissioners take over contract before equipment shall have excavated 50,000 cubic yards of excavation, the party of the first part agrees to pay the cost of operation, shall pay for all material on hand, such as supplies, and shall pay the party of the second part the amount of two thousand dollars ($2,000), which is to compensate the said party of the second part for installing equipment and starting the organization. The party of the first part shall be entitled to receive all pay on work completed, if same is taken over before machine has excavated the stipulated yardage."

On December 6, 1920, Cheshire subcontracted the work to appellant T. D. Hunt at twenty-five cents per cubic yard for the removal of earth, and the written contract between them contains the same stipulations as those referred to above in the contract between Quarles and Cheshire. The district advanced $25,000 in accordance with the contract, which was used in the purchase of machinery and other equipment, and the additional cost of installation of the machinery at the place of work ran the initial cost up to $32,881.63. After installing the equipment, appellant Hunt proceeded with the construction work, and, in addition to a certain amount of grubbing and clearing, he excavated and removed 73,850.70

cubic yards of earth. He was paid $8,447.10 on estimates, and nothing more has been paid to him or to Quarles. The commissioners then, under date of July 29, 1921, gave notice to Quarles, as principal contractor, of the election of the district to exercise the option in the contract for stopping the work and taking over the construction of the ditch. The work was accordingly stopped, and nothing further has been done toward the completion of the improvement. Assessments of benefits were made, and taxes levied and bonds were sold, and part of the money for the purchase price of the bonds was paid over to the commissioners.

Quarles subsequently brought suit against the district, alleging breach of the contract by the commissioners, and also alleging that he had held himself in readiness to comply with the contract, both as to the construction of the work on the original terms specified or on the cost-plus basis specified in the supplemental contract, and prayed for the recovery of compensation for the amount of work done as well as damages for being prevented from doing the remainder of the work.

Appellant Hunt also instituted a separate action against the district and against Quarles to recover the amount of earned compensation under his contract and for damages for breach of the contract.

These actions were instituted in the circuit court, but, on motion of the district, were transferred to the chancery court, and proceeded there to final trial and decree. The district answered, pleading the invalidity of Quarles' contract with the district on account of his having been engineer of the district in the formation of the plans, and also pleading that the contract was an improvident one and should be set aside. There were other denials with respect to the amount of outlay claimed by each of the appellants, and it was also denied that there were any damages sustained. The chancery court rendered a final decree dismissing Quarles' complaint for want of equity on the ground that the contract

with the district was void by reason of his former relation to the district as engineer. The court held that Hunt could recover from the district only on the *quantum meruit* basis, and, after stating his account with the district, brought him out in debt to the district in the sum of $14,288.22. The account between Hunt and the district was stated by the court in its decree as follows:

CREDIT.

73,850.70 cubic yards removed at 8½ per yard	$ 6,277.25
Rental on drainage boat at $30 per day	2,100.00
Grubbing right-of-way	1,800.00
Additional cost of installation	7,881.63
Maintenance of organization during delay	1,100.00
Total	$19,158.88

DEBIT.

Amount advanced for purchase and installation of equipment	$25,000.00
Amount paid on estimates	8,447.10
Total	$33,447.10
Balance due from Hunt to district	$14,288.22

The court also in its decree declared a lien in favor of the district on the drainage boat, which was part of the equipment and on which advances were made, and held that appellant Hunt and his surety were liable on his bond executed during the pendency of the action for the return of the equipment if ordered by the court.

Learned counsel for appellee defend the court's decree on the ground that the contract of Quarles with the district was illegal and void, and that Hunt was entitled to recover only on *quantum meruit*, and that the court allowed him the amount to which he was entitled. Counsel base their contention on the decision of this court in the case of *Carter* v. *Bradley County Road Improvement District*, 155 Ark. 288, but we are of the

opinion that the rule announced in that case is not applicable to the present case. In the Carter case the engineer of the improvement district had, while serving as engineer for the State Highway Commission, entered into a contract with the road improvement district to do the engineering work, and this court held that he was not entitled to recover either on the contract or on the *quantum meruit,* notwithstanding the fact that the work was done after the claimant had severed his connection with the State Highway Commission. In the present case Quarles severed his connection with appellee district as engineer before he bid for the construction work, and this was done without any concealment, openly and with the approval of the attorney for the district as well as the commissioners. He resigned as engineer after all preliminary work had been done and the plans had been completed and approved. It was even after bids had been advertised for and received and no satisfactory bids had been made. There is nothing in the proof to justify the conclusion that there was any collusion between Quarles and the commissioners whereby he was to take advantage of his position as engineer for the purpose of securing an advantageous contract with the district. There is nothing to show that the resignation was a mere evasion of duties devolving upon Quarles as engineer. On the contrary, he had, as before stated, completed all of the engineering work to be done up to that time, and when the bid was made there were no official or confidential relations existing between Quarles and the district. He was perfectly free then to enter into a contract with the district, and we can perceive no principle of law that would forbid his doing so. Nor is the proof sufficient to justify the conclusion that the contract was an improvident one. The bid was much less than the bids received by the commissioners from other persons. There is testimony in the record of other work being done cheaper, and other testimony tending to show that the price stipulated for in Quarles' contract was too high, but we are of the opinion that the testimony as a

whole does not justify a finding that the contract was improvident or that the commissioners could, by the exercise of diligence, have secured a contract at a lower price. The contract entered into was free from fraud or collusion, and we can see no reason why it should not be upheld.

Our conclusion therefore is that Quarles' contract was valid and that he is entitled to recover earned compensation and for damages which arose, for which he should be allowed compensation as in other cases under settled principles of law.

Whatever appellant Hunt is entitled to recover, it must be under the contract and not on the *quantum meruit*. He had no contract with the district, for his contract was with Quarles, but, since Quarles and Hunt are both parties to this suit, Hunt should be allowed, in order to prevent circuitous actions, to recover directly from the district the amount he is entitled to under the contract and for which the district is liable under its contract with Quarles. Hunt is, of course, entitled to recover for the amount of excavation and removal of dirt at the stipulated price under his own contract with Quarles, and also for the price of the grubbing, which is undisputed. He is not entitled to recover anything from the district by way of damages for breach of contract, for the simple reason that the district did not break the contract so far as allowing the construction of the improvement to be made under the terms of the contract. The district in its contract expressly reserved the right and option of stopping the work at any time and completing the job. Hunt is bound, so far as any liability of the district to him is concerned, by the stipulations in the contract between Quarles and the district. It is a hard feature of the contract, but he can obtain no relief from it, for the reason that it became a part of his own contract. For the same reason he is not entitled to recover anything as reimbursement for the additional cost of the installation of equipment. Nor is he entitled to recover for the expense of maintaining a

crew while the equipment was idle. These are items purely of damages for breach of the contract, and, as we have already seen, there was no breach of the contract by the district so far as concerned Hunt, for the reason that the district reserved its right to stop the work at any time, and the stoppage of the work was not a breach but was within the reserved rights of the district. On the other hand, the district should not be permitted to deduct from its liability to Hunt for earned compensation the full amount advanced for the purchase of equipment. This is so because the district expressly agreed in its contract to claim the right of deduction only to the extent of ten cents per cubic yard of excavation and removal of dirt during the progress of the work. Having contracted to accept the return of the money in that way only, the district cannot, after having made an election to stop the work, insist upon the subcontractor returning the money advanced for the equipment. The account between Hunt and the district should be stated as follows:

CREDIT.

73,850.70 cu. yds. removed at 25c per yd.	$18,462.67
Amount allowed on grubbing	1,800.00
Total	$20,262.67.

DEBIT.

Amount paid on estimates	$ 8,447.10	
Amount of deduction at 10c per cubic yard for advancement on equipment	7,358.70	
Total		$15,805.80
Balance due Hunt		$ 4,456.87

The decree in favor of Hunt should be for the balance stated above.

Turning to the claim of Quarles, we are of the opinion that he is entitled to recover from the district the balance of ten cents per cubic yard on the removal of earth by Hunt, which is the difference between the amount he is entitled to under his contract and the

amount to be recovered by Hunt under his contract. Quarles is entitled, under his supplemental contract with the district to fifteen per centum of the cost of the improvement made under his supervision. According to the undisputed evidence, it would have cost $140,000 to complete the work, and Quarles held himself in readiness to do the work when called on by the district, and was not able to obtain any other employment during the period which would have been covered by the completion of the work. He is therefore entitled to recover the compensation which he would have earned under the contract if performed. Quarles is also chargeable with the balance of the sum advanced by the district on equipment after deducting the amount charged to Hunt. Notwithstanding the stipulation in the contract for the deduction of the advancement on the estimates of work done, Quarles is responsible for the full amount, inasmuch as he is allowed under the contract to recover fifteen per centum of the total cost of the completion of the improvement. He stands in a different attitude from Hunt in this respect, for, under his contract, he was not cut off from earning additional compensation by the election of the district to complete the work itself. A fair interpretation of the contract is that the district had the right to stop the progress of the work under the contract and change to the cost-plus basis, and it should not be denied the return of the amount of money advanced merely because it made this change. Quarles took his chances under the contract on the loss of his equipment, and, if he claims the fifteen per centum on the cost of completing the work, he must return the money advanced for the equipment. Quarles' account with the district should therefore be stated as follows:

CREDIT.

73,850.70 cu. yds. removed at 10c per yd.	$ 7,385.07
Amount allowed, 15 per cent of cost of completing the work	21,000.00
Total	$28,385.07

DEBIT.

Balance of amount advanced for equipment, after deducting amount charged to Hunt	$17,641.30
Balance due Quarles	$10,743.77

It is conceded that Quarles is entitled to recover this amount from the district. Both of the appellants are entitled to recover interest from the time of the commencement of their respective actions.

It is conceded by both Quarles and Hunt that there are items of account to be settled between them in this litigation, and that, on the remand of the cause, those matters will be either settled or litigated. We are not asked to decide any issue between them, but they ask that the cause be remanded for that purpose.

The decree of the chancery court is therefore reversed, and the cause remanded with directions to the court to enter a decree in favor of appellants Hunt and Quarles for the respective amounts stated above, with interest, and for further proceedings not inconsistent with this opinion.

HOME MUTUAL LIFE ASSOCIATION v. SWAGERTY.

Opinion delivered March 30, 1925.

INSURANCE—BENEFIT INSURANCE—FORFEITURE.—Where the holder of two benefit certificates failed to pay or to offer to pay the regular monthly assessments for two years before her death, after her application for reinstatement of one of the certificates was refused and her check covering both assessments was returned, she will be held to have abandoned the certificates, though no subsequent notice of assessments was given to her, and no actual notice of forfeiture of the other certificate.

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

Neill Bohlinger, for appellant.

Walker & Walker, for appellee.

McCULLOCH, C. J. Appellant is a mutual insurance company, doing business on what is termed the circle plan, whereby each member is placed in a group or circle, and when a death occurs in a circule an assessment is issued on all the remaining members, and the beneficiary receives the amount raised by the last preceding assessment, after deducting the cost of collection. The maximum amount of each policy is $1,000.

Ellen Swagerty, the mother of appellee, became a member of the association, and was the holder of two certificates, one in Group No. 1 and the other in Group No. 3, appellee being the beneficiary in each certificate. One of the certificates was issued on January 30, 1915, and the other on July 29, 1915. Assessments were paid as late as March 23, 1921, but, according to testimony adduced by appellant, the January assessment was not paid. On April 25, 1921, Mrs. Swagerty, the holder of the certificates, sent in a check for three dollars to cover the assessments for the month of April, but on April 30, 1921, appellant returned the check with a notice to Mrs. Swagerty that the certificate in Group 3 had lapsed on account of failure to pay the January assessment. It was suggested to her that she should apply for reinstatement, and blanks for that purpose were sent to her, which were filled out and signed and returned to the company, but she was later notified of the rejection of her application. No payments were made thereafter of assessments on either of the certificates, and Mrs. Swagerty died May 30, 1923. Appellee is the beneficiary in each of the certificates, and instituted this action praying for the recovery of the maximum amount of $1,000, on each certificate. There was a trial before a jury, and there was a verdict in appellee's favor for the sum of $613.25 to cover the amount which the testimony tended to show was the aggregate of the last preceding assessment in each of the groups, less the cost of collection.

The contention of appellant is that both policies lapsed by reason of nonpayment of assessments. The

theory of appellee is that the assured paid all of the assessments of which she received actual notice and that there was no lapse of the policies by reason of failing to pay assessments of which no notice was sent out.

There is really no dispute in the testimony, and the only question is whether or not the certificates were forfeited by failure to pay the premium.

It is undisputed that the assured was notified of the lapse of one of the certificates, that she applied for reinstatement and was rejected, and thereafter paid no assessments nor offered to pay any. Two years elapsed before the death of the assured, and it is perfectly clear that there was a forfeiture of this particular certificate.

We are of the opinion also that there was a forfeiture of the other certificate by reason of complete abandonment of the policy, notwithstanding the fact that there was no actual notice of a forfeiture. The check which was returned by appellant uncollected on April 30, 1921, was sent to cover the assessments on both of the certificates. The assured knew that the check was returned, and is bound to have known that there were other succeeding assessments. The testimony shows that there were regular monthly assessments, and, even though notice was provided for, the assured could not hold on to a membership indefinitely without contributing to the benefit funds. There is no escape from the conclusion that the assured treated her membership in both certificates as having been lapsed, and that she completely abandoned both certificates. Appellant's only source of revenue was the collection of assessments on the death of its members, and, as before stated, a member could not ignore the requirements and for a long lapse of time continuously ignore the obligation to contribute to the funds of the association by paying assessments. This constituted an abandonment of the policy, and there can be no recovery.

The judgment is therefore reversed, and, as the cause is fully developed, judgment will be entered here in favor of appellant.

COLE v. COLE.

Opinion delivered March 30, 1925.

1. DIVORCE—CONCLUSIVENESS OF WIFE'S STATEMENT.—In an action by a wife for divorce on the grounds of cruel treatment and indignities, her written statement given to him at the time she left him, in which she absolved him from any charge of misconduct, *held* not conclusive, but merely to be considered with other testimony.

2. DIVORCE—CANCELLATION OF DEED—PARTIES.—In an action for divorce, cancellation of the husband's deed to his mother as in fraud of the wife's rights was not justified where his mother was not a party.

3. DIVORCE—ALLOWANCE OF ATTORNEY'S FEE.—Where, on the pendency of an appeal by the husband, the trial court directed the husband to pay $50 to the wife's attorney, and the decree is affirmed in so far as it allows a divorce to the wife, the amount of such fee will not be deducted from the property allowance made by the trial court.

4. DIVORCE—EFFECT OF REVERSAL IN PART.—Where a decree in a divorce case was reversed in so far as it canceled a deed from the appellant to one not a party to the suit, and remanded for further proceedings on that issue alone, this does not call for a reversal of the whole cause nor reopen the issues as to the divorce, distribution of property, and allowance of counsel fees.

5. APPEAL AND ERROR—NEWLY DISCOVERED EVIDENCE.—An application on rehearing for a new trial in a divorce case on account of newly discovered evidence will not be considered on appeal.

6. DIVORCE—PROCEEDING TO MODIFY DECREE AS TO CUSTODY OF CHILDREN.—A proceeding to modify a decree in a divorce suit as to the custody of the children, based upon newly discovered evidence not in the record, must originate in the trial court, and can be reviewed only on appeal from its decree.

Appeal from Greene Chancery Court; *Sam Costen*, Special Chancellor; reversed in part.

Jeff Bratton, for appellant.

M. P. Huddleston, for appellee.

McCULLOCH, C. J. Appellant and appellee are husband and wife, and this action was instituted by appellee (the wife) to obtain a divorce and to obtain her distributive share of appellant's property. The action originated merely as one for division of property, but

subsequently appellee filed an amended complaint praying for a divorce on the ground of cruel treatment and indignities. Appellee secured, at the commencement of the action, a temporary order from the chancery court restraining appellant from disposing of his property. It is also alleged in the complaint that appellant had fraudulently induced her to join in a conveyance of a tract of land to appellant's mother, Mrs. Angie Cole, and that this was done for the sole purpose of placing the title beyond appellee's reach in securing her rights in appellant's estate. There is a prayer for a cancellation of that deed.

Appellant filed his answer denying all the allegations of the complaint with respect to misconduct on his part, and the cause was heard by the court on oral testimony.

The parties intermarried on August 24, 1919, and lived together until the month of July, 1923, when appellee left appellant's home and went to the home of her parents, and about a month later instituted this action. They have three children—two girls and a boy—their ages running from three years down to about two months at the time of the commencement of the action.

Appellee alleged in her complaint and introduced testimony tending to prove all sorts of misconduct towards her on part of appellant. She claims that he neglected her during illness, particularly at the time of the birth of her children, subjecting her to hard work in housekeeping, failure to provide clothing, abuse, epithets; that he struck her one time with a stick; that he was jealous of her association with her friends, and denied her any privileges of going into society. All of these charges were denied by appellant, and he introduced testimony tending to show that the charges were unfounded.

The record is voluminous, and there is a large number of witnesses on each side of the controversy. No useful purpose would be served in reviewing the testimony in detail. From careful consideration of it we fail

to see that the finding of the trial court is against the preponderance of the evidence.

The contention of appellant is that appellee left of her own accord and without any cause being given, and that her sole purpose was to enter upon some career of her own, and that, when she left him, she gave him a written statement absolving him from any charge of misconduct. There is some conflict as to the circumstances under which the statement was made, but, at all events, it is not conclusive and is only to be considered along with other testimony in the case in determining whether or not appellant was in fact guilty of the misconduct charged.

Appellant is shown to be a man conducting a successful business and receiving a fairly good income, and the trial court in its final decree set aside a certain amount of personal property to appellee as her portion, and also ordered appellant to pay an attorney's fee of $150 and also to pay to appellee the sum of thirty-five dollars per month for the support of the children. The court also canceled the deed to appellant's mother, Mrs. Angie Cole, and appointed commissioners to set apart appellee's portion of one-third.

We find that the testimony justified the award of personal property to appellee, as well as the other allowances, but it was improper to cancel the deed to Mrs. Cole, for the reason that she was not a party to the action.

During the pendency of the appeal, this court made an order directing appellant to pay appellee the sum of $50, to be used in payment of attorney's fees in this court, and we reserved until final disposition of the case on the merits the question whether or not this should be deducted from the amount allowed by the trial court. We conclude that the additional sum mentioned should not be deducted, and that the original allowance made by the trial court should stand.

The decree is therefore affirmed in all things except as to the cancellation of the deed to Mrs. Cole, and that

part of the decree is reversed, and the cause remanded with directions that, unless appellee is advised to make Mrs. Cole a party to the action and does so, the complaint be dismissed as to the cancellation of the conveyance. It is so ordered.

McCULLOCH, C. J., (on rehearing). Appellant has filed here a certified copy of an order of the chancellor, rendered subsequent to the rendition of the decree appealed from, and in this order the custody of the children is changed from appellee to appellant, without changing, however, the order previously made by the court with respect to the payment of thirty-five dollars per month to appellee for the support of the children. It does not appear from this supplemental record, however, that the court was asked to modify the original decree in this respect, nor has there been any appeal prosecuted from the order. We are asked to modify the decree so as to eliminate the requirement for the payment of the monthly allowance to appellee, or to remand the whole cause for trial *de novo* so that the lower court can make such an order and can hear new evidence on all the issues in the case.

It is alleged in the petition for rehearing that appellant has discovered new evidence, and his counsel insist that, inasmuch as the cause has been remanded for further proceedings with respect to the cancellation of the deed to Mrs. Angie Cole, we should remand the whole cause for further proceedings so as to afford appellant an opportunity to present this evidence.

The fact that we reversed the cause on one issue does not call for a reversal of the cause on the main issue, the evidence being sufficient to support the decree for a divorce and for distribution of property, allowance of fees, etc. Neither does the fact that appellant has discovered new evidence call for a reversal. We try chancery cases here *de novo*, but upon the record made on the trial below, and we have no authority to consider here an application for a trial *de novo* on account of newly discovered evidence, that being an original proceeding. The

same may be said with reference to appellant's application to modify the decree making a monthly allowance. That allowance is subject to change by the chancery court, and we have no authority to do so here except upon appeal from an order of the chancery court refusing to change the allowance. The question of modification of the requirement of the original decree with respect to custody of the children and allowance of alimony, etc., constitutes a new proceeding which must originate with the trial court and be brought here on appeal before we can review such proceeding. The way is open for appellant to apply to the chancery court for any change with respect to allowances that may be called for by altered circumstances of the parties.

Rehearing denied.

AHERN *v.* PAVING IMPROVEMENT DISTRICT NO. 32 OF TEXARKANA.

Opinion delivered March 30, 1925.

1. MUNICIPAL CORPORATIONS—PAVING ASSESSMENTS—PRESUMPTION.—Even in a direct attack, under Crawford & Moses' Dig., § 5668, on an assessment of benefits to property in a paving district, though tried *de novo* on the record made below, some deference must be given to the judgment of the assessors, which will be presumed correct until the contrary is proved.
2. MUNICIPAL CORPORATIONS—PAVING ASSESSMENTS—EVIDENCE.—In an attack, under Crawford & Moses' Dig., § 5668, on the correctness of the assessment by a board of assessors of a paving district, claimed to be unjust and discriminatory, where the evidence was conflicting and largely depended on the judgment of witnesses, the decree of the chancellor sustaining the assessments as made by the board of assessors and approved by the city council will be affirmed.

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

Shaver, Shaver & Williams, for appellant.

Gustavus G. Pope, for appellee.

McCULLOCH, C. J. Appellee is a paving district, organized in accordance with general statutes, and

covers a territory of seventy-two lots in the city of Texarkana. Appellant is one of the commissioners of the district, and is the owner of twenty-seven of the lots in the district. The assessment of benefits was made by a board of assessors duly appointed, and the list was filed with the council and approved, and an ordinance passed levying taxes on the same for the cost of the improvement. Appellant instituted this action in the chancery court of Miller County, challenging the correctness of the assessment of benefits on his property, and, the suit having been filed within the time prescribed by the statute, it constitutes a direct attack on the assessments. Crawford & Moses' Digest, § 5668.

Appellee filed an answer denying the charges of injustice and inequality in the assessment of appellant's property, and the cause was heard by the court on oral testimony, the trial resulting in a decree dismissing the complaint of appellant for want of equity.

It appears from the testimony that the property in question owned by appellant consists of vacant lots, and the principal basis of his contention is that the assessment should have been on a valuation basis, or at least that more effect should have been given to the difference in values. Other charges of inequality are founded on the claim that appellant's property is broken and hilly, of very little value, and that most of it is subject to washing and inundation from surface water. There is testimony to the effect that the property is not level, but is hilly and slopes down to a gulch, through which the surface water is drawn. On the other hand, it is contended on the part of appellee, and the testimony of witnesses tends to show, that all the elements having any bearing upon the question of assessments of benefits to the property were taken into consideration, and that the assessments were fair and just. It is shown that the question of drainage will be taken care of by a plan to be executed by the city council in providing a way for the water to flow.

While this is a direct attack on the correctness of the assessment, and the case is tried here *de novo* on the record made below, the same as in other chancery cases, yet we must give some deference to the judgment of the assessor, and indulge the presumption that the assessor was correct, until the attacking party proves to the contrary. Numerous witnesses testified in the case on each side, and there is a conflict as to the correctness of the assessment. It is largely a matter of judgment of the witnesses, and we are unable to say from the testimony adduced that the assessments have been shown to be unjust or lacking in uniformity with the assessments of other property in the district. In that state of the case it becomes our duty to leave the assessments undisturbed as made by the board of assessors and approved by the city council.

The decree is therefore affirmed.

WEAVER COTTON COMPANY *v.* BATESVILLE COMPRESS COMPANY.

Opinion delivered March 30, 1925.

1. WAREHOUSEMEN—UNINDORSED RECEIPT—BONA FIDE PURCHASER.—Where a warehouse receipt for cotton stored which obligated the warehouseman to deliver the cotton "upon surrender of this receipt properly indorsed" was lost without being indorsed by the bailor, and his name was altered, and the indorsement of another name was forged thereon, a *bona fide* purchaser of the receipt for value acquired no rights, as the warehouseman was liable only according to the terms of the receipt as issued.
2. WAREHOUSEMEN—NEGLIGENCE.—A warehouseman was not negligent in delivering cotton to the owner who had lost his receipts, as against a purchaser of the receipts not indorsed by the owner, although the warehouseman failed to exact of the owner an indemnifying bond, as provided by Crawford & Moses' Dig., § 10358.

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

Cole & Poindexter, for appellant.

Samuel M. Casey, for appellee.

WOOD, J. On the first day of October, 1923, the appellant instituted an action against the appellee for the conversion of two bales of cotton. The appellant alleged that on the 20th of November, 1922, the appellee received from one J. W. Black two bales of lint cotton, and became the bailee and warehouseman for said cotton and issued to said Black two receipts for same, which receipts were negotiable; that the appellant became the holder of these receipts in due course for a valuable consideration; that, in April, 1923, it made demand of the appellee for the cotton, and appellee failed and refused to deliver the same to the appellant; that the appellee thus wrongfully converted the appellant's cotton, of the value of $285.73. The appellee denied liability to the appellant, and set up in defense that the appellant presented two receipts for the cotton which had been altered since appellee issued them; that the receipts were originally issued by the appellee to one J. W. Blair; that, when presented to the appellee, the name had been changed to J. W. Black, and the indorsement on the back of the receipts was J. W. Black; that, because of this forgery, the appellee did not honor the receipts, and for the additional reason that they had already turned over to J. W. Blair, the owner of the cotton, the two bales of cotton described in the tickets, said Blair having reported to the appellee that he had lost his tickets.

The facts are substantially as follows: The appellant was in the business of buying and selling cotton and the appellee was engaged in the business of warehouseman and bailee for hire, and handling compressing and storing cotton in the bale. The appellant carried on its business in the following manner: If a man had a bale of cotton for sale, he generally had a receipt from the compress and a sample. The appellant bought the cotton by an examination of the sample, and having the receipt transferred to it by an indorsement of the name of the holder of the ticket or receipt on the back

thereof. The appellant purchased altogether on the compress numbers. It paid no attention to the names in the receipt. It bought often from people whom it did not know. They had the samples, and appellant took the samples and number that corresponded with the number on the ticket, and it did not have to have the names of the parties holding the tickets identified. Appellant bought two bales of cotton which were represented by tickets, which tickets were introduced in evidence. The material part of the ticket was as follows: "Received of J. W. Black of Red Stripe, owner, one bale of cotton numbered and described as follows: Private mark—number—weight in 500 re-weight, to be stored and held, subject at all times to reasonable inspection by the owner, and delivered upon surrender of this receipt properly indorsed, and the payment of accured charges." On the back of the receipt was the following: "For value received, I hereby transfer and assign the herein described cotton, representing the same to be my own property; that it is free from any lien and incumbrance whatever, and that I have a good right to sell, assign and transfer the same. (Signed) J. W. Black, owner." There was also indorsed on the back of the receipts in rubber stamp, "Williamson, Inman & Stribling." The two receipts, except as to the number and weight of the cotton, were precisely the same. There was a tag number on the inside of each sample which came off of the compress tag and corresponded with the number on the ticket. The appellee bought the cotton represented by the tickets on the first of March, 1923, and sold the cotton three or four days after that to Williamson, Inman & Stribling. The cotton was not delivered to the purchaser, and appellant refunded the money and took the tickets back. Appellant then made demand on appellee for the cotton. Appellee refused to deliver the cotton or to reimburse appellant, and appellant then brought this suit.

The cotton was worth $285. Appellant didn't know the name of the man it bought the cotton from. The

tickets were written with lead pencil. The man that represented Black claimed that his name was O. J. Baker. Appellant asked Baker to whom it should make the check in payment for the cotton, and made the check out to J. W. Black or O. J. Baker. Appellant stood on everything that comes on the cotton ticket, and the number of course. A holder may have altered the tickets, but appellant didn't know anything about it. The tickets show that they were issued on the 20th of November, and appellant purchased them in March. It was not unusual for a man to hold the tickets that long. Appellant had purchased tickets that had been held a year. There was nothing unusual in buying that way. The number on one of the tickets was 50,522 on the other 50,523. The tickets didn't appear to have been altered or changed.

Three witnesses who were cotton buyers in Batesville testified to the effect that they were familiar with the way that the appellees handled cotton stored with it for compress, and that the receipts issued by the appellee were for the cotton stored with it. The receipts in controversy were submitted to these witnesses, and they testified that, in their opinion, they were genuine receipts.

A witness for the appellee testified that he was the weigher for the appellee in November, 1922. The tickets introduced in evidence were exhibited to the witness and he was asked if he had issued any such receipt as that, and answered that he didn't think that he issued these receipts. Witness actually weighed and received the cotton, but did not issue any receipt to J. W. Black. Witness had duplicates of the receipts he issued that day which he kept in a book for that purpose. He issued two tickets on the same number as that on the tickets in controversy, and on the same date, to J. W. Blair at Red Stripe. He examined the tickets and stated that the name "J. W. Black" had been written there, or the name changed since witness issued it. The initials are the same, but it seemed to witness that the name had been changed. Witness issued the tickets to the man

who brought the cotton there for Mr. Blair. Witness didn't remember his name. A man by the name of Blair came in a few days after the cotton was delivered to the appellee, and, after witness had written the receipts, and claimed that he didn't have the receipts, and witness told him that he could make bond for the receipts and get his cotton in that way. Witness was informed that Blair made bond. It was the custom of the appellee that, when a man stored cotton in its warehouse, he would have to bring the receipts in order to get the cotton, and, if he could not produce the receipts, he was required by the warehouse company to indemnify it by giving a bond for any loss to the company sustained by delivery of the cotton to him. Witness located the receipts that he issued by the numbers on the tickets. It was the custom of the appellee to locate the cotton and let it out and deliver it by the number on the receipts. These tickets were written in lead pencil and delivered to whoever brought the cotton. Witness had no way of knowing the party to whom the receipts were issued, so, in order to keep witness in the clear, he went by the numbers. He had a series of numbers running on the book. One of the witnesses stated that the receipts looked as though the last part of the name had been changed.

The court gave the following instruction: "The undisputed proof in this case shows that the tickets bearing the same numbers were issued to J. W. Blair and the tickets themselves show on their face to be the same tickets except the difference in the name (J. W. Black). It is alleged in the defendant's answer, and not denied, that the two bales of cotton covered by the original tickets have been delivered to J. W. Blair, the true owner of them, and, under that state of facts, there would be no liability on the part of the compress company for it, and it is your duty to return a verdict for the defendant." The jury returned a verdict in favor of the appellee, and from the judgment in appellee's favor is this appeal.

Section 10357 of C. & M. Digest is as follows: "The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was (a) immaterial; (b) authorized; or (c) made without fraudulent intent. * * * Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipts had not been altered at the time of the purchase."

Section 10349 provides: "A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted, shall be void."

In *Shaw* v. *Railway Co.*, 101 U. S. 557, the court had under consideration bills of lading which, under statutes, were made negotiable by indorsement and delivery. In distinguishing between such instruments and bills of exchange and promissory notes commercial paper circulating as evidence of money, the Supreme Court of the United States had this to say, at page 564, concerning negotiable bills of lading: "It is not a representative of money, used for tranmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as banknotes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of those goods. But, if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who

lost them, or from whom they were stolen." See *Citizens' Bank* v. *Arkansas Compress and Warehouse Co.*, 80 Ark. 601-608.

The above language by the Supreme Court of the United States is apposite to warehouse receipts which are negotiable under our statute. While the indorsement by the original owner or depositor in whose name such receipts are issued confers upon any subsequent innocent holder for value a right to demand a compliance with the terms of the statute, *i. e.*, the delivery of the property to him by the warehouseman, yet the indorsement of such receipt by one who is not the original depositor or owner and in whose name the receipt was issued, does not confer upon a *bona fide* holder for value any such right. In other words, negotiable warehouse receipts in the form of these in controversy must first be indorsed by the person to whom delivery was promised by the terms of the receipt in order to confer any rights upon a subsequent holder for value. Subdiv. 3, § 10353, Crawford & Moses' Digest.

The forging of an indorsement of the name of the original depositor or owner in whose name a negotiable receipt is issued by one who may have found a lost receipt or who may have stolen the same, can confer no rights upon a *bona fide* holder of such receipts for value, for the reason that the forged indorsement of such receipt is in law no indorsement at all. In *Citizens' Bank* v. *Arkansas Compress & Warehouse Co., supra,* we said: "The compress receipt represents the property, and the transferring of the compress receipt by the owner transfers the title to the property. But a thief who finds a compress receipt can give no more title to a purchaser from him than he could to property which he had found or stolen * * *. The finder of an unindorsed receipt, which on its face, shows the name of the true owner, can not, by selling or surrendering such receipt, transfer the title of the owner." The receipts under review, by their express terms, only obligate the

compress company to deliver the cotton upon the surrender of this receipt properly indorsed.

In case-note to *National Union Bank* v. *Shearer,* 17, Ann. Cas. 673, under the head of "Negotiability of Warehouse Receipts," it is said: "But a transfer without indorsement will merely transfer the title of the transferor and will not afford the transferee the greater rights which are granted under the statute." True, the receipts under consideration were indorsed "J. W. Black," the name of the person designated in the receipts, but the undisputed testimony shows that the receipts were issued to J. W. Blair and that the name of Black had been substituted in the body of the receipts for "Blair," and also that the name of "J. W. Black" indorsed on the receipts were forgeries. Since, as we have already seen, a forged indorsement was tantamount to no indorsement at all, it follows that the appellant had no title which would give it the right to compel the appellee to deliver to it the cotton, and to render appellee liable to appellant because of its failure to deliver the cotton.

Sections 10355 and 10357 of C. & M. Digest, upon which appellant relies to sustain its cause of action, clearly mean that, where a warehouseman has issued a "negotiable receipt, the negotiation of which would transfer the right to the possession of the goods," then such warehouseman, unless he takes up and cancels the receipt, shall be liable to any one who purchases the same for value and in good faith, for failure to deliver the goods to the purchaser of the receipt. Where a negotiable warehouse receipt has been issued and properly indorsed and negotiated, that is, transferred to one who has in good faith paid value therefor without notice, then the warehouseman is liable to the one who holds such receipt if such owner offers to surrender the receipt with such indorsement as would be necessary for the negotiation of the receipt, and if the holder of the receipt is ready and willing to sign an acknowledgment when the

goods have been delivered showing such delivery, if such signature is requested by the warehouseman. If such be the fact, the warehouseman would be liable, notwithstanding any material or fraudulent alteration of the receipt after its negotiation. A warehouseman is liable under the statute "according to the terms of the receipt as originally issued." If the receipt when originally issued is a negotiable receipt and negotiated by proper indorsement to one who, in good faith, has paid value therefor, any material or fraudulent alteration of such receipt would not excuse the warehouseman from liability to the innocent holder for value upon the failure to deliver to him the goods for which the receipt was issued. Such we believe to be meaning of §§ 10352, 10355 and 10357 of the warehouse receipt act contained in chapter 101 of C. & M. Digest.

Here, the undisputed testimony shows that, according to the terms of the receipts as originally issued, the appellee, warehouseman, was not to deliver the goods except "upon the surrender of the receipts properly indorsed." The undisputed facts are that there was no proper indorsement and therefore no negotiation of the receipts which would transfer the title to the receipts and the right to the possession of the cotton to the appellant. The reason is, as before stated, that the indorsements of the receipts were forgeries.

Appellant further contends that the appellee was negligent in that it delivered the cotton to Blair without the production of the warehouse receipts, and that it should be held liable to appellant under the doctrine that, as between two innocent parties, the loss must fall upon the one whose act contributed most to produce it. The complaint of appellant shows that it bottomed its cause of action upon the ground that it was the holder of the receipts "in due course for a valuable consideration." We find nothing in the pleadings or proof to justify a finding that the appellant had the legal title to the receipts and therefore the right to demand possession

of the cotton of the appellee. Even if appellant's contention here were within the issue raised in the court below, there was no testimony to warrant a finding that appellee should be held as a warehouseman for negligence in delivering the cotton to Blair, its true owner, rather than to the appellant, who had no legal title to the receipt and therefore no right to demand possession of the cotton of the appellee. The appellee, as warehouseman, under § 10358, C. & M. Digest, was not negligent because of the fact that it failed to exact an indemnifying bond specified in such section. The appellant does not contend, and there is no proof, that the bond executed by Blair to the appellee was insufficient to cover all damage to any person incurred by reason of the delivery of the cotton without the surrender of the receipts.

We find no error in the rulings of the court, and the judgment is therefore affirmed.

OGBURN v. STATE.

Opinion delivered March 30, 1925.

1. AUTOMOBILES—UNLAWFUL POSSESSION.—Evidence *held* to warrant conviction under Crawford & Moses' Dig., § 7437, of possessing an automobile, the motor and serial numbers of which had been mutilated, to the extent that the same could not be read.
2. AUTOMOBILES—UNLAWFUL POSSESSION.—That defendant, charged with being in possession of an automobile whose motor and serial numbers had been mutilated, was only temporarily in possession at the request of another who ran away on the approach of officers, was not a defense, under Crawford & Moses' Dig., § 7437, though it might be considered in mitigation of punishment.
3. WITNESSES—IMPEACHMENT ON CROSS-EXAMINATION.—In a prosecution for possessing an automobile whose motor and serial numbers had been mutilated, it was not error for the purpose of impeaching defendant to permit him to be asked on cross-examination as to whether he had not represented himself as a person of a different name, and had not stated that he had a car to sell, which afterwards proved to have been stolen.

4. WITNESSES—CROSS-EXAMINATION.—Defendant, as a witness in a criminal case, may be cross-examined concerning his recent conduct and association, in matters involving moral delinquencies.
5. CRIMINAL LAW—EVIDENCE—CONDUCT OF DEFENDANT.—In a prosecution for possessing an automobile whose motor and serial numbers had been mutilated, there was no error in permitting the officer to testify that just prior to the arrest defendant tried to drive the automobile past him; that the officer pulled his car in front of the car defendant was driving, and that defendant struck the officer's car.

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

H. W. Applegate, Attorney General and *John L. Carter,* Assistant, for appellee.

HART, J. Joe Ogburn prosecutes this appeal to reverse a judgment of conviction against him for violating § 7437 of Crawford & Moses' Digest. That part of the statute which is material in this case makes it unlawful for any person to have in his possession an automobile, the motor and serial number of which has been mutilated to the extent that same can not be read.

At common law a crime consisted of an unlawful act with evil intent, and in many statutory crimes both the intent and act may be required to constitute the crime. Many statutes, however, which are in the nature of police regulations, impose penalties irrespective of any intent to violate them.

Motor vehicles have become frequent subjects of larceny, and the removal or change of the serial number is a convenient method for preventing identification and recovery. Then, too, one committing a crime and escaping in an automobile would be more difficult of apprehension if the serial number or identification mark should be removed. Hence statutes of this sort have been held valid as a legitimate and proper exercise of the police power. *People* v. *Fernow* 286 Ill., 627, 122 N. E. 155; *People* v. *Johnson,* 288 Ill., 442, 123 N. E. 543; and *State* v. *Randolph* 192 Iowa, 636, 185 N. W. 141. This principle has also been recognized by the Supreme Court of the United States as properly coming within the police

power. *Rae Brooks* v. *United States,* 45 S. C., Rep. 345. Opinion by Taft, C. J., March 9, 1925.

Various statutes of this State prohibiting the doing of acts without requiring the allegation or proof of criminal intent have been upheld as a valid exercise of the police power. For instance, in *Wells Fargo & Co. Express* v. *State,* 79 Ark. 349, it was held to be no defense to a statute making it unlawful to ship game beyond the limits of the State, that the express company and its agents had no knowledge that the package contained game.

Again, in *Harper* v. *State,* 91 Ark. 422, it was held that a sale by a licensed liquor dealer to a minor, though made in good faith and without reason to suspect that the purchaser was below age, was a violation of the statute prohibiting the sale of intoxicating liquors to minors.

We have also upheld our statute making it a felony for a person to keep an unregistered still, or still-worm in his possession regardless of intention as to its use. *Earl* v. *State,* 155 Ark. 286, and *Hodgkiss* v. *State,* 156 Ark. 340.

In *Ring* v. *State,* 154 Ark. 250, in construing the same statute, we held that, while the act of taking or holding possession of the still must be voluntary, the possession need not be permanent. It has been well said that, if it was necessary to show a criminal intent in cases of this sort, the statute would soon become a dead letter.

The main reliance of the defendant for a reversal of the judgment is that the evidence is not legally sufficient to support the verdict.

On the part of the State it was shown by a deputy sheriff of Miller County, Arkansas, that he arrested Joe Ogburn in that county while in the possession of a Ford car with a mutilated number. The arrest was made about sixty days before the trial of the case, which was on the 4th day of December, 1924. The deputy sheriff and another officer were in an automobile, and

pulled over in front of the one driven by the defendant. The defendant speeded up his car, and hit the car of the deputy sheriff and burst one of its casings. The deputy sheriff examined the car, and the original serial number had been mutilated or changed so that it could not be read. The officer asked the defendant who the car belonged to, and he said it belonged to a friend, but refused to give his name. Two other persons were in the car with the defendant, but the defendant told the officer, when he started to arrest them, that they had nothing at all to do with the car, and that it was in his possession. The car has been kept at the jail since the arrest of the defendant, and no one has come to claim it.

Under the principles of law decided above, this evidence, if believed by the jury, was sufficient to warrant a verdict of guilty under the statute.

On the part of the defendant, it was shown that the car belonged to a man named Smithers, and that he and his two companions were only riding in the car. When they saw a car approaching, which proved to be the one containing the officers, Smithers jumped out of the car and told the defendant to drive it for him. Smithers disappeared in the woods, and the defendant drove the car on until he was captured by the officers as testified to by them. He claimed that he had no interest whatever in the car.

His evidence, if believed by the jury, did not constitute a defense under the principles of law above laid down. His possession of the car, while only temporary, was his voluntary act, and was not occasioned by any duress whatever. The facts testified to by him might be considered in mitigation of punishment, and doubtless was so considered by the jury, for it assessed his punishment at one year in the penitentiary, which was the lowest term imposed by the statute.

The next assignment of error of the defendant is that the court erred in permitting the prosecuting attorney to ask him if he had not represented to A. M. Stokes that his name was Jim Embree, and had not told

him that he had a car to sell which afterwards proved to be a stolen car. The witness answered no to the question.

There was no error in the action of the court in allowing the question to be asked and answered. The court expressly told the jury that it could not consider the question and answer for anything except in passing on the credibility of the defendant as a witness, and that it could not be considered as evidence of his guilt of the charge under consideration. It has been repeatedly held by this court that, when a defendant becomes a witness in his own behalf in a criminal case, he may be asked on cross-examination concerning his recent conduct and association in matters involving moral delinquencies on his part. *Hollingsworth* v. *State*, 54 Ark. 387, and *Noyes* v. *State*, 161 Ark. 340, and cases cited.

Another assignment of error is that the court erred in permitting the officer, Bob Smith, to testify that the defendant was going to try to pass him.

On this point the officer testified that he could see the defendant was going to try to pass him, and that he pulled his own car over in front of the car driven by the defendant. The defendant then speeded up his car and struck the officer's car, and burst one of its casings. The officer then arrested the defendant. There was no error whatever in allowing this testimony to go to the jury.

It follows that the judgment must be affirmed.

PIERCE OIL CORPORATION v. PARKER

Opinion delivered March 30, 1925.

HIGHWAYS—CONTRACTORS' BOND—LIABILITY FOR OIL AND GASOLINE.—Under Crawford & Moses' Dig., § 5446, requiring road contractors to give bond to pay for labor and materials used in the prosecution of the work, persons supplying oils or gasoline to be used in operating motor trucks engaged in hauling stone for the construction of an improved highway cannot be said to be supply-

ing materials to be used in the prosecution of the work, and therefore are not within the protection of the bond.

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

STATEMENT OF FACTS.

Pierce Oil Corporation brought this suit against R. C. Parker, C. R. Lowery and Road Improvement District No. 1 of Logan County, Arkansas, to recover the sum of $1,000 alleged to be due for materials furnished the defendants in constructing a hard road.

The record shows that Road Improvement District No. 1 was created under the general laws of the State of Arkansas for constructing a hard road between Paris and Roseville in Logan County, Arkansas. The board of commissioners of said district entered into a written contract with R. C. Parker for the construction of said road, and Parker executed the bond required by law for the faithful performance of his contract. Parker assigned an interest in his contract to C. R. Lowery. Subsequently R. C. Parker and C. R. Lowery entered into a written contract with John B. Stephens to haul all of the crushed stone to be used on said road at a stipulated price per cubic yard. Stephens hauled a large amount of stone which was used in the construction of said road in motor trucks, and bought from plaintiff the oil and gasoline which was used in operating said motor trucks.

According to the evidence of the plaintiff there was a balance due it by Stephens of $757 for oil and gasoline. According to the evidence for the defendants, Stephens only owed the plaintiff $577.

The circuit court was of the opinion that the defendants were not liable to the plaintiff for the oil and gasoline furnished by it to Stephens. Judgment was accordingly rendered in favor of the defendants, and the plaintiff has duly prosecuted an appeal to this court.

Sam T. & Tom Poe, and *Evans & Evans,* for appellant.

White & White, and *Carmichael & Hendricks,* for appellee.

HART, J., (after stating the facts). The Legislature of 1915 provided for the establishment of road improvement districts for the purpose of constructing improved roads, and § 5446 of Crawford & Moses' Digest is a part of that act. The section provides that all contractors shall be required to give bond for the faithful performance of such contracts as may be awarded to them, with good and sufficient security, in an amount to be fixed by the board of commissioners, and that said bond shall contain an additional obligation that such contractor or contractors shall promptly make payment to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract.

When the contract was awarded to R. C. Parker and C. R. Lowery for the construction of said improved road, they gave bond as provided in the section of the Digest just referred to.

Counsel for the plaintiff insist that the case is controlled by *Kotchtitzky* v. *Magnolia Petroleum Co.,* 161 Ark. 275. In it a similar section of the statute applying to drainage districts was construed. In that case the court held that one who undertakes to construct a drainage ditch impliedly contracts to pay for all labor done and materials furnished for that purpose, either to himself or to a subcontractor.

We do not regard that case as decisive of the present one. The facts in that case recited that the materials furnished were used in the construction of the improvement. The opinion does not state what the materials were, and the question under review in this case was not discussed or determined. The same thing may be said of the cases of *Oliver Construction Co.* v. *Williams,* 152 Ark. 414; *Arkansas Road Construction Co.* v. *Evans,* 153 Ark. 142; and *Gage* v. *Road Improvement Dist. No. 3,* 153 Ark. 321.

In *Oliver Construction Co.* v. *Erbacher,* 150 Ark. 549, it was held that, where a contractor agrees to be liable for all outstanding bills against a subcontractor "for work and labor and material, services done for and furnished to" the subcontractor, this did not bind the contractor to pay the meat bill of the subcontractor incurred in boarding employees.

Thus it will be seen that the question under consideration in this case has never been decided by this court. The general rule is that dynamite and other explosives used in breaking up earth which must be removed in the construction of roadbeds and embankments, are materials used within the meaning of a statute providing a mechanic's lien for the furnishing of such materials. In some of the cases it is said that, in a broad and practical sense, explosives so used might be said to partake of the nature of both materials and labor.

On the other hand there is a direct conflict in the authorities as to whether oil and coal used in operating road and dredging machinery and in trucks used in hauling earth and stone for constructing roads and levees are material within the meaning of the mechanics' lien statutes of the kind under consideration in this case.

On the one hand, the Supreme Courts of Minnesota, California, and other States have held coal and gasoline used for the generation of power in excavating earth to be materials furnished and lienable under statutes of this sort.

In *Associated Oil Co.* v. *Commary-Peterson Co.,* 32 Cal., app. 582, 163 Pac. 702, the Supreme Court of California held that, under its statute requiring contractors of public works to furnish bonds to pay for materials or supplies furnished, recovery may be had on the bonds for gasoline used in trucks to haul gravel, cement, etc., for road construction.

In *Johnson* v. *Starrett* 127 Minn. 138, 149 N. W. 6, L. R. A. 1915B, p. 708, under a similar statute, it was held that there was a lien for coal used in generating the steam power for a machine used in excavating and for

the gasoline used in motor trucks which carried the excavated earth away.

On the other hand, the Supreme Court of Massachusetts and the Court of Appeals of New York have decided the other way.

In *Shultz* v. *C. H. Quereau Co.,* 210 N. Y. 257, 104 N. E. 621, L. R. A. 1915E, 986, it was held that coal sold to a highway contractor and used to generate steam to propel road rollers and traction engines used on the contract is not within the operation of a statute giving a lien to any person furnishing material to a contractor for "the construction of a public improvement," upon the moneys due him by the State. To the same effect see *Thomas* v. *Commonwealth,* 215 Mass. 369, 102 N. E. 428.

It is worthy of note that these same courts held that there was a lien for dynamite employed directly to the earth which had to be removed. The reason was that it was an essential part of the construction to break up the earth, and dynamite used for that purpose entered primarily into the construction of the improvement. On the other hand, coal and oil, while used as fuel for portable engines and machinery used in construction work, are merely an incident in the operation of the machinery and partake of the same characteristic as it does. In other words, they are at least one step further removed from the actual work of construction and do not have any immediate connection with the structure at any time. In short, they are used in operating the tools and machinery which in their turn act upon the structure. Courts must stop somewhere in the construction of these statutes. Otherwise repairs on the machinery used in the construction of the improvement and the diminished value of the machinery and tools used in such construction will be deemed to be lienable claims. If matters which are only remotely connected with the construction of the public improvement should be held to be lienable, the protection of the bond to the class intended by the statute would be greatly impaired. To the same effect see *Alpena* v. *Title Guaranty & Surety*

Co., (Mich.) 123 N. W. 1126; *Philadelphia* v. *Malone,* 214 Pa. 90, 63 Atl. 539; and *S. B. Luttrell & Co.* v. *Knoxville, L. & J. R. Co.,* 119 Tenn., 492, 105 S. W. 565.

It has also been held that lumber furnished for and used in making forms for a concrete structure as provided in the contract and specifications for its erection, and which is practically consumed and rendered valueless for such use is material, within the meaning of a mechanics' lien law, and of the provision of a bond given by a surety company that the contractor will "pay all the indebtedness incurred for labor and materials furnished and used in and about said contract work, or which might become the basis of a lien." *Chicago Lbr. Co.* v. *Douglas,* 89 Kan., 308, 131 Pac. 563, 44 L. R. A. (N. S.) 843; and *Avery* v. *Woodruff,* 144 Ky. 227, 137 S. W. 1088, 36 L. R. A. (N. S.) 866.

It is earnestly insisted by counsel for the plaintiff that this court should not follow the principles of law decided in the cases above cited and quoted from; but it should, for the sake of uniformity, at least, follow the decisions of the Supreme Court of the United States in construing a similar statute. We might adopt this course, but for the fact that this court has already taken a position in the construction of a similar statute of our own.

Sec. 5446 of Crawford & Moses' Digest provides in effect that contractors constructing improved highways shall be required to give bond for the faithful performance of their contracts, and that said bond shall contain an additional obligation that such contractor or contractors "shall promptly make payment to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contracts."

The Legislature of 1899 passed a statute providing that contractors and other designated persons, "who shall do or perform any work or labor, or cause to be done or performed any work or labor upon, or furnish any materials, machinery, fixtures or other things toward the building, construction or equipment of any railroad,"

etc., shall have a lien on the railroad for such labor, materials, etc. Acts 1899, p. 145. In construing this statute a lien was denied for articles furnished by a hardware company consisting of rope, block and tackle, chains, wheelbarrows, wedges, axes, blacksmith's outfits, such as forges, anvils and tools and sundry steel and tools such as are usually used in quarrying stone. The court held in effect that these articles were equipment merely, and for that reason were not lienable. In other words, the court held that under the statute there was no lien for anything beyond that which entered into or became a part of the roadbed.

Again in *St. L. I. M. & S. R. Co.* v. *Love,* 74 Ark. 528, the court held that there was no lien for the hiring of teams furnished by the claimant to a subcontractor for use in repairing the railroad. The reason again given was that the statute did not create a lien for anything beyond that which entered into and became a part of the railroad.

The object of statutes of the kind under consideration is to substitute the bond required for the security which the claimant might otherwise obtain under a mechanics' lien statute. The giving of the bond under the statute adds nothing to the obligation of the contractor. His liability is fixed by the terms of the statute. The contractor has supervision of the work, and it is easy for him to see what labor and materials are actually used in the work. *Oliver Construction Co.* v. *Williams,* 152 Ark. 414.

The provision of the bond upon which the claim of the plaintiff is based is the promise of the contractor to pay all persons supplying him with labor and materials in the prosecution of the work provided in the contract. The lien statute relating to railroads above referred to gave the contractor, and other named persons who should do any work or furnish any materials or other things towards the construction of the railroad, a lien. Therefore, it will be seen that the provisions of the two statutes are substantially the same.

It is to be presumed that the Legislature in passing the later statute had in mind the provisions of the earlier statute and the construction placed upon it by this court. Thus it will be seen that we have ruled that our statute giving a lien upon railroads for materials furnished should be limited to materials that are furnished for and used in the construction of the road, so as in a sense to become a part of it. Having regard then for the well-defined and established meaning of a similar statute, we think that the fair meaning of the language used in the statute under consideration is only to give persons a lien who supply materials directly used in the prosecution of the work or materials substantially consumed in the prosecution of the work and which are practically useless after such use.

Therefore, we do not think that oil or other fuels used in operating motor trucks engaged in hauling stone for the construction of an improved highway can fairly and justly be said to be supplying materials to be used in the prosecution of the work. As above stated, oil so used is only incidental to the operation of the motor trucks, and can be no more considered materials used in the prosecution of the work, than the motor trucks themselves or the repairs on them. The result of our views is that the judgment of the circuit court was correct, and must therefore be affirmed.

HUNT v. WOODS.

Opinion delivered March 30, 1925.

1. MINES AND MINERALS—MODIFICATION OF DRILLING CONTRACT.—Where the original contract under which plaintiffs drilled a well on defendants' land was modified by a supplemental contract, whereby defendants took over the drilling outfit for the purpose of drilling a new well, in order that a proper test might be made for gas and oil, the original contract was superseded by the supplemental contract to the extent that their terms were inconsistent, and to that extent performance under the first contract was waived.

2. CONTRACTS—RESCISSION.—When a new contract is inconsistent with and renders performance of a former one between the same parties impossible, the former is rescinded.
3. MINES AND MINERALS—COST OF DRILLING WELL—EVIDENCE.—Evidence *held* to support the allowance made by the court for the cost of drilling a well under a supplemental contract whereby the landowners took over a drilling outfit to drill a well at drillers' expense, and to sustain the award to the drillers of the rent of the outfit and damages for detention, loss of parts, and wear and tear.
4. MINES AND MINERALS—RESCISSION OF CONTRACT—DAMAGES.—Where the original contract under which plaintiffs agreed to drill a well on defendants' land was modified by a supplemental contract under which all disputes under the first contract were settled, the chancellor improperly allowed plaintiffs damages for delay as to work under the first contract.

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

STATEMENT OF FACTS.

On the 6th day of May, 1922, G. A. Woods and A. S. Woods, partners as Woods Bros., commenced this action in the circuit court against R. T. Clark and T. D. Hunt to recover possession of a drilling outfit and damages for the detention of the same.

On the 5th day of September, 1922, the plaintiffs filed a supplemental complaint against the defendants in which they alleged that the defendants had returned to the plaintiffs the drilling outfit described in the original complaint, and that there remains nothing for adjudication between the parties, except the indebtedness due by the defendants to the plaintiffs. It is alleged that the defendants on account of their negligence lost and damaged many parts of said drilling outfit. An account of the indebtedness between the parties under their various contracts is attached as an exhibit to the complaint.

The prayer of the complaint is that the plaintiffs recover judgment against the defendants in the sum of $13,167.72, the balance alleged to be due after a statement of their accounts.

On the 11th day of September, 1922, the case was by agreement transferred to equity. The defendants

filed an answer in which they denied all the allegations of the complaint and set up matters which entitled them to judgment against the plaintiffs in the sum of $40,000, or such sum as a master may find that the defendants are entitled to recover of the plaintiffs after stating an account between them.

On the 6th day of September, 1921, a written contract was entered into between R. T. Clark and T. D. Hunt as parties of the first part, and G. A. Woods and A. S. Woods, as parties of the second part. Under the agreement the parties of the second part agreed to drill a test well for oil and gas for the parties of the first part on the land described in the complaint to a depth of 2,500 feet, unless oil or gas was found in paying commercial quantities at a lesser depth. The parties of the second part agreed that, in case they failed, or conditions were such that they could not complete said well to a depth of 2,500 feet, they would move the derrick to another location on said land and drill until they had reached the required depth.

The agreement also provided that the parties of the second part should only be required to move the distance deemed necessary by them when they had to relocate and drill another hole in the case they failed to complete the well that they had attempted to drill. The parties of the first part agreed to furnish at the drilling site, all fuel, water, grease, oils, casing and derrick. They also agreed to pay the sum of $50 per month for a man to pump water during the drilling operations and to repair all breakage on the pump and engine.

The parties of the second part agreed to furnish the parties of the first part a complete log of the well showing their daily operations, the structures that the drill might pass through, and the depth of all materials drilled through.

The parties of the first part also agreed to pay the parties of the second part the sum of $15,000 for the completion of the well.

Other matters set up in the written contract will be stated or referred to in the opinion.

After the test well was dug to the depth of from 1,538 to 1,565 feet, the parties had a dispute as to whether the contract had been complied with in making a test for gas and oil as the work of drilling the well progressed. This led to the making of a supplemental contract on the 12th day of November, 1921, which was also in writing.

This contract provides that it shall be known as a supplemental agreement to the original contract, dated September 6, 1921. It recites that, if the parties of the second part have failed to comply with the terms of their original contract for the testing of the structures called for in drilling the well, they agree to allow the parties of the first part to take over the drilling machinery and equipment for the purpose of drilling a new well and making a complete test at a depth of approximately 1,550 feet.

The contract further provides that the parties of the first part shall have full possession of the equipment, shall hire all labor, shall remove the derrick and machinery, and that the cost of moving and drilling the new well shall be charged to the parties of the second part. The contract also provides that, should the well be ruined and another test be necessary, then the money due shall be paid at once to the parties of the second part, and the original contract completed.

The contract also provides that the parties of the first part shall keep the machinery in good repair, less the usual wear and tear of it.

It also provided that the party of the first part shall pay the parties of the second part all moneys which may be due them under their original contract after the cost of the second well has been deducted.

On the 12th of November, 1921, said parties also entered into another contract in writing whereby the parties of the first part rented from the parties of the second part their drilling rig and all its equipment for the purpose of drilling a test well for oil and gas below a

depth of 2,400 feet. The parties of the first part agreed to pay to the parties of the second part $25 per day for the use of said equipment. The parties of the first part agreed to keep the drilling machinery in good repair and deliver it back in as good condition as it was when they received it.

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

The chancellor found the issues in favor of the plaintiffs and delivered a written opinion giving his reasons for so doing.

The chancellor restated the accounts between the parties as follows:

"To contract price well, contract A		$15,000.00
Service water pumper		100.00
16 days delay 1st test		1,200.00
Rent of rig, contract C		1,350.00
Lost articles and damage to equipment		1,725.35
Value of rig detained		1,950.00
		$21,325.35
By amount paid by defendants	$9,402.00	
Labor at second well	2,000.00	$11,402.00
		"$9,923.35"

A decree was entered in accordance with the findings of the chancellor, and to reverse that decree the defendants have duly prosecuted this appeal.

Henry & Harris, and *L. C. Going,* for appellant.

J. G. Williamson, Lamar Williamson and *Adrian Williamson,* for appellee.

HART, J., (after stating the facts). When the plaintiffs had drilled the first well under the original contract to a depth of 1,538 feet, the log kept by them contained this notation, "well is showing oil and gas very heavy." According to the evidence for the plaintiffs, they reported this fact to a representative

of the defendant, who was on the ground, and received orders to shut down and wait for the casing which was to be furnished by the defendants in making a test for oil and gas. The log shows that the plaintiffs next began to drill on October 10, 1921. They say that the defendants failed and refused to furnish the casing with which to make the test.

On the other hand, according to the evidence for the defendants, the failure to make the test was due to the action of the plaintiffs.

The view we have taken of the matter renders it unnecessary for us to decide this question. The parties compromised their differences in this respect by the execution of the supplemental agreement of November 12, 1921. This agreement expressly recites that it is a part of the original contract dated the 6th day of September, 1921. It also recites that the nature of the agreement is such that the parties of the second part of the original agreement have failed to comply with the terms of their contract for the testing of the structures as called for in their contract for the drilling of the well, and that they agree to allow the parties of the first part to take over their drilling machinery and equipment for the purpose of drilling a new well and making a complete test at the depth of approximately 1,550 feet.

The contract further provides that the parties of the first part shall have full possession of the equipment and shall move the derrick and machinery and charge the cost of moving it to the parties of the second part.

Thus it will be seen that the supplemental agreement by its express terms modifies the original agreement. In it the parties of the second part recognize that they have failed to make the test required in drilling the first well and agree to turn over their drilling machinery and equipment to the parties of the first part to drill a new well in order that proper tests may be made for oil and gas as the drilling progresses.

The new well was to be drilled by the parties of the first part of the depth of 1,550 feet. This showed that

the new well was to be tested at this depth by the parties of the first part for oil and gas. The supplemental agreement imposed new conditions upon the parties to the original agreement, and modified it to the extent that the provisions of the original agreement were changed by those of the supplemental agreement.

The contract when changed by the mutual consent of the parties became a new contract and took the place of the old one in so far as the terms are inconsistent. In other words, the new contract supersedes or modifies the old one to the extent that their terms are inconsistent. *Ozark & Cherokee Cent. Ry. Co.* v. *Ferguson,* 92 Ark. 254; *Murray* v. *Miller,* 112 Ark. 227, *Weaver* v. *Emerson-Brantingham Imp. Co.,* 146 Ark. 379.

It follows that the defendants by making the supplemental agreement with the plaintiffs lost all right to rely upon the first contract either to enforce it as a contract, or to rely upon it in a suit for damages for a breach thereof to the extent that the first contract was changed or modified by the supplemental contract. It has been well said that when a new contract is inconsistent with and renders the performance of a former one between the same parties impossible, the former is rescinded upon the same principle that a subsequent act of the Legislature repeals a former act, when the two are inconsistent. *Paul* v. *Meservey,* 58 Me. 419.

It follows that a waiver of performance under the first contract arose when the supplemental contract was entered into in so far as the test provided for in drilling the first well is concerned.

This brings us to a consideration of the statement of the accounts between the parties. The supplemental contract of November 12, 1921, provides that the parties of the first part shall pay the parties of the second part all moneys which may be due them under their original contract after the cost of the second well has been deducted.

Under the terms of the original contract the parties of the first part agreed to pay the parties of the second

part the sum of $50 per month, for the time the drilling crew was in operation, for a man to pump water. This service was performed for about two months, and the chancellor properly allowed the plaintiffs one hundred dollars for the services of a water pumper. The contract price of the well under the original contract was $15,000, and the chancellor properly allowed this sum, less the cost of drilling the second well. The chancellor allowed the defendants $2,000 for drilling the second well.

G. A. Woods and A. S. Woods both testified that this was a reasonable sum for the cost of the second well. They were corroborated by the testimony of three disinterested drilling contractors, who testified that the well could have been drilled in from ten to twenty days at most, and that $2,000 was a reasonable sum for the cost of drilling it.

According to the testimony of J. W. Jolly, who was in complete charge of drilling the second well, he did not commence it until after January 6, 1922, and completed it by the second day of February, 1922.

While the defendants submitted an expense account much larger than the sum of $2,000, we think that the decision of the chancellor was correct in only allowing that sum. It must be remembered that the defendants were not to receive any profit for drilling the second well, but were only allowed the cost of drilling it. The drilling outfit belonged to the plaintiffs, and the wear and tear on it was very great. Hence drilling contractors were usually allowed a large profit for drilling wells when they supplied their own drilling machinery and equipment. In fixing the price to be paid the plaintffs for drilling the first well, the profits were included. In determining what the profits were, of course their services, the rental value of the drilling outfit, and the wear and tear on the machinery would all be estimated.

We are of the opinion that, when all the testimony is considered, the chancellor did not err in finding that $2,000 was the actual cost of drilling the second well to the depth of 1,550 feet.

The chancellor also allowed the plaintiffs the sum of $1,350 for the rent of their drilling outfit in order to enable the defendants to drill the well deeper than provided for in the first contract.

When the two contracts of the date of November 12, 1921, were executed one of them provided that the defendants had rented from the plaintiffs their complete drilling outfit for the purpose of drilling a test well for oil and gas below the depth provided in the first contract, and as rent they agreed to pay $25 per day for the drilling outfit. The defendants took charge of the drilling outfit of the plaintiffs when this contract was executed on the 12th day of November, 1921, and used it in drilling the first well deeper until the 6th day of January, 1922. Therefore, the chancellor properly allowed the sum of $1,350 for the rent of the drilling outfit under this contract.

The chancellor also allowed the plaintiffs $1,950 for damages on account of the defendants unlawfully detaining their drilling equipment, under the supplemental contract. The drilling of the second well was completed on the 26th day of April, 1922. There was no showing of oil or gas at the depth drilled. On the 5th day of May, 1922, the plaintiffs made a demand in writing of the defendants for the immediate possession of their drilling outfit. On the 6th day of May, 1922, the original complaint in this case was filed. As we have already seen, the suit was commenced in the circuit court for the purpose of obtaining possession of the drilling outfit and damages for the unlawful detention of the same. The drilling outfit was not returned by the defendants to the plaintiffs until the first day of July, 1922.

The plaintiffs introduced evidence tending to show that the rental value of their drilling outfit was not less than $50 per day. The defendants introduced evidence tending to show that its rental value was a very much smaller sum.

The court allowed the plaintiffs $30 per day for the wrongful detention of their drilling outfit, and, after a

careful consideration of the evidence on this point, we are of the opinion that the finding of the chancellor is not against the weight of the evidence. Therefore it will be allowed to stand.

The plaintiffs also made claim for lost articles and damage to their equipment in the sum of $2,982.07, and the court allowed them $1,725.35. Here again we find the testimony in direct conflict. The chief item on this list was 1,650 feet of drill stem estimated by the plaintiffs to be worth $1,497.38. This was the cost of the lost drill stem. On the part of the defendants it was shown that there was only 1,300 feet of drill stem lost, and that it had been badly damaged.

The next item was twenty Hickman tool joints at $30 each, of the total value of $600. According to the testimony for the defendants, these tool joints were very badly damaged.

The next largest item was $500 estimated to be the damage to the entire outfit above its ordinary wear and tear. The other items on the list were from eleven to seventy-five dollars each for lost tools. We do not think the plaintiffs sustained the loss of the item of $500 for damages to the entire outfit above ordinary wear and tear. While drilling machinery wears out very quickly and is very expensive, as we have already seen, these matters are taken into consideration in fixing the profits to be received by their owner in making drilling contracts. After due consideration of the items on this list, we cannot say that the finding of the chancellor in this respect is contrary to the weight of the evidence, and his finding on it will be allowed to stand.

The chancellor allowed the plaintiffs the sum of $1,200 damages for sixteen days' delay in making the first test. The original contract provided that the defendants should have the right to delay drilling the well by notifying the plaintiffs to stop drilling, and that for such delay the defendants should pay the plaintiffs the sum of $75 per day. It is claimed by the plaintiffs that this sixteen days' delay before the first test was occasioned by

the defendants telling them to shut down in order to set an eight-inch casing for the purpose of making the test.

The claim of the plaintiffs for damages in this respect was settled by the supplemental contract of November 12, 1921. As we have already seen, the original contract was modified by it, and its provisions were substituted in part for the provisions of the original contract. It appears both from the terms of the supplemental contract and from the testimony in the case that it was the intention of the parties to adjust all their differences under the first contract by the execution of the two contracts of the date of November 12, 1921. Hence, for the reasons given in the beginning of the opinion where this phase of the case was discussed, we are of the opinion that the chancellor erred in allowing the plaintiffs the $1,200 item for the sixteen days' delay in making the first test.

The plaintiffs have taken a cross-appeal, and they insist that the chancellor erred in not allowing them $461.10 for the delay in furnishing water under the original contract. For the reasons given above, the claim of the plaintiffs for damages in this respect was also settled under the supplemental contract of November 12, 1921.

There are several other smaller items argued in the brief on the cross-appeal, but we do not deem it necessary to give them a separate discussion. We are of the opinion, after a careful consideration of the testimony, that the finding of facts made by the chancellor was correct, except as to the $1,200 item above stated.

Several other matters are argued at length in the respective briefs of the attorneys on both sides; but the conclusions of law which we have reached and announced above renders it unnecessary to set out or discuss these matters.

If we are correct in holding that the purpose of executing the supplemental contract of November 12, 1921, was to modify the original contract and to adjust

all prior differences and claims of damages of the parties under that contract, it follows that the chancellor was right in his statement of the accounts between the parties, except as above indicated.

The result of our views is that the chancellor should have rendered judgment in favor of the plaintiffs against the defendants for the sum of $8,723.35, instead of $9,923.35. Therefore it will be ordered that judgment be rendered here in favor of the plaintiffs against the defendants for the sum of $8,723.35 with six per cent. interest thereon from the 31st day of October, 1923, the date of the decree in the chancery court, until paid.

It is ordered that the decree of the chancery court be modified as indicated in the opinion, and as modified that it be affirmed.

FISK RUBBER COMPANY, INC., v. HINSON AUTO COMPANY.

Opinion delivered March 30, 1925.

FRAUDULENT CONVEYANCES—BULK SALES LAW—AUTOMOBILE REPAIR SHOP.—Where a business alleged to have been sold in violation of the Bulk Sales Law (Crawford & Moses' Dig., § 4870) was an automobile repair shop, in which various accessories were kept for the purpose of repairing cars, the sale of such accessories apart from making repairs constituting an inconsequential part of the business, *held* that the chancellor properly found that such business was not a mercantile business nor the accessories a "stock of merchandise," within the meaning of the bulk sales law.

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

Zeb. A. Stewart and T. P. Oliver, for appellant.

Mahony, Yocum & Saye, for appellees.

SMITH, J. Appellant brought suit in the chancery court of Union County against W. G. and George Rash, who had been engaged in business as the Reliable Auto Company, for an amount due on open account, and against E. W. Hinson, trading as the Hinson Auto Company, to charge him, as a receiver of goods, wares and

merchandise purchased by him from the Reliable Auto Company. It was alleged in the complaint that Hinson purchased the stock of merchandise owned by the Reliable Auto Company in bulk, without complying with §§ 4870 to 4872, inclusive, C. & M. Digest, commonly known as the bulk sales law.

No answer was filed by the Rashs, and judgment was rendered against them for the want of an answer. Hinson filed a separate answer denying the material allegations of the complaint. No attempt was made to show that the provisions of the bulk sales law were complied with; on the contrary, it was alleged in the answer that the sale was not within the provisions of that statute, for the reason that the business sold was a repair business and not a stock of merchandise.

The complaint was dismissed as being without equity as against the Hinson Auto Company, and the question involved on the appeal is the one of fact whether the business sold was a mercantile business within the meaning of the bulk sales statute.

In support of the allegations of the complaint, Howard Lyon was first called as a witness. He testified that he was a salesman for the plaintiff, and, during the years 1921 and 1922, sold various automobile supplies to the Reliable Auto Company, amounting, in the aggregate, to $489.57, and this suit was brought to collect this amount. Lyon testified that the Reliable Auto Company had a garage, in which they made repairs on automobiles and carried a stock consisting of spark plugs, wires, tires, and other articles of that character; that they also kept service cars, and sold tires, casings, and other automobile accessories to the public. He did not know just what articles were embraced in the sale, but he was in the garage after the sale, and it looked as it had before. This witness further testified that he saw a sale by the Reliable Auto Company of four cord tires, which were put on a car by the purchaser at the time of the sale. He further testified that the Reliable Auto Company kept ser-

vice cars, and sold tires, casings and other automobile accessories to the public.

The letterhead of the Reliable Auto Company was introduced in evidence as indicating the business of that concern, and it reads as follows: "Painting, Accessories, Reliable Auto Company, Upholstering, Fisk Tires, 312 West Main Street, Telephone No. 888. Road Service—Anywhere—Any Time. Cars Washed, Polished and Greased. Open Day and Night." It appears, however, that this was a letterhead furnished by the plaintiff, and that it was the custom of plaintiff to furnish such advertising matter to its customers.

A witness named Evans testified that he was in the place of business of the Reliable Auto Company, and was told by the person in charge that various automobile parts and accessories were kept for sale, although he made no purchase of any kind himself.

The third and last witness called by the plaintiff was J. T. Jones, who testified that he had been employed as a mechanic both by the Reliable Auto Company before the sale and by the Hinson Auto Company afterwards, and that the business was conducted in the same manner after the sale as it had been before. He testified, however, that the business was a repair shop, operated in connection with a sales agency for a standard automobile, and that the business carried on, besides the sale of cars, was the general repair of automobiles, special repair of casings, and vulcanizing, and storing cars. The vulcanizing was carried on in the front part of the place of business, and the business was run by him and another mechanic and two negro helpers, in the back end of the shop, together with four boys, and that Mr. Rash stayed out in front. Jones further testified that the parts and accessories kept on hand were kept to be used in connection with the repair business carried on, and, according to this witness, if there were any articles of merchandise or auto parts sold he did not know it, and the business was just a repair shop, and if anything was

sold it was adjusted to the car at the time of the sale as a part of the repair of the car.

By § 4870, C. & M. Digest, it is provided that "the sale, transfer or assignment, in bulk, of any part of or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conduct of any such business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, * * * shall be void as against the creditors of the seller * * *."

Here there was a sale of the entire business, but the question is whether there was a stock of merchandise within the meaning of the statute. A stock of merchandise might, of course, consist solely or largely of automobile parts and accessories, but we have concluded that the finding of the court below that there was no sale of a stock of merchandise is not clearly against the preponderance of the evidence. The business sold was primarily and essentially a repair shop, including an agency for the sale of cars, but it is not contended that any automobiles were included in the sale. To carry on this business it was essential that various parts be kept in stock, but such parts were kept ordinarily for use in repairing cars, and the articles were usually adjusted to the cars of the purchaser.

The case of *Fisk Rubber Co.* v. *Hayes*, 131 Ark. 248, is relied upon by plaintiff as sustaining its contention that the sale was in violation of the bulk sales law. In that case we said the bulk sales law was passed by the Legislature to protect the rights of creditors from fraudulent sales of property upon which credit had been extended, but we refused to hold the purchaser in that case liable under the provisions of the bulk sales law because the portion of the stock sold was inconsequential when compared with the amount and value of the entire stock.

Here there was a sale of the entire business, but we think the court was warranted in finding that the Reliable

Auto Company did not carry a stock of merchandise within the meaning of the bulk sales law, and that the principal business of that company was repair work, and that such supplies as it carried were carried as an incident to that business, and such sales as were made constituted an inconsequential part of the principal business.

A merchant ordinarily sells his stock of goods in substantially the same condition as he receives them, and the value of his stock is not ordinarily enhanced by any act of the merchant while the goods are in his possession; while here it was contemplated that some service should be rendered the purchaser of any part of what is called the stock on hand.

In the case of *Swift & Co.* v. *Tempelos,* 101 S. E. 8, 7 A. L. R. 1581, the Supreme Court of North Carolina, in construing a statute of that State substantially similar to our own, said that the word "merchandise" is usually, if not almost invariably, limited to things which are ordinarily bought and sold in the way of merchants, and as the subjects of commerce and traffic, and held that the goods and fixtures used in a restaurant conducted on the ordinary plan are not a stock of merchandise within the meaning of the bulk sales law. There is an extended annotator's note to the case distinguishing sales which are or are not within the provisions of the bulk sales law.

In the case of *Swanson* v. *DeVine,* 49 Utah, 1, 160 Pac. 872, a business operated under the name of Goodyear Shoe Repair Factory was sold. The business consisted of machinery, tools of trade, heel plates and cushions, laces, spools of thread, shoe soles, leather polish, brushes, etc., the same being used in the repair of shoes, items of which were displayed in a showcase and were sometimes sold at retail. The Supreme Court of Utah held that the owners of this business, who sold it in bulk, were not merchants within the meaning of the bulk sales law of that State. In the opinion the court said: "We think

the words 'trade' and 'business' are there (the statute of that State) used in the sense of a trade in or business relating to merchandise or a stock of goods—carrying on a business or trade in merchandise—and not in the sense of an occupation, handicraft, or a business distinct from merchandise."

It might appear from the very size of the plaintiff's account that the Reliable Auto Company carried a considerable stock, but it will be remembered that this account covered sales to the plaintiff extending over a period of two years, and there is no definite showing how much, if any, of these supplies were included in the sale.

So here we conclude that the business sold was not a mercantile business within the meaning of our bulk sales law, and the decree of the court below is affirmed.

GREEN v. JONES.

Opinion delivered March 30, 1925.

1. BILL AND NOTES—VALIDITY OF NOTE FOR PATENT.—Crawford & Moses' Dig., § 7956, providing that a note given for the sale of a patented article, which does not show on its face that it was executed in consideration of a patented article, is void, and § 7958, providing that any vendor of any patented thing who shall violate § 7956 "shall, upon conviction, be punished by a fine of not more than three hundred dollars," are penal and criminal statutes, and must be strictly construed.
2. BILLS AND NOTES—LEASE OF PATENTED ARTICLE.—Under Crawford & Moses' Dig., § 7956 requiring a note given for the sale of a patented article to show on its face that it was executed for a patented article, does not apply to a lease of a patented article.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; reversed.

Evans & Evans, for appellant.

Kincannon & Kincannon, and *White & White,* for appellee.

SMITH, J. Appellant, who was the plaintiff below, brought this suit to recover on a promissory note exe-

cuted by appellees, the defendants below, to the order of the Ginners' Compress Trust Company, of Milwaukee, Wisconsin, for the sum of $1,200. Plaintiff testified that he acquired the note as an innocent purchaser for value on the day of its execution.

The defense made by the makers of the note was that it was executed in payment of a patented article, a fact not recited in the face of the note, as required by § 7956, C. & M. Digest; and it was also denied that the plaintiff was an innocent purchaser thereof.

The note in suit constituted the consideration for an agreement of even date with the note, made between the maker and the payee of the note, and which reads as follows:

"This agreement, made and entered into this 17th day of February, 1922, by and between the Ginners' Compress Trust Company, of Milwaukee, Wisconsin, hereinafter called the lessor, and the Magazine Gin Company, Magazine, Arkansas, herein called the lessee,

"Witnesseth: Whereas, the lessor has this day agreed to and does hereby lease and deliver to lessee, and installed ready for operation on or before the beginning of the ginning season of 1922, upon the condition herein set forth, the following personal property, to-wit:

"One complete system for baling cotton into cylinder bales, as per specifications and drawings shown in pamphlet called 'Prodigy on Baling Cotton.'

"The lessee does hereby agree to receive said property and operate same at their gin plant, a public toll gin, baling cotton into cylinder bales at the option of the cotton owner.

"Whereas, the lessee, as a guaranty of good faith, does give his promissory note for twelve hundred ($1,200) dollars to lessor.

"The lessee agrees to operate this system for a term of not less than three years, and to use their best energy to make it a success, and to accommodate the ginning public. Said lessee further agrees to pay the lessor

a rental of 20 cents per hundred pounds for all cotton baled in said system, which the lessee is to charge and collect as a toll for compressing the cotton at the gin and deposit the same at the end of each month to the order of the lessor, less the amount hereinafter stipulated.

"It is further agreed by the lessee that he will keep a correct account of all cotton baled on said system, giving the number of bales and weight of same. A settlement of all amounts due under this lease during any one year shall be computed on or before the first day of January of each year while this lease is in effect. The lessee to deduct all the tolls collected up to twelve hundred dollars as the return of his money advanced on installing the system. This amount to be credited on the twelve hundred dollar note until paid.

"It is understood that the title of the above described property shall remain in the name of the lessor, who is the owner.

"This agreement in no way transfers or incumbers the title other than herein set forth, and the lessor shall have the right to enter the premises of the lessee at any time and take possession and remove, without cost to lessee, said system from his premises, provided if any term of this lease is or shall be violated.

"The lessee is not to interfere or in any way hinder the removal of the machine, nor is the lessor to be held responsible for any damage from same.

"Further, the lessor reserves the right to remove the system between ginning seasons provided said system does not outturn two thousand bales under ordinary season conditions, without expense to lessee. The lessee is to do all necessary carpenter work at his own expense.

"The lessor guarantees the system to make a perfect, merchantable bale of cotton and a continuous operation, and guarantees to keep said machine in good repair.

"The lessor also guarantees a market for the product of all cotton outturned, bidding for same in the

open market at the usual premium of round over square, and will furnish the lessee, or whom he may designate, with a limit each day for the purchase of all cotton outturned offered for sale.

"The lessor reserves the right to furnish an operator at his own expense, who will operate and care for the plant when so desired.

"The lessor guarantees not to install another system where it will directly interfere with the patronage of the lessee system for a period of seven years, provided the lessee meets the demands of the ginning public.

"Witness our hands this the 17th day of February, 1922."

There was testimony that the cotton press to be installed under the agreement was covered by patents, and, in submitting the case to the jury, the court gave the following instructions: "You will find for the plaintiff, Mr. Green, the full value of this note, unless you find that the note was given for the purchase or lease of a patented machine, instrument or thing. If you find that it was given for a patented machine, instrument or thing, then you will find for the defendants."

After reading § 7956, C. & M. Digest, the court further instructed the jury as follows: "Therefore, if you find from a preponderance of the testimony that this note was given for the purchase of a patented thing, or a lease for a patented machine, instrument or thing, it is absolutely void, and your verdict will be for the defendants."

The jury found for the defendants under the instructions given, and there was a judgment accordingly, and the plaintiff has appealed.

For the reversal of the judgment it is contended by appellant that the agreement set out above contemplated a lease of a patented article, and not a sale thereof, and that the provisions of § 7956, C. & M. Digest, do not apply to leases of patented articles, but only to sales thereof.

The section of the statute mentioned reads as follows: "Section 7956. Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void."

We think counsel for appellant are correct in their contention that the contract set out was a lease and not a sale, and that the statute does not apply to leases of patented articles.

The statute is both penal and criminal. For its violation the penalty of the forfeiture of the agreed purchase price of the article sold is imposed, and the note or notes executed for the purchase price which do not conform to the requirements of the statute are rendered void in the hands of an innocent purchaser, and, in addition, a fine of $300 may be imposed for a violation of the statute. As the statute is penal and criminal, it must, for both reasons, be strictly construed.

In Black on Interpretation of Laws, § 114, page 286, it is said: "It is a familiar and well-settled rule that penal statutes are to be construed strictly, and not extended by implications, intendments, analogies, or equitable considerations. Thus, an offense cannot be created or inferred by vague implications. And a court cannot create a penalty by construction, but must avoid it by construction unless it is brought within the letter

and the necessary meaning of the act creating it. And where a statute may be so construed as to give a penalty, and also, and as well, so as to withhold the penalty, it will be given the latter construction. A penal statute will not be extended by implication or construction to cases which may be within the mischief which the statute was designated to cure, if they are not at the same time within the terms of the act fairly and reasonably interpreted. Hence an act not expressly prohibited by such a statute cannot be reached by it merely because it resembles the offenses provided against, or may be equally and in the same way demoralizing or injurious. 'In construing such laws, we should be careful to distinguish between what may have been desirable in the enactment in order that it should effectually accomplish its purpose, and what has been really prohibited or commanded by it. Before conduct hitherto innocent can be adjudged to have been criminal, the Legislature must have defined the crime, and the act in question must clearly appear to be within the prohibitions or requirements of the statute, that being reasonably construed for the purpose of arriving at the legislative intention as it has been declared. It is not enough that the case may be within the apparent reason and policy of the legislation upon the subject, if the Legislature has omitted to include it within the terms of its enactment. What the Legislature has, from inadvertence or otherwise, omitted to include within the express provisions of a penal law, reasonably construed, the courts cannot supply.' Further, in its application to a case which clearly comes within its terms, such a law must be strictly construed."

This court has made numerous applications of the principles thus announced in the construction of such statutes, several of which cases are cited in the brief of counsel for appellant.*

* *Brooks* v. *Western Union Tel. Co.*, 56 Ark., 224, *Simmons* v. *American Ry. Express Co.*, 147 Ark., 339, and *Gillam* v. *State*, 47 Ark. 555—are cited in appellant's brief (Reporter).

The subject-matter of the contract between the parties and the note sued on was the lease of a patented article, and not a sale thereof, and, as the statute quoted applies only to sales of patented articles, the court was in error in instructing the jury that a note given for the lease or the purchase of such an article was void.

Appellee insists that, in the interpretation of § 7956, C. & M. Digest, that section should be read in connection with § 7957 and § 7958, C. & M. Digest, and, when so read, the statute should be interpreted as including, not only the sale of a patented article, but the sale of the right to use a patented article.

The last numbered sections read as follows:

"Section 7957. The foregoing section shall also apply to vendors of patent rights, and family rights to use any patented thing of any character whatever.

"Section 7958. Any vendor of any patented thing of any character, or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of § 7956 shall, upon conviction, be punished by a fine of not more than three hundred dollars."

We do not think that the Ginners' Compress Trust Company, the lessor in the agreement set out above, comes within the provisions of § 7957 or § 7958, C. & M. Digest. The Ginners' Compress Trust Company was not the vendor of any patented thing, nor was it the vendor of any family right to use any patented thing.

What we have said disposes of the only question considered by the court below or submitted to the jury, and, for the error in giving the instruction set out above, the judgment of the court below will be reversed, and the cause remanded for a new trial.

Missouri Pacific Railroad Company v. Crawford.

Opinion delivered March 30, 1925.

1. Trial—remark of court—withdrawal of question from jury.—A remark of the court that he thought that the defense had not shown any contributory negligence *held* to justify the assumption on defendant's part that the question of contributory negligence was withdrawn from the jury, and that the court declined to instruct further on that question and had eliminated the question from the instruction already given.
2. Carriers—contributory negligence of passenger in alighting.—Evidence, in an action for injury to a passenger in alighting from a passenger car at night, which would have justified a finding that, had the passenger waited a moment, she could have had the assistance of a brakeman or a finding that had she been in the exercise of due care she might have alighted in safety, *held* to call for submission of the issue of contributory negligence.

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

Thomas B. Pryor and *Vincent M. Miles,* for appellant.

Edward Gordon, for appellee.

Smith, J. Appellee recovered judgment to compensate an injury which she alleged was sustained while a passenger on one of appellant's trains. She testified that, on the night of either the 2d or the 9th of December, 1922, she had purchased a ticket from Morrilton for Kenwood, a flag station, and that the train arrived at Kenwood about midnight, several hours late. There was no agent at Kenwood, and no lights about the station, and the train did not stop opposite the platform provided for the use of passengers entering or debarking from the train. No step was provided for her to step down on, and no one assisted her off the train, and the step of the train was so high from the ground that, in stepping down to the ground, her foot rested on a rock between the ties, which was wet on account of a recent rain, and her foot turned, and her knee was severely sprained.

Among other defenses interposed by the railroad company was the one that the train was not late on the

night of either the 2d or the 9th of December, and that there was nothing unusual about the stop made at Kenwood on either of those dates which would have caused injury to any one.

This question of fact was submitted to the jury, and the jury's verdict is conclusive of that question.

Appellee testified that she had bought at Morrilton, where she took passage on the train, a dollar's worth of coffee and of sugar, and she had these packages in her hand as she stepped from the train, and that she had to swing down from the step in getting off. She testified that she got up immediately from her seat when the train stopped, and that, just as she got off, a brakeman came out of the door and called to her, "Look out, lady, you will get hurt," but she had just stepped to the ground as the remark was made, and she replied to the brakeman, "You should have assisted me or placed a stool for me."

In an instruction given, the court told the jury that it was the duty of the railroad company to furnish plaintiff a reasonably safe place to alight from the train, and, if the company failed in this duty, and this failure was the proximate cause of the injury, to find for the plaintiff. In an instruction numbered 8 the court told the jury to find for the plaintiff if she was injured without fault on her part; and, in instruction numbered 9, the court declared the law of comparative negligence if the jury found plaintiff was guilty of contributory negligence.

After thus instructing the jury, the court made a remark which appears in the transcript as instruction numbered 12 as follows: "12. I really think that, under the testimony of this case, the defense has not shown any contributory negligence." The record recites that the attorney for the defendant company objected and excepted to the statement of the court made before the jury, whereupon the judge remarked: "All right, your exceptions are saved. I don't think there is any testimony showing contributory negligence on the part of the plaintiff. Defendant saves exceptions."

(1) It is insisted by appellee that the record does not show that the question of contributory negligence was withdrawn from the jury; that it is shown only that the court expressed the opinion to the attorney for the defendant that there was no question of contributory negligence for the jury to consider. We do not, however, so understand the record. In view of the recitals set out above, counsel for the defendant was justified in assuming that the question had been withdrawn from the jury, and that the court had declined to instruct further on the question of contributory negligence and had eliminated that question from the instructions already given.

(2) Appellee insists that there was no question of contributory negligence for the jury. It may be said that, under the facts stated, the jury might well have found that appellee was not guilty of contributory negligence; but that is not the question. The question rather is, must it be said, as a matter of law, that the jury could not have found otherwise?

Appellee had the right to assume that the train had stopped at the platform where she could alight in safety, and that, if this had not been done, she would be provided with a step or necessary assistance to alight in safety. But she testified that, while the night was dark, there was light from some source; that "there was the reflection of some light," but the light was not sufficient for her to see just where she stepped. When asked if the train pulled up to the little station, appellee answered: "No sir, it was not quite to the station, as well as I could tell."

From appellee's own testimony it appears that, had she waited a second or two, a brakeman would have been present who could have assisted her in alighting, and we are unwilling to say, as a matter of law, that she should not have looked about to see if any one was present to render this assistance. Moreover, we are unwilling to say, as a matter of law, that appellee might not have alighted from the train, even though she was offered no assistance, had she exercised proper care in doing so, as

she testified that the ground was only about two feet from the step.

Under these circumstances we think the question of contributory negligence should not have been withdrawn from the jury, and, on that account, the judgment will be reversed, and the cause remanded for a new trial.

BROWN v. STATE.

Opinion delivered March 30, 1925.

1. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Refusal of a requested instruction was not error where the subject was covered by instructions given.
2. WITNESSES—IMPEACHMENT BY PURPORTED TESTIMONY BEFORE GRAND JURY.—Where a State's witness in a murder case testified that deceased fired the first shot, and denied that he testified otherwise before the grand jury, admission of an unsigned and unidentified writing purporting to contain his testimony before the grand jury to impeach him was error, in the absence of any proof that such writing was a correct transcript of such testimony.

Appeal from Phillips Circuit Court; *E. D. Robertson,* Judge; reversed.

Sheffield & Coates, for appellant.

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appelleee.

HUMPHREYS, J. Appellant was indicted and tried for murder in the first degree in the circuit court of Phillips County, convicted of murder in the second degree, and adjudged to serve a term of ten years in the State Penitentiary as punishment therefor. From the judgment of conviction he has duly prosecuted an appeal to this court.

The testimony introduced by the State tended to show that appellant shot and killed Lewis Hollinshed on the 8th day of June, 1924, without any justification.

The testimony introduced by appellant tended to show that he shot and killed Lewis Hollinshed in necessary self-defense.

One of the assignments of error insisted upon for a reversal of the judgment was the refusal of the trial court to give instructions Nos. 1 and 3 requested by appellant. It is contended that the refusal of the court to give these instructions deprived appellant of the benefit of the question of reasonable doubt as to whether or not he was assaulted. It appears from an examination of the other instructions that every phase of the doctrine of reasonable doubt was covered, and, for that reason, error was not committed in refusing to give the requested instructions.

The last assignment of error insisted upon for a reversal of the judgment was the admission in evidence of an unsigned and unidentified paper purporting to be the testimony of Jim Spencer, a State witness, given before the grand jury, different in a material part from the testimony given by the witness in the trial. The testimony was introduced for the purpose of contradicting the witness, under the rule that prior testimony given before the grand jury may be introduced for the purpose of contradicting the witness who testifies to conflicting statements given by the witness at the trial of the case. *Davidson* v. *State,* 108 Ark. 191; *Carlton* v. *State,* 109 Ark. 516. The witness, however, denied that he had testified differently when before the grand jury from the testimony then being given by him. His testimony in the trial was to the effect that the deceased fired the first shot at appellant, and that appellant returned the fire, whereas his purported testimony before the grand jury was to the effect that appellant was the aggressor and fired both shots. It was improper to admit the purported evidence of the witness before the grand jury for the purpose of impeaching him without first making proof that the testimony offered was the correct testimony of the witness before the grand jury. As stated above, the record reflects that the witness denied

a material part of the testimony read to him as being the correct statement of his testimony before the grand jury. Some one should have been introduced as a witness who could vouch for the correctness of the statement made by Jim Spencer before the grand jury in order to use same for the purpose of impeaching him.

On account of the errors indicated the judgment is reversed, and the cause remanded for a new trial.

LASETER v. TERRAL.

Opinion delivered March 30, 1925.

1. APPEAL AND ERROR—EXCLUSION OF TESTIMONY.—It cannot be maintained on appeal that the court erred in excluding the testimony of a witness if it is not shown what the testimony of the witness would have been.
2. EXECUTORS AND ADMINISTRATORS—DISALLOWANCE OF CLAIM—EVIDENCE.—On a claim by a father against the estate of his son, to which defense was made that a policy on the son's life in favor of the father was intended as security for the loan, the proceeds of the policy having been received by the father, evidence *held* to sustain a judgment allowing credit for such proceeds.
3. INSURANCE—CONTINUANCE OF POLICY TO SECURE NEW LOANS.—Where a son gave his father a life insurance policy to secure loans, which were subsequently paid, the giving of new loans was sufficient consideration for continuing the insurance as security for the new loans.
4. HUSBAND AND WIFE—HUSBAND AS WIFE'S AGENT.—Evidence that a father, in making a loan to his son, acted as agent for his wife and acquiesced in the son securing the loan with an insurance policy, the proceeds of which the father collected after the son's death, *held* to warrant the inference that the father in collecting the policy had authority to act as his wife's agent.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris*, Judge; affirmed.

Mehaffy, Donham & Mehaffy, for appellant.

Tom Campbell, Floyd Terral, and *J. C. Marshall*, for appellee.

HUMPHREYS, J. This suit was brought by appellant in the probate court of Pulaski County, for $500 in his

own right and for $750 as administrator of the estate of Mattie H. Laseter, deceased, against appellee as the administrator of the estate of W. E. Laseter, deceased. Appellant, A. F. Laseter, was the father of W. E. Laseter, and the husband of Mattie H. Laseter. The suit was originated by filing verified claims in the probate court against the estate of W. E. Laseter, deceased, which had been disallowed by the administrator of the estate of W. E. Laseter, deceased, when presented to him. The probate court allowed the claims, from which allowance an appeal was prosecuted to the circuit court of Pulaski County, where the cause was submitted to a jury upon the testimony adduced by the respective parties and instructions of the court, which resulted in a verdict and consequent judgment in favor of the estate of W. E. Laseter, deceased, on appellant's individual claim, and in favor of appellant, as administrator of the estate of Mattie H. Laseter, deceased, in the sum of $250, with interest from May 17, 1920, from which is this appeal.

The sole contention of appellant for a reversal of the judgment is that the evidence is insufficient to support it. Appellee admitted the existence of the indebtedness at the time W. E. Laseter died, but claimed that $1,000 of the amount was liquidated by the proceeds derived by appellant from a life insurance policy which had been carried by W. E. Laseter in his lifetime in favor of appellant, his father, to secure the indebtedness.

The record reflects, according to the undisputed testimony, that, some time prior to the year 1915, at which time W. E. Laseter married, he took out a policy for $1,000 in favor of his father to protect an indebtedness of $1,500 or $1,600 which he had borrowed from his father with which to pay his expenses while at school; that, after he married, he and his wife paid this indebtedness; that thereafter he borrowed $500 from his father and $750 from his stepmother with which to buy a farm, which amount was carried by them against him as an open account; this amount of money was turned over to him, in his brother's place of business, by his father,

at the time the loan was made, in the form of personal checks of himself and wife; that, in addition to the $1,250 loan, he owed his father a note for $244, and his stepmother some other money, protected by another insurance policy, which amounts were paid off partly before and partly after his death; that appellant was not dependent upon W. E. Laseter for his support, but, on the contrary, was a man of some means; that W. E. Laseter's family consisted of himself, his wife, and a girl child; that, about three months after his death, his widow gave birth to another child; that W. E. Laseter was a man of small means, and his wife had no separate property of consequence.

The record reflects, however, a sharp conflict in the testimony as to the purpose of continuing the $1,000 policy in the name of A. F. Laseter as the beneficiary, after the payment of the $1,500 or $1,600 loan.

Mrs. Ernest Protho, who was the widow of W. E. Laseter, deceased, testified in substance that A. F. Laseter was continued as the beneficiary in the policy for the purpose of securing the $1,250 loan made to her husband by his father and stepmother. She said that, in talking the matter over, her husband offered to give his father a note or to continue the policy in his name as security for the loan, and that his father declined to take a note, and said he did not want him to carry insurance for him, as it cramped him financially; that her husband replied that he might die, and handed her the policy, saying, "Mother, keep this; and if I die, pay father the $1,000 you derive from the policy upon the $1,250 loan;" that his father made no objection to the arrangement; that, after the death of her husband, she gave his father the $1,000 policy and offered to pay him $250; that he took the policy, but refused to take the $250; that, after collecting the policy, he demanded that she pay him $1.250 or else execute a note to him for that amount, which she declined to do, claiming that the policy had liquidated $1,000 of the indebtedness and that she only

owed $250 additional, which she was ready and willing to pay.

A. F. Laseter testified in substance that the insurance policy of $1,000 in which he was the beneficiary was not carried by his son as security for the $1,250 loan; that the only conversation that he had with his son relative to the policy was to advise him to drop it, as the payment of the premiums thereon worked a financial hardship upon him; that, after his son's death, he obtained the policy from the agent of the insurance company, and not from his daughter-in-law, Mrs. Protho; that he collected the policy in the belief that it was his own, and not for the purpose of applying the proceeds to the payment of the $1,250 loan; that he never tried to collect or get a note for $1,250 from Mrs. Protho.

Roy M. Laseter, the brother of W. E. Laseter, deceased, testified that, when his father delivered the checks to his brother, in witness' place of business, to cover the $1,250 loan, nothing was said about insurance; that the only remark made by his brother was that he would execute a mortgage to secure the loan as soon as he got a deed to the farm. Appellant offered to prove by witness a statement made by W. E. Laseter in his lifetime to him about the policy, which testimony was excluded, over appellant's objection. It was not shown what the testimony of the witness would be if permitted to testify with reference to the statement, so we cannot say on appeal that the court committed error in excluding this piece of testimony.

After a careful reading of the testimony, and a construction of same in the light of the rule that it must be construed as strongly as possible in favor of the verdict, we are convinced that the judgment is supported by evidence of a substantial nature. The record not only contains direct and positive evidence to the effect that the $1,000 policy was carried by W. E. Laseter as security for the $1,250 loan, but there are potent circumstances therein from which the jury might have drawn such an inference. The circumstances referred to relate to the

situation and condition of the parties at the time the loan was made. The financial condition of appellant was much better than that of his son, W. E. Laseter. Appellant was not dependent upon his son for support. W. E. Laseter's wife and daughter were dependent upon him. The jury might have drawn a reasonable inference that, unless he was carrying the policy to secure the $1,250 loan from his father and stepmother, he would have changed the beneficiary in the policy from his father to his wife, who was soon to give birth to another child, or to his little daughter.

The suggestion advanced that, if the agreement testified to by Mrs. Protho was actually made, there was no consideration to support it is not sound, for new loans were sufficient consideration for continuing the insurance to secure same.

Again, it is suggested that, if such an agreement existed, there is no evidence in the record tending to show authority in appellant to collect the debt due Mattie H. Laseter, or that payment to appellant bound her or her estate. The testimony reveals that, in making the loan, appellant acted as agent for his wife. It also tends to show that appellant acquiesced in the arrangement of his son to secure the loan with the insurance policy, which policy was collected by him after his son's death. The jury might have drawn a reasonable inference from the fact that appellant made the loan, took security therefor, and collected same, together with his relationship to Mattie H. Laseter, that he had authority to act as her agent in collecting the indebtedness.

The court correctly refused, under the testimony in the case, to instruct a verdict for appellant, and correctly declared the law applicable to the facts in the case.

No error appearing, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. BOYCE.

Opinion delivered March 30, 1925.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF BAILEE.—Where a truck struck by a train had been loaned to the driver for use for his own pleasure, the driver's negligence could not be imputed to the owner nor be interposed as a defense, as the negligence of a bailee is not imputable to the bailor where the subject of the bailment is damaged by a third person.

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

Thomas B. Pryor and *Vincent M. Miles,* for appellant.

J. C. & Wm. J. Clark, for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Faulkner County by appellee against appellant to recover the sum of $621 for damaging his truck through the alleged negligent operation of its train in backing same along its track across North Street in Conway, without sounding the whistle or ringing the bell as a warning against its approach.

Appellant filed an answer denying any negligence on its part, and, by way of further defense, pleading contributory negligence on the part of the driver.

The cause was submitted to the jury upon the pleadings, testimony and instructions of the court, which resulted in a verdict and judgment against appellant for $400, from which is this appeal.

The only question presented by the appeal for determination is whether the court erred in refusing to submit to the jury the issue of whether or not the driver of the truck was guilty of contributory negligence. The requested instruction bearing upon that issue is as follows: "You are instructed that it is the duty of any one, in attempting to cross a railway track, to look and listen to see if a train is approaching, to the end that a collision may be avoided."

The facts are that appellee, who was in the plumbing business, and the owner of the truck, frequently loaned

his car to his helper, Shelton Duffy, to be used by him for his own pleasure. On the night the train collided with and injured the truck, Shelton Duffy, with three of his companions, was returning in it from a dance where they had gone for their personal pleasure.

Appellant introduced testimony tending to disprove any negligence in the operation of its train and to show that the collision was due to the negligence of Shelton Duffy in approaching and crossing the track.

Appellee introduced testimony tending to show that the collision resulted from a failure of appellant to ring the bell or sound the whistle as the train approached the street crossing.

The trial court took the view that, if Shelton Duffy was guilty of contributory negligence, such negligence could not be imputed to appellee, and therefore could not be interposed as a defense to his alleged cause of action. The rule of law adopted by the court is in accord with the modern doctrine of bailments to the effect that the negligence of the bailee is not imputable to the bailor where the subject of the bailment is damaged by a third party. 6 C. J., page 1168; 3 R. C. L., p. 146; *Gibson* v. *Bessemer & L. E. R. Co.,* 226 Pa., 198; 27 L. R. A. (N. S.) 689; *Currie* v. *Consolidated Ry. Co.,* 81 Conn. 383; *Norton* v. *Hines,* 211 Mo. App. 438, *Spelman* v. *Delano,* 177 Mo. App. 28; *Campbell* v. *Chicago, B. & O. R. Co.,* 211; Mo. App. 331; *Lloyd* v. *Northern Pacific Ry. Co.,* 181 Pac. 29; *Cain* v. *Wickens,* 122 Atl. 800; Huddy on Automobiles (6th ed.) p. 824..

No error appearing, the judgment is affirmed.

STATE USE PRAIRIE COUNTY v. MCKEE.

Opinion delivered March 30, 1925.

DEPOSITARIES—PREFERENCE OF COUNTY.—Where, by order of the county court, funds of the county were deposited in an insolvent bank without sufficient surety bond, as required by Acts 1915, No. 45, a suit by the county to establish a preference against the

bank's funds because of wrongful deposit and intermingling of public funds is a collateral attack on the judgment of the county court and not maintainable.

Appeal from Prairie Chancery Court, Southern District; *John E. Martineau,* Chancellor; affirmed.

W. J. Waggoner, Chas. A. Walls, Trimble & Trimble, and *Gregory & Holtzendorff,* for appellant.

Gray & Morris, Miller & Pearce, and *Will G. Akers,* for appellee.

HUMPHREYS, J. This suit was brought by appellants against appellees in the Southern District of Prairie County for the purpose of having the claim of Prairie County in the total sum of $43,036.89, including interest, against the New Bank of Hazen, declared prior and paramount to all other claims against said bank and a first lien upon the assets thereof, and for the further purpose of restraining Charles McKee, Bank Commissioner, and J. W. Jarrett, in charge of the assets of said bank, from distributing the funds thereof among the creditors until the debt and interest due from the bank to said county has been fully paid. The gist of the allegations in the bill is that the county funds were wrongfully deposited in said bank by the treasurer of the county, and the denial of these allegations formed the issue between the parties in the trial of the cause. The cause was submitted to the court upon the pleadings and testimony, which resulted in a dismissal of the bill for the want of equity, from which decree of dismissal an appeal has been duly prosecuted to this court.

The suit is a collateral attack upon the judgment of the county court of Prairie County, rendered at the April, 1923, term thereof, approving and designating the New Bank of Hazen as the depository for the public funds of Prairie County, pursuant to authority conferred upon said court by act No. 45 of the Acts of the General Assembly of 1915. The act contains a provision that the county court shall select a bank, a banker or trust company in said county, as the county depository, who shall offer, on sealed competitive bids, the highest rate of

interest on daily balances for the use of the funds. The act also contains a provision that the successful bidder shall execute a bond to protect the county against loss, with the privilege of furnishing private bondsmen if signed by five solvent and qualified sureties, owning real estate and personal property in the State, of value as great as the amount of the bond above their liabilities and exemptions. The record reflects that neither of these provisions was complied with in the manner designated in the act. The language of the sealed bid did not meet with the requirements of the statute, and the bond was only signed by three sureties, and they were not solvent. In fact, the record shows that the New Bank of Hazen itself was insolvent at the time the bid was made and the bond was filed. It also shows that the president of the bank was the county judge and that the officials of the bank were the sureties on the bond.

The treasurer of the county, however, who is one of the appellants herein, deposited the funds of the county in the bank pursuant to the order of the county judge, which order was regular on its face, in good faith, not knowing of the insolvency of the bank and the bondsmen.

Appellant contends for a reversal of the decree under the rule of law that, where public funds, wrongfully deposited by the custodian in a bank, are intermingled with the other funds of the bank, and the bank thereafter fails, the whole of the assets of the insolvent bank become trust funds out of which the public funds should be paid as a preferred claim. While the rule contended for is correct, and was recognized in the case of *Talley* v. *State,* 121 Ark. 4, it has no application on collateral attack of a judgment regular on its face. In the instant case appellants are confronted with an order of the county court, valid on its face and binding upon the treasurer of the county and parties concerned, until set aside by direct attack. No effort was made to do this, and hence the case is in the same situation as if the bid and bond had conformed in all particulars to the

requirements of the act authorizing the county court to select a depository for the county funds. It was ruled in the Talley case, *supra,* that, where the public funds had been rightly deposited, pursuant to the statute authorizing it, which conferred no lien on the assets of the bank, the county is not exempt from the statute forbidding insolvent corporations from giving preference to creditors.

For the reason given, appellants are not entitled to a preference, and the court committed no error in dismissing their bill for the want of equity.

As we understand, the parties have agreed that judgment may be entered here in favor of appellants for the total amount of their claim as general creditors, with direction that they be permitted to participate in the distribution of the assets as such. It is so ordered.

The decree is affirmed.

KIMBROUGH *v.* AMERICAN RAILWAY EXPRESS COMPANY.

Opinion delivered March 30, 1925.

CARRIERS—DELIVERY OF SHIPMENT TO CONSIGNEE UNDER ASSUMED NAME.—Where a carrier delivered goods received for shipment to the person who ordered them from the shipper, it could not be held liable to the shipper for their value, although the consignee may have ordered and received them under a fictitious name.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

E. D. Chastain, for appellant.

A. M. Hartung, and *Warner, Hardin & Warner,* for appellee.

HUMPHREYS, J. This suit was instituted in the circuit court of Crawford County by appellants against appellee to recover $378.25 on account of the alleged negligence of appellee in failing to deliver 150 crates of strawberries to appellant's consignee.

Appellee filed an answer denying that it negligently failed to deliver the berries to the consignee of appellants.

This cause was submitted to a jury upon the pleadings, the testimony adduced by the respective parties, and the instructions of the court, which resulted in a verdict and judgment in favor of appellee, from which is this appeal.

Appellants contend for a reversal of the judgment upon the ground that the verdict was contrary to the law and the evidence. The facts are undisputed, and, in our opinion, the law applicable thereto sustains the verdict and consequent judgment dismissing appellants' complaint.

T. E. Gratton, under the fictitious name of C. J. Smith, telephoned to appellants, who were engaged in buying and selling strawberries at Rogers, Arkansas, an open order for twenty crates of strawberries to be shipped to him daily. Appellants had never done any business with T. E. Gratton or C. J. Smith, and did not realize, when they received the order, that the berries had been ordered under a fictitious name. They made no inquiry as to the existence or responsibility of C. J. Smith, but shipped berries to him on open account extending over a period of time from May 16, 1922, to June 2, 1922. The berries were delivered by appellee at Pawhuska to a man representing himself to be C. J. Smith, the consignee named in the various shipments. Appellants, having received no payments upon the berries, became uneasy, so N. D. Kimbrough went to Pawhuska in search of C. J. Smith. After much inquiry, he met a man in a garage who admitted that he was the person Kimbrough was looking for. This man paid Kimbrough $175, promising to meet him the next morning and settle in full for the strawberries. The party failed to meet him according to appointment, and, at the expiration of two days' search, he found him at Whizbang, and ascertained that his real name was T. E. Gratton. He succeeded in collecting $10 more from him, but was unable to collect the balance, and afterwards brought this suit to recover same from appellee for a misdelivery of the berries.

The rule applicable is well stated in the case of *Fulton Bag & Cotton Mills* v. *Hudson Navigation Company,* 157 Fed. 987, as follows: "Where a transportation company delivered goods received for shipment to the person who ordered the same from the shipper, it cannot be held liable to the shipper for their value, although such person may have ordered and received them under a fictitious name." The doctrine thus announced is sustained by the weight of authority, as will be seen by reference to the following citations: 10 C. J., § 379, page 266; 4 Elliott on Railroads (3rd ed.), § 2296, p. 776; 2 Hutchinson on Carriers (3d ed.), § 472, page 746; *Edmunds* v. *Merchants' Despatch Transportation Co.,* 135 Mass. 283; *Dunbar* v. *Boston & Providence R. R. Co.,* 110 Mass. 26; *Southern Express Co.* v. *Williams* (Ga.), 27 S. E. 743; *Wilson* v. *Adams Express Co.,* 27 Mo. App. 360; *Pacific Express Co.* v. *Hertzberg,* (Tex.), 42 S. W. 795; *Stimpson* v. *Jackson,* 58 N. H. 138; *Seibert* v. *Ry. Co.,* 155 Pa. Super. Ct. 433. The reason of this rule is that one who orders a shipment under a fictitious name is the real consignee, although the fictitious name appears in the consignment. The title to the property passes to the real party ordering the goods when the shipment is made, although ordered under a fictitious name, so it follows that the carrier is justified in delivering the goods to the owner thereof.

No error appearing, the judgment is affirmed.

TODD v. GRAYSON.

Opinion delivered April 6, 1925.

1. DEEDS—CONSIDERATION.—The cancellation and extinguishment, by a vendor under contract of sale, of the debt evidenced by the vendee's notes and contract constituted a sufficient consideration for the execution of a quitclaim deed by the vendee to the vendor.
2. VENDOR AND PURCHASER—VENDOR'S RIGHT TO EXTINGUISH PURCHASER'S EQUITY.—A vendor who has contracted to sell lands,

on the purchaser's default, has the right to extinguish the vendee's equity in the land, either by foreclosure or by purchase, if the transaction is free from fraud or misrepresentation.

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

Saye & Saye, for appellant.

Gaughan & Sifford, for appellee.

McCULLOCH, C. J. This is an action instituted by appellant, Shelby Todd, against appellee, C. W. Grayson, to cancel a quitclaim deed executed to appellee covering a tract of land in Ouachita County, containing 120 acres. The grounds of attack on the conveyance are that it was executed without consideration and that its execution was induced by false representations and threats.

The land in controversy was originally owned by appellee, and on October 26, 1918, he entered into a written contract with appellant Todd whereby he agreed to sell and convey the land to the latter for the sum and price of $1,800, payable $200 on December 1, 1918, and the remainder in three equal installments on the first day of December, 1919, 1920, and 1921, with interest at the rate of ten per cent. per annum from date until paid. Appellant took possession of the land under his contract and occupied it during the year 1919, but failed to pay any part of the agreed price, and, on December 1, 1919, the parties entered into a new contract in writing, superseding the former one, whereby appellee agreed to sell and convey the land to appellant for the sum and price of $1,960, payable $600 in cash and the remainder in two equal annual payments, with interest. The two deferred payments were evidenced by promissory notes executed by appellant to appellee, bearing interest.

On December 11, 1922, appellant, with his wife joining, executed the quitclaim deed in question, conveying all of his interest in the land to appellee.

Appellant alleged in his complaint, and testified on the witness stand, that he remained in possession of the land from the time the first contract was executed

to him by appellee up to the date of the quitclaim deed, but that he paid rent to appellee during the year 1922, after appellee had attached his crop. He testified that appellee extended the time for the payment of the notes, but later induced him to execute the deed in question by telling him that, unless the deed was executed, he would bring suit in the chancery court to foreclose the lien, and that the court, in addition to compelling appellant to make the deed reconveying the land, would impose a fine on him and his wife of seventy-five dollars.

Appellee denied that there was any failure of consideration in the deed or that he made any false representations or any threats. He testified that appellant was unable to make any payments on the land, and gave it up and rented the land for the years 1921 and 1922, and and that, upon bare request, he executed the quitclaim deed. Appellee denied that he represented to appellant that the chancery court could or would impose a fine for failure to execute the deed.

The cancellation and extinguishment of the debt evidenced by appellant's notes and contract constituted a sufficient consideration for the execution of the deed, therefore it is easy to dispose of appellant's contention that the deed was executed without consideration.

Conceding that the alleged representation concerning what the chancery court would do in the way of imposing a fine constituted such a misrepresentation or threat as would justify the cancellation of the deed, there is a conflict in the testimony on that issue, and we are of the opinion that the finding of the chancellor is supported by the weight of the evidence. Appellee, and also the attorney who prepared the deed and took the acknowledgment, testified that there was no such misrepresentation made to appellant, and there was other testimony in corroboration. Appellant testified that he was induced by the statement of appellee to execute the deed of conveyance, but it is undisputed that, when he executed the deed in the office of the attorney, he was accompanied by a friend and adviser, who told him to execute the deed, since he

was unable to pay the purchase price and therefore had no interest in the land.

After careful consideration of the testimony, we are of the opinion that the case contains no element of misrepresentation or fraud.

Appellee had the right to extinguish appellant's equity in the land either by foreclosure or by purchase, if the transaction was free from fraud or misrepresentation (*Bazemore* v. *Mullins,* 52 Ark. 207); and, as before stated, the evidence does not warrant the belief that appellant was induced by any fraud to execute the conveyance.

Affirmed.

MARSHALL *v.* HOLLAND (1).

BASS *v.* COOPER (2).

Opinion delivered April 6, 1925.

1. COUNTIES—DISBURSEMENT OF REVENUES—RIGHT OF TAXPAYER TO QUESTION.—As a taxpayer has a right to question the disbursement of county revenues, he may sue to declare void special acts of 1923, Nos. 125, 410, fixing the salaries of officers of Mississippi County.
2. TAXATION—SEPARATION OF COLLECTOR'S OFFICE FROM THAT OF SHERIFF.—Under Const., art 7, § 46, the office of tax collector may be disconnected from that of the sheriff, in the discretion of the Legislature, and the sheriff cannot object to such separation if the statute is otherwise valid; but, if the statute is open to attack upon other grounds, the incumbent of the sheriff's office has a standing in court to make an attack upon it.
3. OFFICERS—PROHIBITION AGAINST DUAL OFFICE-HOLDING.—Art. 19, § 6, of the Constitution, prohibiting the holding of more than one office in the same department of government, prohibits a county treasurer from holding the office of county collector.
4. OFFICERS—DUAL OFFICE-HOLING—INVALIDITY OF STATUTES.—Under Const., art. 7, § 46, and art 19, §§ 6, 26 *held* that the Legislature cannot annex the office of county tax collector to any other office than that of sheriff, so that Special Acts 1923, No. 125, § 3, making the county treasurer *ex officio* collector of taxes and fixing the salaries of sheriff and treasurer, is void, and, in the absence of other legal provisions, the sheriff continues as *ex*

officio collector, with the fees and salary fixed by the general law.

5. STATUTES—UNCERTAINTY.—Special Acts 1923, No. 125, § 8, as amended by act No. 410, § 2, limiting the salaries of the circuit and county clerks to fees earned not to exceed a specified amount, *held* not void for uncertainty.

6. CONSTITUTIONAL LAW—PROVISION FOR ADVANCED COSTS.—Special Acts 1923, No. 125, § 15, providing for advance costs in the various courts of record, without providing for a *pro rata* return of unused fees, is not invalid as requiring excessive fees or as denying justice, it being within the power of the Legislature to make reasonable provision for the payment of the costs of litigation so as to help defray the expenses of the courts.

7. COUNTIES—CREATION OF OFFICE OF AUDITOR.—Special Acts 1923, No. 410, creating the office of county auditor of Mississippi County, is not unconstitutional as invading the jurisdiction of the county court over the disbursement of county funds and the auditing of accounts, nor as creating a permanent State office, in violation of art. 19, § 9, of the Constitution.

8. CONSTITUTIONAL LAW—APPOINTMENT OF COMMISSIONERS TO MAKE SALE.—Special Acts 1923, No. 125, § 16, providing that the chancery clerk shall be the commissioner to make all sales ordered by the chancery court, is not invalid as invading the jurisdiction of that court.

9. STATUTES—PARTIAL INVALIDITY.—Section three of Special Acts 1923, No. 125, providing for annexation of the office of county tax collector to the county treasurer's office is separable from the other provisions of the act, and its invalidity does not affect the validity of other portions of the act.

(1) Appeal from Mississippi Crancery Court, Chickasawba District; *J. M. Futrell,* Chancellor.

(2) Appeal from Mississippi Circuit Court, Chickasawba District; *W. W. Bandy, Judge;* reversal in both cases.

Reed & Campbell, for appellants.

Nelson & Crawford, Little, Buck & Lasley and *C. E. Sullinger,* for appellees.

McCULLOCH, C. J. The two cases mentioned in the caption were consolidated, as they both involve substantially the same question, namely, the constitutionality of an act of the General Assembly of 1923 (act No. 125, Special Acts 1923, p. 244, as amended by act No. 410, Special Acts 1923, p. 863), relating to the county officers

of Mississippi County, placing the respective officers on salary and specifying the number and amount of the salaries of deputies, and other matters which will be hereinafter referred to.

The statute in question separates the office of sheriff and tax collector, and makes the county treasurer *ex officio* tax collector, and fixes the salary of that officer, as well as the sheriff; it creates the office of county auditor, to be appointed by the county court, with certain specified duties; it specifies the amount of the advance fees to be paid on the filing of causes in the courts of the county, and fixes the salaries of the clerks of the courts, payable out of the fees, and it also provides that the clerk of the chancery court shall act as commissioner of the court in chancery. There are other provisions of the statute unnecessary to mention, as these are the ones which are attacked as being invalid.

Appellant, H. F. Marshall, instituted one of these actions in the chancery court, alleging that he is a resident citizen and taxpayer of the county, and praying that the statute be declared void, and that the county judge and other officers, who are made defendants, be enjoined from putting the scheme into effect. The chancery court sustained a demurrer to the complaint and dismissed the complaint for want of equity. Appellant declined to plead further.

In the other case, appellant Bass is the sheriff of the county, and he instituted an action at law against appellee Cooper, the treasurer, under the usurpation statute (Crawford & Moses' Digest, § 10325 *et seq.*), alleging that the latter is wrongfully and illegally attempting to usurp the office to which he is entitled. The circuit court sustained a demurrer to the complaint in that action, and dismissed the complaint, when appellant Bass refused to plead further.

In the case of *Bass* v. *Cooper* there is only involved the question of the right of the appellee to discharge the duties of tax collector, but, in both cases, the contention is that there are invalid provisions in the statute which

cannot be separated, and that the whole of the statute must be stricken down.

In the case of *Marshall* v. *Holland,* the chancery court decided that the complaint was demurrable on the ground that appellant had no right to maintain the action, not having shown any interest in the subject-matter of the litigation. Counsel for appellees defend this ruling on the ground that the effect of the litigation is a challenge of the right to hold office, and, for that reason, the cause does not fall within the jurisdiction of the chancery court. To the extent that the right to hold office is involved, it is a mere incident to the suit, and a taxpayer has a right to maintain an action to prevent an alleged diversion of public revenues. *Lee County* v. *Robertson,* 66 Ark. 82. The fixing of salaries of public officers necessarily involves disbursement of the public revenues, and a taxpayer is therefore sufficiently interested to justify him in maintaining an action.

Power to disconnect the office of collector from that of sheriff having been conferred upon the Legislature by the Constitution (art. 7, § 46), the incumbent of the office of sheriff has no right to complain of the statute separating the two offices, if it is in other respects a valid enactment (*Vaughan* v. *Kendall,* 79 Ark. 584); but, if the statute is open to attack on other grounds, the incumbent has a standing in court to make an attack upon it. The principal assault upon the validity of the statute under consideration relates to this feature of it, and is common to both of the cases now before us. The Constitution (art. 7, § 46), provides that the sheriff "shall be *ex officio* collector of taxes, unless otherwise provided by law:" and another section of the Constitution reads as follows: "No person shall hold or perform the duties of more than one office in the same department of the government at the same time, except as expressly directed or permitted by this Constitution." Section 6, art. 19.

Section 3 of the statute under consideration provides that "the county treasurer shall be *ex-officio* col-

lector of taxes," and another section fixes the salary of the treasurer for the performance of the duties of both offices.

This court has held that the position of tax collector is a separate office, which, according to the express provision of the Constitution, may be held so long as the Legislature permits, by the incumbent of the sheriff's office, and no longer. *Ex parte McCabe,* 33 Ark. 396; *Falconer* v. *Shores,* 37 Ark 386. The opinion of this court in *Vaughan* v. *Kendall, supra,* is inaccurate in stating that the duties of tax collector are a mere incident to the other office. That statement is in conflict with the ruling of the court in the two other cases cited above. The point involved in that case was whether or not the two offices of sheriff and tax collector could be separated so as to affect the incumbency of the individual then in office, and we were not called on to decide the question whether the position of tax collector was in fact a separate office or was a mere incident to another office.

Section 26, art. 19, of the Constitution reads as follows: "Militia officers, officers of the public schools and notaries may be elected to fill any executive or judicial office." This provision and the one permitting the sheriff to be *ex-officio* collector of taxes are the only two provisions found in the Constitution expressly permitting dual office-holding. It is the contention of counsel for appellees that § 6, art. 19, relates only to officers in departments of the State Government, not to county officers, and they rely upon the decision of this court in *Peterson* v. *Culpepper,* 72 Ark. 230, in support of that contention. The insertion of the word "State" before the word "government" in that section of the Constitution is unwarranted, and the question of so interpreting the Constitution was not involved in the decision cited above. The question under consideration in that case related to the right of one person to hold the office of sheriff and chief of police of a municipality, the court upholding the right on the ground that there is no incompatibility between the two offices.

Section 6, art. 19, relates to the subject of incompatibility of dual office-holding and defines, to a certain extent, the instances in which a person may not hold two offices, but does not undertake to define what shall constitute the different departments of government. The offices of sheriff, collector, treasurer and certain other county officers are all embraced in § 46, art. 7, and this necessarily groups them as officers in the same department.

It is further contended by counsel for appellees that, since the Constitution expressly authorizes the separation of the office of collector of taxes from that of sheriff —in other words, makes other provision for the discharge of the duties of the office of collector—this necessarily clothes the lawmakers with supreme power in relation to such provision and permits the annexation of the collector's office to any other office under the Constitution. We do not think that this contention is sound, for the reason that the provision in § 6, art. 19, is an inhibition against dual office-holding, "except as expressly directed or permitted by this Constitution," and there is no provision in the Constitution for dual office-holding except in the instance of sheriff and collector of taxes, and all of those offices mentioned in § 26, art. 19, namely, militia officers, officers of the public schools, and notaries. It follows therefore that there is no authority for joining together two offices in the same department, except those expressly permitted by the Constitution. The authority found in § 46, art. 7, to "otherwise provide by law" for the office of collector, does not confer authority on the Legislature to annex it to an office other than that of sheriff. Placing the collector's office under legislative control does not imply authority to annex it to another office, for to do so would bring it in conflict with the other provision of the Constitution prohibiting dual office-holding.

The language of the opinion of this court in *Durden* v. *Sebastian County*, 73 Ark. 305, quoted in the brief, has not escaped our attention, but we do not construe the language as meaning that the collector's office may be

annexed to another county office. The court there was merely dealing with the power of the Legislature to separate it from the sheriff's office, and, in saying that the collector's office "may be filled by another person or officer than the sheriff," it was not meant to declare the law to be that the office could be annexed to another one. Nor can it be said that the mere fact that the office of tax collector is referred to in art. 7, § 46, forces the conclusion that the lawmakers may continue to treat it as an *ex officio* office and annex it to another office.

Our conclusion is that this feature of the statute is void, and it necessarily results that the office of tax collector falls back to its constitutional status as a part of the duties of the sheriff, since no other legal provision has been made for its separation.

That part of the statute which fixes the salary of the treasurer is also void, for the reason that we cannot assume that the lawmakers would have provided the amount of salary fixed by the statute or that they would have provided for the additional assistants or deputies if that officer was only to discharge the duties of treasurer, not including the *ex officio* duties of collector.

That provision of the statute fixing the salary of the sheriff and the number of his deputies is also void, for the reason that it cannot be assumed that the lawmakers would have thus placed this limitation upon the office of sheriff if that officer was to perform the *ex officio* duties of tax collector. Those provisions of the statute must therefore be eliminated, and the offices therein mentioned fall back into the status they occupied before the statute was passed; that is to say, the sheriff continues to be *ex officio tax* collector and is to receive the fees and emoluments prescribed by general statutes for the discharge of the duties of both offices; and the treasurer receives commissions under general statutes.

The next attack is upon § 8 of the statute, which fixes the salaries of the county clerk and circuit clerk and provides for the payment of those salaries out of the revenues of the offices arising from fees collected.

The contention is that this section is void for uncertainty, in that it does not provide definitely for the payment of the salary. We are of the opinion that there is no uncertainty about this provision of the statute, for it fixes the amount of the salaries, which are not to exceed the fees received in those offices. The power of the lawmakers is supreme with respect to fixing fees and emoluments of office, and we perceive no reason why such a limitation as is found in this statute may not be placed upon the amount to be received. It is definite and certain that those officers are to receive fees up to the specified amount of salaries and no more, and, if the fees are not earned in sufficient amount to make up the salary, it is limited to the amount so earned. It would be within the power of the Legislature to restrict the emoluments of those offices to a portion of the fees earned, and the result would be the same, so far as concerns the validity of the enactment, as the present statute which limits the amount of salary to the total amount of earned fees.

It is also contended that the feature of the statute (§ 15) which provides for the amount of the advance costs to be paid by litigants in each cause pending in the courts is void for the reason that the amounts are excessive, and constitute a denial of justice, or, rather, that it is in conflict with that provision of the bill of rights that every person is entitled to "obtain justice freely and without purchase." The staute provides for advance costs in the sum of $7.50 on appeals to the circuit court, and for an advance fee of $10 in all other circuit court cases; an advance fee of $7.50 for divorce cases and *ex parte* cases in the chancery court; $15 for all other proceedings in the chancery court, and $7.50 in the common pleas court. It is the contention that the requirement for the payment of these fees without a provision for a *pro rata* return of the fees not used in paying the salaries renders the provision oppressive and therefore unconstitutional. It cannot be said, we think, that the amount is excessive, and the fact that the unused amount of the fees goes into the public revenues does not render

the statute void. It is within the power of the Legislature to make reasonable provisions for the payment of cost of litigation so as to help defray the expenses of the courts. Our conclusion is that this provision of the statute is not invalid.

The next contention is that that part of the statute which creates the office of county auditor is unconstitutional. The argument is that this is an invasion of the constitutional jurisdiction of the county court in its control over the disbursement of county funds and in the auditing of accounts. This argument is unsound, for the reason that the creation of the office of auditor does not take away any of the jurisdiction of the county court; on the contrary, the duties of the auditor are in aid of that jurisdiction, and not in conflict with it. The control of the county court over the auditing of accounts is complete, notwithstanding the aid furnished by the auditor in the discharge of those duties. This feature of the statute is also assailed on the ground that it is in conflict with the provision of the Constitution which prohibits the creation of "any permanent State office not expressly provided for by this Constitution." The readiest answer to this contention is that the office is not a State office within the meaning of the Constitution. *Fort Smith District of Sebastian County* v. *Eberle,* 125 Ark. 350; *Little River County Board of Education* v. *Ashdown,* 126 Ark. 549.

Section 16 of the statute provides that the chancery clerk shall be the commissioner to make all sales ordered by the chancery court, unless he is disqualified, in which case one of his deputies shall be appointed, and there is an attack on this provision upon the ground that it constitutes an invasion of the jurisdiction and authority of the court. Such is not the effect of the statute, for the jurisdiction of the chancery court is left unimpaired. The appointment of commissioners, masters and receivers is not a matter necessarily and exclusively falling within the jurisdiction of the court, and it is within the power of the lawmakers to regulate those appointments. There

is a general statute on this subject (Crawford & Moses' Digest, §§ 10017 and 10042), the validity of which was distinctly recognized by the decision of this court in *State* v. *Swaim,* 167 Ark. 225.

Section 18 of the statute provides that the violation of any provision of this statute by any officer shall render him guilty of a misdemeanor, punishable by fine, and that such officer may also be removed from office by the circuit court or chancery court, or by a circuit judge or chancellor, either before or after conviction, upon petition of ten taxpayers. The validity of this provision is assailed in the argument, but we do not think that the question arises in this case, further than the question of its validity may affect the validity of the whole statute; hence we proceed to a consideration of the final question presented in the case, whether or not the invalidity of some of the provisions of the statute necessarily strikes down the whole enactment.

Section 21 provides that "if any section, subsection, sentence or phrase in this act shall be held unconstitutional, such decision shall not affect the validity of the remaining parts of the act." There was a similar provision involved in the statute considered by this court in the case of *Nixon* v. *Allen,* 150 Ark. 244, and we held that the determination of the invalidity of certain features of the statute necessarily invalidated the whole, notwithstanding this provision. In that case, however, the provisions found to be invalid were so interwoven with all the other portions of the act that the whole scheme fell with the striking down of the particular provisions. Such is not the case here, for the invalid provisions with reference to the separation of the office of tax collector from the sheriff's office, the annexation of that office to the office of treasurer, and the fixing of salaries of those two officers, may be eliminated without disturbing the scheme otherwise prescribed in the statute. This is a separable provision of the statute, as it relates only to the two offices mentioned, and the elimination leaves the remainder of the statute intact. The same can be

said with reference to removal of officers, if that should be found to be invalid.

The decree of the chancery court in the one case and the judgment of the circuit court in the other case are each reversed, and the cause remanded with directions to grant the relief to the extent indicated in this opinion.

FIDELITY MORTGAGE COMPANY v. EVANS.

Opinion delivered April 6, 1925.

1. VENUE—ACTION AFFECTING TITLE TO LAND.—An action to remove a cloud upon the title to land is a local action within Crawford & Moses' Dig., § 1164, and should be brought in the county in which the land is situated.
2. JUDGMENT—RECITALS OF JURISDICTION.—Recitals in a judgment that the court had jurisdiction of the parties defendant is *prima facie* evidence of that fact, under Crawford & Moses' Dig., § 6239.
3. CORPORATION—SERVICE ON AGENT OF FOREIGN CORPORATION.—Under Crawford & Moses' Dig., § 1829, service of summons upon the designated agent of a foreign corporation is sufficient to give the court jurisdiction, whether made in the county of the venue or not.
4. PROCESS—DEFENDANT REMOVING FROM COUNTY.—Where a defendant removed from the county of the venue after filing of the complaint, service of summons in another county would be sufficient, under Crawford & Moses' Dig., § 1180.
5. JUDGMENT—TIME FOR TAKING DEFAULT.—A default judgment may be taken where more than 20 days have elapsed since service of summons on the defendants.

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

E. L. Carter, for appellant.

Evans & Evans, for appellee.

WOOD, J. On the first of February, 1923, one Lewis Finley sold a certain tract of land in Logan County to one John I. Nichols. The consideration was $700, $400 of which was paid in cash and a note executed for the balance of the purchase money, dated February 17, 1923, in the sum of $300, due sixty days after date, bearing

interest at the rate of ten per cent. per annum from date until paid. A warranty deed was executed by Finley to Nichols for the land, and a lien was reserved in the face of the deed to secure the balance of the purchase money, Nichols applied to the Conservative Loan Company, a corporation doing business in Arkansas, for a loan of $300, and executed to the loan company a first mortgage on the land mentioned to secure the loan, and also a second mortgage on the land to secure other notes executed to the loan company in the sum of $95. The notes and mortgages were delivered to the loan company, or to appellant C. H. Christner, its president, upon the promise of Christner and the company to make him the loan. Nichols, during the year 1923, sold the land purchased of Finley to one Delling. Chas. I. Evans became the owner of the $300 note executed by Nichols to Finley. The Fidelity Mortgage Company, another corporation doing business in Arkansas, was organized for the purpose of taking over, and did take over, the assets of the Conservative Loan Company, including the notes and mortgages mentioned. Christner was the president and general manager of these companies. The Conservative Loan Company and Christner failed or refused to advance the money for which Nichols had executed his notes and mortgages, and also failed and refused to return the notes and mortgages executed by Nichols as above mentioned. On the third of December, 1923, this action was instituted by Nichols, Delling and Evans in the chancery court of Logan County against the Conservative Loan Company, the Fidelity Mortgage Company and Christner to recover judgment in the sum of $395, with interest from February 1, 1923, and for damages, and all equitable relief.

Summons was issued on the fourth of December, 1923, directed to the sheriff of Pulaski County, commanding him to serve the companies and Christner. The returns of the sheriff show that on 19th of December, 1923, he served the summons by delivering a copy to each of them as follows: Conservative Loan Company,

to C. H. Christner, president of said company; also Fidelity Mortgage Company, to C. H. Christner, president of the company; and to C. H. Christner in person, in the county of Pulaski, as commanded. A second summons was issued on the 18th of January, 1924, directed to the sheriff of Pulaski County, and the return on the same are as follows: "Came to hand this 19th day of January, 1924, at 3 o'clock P. M., and I have duly served this summons upon each of said defendants by delivering a copy hereof to each of them, as follows, to-wit: Conservative Loan Company, by delivering a true copy to C. H. Christner, president. I have further served C. H. Christner as president of Fidelity Mortgage Company. I have further served C. H. Christner in person, in said county. In the county of ——— as commanded. Homer Adkins, sheriff, by J. M. Haynie, D. S."

The cause came on for trial on February 5, 1924. The court found and recited in its decree that the defendants failed to appear; that they had been duly served with summons "for the time and in the manner required by law to entitle plaintiffs to trial at this term of court;" "that it had jurisdiction of each of the defendants, and that they have each been duly served with summons to appear and defend in this action, but they have each failed, neglected and refused to appear, answer or otherwise plead, and that they make default." Then, after finding the facts substantially as above set forth, and that the defendants had breached their contract, the court rendered a decree against them in the sum of $395, together with interest thereon at the rate of six per cent. per annum from the 17th of February, 1923, from which is this appeal.

The appellants present three grounds for the reversal of the decree. First, that the chancery court of Logan County did not have jurisdiction of the subject-matter; second, that the court did not have jurisdiction of the persons of the appellants; third, that the decree was prematurely rendered. We will dispose of these in the order mentioned.

1. The complaint set up a cause of action for damages growing out of an alleged breach of contract to loan money to Nichols, and alleged in substance that the appellants had agreed to loan Nichols $395, balance of the purchase money, for which sum Nichols had agreed to and had executed his notes and mortgages on certain land in Logan County, and had delivered the notes and mortgages to the appellants; that the appellants, after having received the notes and mortgages, failed and refused to make the loan, and also failed and refused to return the notes and mortgages; that Nichols had sold the land purchased by him of Finley to Delling, and that Evans had become the owner of the note for the balance of the purchase money due by Nichols for the land. The prayer of the complaint was in the alternative, that judgment be rendered against the appellants for the amount of the loans, or that they be required to deliver the notes and mortgages. There was also a prayer for all equitable relief.

Clearly, one purpose of the action, as shown by the allegations of the complaint and the findings of the decree of the court, was to have surrendered and canceled the outstanding mortgages. These mortgages were clouds on the title. Appellee Delling, who had purchased the land from Nichols, and appellee Evans, who held the purchase money note which was secured by a vendor's lien, were entitled to have the outstanding notes and mortgages executed by Nichols and wife surrendered and canceled. The action, in this respect, affected the land in Logan County and gave the chancery court of that county jurisdiction of the subject-matter. As incident to the general and equitable relief prayed for, it might have been necessary, in the final analysis, under the pleadings and proof, not only to have canceled the notes and mortgages in the hands of the appellants, corporations, but also to have the lands sold to satisfy the lien for the purchase money. At any rate, it is manifest that, under the pleadings and prayer for general relief, the action and decree of the court affected the land in Logan

County. These allegations were sufficient to give the chancery court of that county jurisdiction of the subject-matter. Section 1164, C. & M. Digest; *Harris* v. *Smith,* 133 Ark. 250, and cases there cited.

2. The decree of the court recites as follows: "The court finds that the defendants, Conservative Loan Company and Fidelity Mortgage Company, are corporations doing business in this State; that each of them have been duly served with summons in this case for the time and in the manner required by law to entitle plaintiffs to trial at this term of court; that defendant Christner has been duly and legally personally served with summons in this cause for the time and in the manner required by law to entitle plaintiffs to trial at this term of court. The court finds that it has jurisdiction of each of the defendants, and that they have each been duly served with summons to appear and defend in this action," etc.

The above recitals in the judgment roll of the chancery court were certainly *prima facie* evidence that the court had jurisdiction of the parties defendant to the action. Section 6239 of C. & M. Digest; *White* v. *Smith,* 63 Ark. 513. The above recitals are not overcome by the summons issued to the sheriff of Pulaski County and the return thereon showing service upon each of the defendants in that county. The evidence as to this summons and the return thereon may not have embraced the entire proof before the court on the issue as to the service of process on the defendants. There are no recitals in the judgment itself showing that the above summons and return thereon embraced all the evidence that was heard by the court on the issue of process, nor is there any statement in the transcript of the record showing by bill of exceptions or otherwise that the summons and the return thereon was all the evidence heard by the trial court on that issue. In the absence of such showing, the presumption is, from the above recitals of the court's decree, that the court had before it facts sufficient to justify its finding. See *Love* v. *Coffman,* 72 Ark. 265.

Furthermore, the recitals of the decree show that the court found that the Conservative Loan Company and the Fidelity Mortgage Company are corporations doing business in this State. This finding, of itself, does not indicate whether they were domestic or foreign corporations, but, in the absence of a showing to the contrary, it must be presumed that the court found that they were foreign corporations, and that they had designated Christner as their agent upon whom process might be served, in compliance with the provisions of § 1826 and 1829 of Crawford & Moses' Digest. Under § 1829, *supra,* the service upon such designated agent at any place in the State was sufficient to give the trial court jurisdiction of the corporations, whether or not the service was had in Logan County. If foreign corporations, and if Christner was the agent named upon whom process might be served, then it was not essential that the service be had in Logan County. The service in Pulaski County on such agent was sufficient.

So far as the service of process against Christner in his individual capacity is concerned, in the absence of a showing to the contrary, it will be presumed that the court found the existence of every fact essential to give it jurisdiction of his person. The court may have found that, at the time of the filing of the complaint in Logan County, Christner was a resident of that county, and that, after the complaint was filed, he removed to another county. If so, the service upon him in the county of Pulaski was sufficient. See § 1180, C. & M. Digest. We conclude therefore that the court had jurisdiction over the persons of the defendants to the action.

3. The appellants contend that the judgment was premature because the summons against Christner and the corporations was served on the 19th day of January, 1924, and that the decree was rendered on the 5th of February, 1924, which was only seventeen days after the date of the service, and that therefore the decree was premature. The record shows that summons was issued on the 4th of December, 1923, and that on the 19th of

December, 1923, the same was served on the appellants, and that the decree was rendered on February 5, 1924. Forty-seven days, therefore, intervened between the time of the service of the summons and the rendition of the decree. True, there was another summons issued on the 18th day of January, 1924, which was duly served the next day, January 19th, the last service therefore was only seventeen days before the decree was rendered. But the service under the first summons, as we have seen, was amply sufficient, and the decree was justified, and not premature under such service.

Thre is no reversible error in the rulings of the trial court, and its decree is therefore affirmed.

HOLDEN v. STATE.

Opinion delivered April 6, 1925.

1. LARCENY—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of stealing seed cotton of the value of $100.
2. LARCENY—INDICTMENT—VARIANCE.—Proof that a landlord had a lien on cotton stolen by defendant is not variant from an indictment charging that the cotton stolen was the property of the landlord.
3. LARCENCY—INSTRUCTION.—An instruction to the effect that, if the landlord owned a fourth interest in the cotton alleged to have been stolen, the title to that part would be in him was not objectionable as assuming his ownership.

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

A. J. Johnson, for appellant.

H. W. Applegate, Attorney General, and *Darden Mose,* Assistant, for appellee.

HART, J. Sol Holden prosecutes this appeal to reverse a judgment of conviction against him for grand larceny, charged to have been committed by stealing 1,200 lbs. of seed cotton of the value of $100, the property of R. R. Rice.

The first assignment of error is that the verdict is not legally supported by the evidence.

On the part of the State it was shown that the cotton in question was grown on the farm of R. R. Rice, in Lincoln County, Arkansas, by a negro called Cool Shorty. Shorty was to pay one-fourth of the cotton raised by him as rent. He was also indebted to Rice for supplies, and it was their custom for the cotton to be sold by Rice and the proceeds applied first to the payment of the rent and the balance to the payment of the supply account.

Holden procured Augustus Bradley to drive a wagon containing a bale of cotton to a gin at the town of Gould. The cotton was out on the pike, and Holden told Bradley, if any one asked whose cotton it was, to tell them that it belonged to him (Holden). This was in the night time. The evidence shows that the cotton in question was raised on the farm of R. R. Rice by Cool Shorty. Holden went ahead of the wagon, on horseback, and took charge of the cotton at the gin. He had it ginned as his own cotton, and then sold it as his own cotton. The cotton was sold without the knowledge or consent of Rice. The value of the rent cotton in question belonging to Rice was $32 or more.

It is next insisted that there is a variance between the proof and the indictment. We cannot agree with counsel in this contention. The indictment charged that Hoden sold 1,200 lbs. of seed cotton of the value of $100, the property of R. R. Rice. The proof shows that this cotton was grown on the farm of R. R. Rice, and that he had a lien on it for rent and supplies. A tenant by whom the cotton was grown was to pay him one-fourth of it for rent and the balance was to be applied to the payment of his supply account. The cotton was to be sold by Rice. It is fairly inferable from this testimony that the cotton was in the possession of Rice, and that he had a special ownership in it. *Blankenship* v. *State,* 55 Ark. 244, and *State* v. *Esmond,* 135 Ark. 168.

It is next insisted that the court erred in giving instruction No. 3, which reads as follows:

"If you find from the evidence in this case, beyond a reasonable doubt, that a man by the name of Cool Shorty raised the cotton in question under an agreement with R. R. Rice, the landowner, by the terms of which said R. R. Rice was to receive one-fourth of the cotton, then as a matter of law the title to that part of the cotton stolen, if you find the same was stolen, would be in the said R. R. Rice."

The defendant objected specifically to the instruction on the ground that it tells the jury as a matter of law that Rice was the owner of the land under contract to receive one-fourth of the cotton from Cool Shorty.

We do not think the instruction is fairly susceptible to this construction. It tells the jury that, if it finds from the evidence that Shorty raised the cotton under an agreement with Rice that he was to receive one-fourth of the cotton as rent, then as a matter of law the title to that part of the cotton was in Rice. There was no error in giving this instruction. The proof on the part of the State, if believed by the jury, showed special ownership of the rent cotton in Rice.

It follows that the judgment must be affirmed.

HUDGINS v. HOT SPRINGS.

Opinion delivered April 6, 1925.

TAXATION—PROPERTY OF CITY—DUMPING GROUND.—Land purchased by a city for present use as a dumping ground and used as such for several months, though such use had been discontinued because the road to it had become impassable, is exempt from taxation under Const., art., 16, § 5, and Crawford & Moses' Dig., § 9858.

Appeal from Garland Chancery Court; *J. P. Henderson*, Chancellor; affirmed.

STATEMENT OF FACTS.

The land in controversy was purchased by the city of Hot Springs in December, 1912, for the purpose of

depositing the refuse of the city. It was so used for three or four months, and its use was then discontinued, because the road to it became impassable. The road has not been repaired, and, on that account, it has not been used for a dumping ground by the city since, nor has it been used for any other purpose. The land in some way was assessed and sold for taxes, and, after the period for redemption had expired, J. W. Hudgins obtained a tax title to it. This suit was brought by the city against him to cancel his tax title.

From a decree in favor of the city, Hudgins has duly prosecuted an appeal to this court.

Cobb & Cobb, for appellant.

Leo P. McLaughlin and *George P. Whittington,* for appellee.

HART, J., (after stating the facts). The decision of the chancellor was correct. The city purchased the property for use as a dumping ground for its refuse. This was a public purpose. Section 16, art. 5, of the Constitution exempts from taxation public property used exclusively for public purposes. Section 9858 of Crawford & Moses' Digest exempts from taxation the following:

"All market-houses, public squares, other public grounds, town and city houses or halls, owned and used exclusively for public purposes, and all works, machinery and fixtures belonging to any town and used exclusively for conveying water to said town."

We do not think the case of *Pulaski County* v. *First Baptist Church,* 86 Ark. 205, is applicable. In that case the property was held to be taxable because it was not used for church purposes. Here the property was used for a public purpose, and there had been no change in the use of it. The city had simply quit using it for a time as its dumping ground because of the condition of the roads. It had not been used for any private purpose, and it could not even be said that, at the time the property was sold for taxes, the city had abandoned its use as a dumping ground. It was not bought for future

use, but was actually used as a dumping ground for several months after its purchase.

In *State* v. *Gaffney,* 34 N. J. 131, the court held: "Lands and real estate acquired and held by the corporation of Jersey City, under the act to authorize the construction of works for supplying Jersey City and places adjacent with pure and wholesome water, and its supplements, although not in actual use, are exempt from taxation, if not held for speculation or to meet a remote, contingent expectation of necessary use, or mere incidental convenience, but are held in good faith, and are reasonably necessary to meet the increased and growing demand for water."

We think that principle of law controls here. Having held that the property belonged to the city and was used by it for a public purpose, Hudgins acquired no title at the tax sale, and the city was entitled to maintain this action. *Winn* v. *Little Rock,* 165 Ark. 11.

It follows that the decree will be affirmed.

GREGORY v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered April 6, 1925.

1. RAILROADS—FAILURE TO KEEP LOOKOUT—CONTRIBUTORY NEGLIGENCE.—Under Crawford & Moses' Dig., § 8568, a railroad is liable for failure to keep a lookout which would have enabled it to avert an injury notwithstanding the contributory negligence of the person injured.
2. RAILROADS—COMPARATIVE NEGLIGENCE—INSTRUCTION.—It was error to instruct that the railroad company would not be liable for failure to keep a lookout if the negligence of the plaintiff was equal to or greater than the negligence of the trainmen.
3. TRIAL—INSTRUCTION—SPECIFIC OBJECTION.—An objection to an instruction relating to the duty of trainmen to keep a lookout, *held* sufficient to apprise the court of error in the instruction.
4. RAILROADS—KEEPING LOOKOUT—JURY QUESTION.—Whether trainmen operating defendant's train, which collided with plaintiff's motor bus at a public crossing, kept a proper lookout, *held* for the jury.

5. RAILROADS—DUTY TO KEEP LOOKOUT.—Under Crawford & Moses' Dig., § 8568, it was the duty of the trainmen to keep a constant lookout for travellers along the highway, and if the appearance of a motorbus moving at the same rate of speed, indicated to the fireman that it would not stop, he could have signaled to the engineer to stop before the motor bus got too close to the crossing.
6. TRIAL—ABSTRACT INSTRUCTION.—In an action for damages sustained at a railroad crossing, near which the railroad crossed a "cut-off track" of another railroad, an instruction as to the duty to stop before crossing another railroad was properly refused as abstract, where it appears that the "cut-off" track was nothing more than a switch or transfer track.

Appeal from Cross Circuit Court; *G. E. Keck,* Judge; reversed.

STATEMENT OF FACTS.

Appellant sued appellee to recover damages in the sum of $2,000 for negligently running into one of his motor cars with one of its passenger trains.

The accident occurred at the crossing of a concrete public highway with the railroad, between Marion, Arkansas, and Memphis, Tennessee. At the crossing where the accident occurred the highway crosses the railroad track at an angle of about 65 degrees. About 800 feet west of this crossing a track of the St. Louis & San Francisco Railway Company, called a cut-off track, crosses the railroad track at an angle of about 54 degrees. At a point about 500 feet north of the crossing on the public highway, a person looking to the west is apt to be confused as to whether a train at the crossing of the two railroads is upon the cut-off track or the main track of appellee. The motor bus of appellant and the passenger train of appellee were both going towards Memphis at the time the train struck the motor bus and demolished it. Between five and six hundred feet before you get to the crossing in question, while traveling the public highway, you can see where the railroad of appellee intersects the cut-off track of the Frisco railroad, and a person not familiar with the situation would think they were all one track. You can see the Frisco crossing from a point in the highway 500 feet north of the concrete public

highway crossing for a distance of 150 feet as you travel towards the public highway crossing. Then for 200 feet the view of the railroad is obscured by bushes, and then you have a clear view for between two and three hundred feet between the highway and the railroad.

G. H. Smith, one of the witnesses for appellant, had just passed the railroad crossing, going north on the concrete highway, in a truck, just before the accident occurred. He heard the train whistle just before he reached the crossing. The train was then on the other side of the cut-off crossing. After the witness had crossed the railroad and got about 150 or 200 feet, he passed the motor bus, which was running at the usual rate of speed, and it did not slacken its speed. Because of this fact, he began to doubt if the motor bus could go over the public crossing before the train reached it. There is a little bunch of shrubs between the highway and the railroad track, but that would not prevent one from seeing.

On the part of the railroad company, it was shown that the fireman was keeping a lookout, and gave the signal to stop the train as soon as he saw that the motor bus was not going to stop. He gave the engineer the stop signal when the train was about 150 or 200 feet from the crossing. The bus was about 75 feet from the crossing before the fireman saw that it was not going to stop. The bell was ringing, and the train was stopped as soon as it could be, when the emergency signal was given.

Other facts will be stated in the opinion.

There was a verdict for appellee, and, from the judgment rendered in its favor, appellant has duly prosecuted an appeal to this court.

Frank Berry, for appellant.

Thomas B. Pryor and *Daggett & Daggett,* for appellee.

HART, J., (after stating the facts). Counsel for appellant insists that the court erred in giving instruction No. 2 to the jury. The instruction is as follows: "If you find from the evidence in this case that the

employees in charge of the train failed to keep a constant lookout for persons or property on or near the track, and, if they had kept such a lookout, the employees in charge of said train could have discovered the perilous position of the bus in time to prevent the injury, by the exercise of ordinary care, after the discovery of such peril, your verdict should be for the plaintiff, notwithstanding you may find the man in charge of the bus to have been guilty of contributory negligence, unless you find that his negligence, if any, was of a degree equal to or greater than the negligence of the employees in charge of the defendant's train, if any, in which event you should find for the defendant as to the alleged failure to keep a constant lookout."

The instruction appears to have been based upon § 8568 of Crawford & Moses' Digest, commonly called the lookout statute. The appellant specially excepted to the giving of the instruction, "because it authorizes judgment for the appellee notwithstanding discovered peril and failure to stop."

Counsel for appellant claims that the latter part of the instruction is erroneous because it precludes the jury from finding for appellant if his negligence, or that of his employees, was of a degree equal to or greater than the negligence of the employees in charge of appellee's train. We think counsel for appellant is correct in his contention. As we have just seen, the duty of the trainmen to keep a lookout, under the section above referred to, makes the railroad liable to the person injured, either in person or in property, for all damages resulting from neglect to keep the lookout, notwithstanding the contributory negligence of the person injured.

Section 8568 of Crawford & Moses' Digest makes it the duty of a railroad to maintain a constant lookout, and charges it with having seen what its servants would have seen had this lookout been kept; and if, by keeping this lookout, the railroad company could and would have discovered the traveler's peril in time to avert the injury,

it is liable, if it fails to do so, notwithstanding the fact that the traveler's contributory negligence placed him in peril. *Blytheville, Leachville & Ark. Sou. Ry. Co.* v. *Gessell,* 158 Ark. 569.

Thus it will be seen that the concluding part of the instruction is directly contrary to the statute. In short, the statute provides that the railroad shall be responsible to the person injured for all damages resulting to him or to his property from the neglect of the railroad company to keep the lookout provided by the statute, notwithstanding his contributory negligence. The concluding part of the instruction in question relieves the railroad company from liability, if the negligence of the servant of appellant was equal to or greater than the negligence of the employees operating the train which struck the motor bus of appellant.

But it is insisted that this error is not available to the appellant, because he made a specific objection to the instruction, and that the specific objection is not applicable to the concluding part of the instruction. We do not agree with counsel in this contention. The instruction was excepted to specially because it authorized judgment for the appellant notwithstanding discovered peril and a failure to stop. This is the very essence of the lookout statute, and, it having provided in specific terms that contributory negligence does not relieve the railroad company from liability to the person injured, the instruction was necessarily prejudicial to the rights of appellant. It relieved the railroad company from all responsibility, even if it discovered the peril in which the appellant's motor bus was placed, and failed to stop its train, provided the jury should find that the negligence of the appellant's driver was equal to or greater than the negligence of the operators of the train. We think the specific objection was sufficiently definite to have apprised appellee and the court trying the case of the error in the instruction.

This brings us to a consideration of whether the instruction was abstract, because the undisputed evidence

showed that the servants of appellee were keeping the lookout required by law and stopped the train as soon as it could be ascertained that the motor bus was not going to stop before it reached the crossing to allow the train to pass by.

According to the testimony of the engineer, he was on the right-hand side of the engine, which was going east, and could not see the approaching motor bus, which was coming towards the crossing from the fireman's side of the engine.

G. H. Smith passed the crossing going north, and passed the motor bus about 150 feet or 200 feet north of the crossing. According to his testimony, it was running at the usual speed, and, according to the testimony of others, the motor bus was running at the rate of 25 or 30 miles per hour. The bus had not slackened its speed when Smith passed it in his truck. At the time he passed it his attention was attracted to it, because he did not think it could get across the public crossing before the train got there, and it seemed to him like the bus was not going to stop. According to his testimony, while there was a little bunch of scrubs between the public highway and the railroad track, one could see five or six hundred feet. Now the motor bus was going as fast as the train, and the jury might have found that the fireman was not keeping a lookout as he said he was, or that, if he was keeping a lookout, the appearance of the motor bus indicated that it was not going to stop. As soon as the fireman gave him the stop signal, the engineer applied the brakes in emergency and made a perfect stop. The train was running about 25 or 30 miles an hour, and the bell was ringing automatically.

According to the testimony of the fireman, he was keeping a lookout, and thought the bus was going to drive up to the crossing and stop like it usually did. The train was about 150 or 200 feet from the crossing when the fireman gave the engineer the stop signal. At that time the motor bus was 70 or 75 feet from the crossing. The train was running at the rate of 25 or 30 miles

per hour. With all the appliances working properly, it required seven or eight hundred feet to stop the train. It was about seven or eight hundred feet from the cut-off crossing to the concrete road crossing.

When all the attending circumstances are considered, we think it cannot be said that the testimony of appellee's employees was undisputed on this point. We are of the opinion that it was a jury question. While it was the duty of the driver of the motor bus to look and listen for approaching trains, and to stop, if necessary, to allow such trains to go over the crossing in advance of his motor bus, it was equally the duty of the operators of the train to keep a constant lookout for travelers along the highway, and, if the appearance of the motor bus indicated that it was not going to stop for the crossing, the fireman should have signaled the engineer to stop before the motor bus got quite so close to the crossing. It will be remembered that the motor bus was going at about the same rate of speed as the train.

It is next insisted by counsel for the appellant that the court erred in giving instruction No. 6, which reads as follows: "You are instructed that all persons operating trains in this State are required to stop their trains at all places where any other railroad crosses, joins, unites or intersects, and you are further instructed that, while a failure to do so shall not be considered by you as an act of negligence on the part of the defendant, you may take this into consideration in determining whether the plaintiff's agent was guilty of contributory negligence."

We do not think there was any error in refusing to give this instruction. Our statute provides for the manner in which the railroads shall cross, intersect, or unite with other railroads, and that every railroad shall cause all its freight and passenger trains to stop at all points where another railroad crosses, joins, unites, or intersects with it, and that it shall take and receive on their trains all passengers, freights, and mail which such railroad so

crosses as for shipment at such point. Crawford & Moses' Digest, §§ 8489 and 8491.

In the case before us there is nothing in the record from which it may be inferred that the cut-off crossing was a railroad within the meaning of the statute just referred to. On the other hand, it is fairly inferable that it was nothing more than a switch or transfer track, and was not a crossing where trains were obliged to stop, within the meaning of the statute. Hence the instruction was abstract, and there was no error in refusing to give it.

For the error in giving instruction No. 2, as indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

BIZZELL v. HAMITER.

Opinion delivered April 6, 1925.

MASTER AND SERVANT—LIABILITY FOR SERVANT'S NEGLIGENCE.—The owner of an automobile is not liable for damages in a collision caused by his servant's negligence in driving the automobile, where the servant was on a mission of his own without the master's knowledge and having no relation to his employment.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

Longstreth & Longstreth, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

SMITH, J. Appellant—who was the plaintiff below—instituted this action against appellee to recover damages on account of the demolition of his automobile resulting from a collision between the automobile which appellant was driving and another owned by appellee and driven by his chauffeur. After all the testimony had been introduced, the court directed the jury to return a verdict in favor of appellee, which was done, and this appeal questions that action.

The testimony shows that, while appellant was driving his automobile near the intersection of Wright Avenue and High Street, in the city of Little Rock, his car was run into and wrecked by an automobile belonging to appellee, which was being driven by appellee's chauffeur at a reckless speed and contrary to the rules of the road.

Appellee resides at 23rd and Broadway Streets, and maintains an office at Second and Main Streets. A colored boy named McCoy was employed by appellee as a chauffeur, and had been so employed for about two years before the collision in question. McCoy was employed to drive appellee to and from his office and to such other places as he was directed to drive. He also drove members of appellee's family, but he was always given direction where to drive. McCoy was forbidden to use the car without permission.

On the afternoon of June 9, 1923, McCoy was told by appellee's wife to drive to appellee's office and bring appellee home. This was a service which McCoy performed daily, and, in driving from appellee's home to his office, both in the morning and in the afternoon, it was customary either to drive four blocks east to Main Street, or to drive either one block west to Arch Street or two blocks west to Gaines Street and then north to appellee's office. In performing the duty of going after appellee there was no necessity for going more than two blocks west from appellee's home, and, so far as appellee was advised, this was never done. But, when McCoy received the order to go after appellee on the day of the collision, he conceived the idea of first going after his laundry, and, for that purpose, he drove west seven blocks, and from there he was going back to State Street on another personal mission. Appellee knew nothing of this, and had given no permission for this use by McCoy of the car.

McCoy testified that appellee did not know what he was about to do, and, to prevent appellee from knowing that he had made this use of the car, he accelerated its

speed to shorten the time which would be required to discharge his own mission, and it was while thus driving rapidly to get to appellee's office, without consuming too much time, that McCoy ran into and damaged appellant's car. These facts are established by the undisputed evidence, and we think the rule announced in the case of *Healey* v. *Cockrill,* 133 Ark. 327, is applicable here. The facts in the two cases are very similar, but there was here a greater turning aside from the business and the scope of the servant's employment than is found in the case cited.

In that case we said that a slight deviation from the employer's service or a mere incidental departure from the service to mingle it with the servant's own purposes did not discharge the master from liability for the servant's acts, but, if the servant completely abandons his duty to his master and steps aside to do an act wholly for his own purposes, and which has no relation to the employment, the master ceases to be liable.

The latter appears to be the case here. McCoy was making a use of the car which was unknown to appellee and was unauthorized by him. McCoy, at the time of the collision, was on a mission which had no relation to his employment. He had stepped aside for a purpose wholly personal to himself, and, while pursuing that purpose, and while driving at a speed intended to conceal what he was doing, the damage was done.

We conclude therefore that the verdict was properly directed in appellee's favor, and the judgment pronounced thereon is affirmed.

HUMPHREYS, J., did not participate.

EUREKA OIL COMPANY *v.* MOONEY.

Opinion delivered April 6, 1925.

1. MASTER AND SERVANT—APPLICATION OF RES IPSA LOQUITUR DOCTRINE.—In an action for the death of an employee, whose duty it was to go out on a plank over a pool of oil to clean the intake pipe, where the proof was merely that his body was found in the pool, there being no eye witnesses, *held* that the doctrine of *res ipsa loquitur* is not applicable, and the burden was on the plaintiff to show such facts and circumstances as tend to show, not as a matter of speculation or conjecture, but as an inference reasonably deducible from the testimony, that defendant had been guilty of negligence which was the proximate cause of deceased's death.
2. MASTER AND SERVANT—DEATH OF SERVANT—JURY QUESTION.—Evidence that the death of plaintiff's decedent resulted from defendant's negligence, *held* sufficient to go to the jury.
3. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTION.—An instruction that, though a servant assumes the risks ordinarily incident to his employment, he does not assume risks of injury from the negligence of the master unless he knows of such negligence and appreciates the danger arising therefrom, *held* objectionable as relieving the servant of the risk of obvious danger.
4. DEATH—PECUNIARY LOSS.—In an action for the death of a minor servant, evidence *held* to show damages to his parent by way of pecuniary loss, but no damages for deceased's conscious pain and suffering.

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

Powell, Smead & Knox, for appellant.

J. W. Westbrook and *W. R. Donham,* for appellee.

SMITH, J. Cleo Mooney, appellee's intestate, was employed as a pumper at one of the oil wells of the appellant company, in Union County. A dam had been constructed by appellant across a ravine, and, as the oil flowed from the well, it ran down this ravine to a dam and formed a pool. The pool was about thirty feet across at the lower end, and was about two feet deep.

A plank about seven or eight feet long was used as a walkway from the dam out into the pool to an intake pipe of a suction pump. One end of the plank rested on the dam and the other rested on a cross-piece nailed to

two stobs which had been driven into the ground in the pool, and about three feet from the dam. The plank was about a foot wide, and was not fastened at either end, and extended out over the cross-piece on which it rested out into the pool. There was testimony that the plank was loose and unsteady, and that, if one stepped beyond the cross-piece, the plank would tilt.

The pool filled about every thirty minutes, and, when filled, the plank was about two inches above the oil. The intake pipe was down in the pool, covered with oil. It frequently became clogged with silt and debris, and therefore required the constant attention of the pumper. It was necessary to keep it clean, so that the pump would be kept working, otherwise the oil would flow over the dam. The well did not flow constantly, and therefore had to be swabbed. It would then throw oil about twenty feet high and continue flowing for two or three hours, when it had to be swabbed again.

Appellee's intestate was a boy eighteen years old, but he was as large as a full-grown man. He was employed one day, and continued to work during the night following, and negligence is predicated upon the failure of the appellant company to warn him of the dangers incident to the employment, it being alleged that deceased was inexperienced in the work in which he was engaged.

Mr. Mooney, the appellee, who was deceased's father, testified that he was at the pool about ten o'clock P. M. before deceased was found dead in the pool at five o'clock the next morning. Mr. Mooney testified that, just before he left the place where his son was at work, he saw his son go out on the plank walkway and get down on his hands and knees to clean the suction or intake pipe, and that, as his son raised up and started back to the dam, he staggered and came near falling, and at that time he could smell the fumes of the oil.

About midnight deceased went to another oil well where some workmen were engaged and borrowed a hammer and cold chisel, presumably for the purpose of

doing some work on the suction pump. No witness testified that deceased was seen alive after that time.

The next morning about five o'clock Mr. Mooney went down to the pool, and, not seeing his son, reported the fact to appellant's foreman, and the two went back to the pool to search for the body. Mr. Mooney walked out on the walkway and felt around in the oil with a stick, and soon found the body of his son, his feet being next to the walkway and his head farther out in the pool.

Mr. Mooney brought suit, as the administrator of his son's estate, to recover damages for the pain and suffering endured by his son, and also for the loss of contributions made to him by his son out of his wages. There was a verdict for the estate in the sum of $500 and for the father for $2,500, and judgment was rendered accordingly.

For the reversal of the judgment it is insisted, (1), that there is no proof that the death of appellee's decedent was caused by any negligence of appellant; (2), that, even if appellee's theory of the cause of death was established, decedent assumed the risk of the danger which resulted in his death; (3), that there was no proof of damage; and (4), that error was committed in instructing the jury.

In support of its first assignment of error appellant insists that the cause of death is purely a matter of speculation and conjecture, and that the testimony did not warrant the submission of the question of its negligence to the jury.

Appellee's first answer to this insistence is that the doctrine of *res ipsa loquitur* applies, and that, under the case made, the burden was on appellant to account for the injury and to excuse the presumption of its negligence.

It may be said that the case was not submitted to the jury on the theory that the doctrine of *res ipsa loquitur* applies, and we do not think that it does apply. *Arkansas Light & Power Co.* v. *Jackson,* 166 Ark. 633, and cases there cited. The burden was therefore on appellee to

show such facts and circumstances as that—not as a matter of speculation or conjecture but as an inference fairly and reasonably deducible from the testimony—appellant had been guilty of some negligence which was the proximate cause of deceased's death. It is a close question whether the evidence is legally sufficient for this purpose or not, but we have concluded that the testimony was sufficient to send the question of appellant's negligence being the proximate cause of deceased's death to the jury.

Deceased was eighteen years old, and he lost his life before he had performed one full day's labor. He had previously worked in the oil fields, but he had never before been engaged in work similar to that in which he was employed at the time of his death. There was testimony that, as the oil came from the well, it emitted dangerous fumes, which the pumper had to inhale while clearing the intake pipe, since, while so engaged, he had to get down on his hands and knees on the plank walkway to reach down in the pool, and in such manner as to cause his face to come almost in contact with the oil. The testimony on the part of the appellant was to the effect that, while the oil did emit fumes when it first came out of the ground, these fumes were immediately dissipated and no fumes were thrown off by the oil in the pool.

It is the theory of appellant that deceased was murdered and thrown into the pool of oil for the purpose, possibly, of robbery. This was the theory of the case first accepted, and a man suspected of the crime was arrested, but the charge was dismissed, and the party suspected testified as a witness for appellee at the trial.

In support of the theory that the deceased was robbed, the testimony of an X-ray expert and a physician was offered, to the effect that deceased's skull had been fractured and no oil was found in his lungs. In refutation of this theory, another physician testified that, in his opinion, deceased's skull was not fractured, although he admitted that his examination was not sufficiently

thorough for him to be sure. Deceased had on his person, when found, a watch and $25.33 in money.

For the reversal of the judgment it is first insisted that there is no proof that decedent's death was caused by any negligence of appellant, and that, if appellee's theory of the cause of death was established, decedent assumed the risk.

As we have said, the case is a close one on the facts whether the testimony is legally sufficient to support the finding that decedent's death was caused by any negligence on the part of appellant. As was said in the case of *St. L. I. M. & S. R. Co.* v. *Hempfling,* 107 Ark. 476, the jury have no right to guess, without proof, what the probable cause of decedent's death was, but it was there also said: "The law is well settled that, where there are no eye-witnesses to the injury and the cause thereof is not established by affirmative or direct proof, then all the facts established by the circumstances must be such as to justify an inference on the part of the jury that the negligent conditions alleged produced the injury complained of. Where such is the case, the jury are not left in the domain of speculation, but they have circumstances upon which, as reasonable minds, they may ground their conclusions. Negligence that is the proximate cause may be shown by circumstantial evidence as well as by direct proof."

Viewed in the light most favorable to appellee, the testimony may be further summarized as follows: Deceased was only eighteen years old, and had only one day's experience in the work he was engaged to do by appellant. This work brought his face in close contact with the pool of oil, which may have emitted fumes having a deleterious effect, of which deceased was not warned, and which rendered more dangerous the unfastened plank on which his duties were performed. There was no testimony that he had quarreled with anyone, and he was not robbed, for his money and watch were on his person. His body was found at the place where his duties would have called him. So we have

concluded that it was not mere speculation or conjecture for the jury to have found that deceased came to his death while engaged in the discharge of his employment, and that he had not been given the warning which a boy of deceased's age and inexperience should have had. Appellant admits that no warning was given, but contends that none was necessary.

These were, of course, disputed questions of fact. The testimony on behalf of appellant was to the effect that no fumes were exhaled from the oil pool. That deceased was in appearance and in experience a full-grown man. That there were no dangers incident to the employment which were not open and obvious, if the duties of the employment were discharged with any degree of care. That the walk extended only three feet in the pool, and, if there were any dangers, they were so simple, open and obvious that any one would see and appreciate them.

Over appellant's objection the court gave an instruction numbered 2, reading as follows: "You are instructed that, while a servant assumes all the risk of injury ordinarily incident to the employment in which he is engaged, he does not assume the risk of injury from the negligence of the master for whom he works, unless he knows of such negligence, and appreciates the danger arising therefrom."

Specific objections were made to this instruction on the grounds (1), that it failed to require deceased to exercise ordinary care for his own safety; (2), that it relieved deceased of the risks that were open and obvious.

As to the first objection it may be said that other instructions fully and correctly declared the law in regard to the duty to exercise ordinary care for one's own safety, and the instruction does not purport to deal with that issue. But we think the second objection was well taken, under the facts of this case.

We have no way of knowing on what charge of negligence the jury's verdict was based, but, under the instruction set out above, deceased was relieved from

the assumption of its risk, whatever it may have been, unless there was a finding that he was aware of such negligence and appreciated the danger arising therefrom.

The law in regard to the duty of the master to warn an inexperienced servant, and in regard to the assumption of risks by such servants, is nowhere stated any clearer than in the case of *Emma Cotton Seed Co.* v. *Hale,* 56 Ark. 216, where it was said: "If, however, the servant, by reason of his youth and inexperience, is not aware of or does not appreciate the danger incident to the work he is employed to do or to the place he is engaged to occupy, he does not assume the risks of his employment until the master apprises him of the dangers. It would be a breach of duty on the part of the master to expose a servant of this character, even with his consent, to such dangers, without first giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to enable him to appreciate the dangers, and the necessity for the exercise of due care and caution, and to do the work safely, with proper care on his part. For a breach of his duty the master is bound to indemnify such servant against the consequences. He cannot escape this liability by delegating the duty to instruct or inform to another person. But, if such servant receives the information and caution from any source, and accepts the place and undertakes the work, he assumes the risks ordinarily incident thereto, and cannot thereafter recover for injuries because the place was not safe. As to such work or place and its dangers, he would then be placed on the footing of an adult, and could not, on account of infancy, be relieved of the consequences of such risks."

The jury may here have found only that appellant was negligent in not having a safer walkway, and, if this were true, the instruction is erroneous because it permits the jury to find that deceased had not assumed the risk of that danger unless it was also found that he knew and appreciated that danger, whereas such danger as existed on that account was obvious and patent to a person of the

age and possessing the intelligence which deceased was shown to possess. Nothing could be simpler than the danger of falling off a plank, and it was therefore error to submit to the jury the question whether deceased had assumed that risk.

In the case of *Royal* v. *White Oil Corporation,* 160 Ark. 467, the plaintiff sued to recover damages for personal injuries received in consequence of the slipping of a plank on which he was standing while engaged in looking in a water tank to see if it was full of water. A verdict was directed for the defendant, and, in affirming that judgment, we said: "The duty of the master to exercise ordinary care to provide reasonably safe tools and appliances for his servants has no application where the tools are common tools in ordinary use and the servant possesses ordinary intelligence and knowledge of their use and construction. *Railway Company* v. *Kelton,* 55 Ark. 483; *Marcum* v. *Three States Lbr. Co.,* 88 Ark. 28; and *Fordyce Lumber Co.* v. *Lynn,* 108 Ark. 377."

It is true deceased had only been employed one day, but the danger from the work—such as there was—was immediately obvious and patent, unless, indeed, this danger was enhanced by the fumes from the oil. Any other danger was so obvious and patent that it was error to submit the question of deceased's knowledge and appreciation of it.

It is insisted that there was no testimony upon which to base the finding that appellant had sustained a loss of contributions from the deceased, his son. But we think this question was properly submitted to the jury. Appellee testified that deceased quit school to earn money to assist in defraying the expenses of his mother, who was an invalid, and that deceased gave appellee all of his earnings, which amounted to $5 per day, except only so much as was necessary to defray deceased's personal expenses.

Appellant also insists that there was no testimony upon which to base the verdict for conscious pain and suffering, and we think this assignment is well taken.

As we have said, the pool of oil was only two feet deep, and deceased was only a few feet from the dam, and, unless he was asphyxiated or sustained a fractured skull by striking his head on the walkway or one of the stobs supporting it, it is difficult to surmise how he died. But, even though he drowned, there was no testimony that he suffered consciously before expiring, as was the case in *St. L. I. M. & S. R. Co.* v. *Stamps*, 84 Ark. 241, where a judgment was sustained for pain and suffering in favor of the estate of a man who died by drowning.

For the error indicated in instruction numbered 2, and in submitting the question of the right to recover for conscious pain and suffering, the judgment is reversed, and the cause will be remanded for a new trial.

MISSOURI PACIFIC RAILROAD COMPANY *v.* KINSLOW.

Opinion delivered April 6, 1925.

1. CONTINUANCE—ABSENT WITNESS—DILIGENCE.—Diligence in proving the attendance as witness of an absent employee is not shown by defendant where the witness has not been subpoenaed but was merely instructed to be present.
2. CONTINUANCE—DISCRETION OF COURT.—Overruling an application for a continuance on account of the absence of a witness from the State was not an abuse of discretion where diligence was not shown in procuring his attendance and a statement as to what he would prove was admitted and treated as evidence.
3. MASTER AND SERVANT—ASSUMED RISK—SUFFICIENCY OF EVIDENCE.—A finding that plaintiff did not assume the risk of being injured in operating a ripsaw *held* sustained, though the evidence was conflicting.
4. MASTER AND SERVANT—NEGLIGENCE OF MASTER—JURY QUESTION.—Whether a ripsaw was equipped with a proper guard *held* for the jury.
5. TRIAL—REPETITION OF INSTRUCTIONS.—Refusal to give an instruction on a subject covered by another instruction which was given *held* no error.

Appeal from Pope Circuit Court; *J. T. Bullock*, Judge; affirmed.

Thomas B. Pryor and *Vincent M. Miles,* for appellant.

Ward & Caudle, for appellee.

HUMPHREYS, J. Appellee, whose hand was permanently injured while operating a ripsaw for appellant in its machine shops in North Little Rock, brought this suit, by his next friend, in the circuit court of Pope County, to recover damages for the injury, alleging that it occurred through the negligence of appellant in failing to warn appellee of the dangers incident to operating the machine, and in not having it equipped with the proper guard to prevent the saw from catching the timber he was sawing and kicking it back toward him.

Appellant filed an answer denying the material allegations of negligence, and, by way of further defenses, pleading contributory negligence and assumption of the risk by appellee.

The cause was submitted to the jury upon the pleadings, the testimony introduced by the parties, and instructions of the court, resulting in a verdict and consequent judgment for appellee in the sum of $500, from which is this appeal.

Appellant first contends for a reversal of the judgment because the trial court refused to continue the cause until the next term of court, on account of the absence of D. C. Nichols, assistant foreman in the shops, by whom it expected to prove that appellee had not only been warned of the dangers incident to operating the machine, but had been instructed not to operate same. Also that the machine was properly equipped. This witness had not been subpoenaed, but had been instructed by the railroad officials to be present, and would have been had he not had trouble with his family and skipped out to Texas. It was stated in the affidavit for continuance that witness could be located and his presence obtained or his deposition taken by the next term of court. The facts to which he would have testified, if present, were set out fully in the motion for continuance, and the attorney for appellee admitted that witness would testify to the statements con-

tained in the affidavit, if present. His statement was read to the jury and treated as evidence in the case. Learned counsel for appellant argues that prejudice resulted to his client because he was compelled to reduce Nichols' testimony to writing before the trial without having had an opportunity to converse with him. No showing is made that he could not have conversed with him during the pendency of the suit, and no showing is made that the testimony would have been different from the statement contained in the motion for a continuance. We do not think sufficient diligence was shown to obtain the presence of the witness, and do not think the trial court abused its discretion in overruling the motion to continue the cause.

Appellant next contends for a reversal of the judgment upon the alleged ground that appellee operated the ripsaw without the guard, and knew and appreciated the dangers of doing so. This alleged ground is not supported by the undisputed testimony. Appellee was twenty years of age, and was working as an apprentice in the shops. He had never had any experience in operating a ripsaw before he undertook to operate the one in question. It was a circular saw, which came in through a square table. It revolved toward the operator, and, when in motion, moved very rapidly. Testimony was introduced tending to show that the operation of the ripsaw was dangerous. The foreman testified that he never permitted an apprentice to operate a ripsaw until he had been in the shop six months, on account of the danger incident to the operation thereof. Appellee had not been in the shop that long at the time the injury occurred. Appellee testified, in substance, that he was instructed by D. C. Nichols, the assistant foreman, on the occasion when he was injured, to make six mallets with handles; that, in order to make the handles, it was necessary to rip them out of blocks which had been provided for the purpose; that, while engaged in this work, the piece of timber which he had passed through the ripsaw was caught by the saw and thrown back toward him,

which hit and injured his hand; that he had never worked in the shop before, and had never been called upon to pay any particular attention to the ripsaw; that Mr. Nichols nor any one else had given him any instructions how to run it; that no one had ever told him that it was dangerous to operate the machine, and that no one had ever talked to him about it at all. It is true that, on cross-examination, he said that he knew the guard should be over the saw, and that he thought that it was over the saw when he was operating same, but he afterwards stated that he did not realize the danger incident to operating it without pulling the guard over the saw, and that he was not certain whether the guard was over it at the time. It is also true that, while in the hospital on account of the injury, he signed a purported statement to the effect that the injury resulted from his own negligence, and that the railroad was not to blame for it, but he denied that he made such a statement to the claim agent, claiming that the statement he made was exactly like his testimony before the jury. William Westphall, a witness for appellee, testified that he owned and operated a ripsaw of the same kind as the one upon which appellee was injured, and that, in order to keep short timber from turning and catching in the saw and being hurled back toward the operator, a thin strip of iron or guard was placed up behind the saw.

The testimony introduced in behalf of appellant was contradictory on all material points to that introduced by appellee.

We cannot say as a matter of law that, because appellee's evidence was conflicting, and that because he made a purported statement to the claim agent different from his testimony before the jury, his testimony must be disregarded. On the contrary, we must conclude that the jury accepted as true the portions of his testimony most favorable to his cause of action. Viewing the testimony introduced by appellee in this favorable light, there is sufficient legal testimony of a substantial character in the record to support the verdict and judgment.

Appellant next contends for a reversal of the judgment because the court gave instruction No. 4, submitting the issue to the jury as to whether or not the machine was equipped with the proper guard. The testimony of William Westphall, set out above, together with the undisputed evidence that the mallet handle was kicked back by the saw, warranted the submission of that issue to the jury.

The last contention of appellant for a reversal of the judgment is that the court erred in refusing to give its requested instruction No. 8 to the jury, which is as follows:

"If you believe that Kinslow was operating the saw as a volunteer, and not under the directions of his foreman to do this work, but at the request of some fellow-servant, who so directed him, then he assumed the risk of his injury, and your verdict must be for the defendant." This instruction was covered by instruction No. 14, given at the request of appellant.

No error appearing, the judgment is affirmed.

HARPER v. THURLOW.

Opinion delivered April 6, 1925.

1. SPECIFIC PERFORMANCE—SUFFICIENCY OF WRITING.—Specific performance of a contract for the sale and purchase of realty will be decreed if the several writings relating to the transaction disclose, without resorting to extrinsic evidence, the parties to the contract, the subject-matter and the terms and conditions of the sale.
2. VENDOR AND PURCHASER—SUFFICIENCY OF DESCRIPTION.—Correspondence between a vendor and purchaser, when read together, *held* to describe the land sufficiently.
3. VENDOR AND PURCHASER—ACCEPTANCE OF OFFER.—Letters between a vendor and purchaser *held* to show an unconditional acceptance of the vendor's offer before its withdrawal.
4. EVIDENCE—PRESUMPTION FROM MAILING LETTER.—Proof that plaintiff mailed a letter to defendant raises a presumption that the addressee received it.

5. VENDOR AND PURCHASER—ACCEPTANCE OF OFFER—EVIDENCE.—A finding of the trial court that a vendor had not received the purchaser's unconditional letter of acceptance *held* contrary to the preponderance of the testimony.
6. SPECIFIC PERFORMANCE—PARTIES.—Though one of the plaintiffs was not entitled to a decree of specific performance because he was not a party to the contract sought to be enforced, this will not prevent relief from being granted to the other plaintiff who was a party to the contract.
7. SPECIFIC PERFORMANCE—INTEREST OF VENDOR'S WIFE.—Though the vendor's wife refused to join in his deed to the purchaser, this will not prevent relief from being granted to the latter where he expressed a willingness to accept a deed without the vendor's wife joining in it.
8. SPECIFIC PERFORMANCE—SALE OF HOMESTEAD.—The defense that specific performance of a land sale of a homestead cannot be enforced if the wife refuses to join in the deed was waived where such defense was neither pleaded nor proved.

Appeal from Saline Chancery Court; *Jethro P. Henderson,* Chancellor; reversed.

Saye & Saye, for appellant.

J. B. Milham, for appellee.

HUMPHREYS, J. This is a suit to obtain specific performance of an alleged contract for the sale and purchase of the E½ of the NW¼ of section 26, township, 1 south, range 14 west, in Saline County, Arkansas. The contract, if made, was entered into by correspondence between one of the appellants, J. C. Harper, and appellee, M. J. Thurlow. M. J. Thurlow owned the land, and, at the time of the correspondence, resided in Toledo, Ohio, and appellee at or near Bryant, Arkansas. The correspondence between the parties constituting the alleged contract is as follows:

"Cleveland, Ohio, Nov. 6, 1922.

"Mr. J. C. Harper, Bryant, Ark.

"Dear sir: I saw your inquiry regarding the land I own near Bryant. In answer will say that if you want the place you can have it on the following terms: Price, $2,100, cash or terms. Would sell same on land contract $500 down, and $160 every six months, giving deed to same when four payments have been made. That would

give you deed when $1,140 is paid. Would then make mortgage for the balance. In that way you would have five years to pay for same. Will accept 6 per cent. per year as interest on the balance unpaid, paying the interest every six months. In that way it will get less each time. My address is 16 Victoria Apts., 21st and Monroe Streets, Toledo, Ohio. "M. J. THURLOW."

"Bryant, Ark., Dec. 21, 1922.

"Mr. M. J. Thurlow,

"Dear sir: In reply to your letter of Nov. 6 in regard to your land at Bryant, will say that I think you are a little high in your price. Other land is only bringing $20 per acre. All 'round here realty is a good bit off to what it was, as well as all other things in country. Let me hear just what is the best you will do on the terms you mentioned in your letter, and I will see what I can do.

"Yours truly,

"J. C. HARPER."

"Little Rock, Ark., Feb. 7, 1923.

"Mr. M. J. Thurlow,

"341 West Del. Ave., Toledo, Ohio.

"Dear sir: I have found a purchaser for your land, who has turned over to me $10 to bind the trade, and he asked me to have you send an abstract so that he can examine the title. He understands that, in accordance with your letter of November 6, 1922, the price of the land is to be $2,100, to be paid as follows: $500 cash and $160 every six months thereafter until paid in full, the deferred payments to bear interest at the rate of 6 per cent. per annum. He further understands that you will give him a deed when he has paid in $1,100 altogether. Please prepare deed and send it with draft attached to some bank in Little Rock, with instructions as to when to deliver the deed. It is my understanding that the land is as follows: East one-half (E½) northwest quarter (NW¼), section twenty-six, township one (1) south of range fourteen (14) west.

"Yours very truly,

"J. C. HARPER."

"Toledo, Ohio, Feb. 15, 1923.

"Mr. J. C. Harper, Bryant, Ark.

"Dear sir: I am in receipt of your letter of recent date, stating you had found a buyer for me, but you did not state who the buyer was. You also state that you have accepted a deposit from the prospective buyer to bind the bargain. I was under the impression that you were the one who wanted the land, and presumed that, in all probability, you wanted to make a farm of the place on which to raise crops. However, that part would not make any difference to me. The terms I made for you last November were to sell to you on a contract, the deed to be signed and sent to you when you had paid $1,100. That means just the same as depositing the deed in a bank, for you would have your contract recorded, and that contract would call for a deed when the $1,100 is paid. It would be necessary for me to know who the prospective buyer is in order to make the proper contract, as his name would be entered thereon and signed by he and his wife (if married). The abstract would go forward to the England Loan Company of Little Rock, as that is the only bank I know there. It would be necessary to give them a receipt for same. I will do nothing further until I hear from you again. Yours truly,

"M. J. THURLOW,

"341 W. Delaware, Toledo, Ohio."

"Feb. 26, 1923.

"Mr. M. J. Thurlow, Toledo, Ohio.

"Dear sir: Your letter of the 15th instant rec'd, and in reply will say that I will buy the land on the terms you mention, of $500 cash and $160 every six months, with interest at six per cent., until the $2,100 is paid, you to deliver deed to me when four payments have been made, or when you have rec'd $1,140. You can make contract to J. C. Harper (single), and send all papers to the England National Bank at Little Rock, and if, upon examination by my attorney, are found to be O. K., contract will be signed and the $500 paid at once.

"Yours truly,

"J. C. HARPER."

"Bryant, Ark., 5-19-23.

"Mr. M. J. Thurlow,

"Dear sir: On Feb. 26, 1923, I sent you a letter accepting your offer on your land at Bryant, and have not had any reply from you. I would like to hear from you by return mail, what you intend to do, as I am still waiting on you for a reply. Would thank you very much if you would let me know.

"Yours truly,

"J. C. HARPER,

"Address Bryant."

"Toledo, Ohio, May 26, 1923.

"Mr. J. C. Harper,

"Bryant, Ark.

"Dear sir: Just received your letter, and in answer would say that I was under the impression that I answered your last letter long ago, telling you that I was unable to complete the deal, as another party has made a better offer, and Mrs. Thurlow was not willing to attach her signature to the proposition I made to you.

"Yours truly,

"M. J. THURLOW."

After the institution of the suit a settlement was attempted through correspondence, but, as it was not effected, it is unnecessary to incorporate the letters which passed between the parties and lawyers relative thereto. It appears in the correspondence relative to the settlement that J. A. Shipton, the other appellant, was interested in the purchase of the land with J. C. Harper.

The trial court dismissed appellant's bill for the want of equity, from which decree an appeal has been duly prosecuted to this court.

Appellants contend for a reversal of the decree upon the ground that the letters contained every necessary element and essential of a contract for the sale and purchase of real estate. Appellee contends, however, that the letters did not contain several necessary elements of

an enforceable contract for the sale and purchase of land, viz., that the letters did not sufficiently describe the land and did not show an unconditional acceptance of the offer made by appellee.

The rule is that specific performance of a contract for the sale and purchase of real estate will be decreed if the several writings relating to the transaction disclose, without resorting to extrinsic evidence, the parties to the contract, the subject-matter, and the terms and conditions of the sale. *St. L. I. M. & S. R. Co.* v. *Beidler,* 45 Ark. 1.

The letters, when read in aid of each other, sufficiently describe the land. The letter of November 6, 1922, refers to the land owned by appellee near Bryant. The letter of December 21, 1922, refers to it in the same way. The letter of February 7, 1923, described the land by government calls, and the subsequent letters did not indicate that the land was incorrectly described. The description of the land was certain and specific.

The letters also show an unconditional acceptance of the offer before it was withdrawn. Appellee suggests that Harper's reply on December 21, 1922, to Thurlow's offer on November 6, 1922, was a rejection of the offer, but we do not so interpret it. It was an attempt on his part to get a better proposition, but was not a refusal to accept the offer. Harper's next letter, of date February 7, 1923, and Thurlow's answer thereto, of date February 15, 1923, clearly show that neither one of them treated Harper's letter of December 21, 1922, as a termination of the offer, but, on the contrary, as a continuation thereof. In saying that the letters show an unconditional acceptance of the offer, we are not unmindful that appellee testified that he had not received Harper's letter of acceptance dated February 26, 1923. The letter referred to is an unequivocal acceptance of the offer, and we think the learned trial court erred in finding that the letter was not received by appellee. J. C. Harper testified that he mailed the letter to Thurlow, and produced a carbon copy thereof. This raised a presumption that appellee

received it. Appellee did not deny receiving such a letter in his reply to Harper's letter of date May 19, 1923. Harper wrote him on that date that he had written and accepted his offer on February 26, 1923, to which Thurlow responded on May 26, 1923, that he was under the impression that he had answered his (appellant's) last letter long ago. The effect of this response was to admit that he had received the letter accepting his offer, which he had answered long ago, and in which he had told said appellant he could not carry out the deal because another party had offered him more, and Mrs. Thurlow was not willing to carry out the original offer. As stated before, he did not deny receiving the acceptance, or contend that Harper had failed to accept the offer within a reasonable time, but put his refusal to carry out his proposition on the ground that, in the meantime, he had received a better offer.

The finding of the trial court to the effect that the offer was not accepted was contrary to the weight of the evidence.

The suggestion of appellee that J. A. Shipton was not a party to the contract, and for that reason not entitled to a decree for specific performance, cannot prevent J. C. Harper, under the general prayer of the bill and the testimony in the case, from obtaining specific performance of the contract appellee made with him.

Neither can the suggestion of appellee, to the effect that the record does not reflect what interest Mrs. Thurlow has in the land, prevent relief being granted to Harper under his contract. The letters reveal that appellee owned the land, and appellant, J. C. Harper, has expressed a willingness to accept a specific performance of the contract without his wife joining in the execution of the deed therefor. The record reflects that appellee was residing in Toledo, Ohio, and, if he ever impressed a homestead right on the land and had not abandoned it, it was incumbent on him to interpose this as a defense, and not upon appellant to allege and prove that it was not his homestead.

On account of the error indicated the decree is reversed, and the cause remanded with directions to the trial court to enter a decree for specific performance of the contract.

MYERS v. STATE.

Opinion delivered April 13, 1925.

1. BANKS AND BANKING—RECEIVING DEPOSITS IN INSOLVENT BANK—INDICTMENT.—Where an indictment of a bank president for receiving a deposit while the bank was insolvent alleged that the check deposited was one circulating as money but did not mention the name of the depositor, it will not be presumed that the payee of the check made the deposit.
2. INDICTMENT AND INFORMATION—INTENDMENT.—Nothing can be taken by intendment in an indictment; on the contrary, the material elements of an offense must be stated with reasonable certainty.
3. INDICTMENT AND INFORMATION—STATUTORY OFFENSES.—To the general rule that it is sufficient to charge a statutory offense in the language of the statute there is an exception in cases where a more particular statement of the facts is necessary to set forth the offense with requisite certainty.
4. BANKS AND BANKING—INSOLVENCY—RECEIPT OF DEPOSITS.—In an indictment of a bank president for assenting to the receipt of a deposit in an insolvent bank, it is necessary to describe the deposit and name the depositor.

Appeal from Polk Circuit Court; *B. E. Isbell*, Jugde; reversed.

Norwood & Alley, for appellant.

H. W. Applegate, Attorney General, and *John L. Carter*, Assistant, for appellee.

McCULLOCH, C. J. Appellant was convicted of the crime of assenting to the receipt of deposits in an insolvent bank, the indictment (omitting caption) reading as follows: "The said D. E. Myers, in the county and State aforesaid, on the 16th day of October, 1923, being then and there president of the Bank of Hatfield, a banking corporation, doing business at Hatfield, Arkansas, did unlawfully, knowingly and feloniously permit, connive at

and assent to the receipt on deposit in said Bank of Hatfield a certain check circulating as money, given by the T. M. Dover Mercantile Company, a corporation, in favor of the Watkins Lumber & Mercantile Company, a corporation, in the sum of $1,818.60, and of the value of $1,818.60, and said check being drawn on said Bank of Hatfield, and deposited in the said Bank of Hatfield, the said D. E. Myers then and there well knowing said bank to be insolvent and in a failing condition, against the peace and dignity of the State of Arkansas." There was a demurrer to the indictment on the ground that it was defective in failing to state the name of the person or corporation from whom the deposit was received. The court overruled the demurrer, and, as before stated, the trial on the indictment resulted in appellant's conviction. The ruling of the court on the demurrer constitutes the principal assignment of error on this appeal.

The statute under which the indictment was preferred 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." Crawford & Moses' Digest, § 697.

It will be observed that the indictment does not directly mention the name of the depositor, but it is contended by the Attorney General that the language is sufficient to indicate by necessary inference that the payee of the check which was deposited was the depositor thereof. We do not agree with this contention, for the

fact that an ordinary check is deposited in a bank does not imply that the deposit was made by the payee. The language of the indictment in fact negatives this inference by the affirmative statement that the check was one which circulates as money. No presumption can therefore be indulged that the payee of the check deposited it. Nothing can be taken by intendment in an indictment, but, on the contrary, the material elements of an offense must be stated with reasonable certainty. *State* v. *Lester,* 94 Ark. 242.

The next question arising is whether or not it is essential in an indictment for this offense that the name of the depositor should be stated. The offense attempted to be charged in the indictment is purely a statutory one, and the general rule is that it is sufficient to charge a statutory offense in the language of the statute which declares it. But we have consistently adhered to an exception to this general rule in cases where a more particular statement of the facts is necessary to set forth the offense with requisite certainty. *State* v. *Graham,* 38 Ark. 519; *Boles* v. *State,* 58 Ark. 35; *St. Louis-San Francisco Ry. Co.* v. *State,* 68 Ark. 251; *Holland* v. *State,* 111 Ark. 214; *Clevenger* v. *State,* 136 Ark. 46; *State* v. *Western Union Tel. Co.,* 160 Ark. 444. The present instance falls, we think, within the exception to the general rule. It is not sufficient merely to charge in the language of the statute that the accused assented to the reception of the deposit after having had knowledge of the fact that the bank was insolvent. In order to put the accused on defense, the kind of deposit should be described and the name of the depositor should be stated. It is unnecessary to determine in this case whether or not each deposit constitutes a separate offense; but we are of the opinion that the indictment should apprise the accused of the name of the depositor, so as to put him upon notice of the particular charge which he is called on to meet.

The indictment in this case is therefore insufficient, and the judgment is reversed and the cause remanded, with directions to sustain the demurrer.

BOWERS v. MITCHELL.

Opinion delivered April 13, 1925.

1. MORTGAGES—ABSOLUTE DEED AS MORTGAGE—REDEMPTION.—Where a husband and wife, as tenants by entireties, executed a deed, absolute in form but intended as a mortgage, to another, and such grantee reconveyed it as a gift to the wife, with no intention of extinguishing the debt, the husband, upon the wife's death, was entitled to redeem from the mortgage by paying the mortgage debt.
2. MORTGAGES—REDEMPTION—PARTIES.—Where a husband and wife, as tenants by the entireties, executed an absolute deed to land as security for a debt, and the grantee reconveyed the land to the wife as a gift and not intending to extinguish the debt, and, upon the wife's death, her heirs conveyed the land to a third person, the husband is entitled to redeem the land from the latter by paying to him the balance of the debt.

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

Botts & O'Daniel, for appellant.

Gibson & Burnett and *John W. Moncrief*, for appellee.

McCULLOCH, C. J. Appellant instituted this action seeking to have a deed in absolute form, executed by himself and his wife, Maude M. Bowers, to the latter's brother, Z. C. Mitchell, declared to be a mortgage. The property in controversy, which was conveyed by the deed referred to, is a lot in the town of DeWitt, and appellant and his wife, Maude M. Bowers, held title to the lot under a deed which conveyed it to them as tenants by the entireties with the right of survivorship. Appellant and his wife built a house on the lot and occupied it as their home. Before they completed the building they executed the deed in question to Z. C. Mitchell, on March 4, 1911, for the expressed consideration of $400. It is undisputed that appellant and his wife received this sum from Mitchell and used it, together with other funds, in completing the building and other improvements on the lot. It is contended, however, by appellant that the deed was intended as a mortgage and not as an absolute

conveyance. Mitchell reconveyed the lot to Mrs. Bowers by deed executed in May, 1916, and Mrs. Bowers died about two years later. Appellant testified that he never ascertained that the deed was made to his wife alone until after the latter's death. They left no children, and the estate of Mrs. Bowers fell to her mother and collateral heirs, subject to appellant's curtesy rights. That, at least, is the effect, if the conveyance to Mitchell was intended as an absolute deed instead of a mortgage, but it is contended by appellant that he is entitled to treat the property as being held by him and his wife as tenants by entireties, notwithstanding the fact that the legal title was reconveyed by Mitchell to Mrs. Bowers. Appellant and his wife continued to occupy the premises up to the time of the latter's death, and appellant has continued to occupy the property since his wife's death.

After the death of Mrs. Bowers, appellee, P. H. Snarr, purchased the property from Mrs. Bowers' mother and collateral heirs, paying the sum of $1,200 therefor. Appellant alleges that he repaid the debt to Mitchell prior to the reconveyance by the latter to Mrs. Bowers; that he gave directions for Mitchell to make the deed of reconveyance to him and his wife so that they could hold it as theretofore as tenants by the entireties, but that the deed was executed to Mrs. Bowers in disregard of his instructions.

Appellant's testimony tends to establish his contention, not only with respect to the deed being a mortgage, but also to the effect that he had paid the debt in full and had also paid the taxes on the property.

Appellees denied that the deed was intended to be a mortgage or that the debt had been paid. Mitchell claimed that he bought the property from appellant and his wife for the sum of $400 in consideration for the conveyance, that there was no loan of money, and that the amount had not been repaid to him. He testified that his reconveyance of the property to Mrs. Bowers, who was his sister, was made solely as a gift to her, with

the distinct agreement and understanding that appellant was not to share in the benefits of the reconveyance.

The testimony was conflicting, and, on the final hearing, the chancellor found that the deed to Mitchell was intended as a mortgage, but that only the sum of $100 had been paid to Mitchell on the debt, and there was a decree in favor of appellee Snarr declaring a lien in his favor for the amount of the balance of the debt, with interest. Both parties have appealed.

We are of the opinion that the testimony supports the trial court in all of its findings of fact. Without narrating all the facts and circumstances in detail, it is sufficient to say that the deed to Mitchell was intended as a mortgage to secure a loan of $400. Much of the testimony adduced by appellant in support of his contention that he had repaid the debt in full is hearsay and therefore incompetent, but, when the legal testimony is considered, we cannot say that the finding of the chancellor that only $100 was paid on the debt is against the preponderance of the evidence.

It is further contended by counsel for appellant that the reconveyance by Mitchell to Mrs. Bowers operated as an extinguishment of the mortgage debt, and that the deed should be declared to be a mortgage fully satisfied, and that appellant should be restored to his original rights as tenant by the entirety, with right of survivorship to the whole estate upon the death of his wife. Counsel rely on the general proposition stated by the authorities that a reconveyance in fee of mortgaged property by the mortgagee to the mortgagor extinguishes the lien of the mortgage and operates as a discharge of the debt. 47 Cyc. 1405. The statement of the general rule is undoubtedly sound, but it is not without its exceptions and limitations. A reconveyance to one of the mortgagors is not necessarily an extinguishment of the mortgage debt, and, in the present case, the evidence shows that there was no intention to extinguish the debt, but that the deed was made solely as a gift to Mrs. Bowers. The original deed operated *prima facie* as an absolute transmission of the

title in fee simple from appellant and his wife to Mitchell and from the latter to appellant's wife. Notwithstanding the fact that the deeds show an absolute conveyance of the title, appellant, as one of the mortgagors, is permitted, under settled principles of equity, to show that the conveyance absolute in form was actually intended as a mortgage. But, in order to avail himself of the benefit of these principles, he is required to do equity by restoring the consideration for which the deed was executed. *Bryan* v. *Hobbs,* 72 Ark. 635.

Appellee Snarr, under his chain of conveyances from Mitchell, succeeded to all the rights of the latter as the original mortgagee, and the trial court, as a court of equity, properly required appellant to pay the original mortgage debt as a condition upon which he could obtain a redemption from the mortgage. The effect would have been the same if the deed had been a mortgage deed in form as well as in fact and the debt had been transferred from Mitchell to Mrs. Bowers. This would not have operated as an extinguishment of the debt, and, in order to secure redemption, appellant would have had to pay the mortgage debt; therefore, in order to secure a decree declaring the absolute deed to be a mortgage, he must pay the debt.

We find that the decree was correct, and the same is, upon both appeals, affirmed. It is so ordered.

ARKANSAS COTTON GROWERS' CO-OPERATIVE ASSOCIATION *v.* BROWN.

Opinion delivered April 13, 1925.

1. AGRICULTURE—CO-OPERATIVE ASSOCIATIONS—CONTRACTS. — Acts 1921. p. 153, authorizing the organization of associations for co-operative marketing of farm products, (by § 6, subdiv. g) impowers such associations to make contracts for sale and future delivery of agricultural products.

2. CORPORATIONS—BY-LAWS.—The by-laws of a corporation evidence the contract between it and its members or stockholders, and govern transactions between them.
3. AGRICULTURAL—CO-OPERATIVE ASSOCIATIONS—SALES FOR FUTURE DELIVERY.—The contract of a member with a co-operative marketing association authorizing the association to "resell" cotton sold to it by its members *held* to authorize the association to make contracts for the sale and future delivery of cotton, such sales being authorized by the statute and by-laws of the association and in conformity to the usages of the cotton trade.
4. AGRICULTURAL—CO-OPERATIVE ASSOCIATIONS—SALES FOR FUTURE DELIVERY.—Acts 1921, p. 153, in so far as it exempted members of a co-operative marketing association from individual liability for the debts of the association, did not restrict the power of the association to contract for the sale and future delivery of cotton.
5. GAMING—SALE FOR FUTURE DELIVERY.—A contract of sale for future delivery of cotton which the seller expects to acquire by purchase, though speculative, is not a gambling contract.
6. AGRICULTURE—VALIDITY OF PLAN OF MARKETING ASSOCIATION.—Though the plan of a co-operative marketing association organized under Acts 1921, p. 153, to effect the orderly marketing of the cotton crop throughout the year, instead of dumping it during the short gathering season, may result in loss to the association by reason of mistakes of judgment in the sale of cotton for future delivery, this does not render this plan illegal or improvident.
7. AGRICULTURE—MARKETING ASSOCIATION—BREACH OF CONTRACT.—Refusal of a member of a co-operative marketing association, organized under Acts 1921, p. 153, to deliver all of his cotton to association, pursuant to his contract with it, *held* a breach of such contract.
8. EQUITY—JURISDICTION—Equity has jurisdiction to grant relief where legal remedies are inadequate.
9. INJUNCTION—ENFORCEMENT OF CONTRACT WITH MARKETING ASSOCIATION.—Acts 1921, p. 153, § 17, providing that, in the event of a breach of a marketing contract by a member, this association shall be entitled to an injunction and to a decree of specific performance, is not unconstitutional as enlarging the jurisdiction of chancery.

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

Sapiro, Levy & Hayes, Moore, Smith, Moore & Trieber, and *Clayton & Cohn,* for appellant.

T. M. Mehaffy and *J. W. House, Jr.*, for appellee.

McCULLOCH, C. J. The General Assembly of 1921 enacted a statute authorizing the organization of associations, as bodies corporate, to promote and regulate co-operative marketing of farm products. Acts 1921, p. 153. The design of the statute is fully stated in the caption, which reads as follows: "An act to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation, and to eliminate speculation and waste; and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer; and to stabilize the marketing problems of agricultural products." The statute seems to be in a form which has become standard, and has been enacted in many of the States, the enactment of such legislation being manifestly prompted by the universal urge to promote prosperity in agricultural pursuits. There has been much discussion of the plan in the decisions of the courts of the various States where it has been adopted, and the general view expressed is that the statute should be liberally construed in order to carry out the design in its broadest scope.

The statute authorizes the organization of corporations to carry on the business of marketing the farm products of their members, and declares that associations thus formed "shall be deemed non-profit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers." Such an association is prohibited from handling the agricultural products of any non-member. The pertinent clauses of the section defining the powers of an association are as follows:

"(a). To engage in any activity in connection with the marketing, selling, harvesting, preserving, drying, processing, canning, packing, ginning, compressing, storing, handling or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof;

or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association, however, shall handle the agricultural products of any non-member.

"(b). To borrow money, and to make advances to members.

"(c). To act as the agent or representative of any member or members in any of the above-mentioned activities. * * *

"(g). To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated, or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and, in addition, to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized, or to the activities in which it is engaged; and, in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this act; and to do any such thing anywhere."

Appellant is an association organized pursuant to the terms of the statute referred to, and articles of incorporation were adopted as prescribed by the statute. One of the provisions of the articles of incorporation reads as follows:

"To do each and every thing necessary, suitable or proper, in the judgment of the directors of the association, anywhere throughout the world, for the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated, or which shall, at any time, appear conducive to or expedient for the interests or benefits of the association and the members thereof, and to contract accordingly."

By-laws were adopted which contain the following pertinent provisions:

"Section 4. To make and enter into agreements with spinners, buyers or others for the sale, marketing or consignment of the cotton grown by members of the association or the products therefrom.

"Section 5. To carry out the marketing contracts of the association and growers in every way advantageous to the association representing the growers collectively."

Contracts were entered into between appellant association and its members, beginning with the year 1922 and continuing from year to year, as new members could be secured. The contract with all the members was of the same form, and provided that the association should buy, and the member, who was designated as the grower, should sell and deliver to the association, all of the cotton "produced or acquired by or for him in Arkansas" during the period of five years. The first series of contracts, and the one under which the association dealt with appellee, specified the years 1922, 1923, 1924, 1925 and 1926. The first section of the contract reads as follows:

"Arkansas Cotton Growers' Co-operative Association Marketing Agreement.

"The Arkansas Cotton Growers' Co-operative Association, a non-profit association, with its principal office at Little Rock, hereinafter called the association, first party, and the undersigned grower, second party, agree:

"1. The grower is a member of the association, and is helping to carry out the express aims of the association for co-operative marketing, for minimizing speculation and waste, and for stabilizing cotton markets in the interest of the grower and the public, through this and similar organizations undertaken by other growers."

The contract provided that the contracting member, or grower, should not sell cotton to any one except the association, and that all cotton should be delivered,

immediately after picking and ginning, to a public warehouse for the order of the association, and that the warehouse receipts should be delivered to the association, as well as the bills of lading when shipped. Other provisions of the contract read as follows:

"5. The association shall pool or mingle the cotton of the grower with cotton of a like variety, grade and staple delivered by other growers. The association shall classify the cotton, and its classification shall be conclusive. Each pool shall be for a full season.

"6. The association agrees to resell such cotton, together with cotton of like variety, grade and staple, delivered by other growers under similar contracts, at the best prices obtainable by it under market conditions, and to pay over the net amount received therefrom (less freight, insurance and interest), as payment in full to the grower and growers named in contracts similar hereto, according to the cotton delivered by each of them, after deducting therefrom, within the discretion of the association, the costs of maintaining the association, and costs of handling, grading and marketing such cotton; and of reserves for credits and other general purposes (said reserves not to exceed two per cent. of the gross resale price). The annual surplus from such deductions must be prorated among the growers delivering cotton in that year on the basis of deliveries.

"7. The grower agrees that the association may handle, in its discretion, some of the cotton in one way and some in another; but the net proceeds of all cotton of like quality, grade and staple, less charges, costs and advances, shall be divided ratably among the growers in proportion to their deliveries to each pool, payments to be made from time to time until all accounts of each pool are settled.

"8. The association may sell the said cotton within or without this State, directly to spinners or exporters, or otherwise, at such times and upon such conditions and terms as it may deem profitable, fair and advantageous

to the growers; and it may sell all or any part of the cotton to or through any agency, now established or to be hereafter established, for the cooperative marketing of the cotton of growers in other States throughout the United States, under such conditions as will serve the joint interest of the growers and the public; and any proportionate expenses connected therewith shall be deemed marketing costs under paragraph 6."

The domicile and place of business of appellant association is at Little Rock, where its operations have been carried on. The association secured a large number of members, who contracted to deliver cotton, and has been functioning in accordance with the statute and the terms of its by-laws since the time of its organization.

Appellee is a farmer in Pulaski County, and became a member of the association in the year 1922, and entered into the form of contract above referred to. He had on hand a considerable quantity of cotton of the crop of 1921, and this was delivered to the association for sale.

Appellee instituted this action against appellant in the chancery court of Pulaski County, alleging that appellant had wrongfully and negligently and without his approval sold sixty-four bales of his cotton at less than the market price, causing injury to him in the sum of $4,949, and he prayed for a recovery of that sum as damages. He further alleged that appellant association had wrongfully and without legal or contractual authority adopted the plan of selling cotton for future delivery, and was persisting in said plan, in violation of its contract, and prayed for a cancellation of his contract with appellant.

In the answer, appellant denied that it had been guilty of any negligence or misconduct in the sale of appellee's cotton, or that it had in any manner broken the contract, but, in a cross-complaint against appellee, it is conceded that a plan of operation had been adopted whereby contracts were entered into with buyers for

future sales and deliveries of specified kinds and quantities of cotton, but it was denied that this method of doing business was in conflict, either with the statute authorizing the organization of the corporation or with the contract entered into between the corporation and appellee and its other members. In the cross-complaint it is alleged that appellee had produced thirty-six bales of cotton, twenty-seven of which had been delivered to the association under appellee's contract, but that he had refused to deliver the other nine bales, and was about to sell the same to other parties, in violation of his contract. The prayer of the cross-complaint was that appellee be enjoined from disposing of the cotton otherwise than by delivering it to appellant under his contract, and that appellee be required, by decree of the court, to specifically perform his contract. On the hearing of the cause the court found against appellee on his claim for damages, and refused to grant him relief by canceling the contract. No appeal has been prosecuted from that part of the decree. The court also denied relief to appellant, and dismissed its cross-complaint for want of equity, and an appeal has been prosecuted to this court from that part of the decree.

The questions presented on the appeal are therefore whether the contract has been broken, and, if so, by whom, and, if broken by appellee, whether or not appellant is entitled to equitable relief by injunction and by specific performance of the contract. The decision of the case turns primarily on the question whether or not appellant is authorized, under its contract with the members, to enter into contracts with buyers for the sale and furture delivery of cotton.

It is undisputed that appellant claims the right to make such contracts as a part of its plan, and that it has entered into such contracts with buyers in some instances for the sale of cotton before it was actually delivered to appellant by the members. If these contracts for future delivery are unauthorized, then such acts on the part of

the association constituted breaches of its contract with members, and the association is not entitled to compel performance on the part of its members.

The party to a contract who commits the first breach is the wrongdoer, and thereby absolves the other party from performance. This is elemental. We proceed, then, to determine whether or not the contract between appellant and its members authorized sales of cotton for future delivery.

The evidence adduced in the case shows that sales made by appellant were for stipulated prices above the New York Cotton Exchange quotations on the day thereafter named by the sellers, who had the privilege, at any time before the first day of the stipulated month governing the quotations, to call the date of the sale and thereby fix the price. It seems that this method of sale is designated in trade parlance as sales "on call," and the price is fixed by the price of cotton on the New York Cotton Exchange on the day on which the call is made, plus a stipulated price, or basis, above the staple and grade upon which the prices are based on the New York Exchange.

We think there is scarcely any doubt that the statute authorizes contracts for sale and future delivery of commodities. Indeed, we do not understand that counsel for appellee seriously contend that no such authority is found in the statute. Subdivision g of § 6 appears to confer ample authority upon the association for the "accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated, * * * and to contract accordingly." It calls for no excessive degree of liberality in the construction of the statute to hold that this provision authorizes the association to do all the things enumerated in the statute, and also to enter into contracts for the doing of the same. In other words, it contains, not only authority to sell the products committed to its control, but to enter into executory contracts for such sales. There is no

other way, it seems to us, to interpret the language, "to contract accordingly," and any other interpretation would render the language meaningless. Nor can there be any doubt that appellant's articles of incorporation and its by-laws authorize executory contracts for sale of commodities. One of the subdivisions of the articles of incorporation, which is hereinbefore quoted, is in almost the precise language of the statute authorizing the corporation to do all the things necessary "and to contract accordingly," and one of the sections of the by-laws hereinbefore quoted expressly authorizes the association to "enter into agreements with spinners, buyers or others for the sale, marketing or consignment of the cotton grown by members of the association." Now, when we come to interpret the language of the contract itself between the association and the members, we should do so in the light of the statute which authorizes it, and the articles of incorporation and the by-laws which govern the operation of the association. In fact, it is settled law that the by-laws of a corporation evidence the contract between it and its members or stockholders and govern the transactions between them. The contract between the association and its members does not expressly confer the power to make an executory contract with purchasers for future delivery, neither does it prohibit such a contract. It authorizes the association to "resell such cotton, together with cotton of like variety, grade and staple, delivered by other growers under similar contract, at the best prices obtainable by it under market conditions." The only fair interpretation to be given to this language is that it was meant to authorize sales of cotton in the manner authorized by the statute and by the by-laws of the association. Any other interpretation would be a very restricted one and would not evince the liberality with which we should view remedial operations of this kind, which are wholly for the benefit of the members of the association. Moreover, we should interpret the meaning of the word

"resell" in the light of general customs of trade and business with reference to the sale of the commodity dealt with, and the proof is overwhelming that the general method of doing business in the cotton trade is to contract for sale and future delivery and upon terms generally the same as adopted by appellant. The proof in the case is that the business of selling cotton in quantities throughout the season cannot be carried on in any other way, for manufacturers of cotton products nearly always prefer to buy on future delivery. It is proved also, and not denied, that the producers of cotton and the manufacturers do not deal directly with each other, and that the necessities of the trade require the intermediation of merchants and brokers, between whom contracts for sale and future delivery are customary. In order for a marketing association to do business and carry out the purposes for which it is organized, it must, to more or less extent, conform to the usages of trade and to ordinary business methods. It is an old adage that "it takes two make a trade," and, in order for sellers to find purchasers, they must conform, to some extent, with the wishes of the latter in the method of carrying on negotiations and in consummating sales. It is fair to assume that the word "resell" in the contract was used with reference to these methods of doing business in the cotton trade, and, as the general method was to sell for future delivery, we should interpret the language of the contract as conferring authority upon the association to conform to those usages. Good reasons are stated in the evidence why the spinners and other manufacturers of cotton products prefer to buy cotton on contracts for future delivery and why sellers of cotton are compelled, in order to do business successfully, to conform to those preferences and methods established by the buyers. The manufacturers want to know in advance when and where they will get cotton of the desired staple and grade, and, even before cotton is gathered and ready for delivery, they find it necessary to make terms for

a supply. And those engaged in selling cotton, in order to hold the trade of their customers, must conform to those preferences and must provide the desired way of supplying the cotton. In no other way, the evidence shows, can the business be successfully operated. The inference is therefore strong that the parties, in framing the language of the contract before us, intended to give the association the authority to conform to those usages of trade and to make sales in the manner customary to the usual trade. Other courts, in interpreting this contract, have held that it authorizes sales for future delivery. *Kansas Wheat Growers' Assn.* v. *Schulte,* 113 Kan. 672, 216, p. 311; *Northern Wisconsin Co-op. Tobacco Pool* v. *Bekkedal,* 182 Wis. 571; 197 N. W. 936. No cases holding to the contrary are cited.

One of the arguments made against this interpretation of the contract, and the one which seems to have largely influenced the chancellor, is that there is possibility of a breach of such a contract on the part of the association by reason of inability to make delivery of cotton under such a contract, thereby incurring liability for a breach, and that the statute contains an express provision that the members shall not be liable for the debts of the association in excess of the sums remaining unpaid on membership fees or subscriptions to capital stock. The argument is that, since the association is non-profit bearing and the members are not liable for debts, there is necessarily no authority to incur obligations which might result in liability for damages. This argument, we think, flies right in the face of the statute itself, which expressly authorizes the association to do all the things that are enumerated in the statute, including the selling of commodities, and to contract therefor. It is our duty to reconcile these provisions of the statute, and, in doing so, we must assume that the lawmakers, by exempting the members from individual liability, did not intend to restrict the power of the association to make contracts. The lawmakers, in framing this statute, did

so upon the theory that the association would perform its contracts, and not break them, so as to incur liability, and authority was granted for creating an expense fund, out of which incidental losses and expenses might be paid.

In interpreting the statute and the contract we are not dealing with the question of abuse of power by the association, but with the question of extent of power to be properly exercised, and, in solving the question, we must assume that the lawmakers intended to confer a power to be rightly exercised. If the power is abused by the officers and agents controlling the management of the association, then there is ample remedy in the courts for the correction of such abuses.

Again, it is argued that contracts of sale for future delivery constitute gambling transactions, and, being unlawful, it is not to be presumed that the lawmakers intended to authorize such acts or that the parties intended to contract therefor. The answer to this argument is that contracts of this character do not constitute gambling transactions. They contain no element of wager. The ordinary form of contract for sale of cotton on future delivery, as disclosed by the evidence, is as follows: The seller holds or expects, by purchase or otherwise, to acquire for sale a quantity of cotton of a given grade and staple, and he finds a purchaser with whom he makes terms of sale. This occurs, for instance, in September or October, and he enters into a contract for the sale of a given number of bales of that grade and staple, the price to be fixed according to the quotations for December delivery on the New York Cotton Exchange, on any day thereafter, to be named by the seller. This is termed a sale "on call," and the seller has the right, under the contract, to "call" the sale on any day he chooses prior to the final day of delivery on December contracts. The Cotton Exchange quotations are based solely on cotton of a single grade and staple, that is to say, middling cotton, 7/8 inch staple. If the cotton to be

sold and delivered is above or below that grade and staple, the parties agree on a price above or below the Exchange quotations, so as to cover the difference between the price of the Exchange quotations and the price of the higher or lower grade of the cotton which is the subject-matter of the sale. The contract stipulates the quantity and the grade and staple of the cotton to be delivered, and, if it is of better grade than that quoted on the Exchange, the parties agree upon the difference. That is termed the "basis." As an illustration: If the parties agree that the cotton delivered is worth 200 points, or two cents per pound, more than the kind of cotton quoted on the Exchange, they agree upon that much advance price above the quotations on the day the sale is called by the seller. Now, there is an element of uncertainty as to the fluctuations of the market between the date of the contract and the date of delivery on December contracts, and it involves, to a more or less extent, a matter of speculation as to whether the seller will obtain the price which he hopes to get for his cotton, but, as before stated, there is no element of wager in the contract. The choice is with the seller to determine, before the final day of delivery, when he will "call," and thereby fix the price definitely according to the Exchange quotations. The result would be the same if he held his cotton without obligation to sell, hoping to get a higher price on a later date, and he thereby takes a chance of the market declining. There is that much element of speculation in all business transactions where there is a chance of a decline or advance in the market. The seller of any commodity may, with propriety, exercise his judgment as to the best time to sell, and he does not lay himself open to any implication of wagering. A farmer with a bale of cotton or a load of wheat or potatoes, hoping to obtain the highest price for his product, may be uncertain as to the best time to sell, and may, in indulging that hope, postpone the sale to a future date, and yet he is not engag-

ing in a wager. The same may be said with reference to the fluctuations in the basis upon which sales are made. On account of weather conditions, there may be fluctuations in the basis upon which cotton is sold, so that the margin of difference between the fluctuations on the Exchange and the market value of the particular grade and staple of cotton which is the subject-matter of the sale may widen, so that the seller, under the contract, would get less for his cotton than he would have gotten if he had waited until the day of delivery to fix the basis. But, as before stated, this is not a wager, even though it contains an element of uncertainty. Cotton is sold by producers indirectly to the manufacturers solely on grade and staple. There is a demand for the different kinds of grades and staples because some kinds are used for one purpose in the manufacture of products, and some for another. Sometimes there is a shortage of certain grades and staples and an excess of others, and, in consequence, the scarcity of the one grade advances the price abnormally, and there is a corresponding decline in the other grades and staples which are more abundant. In other words, the price of one grade and staple of cotton may advance and another be at the same time on the decline. This is not the case in regard to Exchange quotations, for they are, as before stated, all based on a single grade and staple. All of these uncertainties are taken into account in selling cotton, and the business necessarily involves that much element of speculation. This kind of a transaction must not be confused with the business of dealing in futures, for, in the latter case, no actual delivery of the cotton is in contemplation of the parties. The one character of transaction is legitimate, though it involves an element of uncertainty, whilst the other is purely a wager based on the advance or decline of cotton, without the parties intending actually to sell and deliver. The distinction has been clearly recognized and stated by this court and by the Supreme Court of the United States. This court, in passing upon the question of the validity of contracts for future delivery, said:

"But this is not what is commonly known as dealing in futures. This phrase has acquired the signification of a mere speculation upon chances, where the grain, cotton or stock dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference in the market." *Fortenbury* v. *State,* 47 Ark. 188. The Supreme Court of the United States, in declaring the validity of a sale for future delivery, said: "And the fact that, at the time of making a contract for future delivery, the party binding himself to sell has not the goods in his possession and has no means of obtaining them for delivery, otherwise than by purchasing them after the contract is made, does not invalidate the contract." *Clews* v. *Jamison.* 182 U. S. 461.

Attention is also called to the fact, shown by the evidence, that appellant lost heavily on one of its contracts for future delivery, on account of inability to make delivery in accordance with the contract, thereby incurring liability for damages, and this is urged as a reason why that kind of business is too hazardous to justify the association in indulging in it. In September, 1923, the association contracted to sell to certain buyers in the east 500 bales of cotton of a certain grade and staple on the basis of 225 points on December quotations, subject to the seller's call, and, on account of failure to get from its members enough cotton of that kind, the association was able to deliver only 350 bales. Cotton advanced rapidly, and the association suffered damage in the sum of about $6,000 on account of breach of the contract. There was another transaction of like character on which the association suffered a loss of $250. It is explained by witnesses that this occurred on account of the sudden and rapid depreciation in the grade of cotton, caused by bad weather, and that for that reason less of the required grades was obtained, and the association did not receive a sufficient quantity of cotton to comply with the contract. The conditions were exceptional, and the same result may or may not occur again. The exercise

of better judgment and more careful and frequent estimates of the condition of the crop during the gathering season may serve to obviate or to minimize the extent of such results. At any rate, that is one of the incidents of the business, and it is the duty of those in charge of the management of the association to do all that can be done to prevent such loss. The fact that this loss did occur does not characterize the business as being so hazardous as to bring it within the denunciation of wrongdoing, or characterize the general plan as unsuccessful. If the management is poor, the remedy is with the members of the association themselves, who have it within their power to change the management, or, if the managing officers and agents are derelict in their duties, and, by neglect or otherwise, cause loss to the association, they can be held accountable. Occasional losses are incident to any business, for no scheme is so perfect as to absolutely avoid them. Where the losses occur merely as an incident of the business and not as the result of negligence on the part of the managing officers and agents, such losses, to that extent, reduce the net returns from the sale of cotton and lessen the benefits enjoyed by the members. The plan, of course, contemplates the selection of officers and agents who are men of experience in the business and of good judgment, so that losses may not occur, or, at least, that the danger may be minimized. The general plan must not be denounced as illegal or improvident merely because mistakes of judgment may have occurred or possibly may occur again in the future. The plan may or may not be perfect. It is scarcely possible to devise a business plan of mathematical exactness or which affords absolute immunity from misadventure and loss, and the question of completeness of the plan is not involved in this controversy. Manifestly it has been designed by those who are, or should be, well informed as to the nature of the business so as to bring the best results. At any rate, it was designed to work for the benefit of

farmers who produce cotton and other agricultural products, and those who go into it do so voluntarily. There are inherent difficulties in the marketing of cotton which should be obviated, if possible. This plan contemplates the orderly marketing of cotton throughout the whole year, instead of forcing it on the market during the short gathering season, thereby preventing what is termed "dumping." It is well known that, when the gathering season begins, the price of cotton is established, and is generally fairly well stabilized for a time, until the cotton is open and is gathered and goes to market with such rapidity that the market is overstocked, and a decline in the price results, until the crop is all marketed by the farmer and gets into the hands of speculators or legitimate dealers in cotton, and then it advances, but the farmer gets no benefit from the advance. As a general rule, farmers are in debt to a more or less extent when the gathering season comes on, and they are unable, acting alone, to hold their cotton for better prices. Under the plan of this association, the producers group themselves together, money is borrowed by the association and advanced to the members on their cotton, at a low rate of interest, and the sale of the product is distributed throughout the whole year instead of being dumped on the market during a short period. The effort to bring about better results is at least to be commended.

Our conclusion is that the plan is not illegal and not beyond the scope of the contract, hence it cannot be stricken down by the judgment of a court. This leads to the conclusion that no breach of the contract was committed by the association, but that, on the contrary, appellee broke the contract by refusing to deliver all of his cotton in compliance therewith.

This brings us to the question whether or not the remedy sought by appellant is available. It is contended that the chancery court does not possess jurisdiction to prevent a breach by injunction and thereby compel specific performance of the contract. The statute creat-

ing the association contains an express provision for such relief, but it is contended that this statute constitutes an attempt to enlarge the jurisdiction of the court, which is beyond the power of the lawmakers. We do not agree to this view, for it has always been within the jurisdiction of courts of equity to grant relief where legal remedies are inadequate, and it is evident that, by reason of the peculiarity of the co-operative marketing plan, any legal remedy would be wholly inadequate. The only remedy at law would be a suit to recover damages, but this remedy is inadequate, for the reason that the recovery of damages for a failure to deliver cotton would not repair the injury done if a substantial number of the members should refuse to deliver cotton. This would thwart the whole scheme and render it abortive. In that event the amount of damages recovered and distributed among the persistent members would not compensate for the loss caused by the failure to obtain the better price which it is expected will result from co-operative marketing. The statute making this equitable remedy available is not an enlargement of the jurisdiction of the chancery court, for it merely brings the remedy within the jurisdiction of the court as it existed prior to the adoption of our Constitution. *Marvel* v. *State*, 127 Ark. 595. There are cases cited in the brief of appellant which support the view that the chancery court has jurisdiction to grant the relief prescribed by the statute.*

The decree of the chancery court is therefore reversed, and the cause remanded with directions to

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* The following cases are cited in appellant's brief: *Oregon Growers' Co-op. Ass'n.* v. *Lentz*, 107 Ore. 561; *Kansas Wheat Growers' Ass'n.* v. *Schulte*, 113 Kan. 672; *Tobacco Growers' Ass'n.* v. *Jones*, 185 N. C. 275; *Texas Farm Bureau Cotton Ass'n.* v. *Stovall*, (Tex.) 253 S. W. 1101; *Washington Cranberry Growers' Ass'n.* v. *Moore*, 117 Wash. 430; *Brown* v. *Staple Cotton Growers' Co-op. Ass'n.*, 132 Miss. 859; *Northern Wis. Tobacco Pool* v. *Bekkedole*, 197 N. W. (Wis.) 936; *Hollingsworth* v. *Texas Hay Ass'n.* 246 W. (Texas.) 1068. (Rep.).

enter a decree in favor of appellant for the relief prayed for.

HART and HUMPHREYS, JJ., dissent, not because the plan is illegal, but that the transaction is beyond the scope of the contract.

SUPPLEMENTAL OPINION.

McCULLOCH, C. J. We are asked by attorneys representing other interests than those of the parties to the present litigation—interests which will likely be involved in subsequent litigation—to withdraw from the opinion the paragraph which states as applicable to the present case, the elemental principle that the "party to a contract who commit the first breach is the wrongdoer and thereby absolves the other party from performance."

It is urged that this application of the principle is unnecessary to a decision of the case and should be withdrawn so as not to affect future litigation in which its application may be invoked.

Upon reconsideration we have concluded to grant the request and confine the decision to the effect that appellant has not, in its methods of business, broken the contract by transcending its powers under the statute, or under its articles of association, or under its contracts with members, and that it is entitled to the relief prayed for in its cross-complaint.

VILLAGE CREEK DRAINAGE DISTRICT OF LAWRENCE COUNTY *v.* IVIE.

Opinion delivered April 13, 1925.

1. MANDAMUS—JURISDICTION.—Since, by the act creating two separate judicial districts in Lawrence County (Acts 1887, No. 85), the jurisdiction of the county court sitting at Powhatan is coextensive with the county, the superintending control of the circuit court by mandamus over the county court may be exercised by the circuit court sitting in either district, regardless of the place of residence of the county judge.

2. MANDAMUS—MATTER OF DISCRETION.—Mandamus will not lie to control a matter which involves an exercise of discretion.
3. MANDAMUS—GRANTING CONTINUANCE.—As the matter of granting a continuance of a hearing of complaints as to the assessment of benefits in a drainage district is within the discretion of the county court, it will not be controlled unless there is an obvious abuse of such discretion; and no abuse is shown where such hearing was continud to a definite date, in order that a cause pending in the federal court involving certain assessments in the same district might be determined.

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

W. P. Smith, O. C. Blackford, W. M. Ponder, W. A. Jackson and *G. M. Gibson,* for appellant.

W. E. Beloate, John S. Gibson, and *E. H. Tharp* for appellee.

McCULLOCH, C. J. Village Creek Drainage District of Lawrence County was created by special statute, authorizing the construction of ditches to drain certain territory in Lawrence County, and the board of commissioners of the district instituted this action in the circuit court for the Eastern District of Lawrence County, to compel the county court to give a hearing upon the assessment of benefits and to reject or confirm the same in accordance with the statute, which provides that, after the assessment of benefits has been made by the commissioners and filed with the county clerk and notice thereof given, "the county court shall consider the assessment of benefits and hear any complaints thereof, and enter its finding thereon, either confirming such assessment or increasing or diminishing the same, so that the several assessments shall be equitable and just."

It is alleged in the petition for mandamus that, prior to September 1, 1924, the board of commissioners of appellant district completed the assessment of benefits, and that notice was duly published of a hearing by the county court on that date; that, on the date mentioned, the county court convened at Powhatan, the county seat of Lawrence County, and then adjourned to the courthouse at Walnut Ridge, in the Eastern District of Law

rence County, and that certain foreign corporations owning lands in the district appeared and, by proper petition and bond, removed the hearing as to their lands to the federal court, and that the county court thereupon postponed the hearings on the assessment of benefits until December 15, 1924; that, on the last-mentioned date, the county court was opened at Powhatan, and was adjourned to the courthouse at Walnut Ridge, at which place the court made an order, over the protest of the commissioners, adjourning the hearings over to January 26, 1925.

It is further alleged in the complaint that, when the county court convened on January 26, 1925, for the purpose of hearing complaints on the assessment of benefits, the court, on motion of certain remonstrants against the assessment, and over the protest of the board of commissioners, postponed the hearing until May 25, 1925. It is also alleged that the reason given by the county court for this order of continuance was to await the action of the United States District Court at Jonesboro. The order of the county court continuing the hearing is exhibited with the complaint, and it recites that the remonstrants against the assessment asked for a continuance on the ground that certain foreign corporations had removed their causes to the federal court, and that the same were to be heard at the May term of the federal court at Jonesboro. The order of the county court granting the continuance does not extend the postponement until the causes in the federal court shall be disposed of, but merely continues the case until a day certain, namely, May 25, 1925.

Appellee, as county judge, appeared in the circuit court and demurred to the petition of appellants, and the court sustained the demurrer and dismissed the complaint, from which judgment of dismissal an appeal has been prosecuted to this court.

Counsel for appellee contend, in support of the court's ruling, that the circuit court for the Eastern District of Lawrence County had no jurisdiction to hear and

determine a petition for a mandamus or other extraordinary writ to the county court which is held at Powhatan, the county seat of Lawrence County, which is located in the Western District.

Under act No. 85 of the General Assembly of the year 1887, Lawrence County was divided into two judicial districts, the Eastern and Western, and authority was granted for holding courts, except the county court, at Walnut Ridge, in the Eastern District, and at Powhatan, the county seat, in the Western District. No mention is made in that statute of dividing the county into districts as to the county court, but, on the contrary, § 17 of act No. 85, *supra,* provides that "as to all matters not within the provisions of this act, the county of Lawrence shall be one entire and undivided county."

The circuit court derives its jurisdiction to hear and determine a petition for mandamus, or other extraordinary writ, to the county court, from § 14, art. 7, of the Constitution, which provides that circuit courts "shall exercise a superintending control and appellate jurisdiction over the county, probate, court of common pleas and corporation courts." Now, as we have already seen, the act dividing Lawrence County into judicial districts for certain purposes does not limit the jurisdiction of the county court sitting at Powhatan, and, as the jurisdiction of the county court sitting there is coextensive with the county, the superintending control of the circuit court may be exercised by that court sitting in either district. The petiton for mandamus is not a suit against a ministerial officer, which must be brought in the county or district where the officer resides, as was the case in *Reed* v. *Wilson,* 163 Ark. 520, relied on by counsel for appellants, but it is one where the superintending control of the circuit court over the county court is invoked, therefore the place of residence of the county judge does not fix the jurisdiction of the circuit court. Our conclusion therefore is that the circuit court for the Eastern District of Lawrence County had jurisdiction.

If the granting of a continuance was a matter of discretion, it must be conceded that the exercise of that discretion will not be controlled by mandamus. *Nixon* v. *Grace*, 98 Ark. 505.

Our attention is called to the fact that the statute creating the drainage district provides that the county court shall consider the assessment of benefits and hear complaints "on the day fixed for the said hearing." This feature of the statute must be construed to be directory, otherwise the court would have no power to enter an order either rejecting or confirming assessments on any other day. We do not think that the lawmakers intended to limit the exercise of the jurisdiction of the county court to the particular day covered by the notice, and we are of the opinion that the power of the court to continue the hearings from time to time is not restricted. In other words, we think that the matter of postponing the hearings is one of discretion with the county court, and that this discretion is not controlled unless there is an obvious abuse of the power. We are further of the opinion that there is no abuse of discretion shown, for the court continued the hearing to a definite date.

Counsel rely on our decision in *Road Improvement District* v. *Henderson,* 155 Ark. 482, as sustaining their contention that the court had no power to continue for the purpose of awaiting the decision of the federal court. There is a material difference between the facts of this case and the one cited. In that case the chancery court had granted a temporary injunction and then continued the case indefinitely, leaving the injunction in force until there could be a hearing of a cause in the federal court involving the validity of the district. There was no continuance until a definite date, as in the present case, and we held that the effect of the order of continuance was a refusal to exercise the jurisdiction of the court, and a mandamus was granted to compel the chancery court to proceed with the hearing. In the present case the order of continuance made by the county court does not make the exercise of jurisdiction depend upon the action of the

federal court, but merely continues the cause to a definite date, and the fact that the pendency of the hearing in the federal court influenced the decision in granting the continuance does not necessarily constitute an abuse of the court's discretion. There is just this distinction between an indefinite continuance to await the action of another court and a definite continuance to a fixed date.

The circuit court was therefore correct in refusing to grant the mandamus, and the judgment dismissing the petition of appellants is affirmed.

LANE v. STATE.

Opinion delivered April 13, 1925.

1. JURY—"IMPARTIAL JURY.—To be "impartial," within Const. art. 2, § 10, and Crawford & Moses' Dig. § 3159, a jury in a criminal case must be composed of twelve men whose impressions on the merits of the cause are determined by the testimony adduced before them at the trial, and the integrity of the trial is destroyed if one juror enters the jury box entertaining and concealing actual bias against the accused.
2. JURY—IMPARTIALITY OF JURY—DISCRETION OF COURT.—The question of the impartiality of the jury, as guaranteed by the Const. art. 2, § 10, is a judicial question of fact within the sound discretion of the trial court.
3. CRIMINAL LAW—FINDING OF COURT—CONFLICTING EVIDENCE.—Where evidence as to the impartiality of a juror is conflicting, the finding of the trial court will not be disturbed.
4. JURY—DISQUALIFICATION BY BIAS.—Where a juror heard the testimony of the prosecuting witness at the examining trial and pronounced it the truth, but failed to disclose such fact on *voir dire*, he was disqualified as a juror, notwithstanding he testified that he entered the jury box without prejudice, nor does it matter in such case that the evidence establishes defendant's guilt.

Appeal from Greene Circuit Court, Second Division; *W. W. Bandy*, Judge; reversed.

A. G. Little and *Huddleston & Little*, for appellant.

The Constitution provides for a trial by an impartial jury. As to what is meant by an "impartial jury,"

see *Curry* v. *State,* 5 Neb. 413; *Randle* v. *State,* 28 S. W. 954; *Smith* v. *Eames,* 36 Am. Dec. 515; *Coughlin* v. *People,* 19 L. R. A. 57; *Stephens* v. *People,* 38 Mich. 739; *Jones* v. *State,* 52 So. 791; *Sasser* v *State,* 59 S: E. 255; *State* v. *Lathem,* 50 So. 780; *Turner* v *State,* 111 Pac. 988; *Robbins* v. *State,* 155 S. W. 52; *State* v. *Swafford,* 153 Pac. 1056; *Pitchford* v. *Com.* 125 S. E. 707; *Johnson* v. *State,* 244 S. W. 518; *Com.* v. *McClosky,* 117 Atl. 192; *Adams* v. *State,* 243 S. W. 474; *Baker* v. *Com.,* 233 S. W. 1046.

H W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

WOOD J. At the December term, 1924, of the Greene Circuit Court, John Lane was indicted, tried and convicted of the crime of grand larceny, it being charged that he stole United States Government bonds, the property of James Alexander, of the value of $20,200. He appeals.

It was shown on a motion for rehearing that J. B. Kirchoff, one of the trial jurors, stated before the trial that he was present at the preliminary trial of John Lane for the same offense; that he heard the evidence adduced at that trial. He stated that he heard James Alexander, the prosecuting witness, testify, and he (Kirchoff) could tell from the testimony that Alexander was telling the truth; that anybody could tell from the way Alexander swore that he was telling the truth and they could not tangle him up." Mr. Block stated, in the presence of Kirchoff, "Of course you cannot tangle a man up when he is telling the truth." Kirchoff kept on discussing the case at some length after Block walked away, and stated that the bonds would have to be returned, even though Lane were acquitted, because gambling for property was not a legal transaction. Kirchoff further stated in the conversation that he had just come from the courthouse where he had attended the preliminary examination.

M. P. Huddleston, one of the attorneys for the appellant, testified that he questioned Kirchoff on his *voir*

dire as to whether or not he had formed or expressed any opinion as to the guilt or innocence of the appellant and whether or not he was familiar with the facts, or had heard the facts stated or related by any person. Kirchoff replied to these questions in the negative. Other jurors had been asked the same questions on their *voir dire,* and, upon answering that they were present at the preliminary examination and heard the facts stated, they were excused by the trial court on account of express bias. Huddleston further testified that he had no information during the progress of the trial of the facts tending to show the disqualifications of the juror Kirchoff.

Kirchoff testified that he might have entered into the conversation to which the witnesses had testified. He was pretty confident he did. He might have said the things the witnesses testified he did say. Kirchoff was asked the following questions:

"Q. Tell the court whether or not you ever said anything with regard to Lane keeping them (the bonds) if they were won in a crap game? A. I think if Lane won them in a crap game he ought to have the bonds. I have no feeling either way. Feel as good towards Lane as I do Alexander. Just a little bit more to Lane, if anything. * * * Q. On examination qualifying you as a juror, tell the court whether or not you were asked if you had been at the preliminary hearing? A. I don't think so. Q. If you had been asked that what would you have said? A. Yes sir."

Kirchoff was further asked whether he was asked, on his *voir dire,* whether he had formed any opinion as to the guilt or innocence of John Lane, and what his answer was, and he replied that his answer was "No sir." He further stated that he didn't have any opinion at that time; that he went in the jury-box capable of giving John Lane a fair trial and the benefit of the reasonable doubt; that his feeling toward John Lane at the time he went into the jury-box was very friendly; that he would have given him a little the best of it; that is the way he felt

about it. He didn't recall at the time of ever expressing any opinion in the case—did not remember the other conversation. He went into the jury-box without any opinion one way or the other, and the fact that he had heard the testimony at the preliminary examination did not affect or bias him in rendering his verdict as to the guilt or innocence of John Lane. He was guided in his verdict by his own judgment and by the testimony heard at the trial. No outside influence one way or the other entered into his verdict. He was not sure whether or not he was asked on his *voir dire* whether he could go into the jury-box and try the case according to the law and the evidence, notwithstanding what he had previously heard, but if he was asked that question, his answer would have been, "Yes."

Kirchoff further testified that, when the jury were deliberating on their verdict, the appellant was found guity by unanimous vote. Nine of the jurors were in favor of fixing his punishment at four years' imprisonment in the penitentiary, and witness and one juror were in favor of giving him only one year. The final sentence was for three years, which was brought about by the insistence of the witness and one other juror that the punishment be fixed at one year. If this witness and the other juror had not held out for the lighter sentence, the verdict could have been reached in five or ten minutes. As it was, the jurors delayed two hours before they returned a verdict fixing the punishment at imprisonment for three years.

The testimony of Alexander, the prosecuting witness, as taken at the examining trial, was, by stipulation, brought into this record, and, without setting out the same in detail, suffice it to say it shows that, if Alexander was telling the truth, Lane was guilty of the crime with which he was charged.

Our Constitution provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." Article II, § 10, Con-

stitution. Our statute provides: "Actual bias is the existence of such a state of mind on the part of the juror in regard to the case, or to either party, as satisfies the court, in the exercise of a sound discretion, that he cannot try the case impartially and without prejudice to the substantial rights of the party challenging." Section 3159, Crawford & Moses' Digest.

Thus both the Constitution and statute guarantee to every accused person the right to an impartial jury in the trial of the offense with which he is charged. A trial jury in felony cases must be composed of twelve men who are indifferent between the prisoner and the commonwealth. 16 R. C. L., p. 181, § 2. To be strictly impartial, a jury should be composed of twelve men, each and all of whose minds, when they enter the trial jury-box, should be like a blank sheet of white paper, so to speak, with no impressions written thereon as to the merits of the cause. A jury, to be impartial, must have the impressions of the merits of the cause written or stamped on their minds by hearing the testimony adduced before them at the trial, and *after* they enter the trial panel—not *before*. To be impartial, a jury must be composed of twelve impartial men. Even if one juror enters the jury-box entertaining an actual bias against the accused and conceals such bias on his *voir dire,* the integrity of the trial panel is destroyed. *State* v. *Mott,* 74 Pac. (Montana), 728; *Woods* v. *State,* 41 S. W. (Tenn.), 811. Whether this constitutional and statutory guaranty of impartiality on the part of the jury has been infringed in any case is necessarily a judicial question and one of fact to be determined, in the first instance, by the court before whom the trial is had; and, where the impartiality of the jury is challenged, the trial judge is vested with a large measure of discretion in determining the issue. Where there is a conflict in the evidence as to whether a juror has entered the jury-box with a preconceived impression of the merits of the case, such as to render him unfit to try the case impartially between the prisoner and the commonwealth, the judgment of the

trial court on that issue, in the exercise of its sound discretion, will not be disturbed by this court. *Pendergrass* v. *State.* 157 Ark. 364, and cases there cited; *Curry* v. *State,* 5 Neb. 412-13. But where, as in the present case, a juror in advance has heard the testimony of the prosecuting witness in the preliminary hearing and pronounced that testimony to be the truth, and where a juror does not deny such fact, but, on the contrary, confesses that he might have said it, then there is no alternative but to hold that such juror entered the jury-box with an express bias which, under the Constitution and statute above, would disqualify him as a juror in the cause. Where such is the fact, the integrity of the trial is destroyed, notwithstanding the juror, on the trial of the issue of his impartiality, may testify that he really entered the jury-box without any bias or prejudice that would affect the trial, and that he could, and did, try the case according to the law and the evidence. The fact remains that Kirchoff, under the uncontroverted proof, entered the jury box with an express bias in favor of the State against the appellant, which the uncontradicted proof shows was concealed on his *voir dire.* Whether this was intentional or unintentional on the part of the juror is wholly immaterial. Nor does it matter in such cases if the guilt of the accused be established beyond peradventure, for, however guilty one may be, he is nevertheless, under our Constitution and statute, entitled to a trial by a jury composed of jurors each and all of whom have not prejudged his guilt, or, what is the same thing, have not determined in advance that the testimony of a witness or witnesses for the State establishes the truth of the charge. See *Coy* v. *State,* 162 Ark. 178; *Shribner* v. *State,* 108 Pac. 422-426; *Glover* v. *State,* 57 S. E. 101-104, and other cases cited in appellant's brief.

The uncontradicted testimony shows that the juror Kirchoff entered the trial panel with an express bias against the appellant. He was therefore not an impartial juror, and the trial court erred in holding to the contrary. For this error the judgment is reversed, and the cause will be remanded for a new trial.

WELDON v. STATE.

Opinion delivered April 13, 1925.

1. HOMICIDE—JURY QUESTIONS.—Testimony held sufficient, in a prosecution for murder, to justify submission of questions whether defendant killed deceased and whether such killing was murder in the first degree.
2. HOMICIDE—PREMEDITATION.—Premeditation and deliberation will not be presumed from the mere fact that the killing was done with a deadly weapon.
3. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to sustain finding that defendant killed deceased with deliberation and premeditation.
4. HOMICIDE—MOTIVE—EVIDENCE.—In a prosecution for murder, evidence that deceased was a forest ranger whose duties required him to report liquor violations, and that defendant was violating such laws, was competent and relevant on the issue of a motive for the killing.
5. CRIMINAL LAW—INSTRUCTION—WEIGHT OF EVIDENCE.—Where there was evidence that deceased's duty was to report liquor violations and that defendant was engaged in violating the liquor laws, an instruction that the jury might consider liquor violations if they find that defendant killed deceased, as tending to shed light, if it shed any, upon the motive of the killing, *held* not to be on the weight of the testimony nor to invade the jury's province.

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

W. P. Strait and *Wilson & Majors,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

WOOD, J. The appellant was indicted in the Yell Circuit Court of the crime of murder in the first degree in the killing of one W. D. Jones. The jury returned a verdict finding him guilty of murder in the first degree and fixing his punishment at life imprisonment in the State Penitentiary. From the judgment rendered in accordance with the verdict, he prosecutes this appeal.

The testimony for the State is substantially as follows: W. D. Jones was a forest ranger. His duty was to patrol the United States Government Forest Reserva-

tion for the purpose of preventing fires, trespass, etc. The forest reservation service was under the control of the Department of Agriculture. The forest rangers were under instructions of the Department of Agriculture to report "to the federal and local prohibition officers the location of illicit local stills which are noticed in the performance of their duties as rangers."

Bob Weldon lived in Yell County, Arkansas, on his homestead, at the foot of one of the mountains adjoining the reservation. On the night of the 28th of August, 1924, Jones was killed at the home of Weldon. The body was found at a woodpile where there were a few chips and a pine knot or two. It was ten or twelve steps from the body to the gate of the yard fence around Jones' house. The body was near a trail running a little north of east from Weldon's to the McGough place. Jones' head was near one of the washpots. His hat was near by, and also a carbide light. The body was lying on its right side, face on the ground, in the chips, ashes and dirt. There was quite a lot of blood, when the body was turned over, on the clothes, and the blood had spread something like two feet along the ground by the side of the body. This blood had apparently run from the body. There was so much blood it made a kind of mud on the ground, which came up over the soles of one's shoes. There was blood on sticks of wood that lay away from the body a couple of feet. Some of the blood had run under the wash-kettle. There were three bullet wounds in the body—two about four inches apart, and one almost in the center of the back, a little lower than the other two. There was very little difference between the holes in the back and in the front. It could not be ascertained whether the bullets entered from the back or front. Besides the bullet wounds, there were also knife wounds. Jones was cut from the backbone almost around to the front on the left side and one cut about two or three inches long on the right side. There was also a stab on one side, and one also under the shoulder-blade, and several other cuts on the

body, hands and arms. On the body of Jones were a watch, a pocket-knife and a handkerchief. The knife was closed. There was no weapon of any kind around the body or on it. On an examination of the premises a rifle was found, and on the window-sill of the east room of Weldon's house there was a scabbard for a large pistol, but no pistol in it. Weldon had a large Luger pistol.

The government had planned the erection of an observation tower on what was called Powell's Mountain, close to Weldon's homestead, and Jones had been instructed, on the day preceding the night of the killing, to survey a route over which to move material for the tower to the top of the mountain. Jones was directed to look over the route by Weldon's place first, as it was contemplated that they would probably have to go through Weldon's pasture, as that would be a cheaper and better route than the other way. A man by the name of Yates lived about a quarter of a mile from Weldon's. There was a road leading from his house to Weldon's and beyond Weldon's was a trail—kind of old road across Powell Mountain. Jones, Weldon and Yates were at the home of Yates on Thursday morning, and, while there, Jones said something about looking out the best way to get to move the tower to Powell Mountain, and Weldon said he thought the government trail that turned off at Stokes' would be the best route, and Jones replied that it didn't make any difference, just so he didn't have too many logs to cut out of the road, and stated that he would look out the way leading by Weldon's and come back the other way. Jones and Weldon left Yates' house about twelve o'clock, and that was the last time Yates saw Jones alive. About eight or nine o'clock Thursday night Yates heard hollering and shooting in the direction of Weldon's. There were four or five shots. The hollering was like some one trying to holler and couldn't. It was a weird kind of noise. Yates was sleeping on his front porch. The shooting and hollering was going on when he awoke. He heard the hollering and shooting,

and started to Weldon's house after he heard the second shot. He got about half-way there. The hollering had hushed, and Yates went to within eighty or one hundred yards of Weldon's house. He heard a horse trot around out there, and started back home. When Yates got near Weldon's house, he heard some one say something, but didn't know who it was—sounded like Weldon. There was some shooting while witness was standing up there, and the horse trotted around, and two guns fired. These two shots seemed like they were on the far side of the house from where Yates was standing. Yates then returned home, and heard a gun fire about half-way between his house and Weldon's. Not long after, Weldon came to Yates' house, and Yates asked him what all the shooting was about up there. Weldon replied, "Just shooting into the air." He asked Yates to get up and go home with him, saying that he had had a little trouble up there, and Yates might help him. Weldon had a shotgun in his hand, and fired the same, demanding, with an oath, that Yates get up and go where the children could not hear him talk. Yates finally started up the road with Weldon, but told him that he could not go to his house, and asked Weldon what kind of trouble he had had up there, and Weldon replied, "I think there was two or three Ku Klux run in on me. They called me out to the gate, and some one struck me across the head. We had it around and around there, and I left my troubles laying in the chip-yard." When Yates refused to proceed further with Weldon, Weldon said, "If I have got to stay by myself, I want to get off the road," and he did go off to the side of the road, twenty-five or thirty steps, and lay down and put his gun beside him. Next morning about sun-up Yates went to where he had left Weldon the night before, and found him there. Weldon asked Yates to go home with him. Weldon had blood on his arms and fingers and finger-nails and on his body—looked like right smart blood. Yates had noticed the blood the night before, and Weldon had said that night, "I can't hardly

stand to smell this damned blood." Yates went with Weldon to Weldon's house. Weldon walked straight to Jones and pulled his shirt bosom open, and then walked back between the gate and Yates, and said, "By G—, I wish I knew some way to get out of this." Yates said, "I could not tell you." Weldon asked Yates what he was going to do, and Yates said he was going after somebody. Yates left Weldon standing there, and, when Yates got back with help, Weldon was gone, and the body of Jones was still lying there.

It was shown that Weldon went to the home of Ed Odom, in Montgomery County, about fifteen miles away. Odom had been his friend for many years, and was still his friend. He arrived at Odom's house on Friday, and went to the field where Odom was working, about three o'clock of that day, and said to Odom, "I am in trouble, or somebody is in trouble to my credit. There was a man found at my gate, one of my best friends—one among my best friends was found at my wash place, dead, this morning. I thought I would dodge out two or three days. I didn't know but what they would take me up and mob me or do something. I thought I would dodge out two or three days until the excitement was over, and go in and give up and make bond." Weldon wanted Odom and Weldon's father-in-law, Stacey, who also lived in Montgomery County, to go over to Weldon's and stay with his wife until he returned home. Odom went and got Stacey, and returned to Odom's house, and Weldon wanted Odom to get him a pair of shoes and a pair of overalls, and gave Odom the money to buy the same. Odom went for these articles, and, when he returned, Weldon was down in Odom's field. Odom gave Weldon the shoes, and told him that he couldn't get the overalls. In the meantime Stacey had come to Odom's house, and that night, while Odom and Stacey were having a conversation, Weldon would sit there and whistle and kind of hum a little, and then he asked this question: "How could you commit cold-blood murder?" Odom told him

that he didn't understand the question, and Weldon again asked, "What can you commit cold-blooded murder with—with a knife?" Odom answered, "Yes," and asked Weldon how the man was killed—whether he fell dead or was shot, or killed with a knife, and Weldon replied that he thought that he was cut with a knife. Later Odom expressed to Weldon his regret, saying, "Bob, this sure has hurt me, and hurts me worse than anything that has ever occurred," and Weldon replied, "Yes, it has hurt me, Mr. Odom; it has hurt me or ruined me," or something to that effect. The next night Odom told Weldon that the officers had been there looking for him. Weldon asked Odom if he thought they would electrocute him (Weldon). This conversation occurred at Odom's barn on Saturday night. Weldon did not say anything about getting away, but Odom told Weldon that it would be a hard matter for him to get away, and it was during this conversation, and after he started to give up, that Weldon asked if Odom thought they would electrocute him. In a further conversation, on Saturday night, at Odom's barn, Weldon said, "I haven't told anything yet," and then commenced to tell Odom about when the man came to his house and when he left. Weldon said it was about eight o'clock when the man came to his house, the best he could remember. Somebody came there and hollered him out, and he went out in the yard, and some fellow said, "Oh, yes, G— d— you, we got you right where we want you now," and hit him with something and knocked him down, and Weldon said a fight then commenced. They went around and around, and when he (Weldon) came to himself, or got away, he made for the kitchen door, and there was one man running west of the house and one running east, the one north of the house running east and the one on the west going south, and he (Weldon) got in his house, grabbed his gun, and through excitement and scare, cocked it, pulled the trigger, and it went off in the house. Then he went out of the door and out in the yard and

shot it. It was further shown that Weldon had no land in cultivation on the place on which he had lived for the last ten or twelve years.

Weldon testified that on Thursday, when he and Jones left the home of Yates together and went to Weldon's house, Jones had some whiskey, which they drank on the way to Weldon's house. Weldon had whiskey at his home, and, after he and Jones got to Weldon's, they continued their drinking until late in the afternoon, when Jones left, taking a trail in a westerly direction across the mountain. Weldon's testimony shows that, after Jones left his home late in the afternoon, he (Weldon) became very drunk, and lay down across his bed and went to sleep about five or six o'clock in the afternoon; that, about eight or nine o'clock, some one aroused him, calling him from his west yard gate, from which the trail leads that Jones had taken in the late afternoon. He was in a drunken stupor, but got up and went to the gate. He went through this gate and approached a man who was standing there, but whom he didn't know; that the man struck him across the head and knocked him down, rendering him completely insensible. The next thing he knew he was getting up off of a man; that, as he arose, he saw two other persons, one in his yard and the other to the east and on the outside of his yard. He faintly remembered that he went into the northwest door of his home to get his shotgun, thinking that he was being mobbed and that his home was being assaulted. He heard some noise in his house as he went in. He got his shotgun, and went out to his south door, and, as he started out of the room, both barrels of his gun were discharged, shooting holes in the wall. He reloaded his gun and went out of the house and around the east end of it, and, as he approached the northwest corner, he saw some one dodging behind his smokehouse; that he fired at the person thus dodging, and struck the corner of the smokehouse with a large number of squirrel-shot. He faintly remembered that, after firing the shot at the

corner of his smokehouse, the thought came to him that he would have to get help. He then began hollering, left his home, and went to Albert Yates,' about a mile away.

There was testimony corroborating the testimony of appellant as to the showing that there were squirrel-shots through the corner of the smokehouse and that a hole was blown through the wall of the house at the door and in the ceiling of the porch where the shot had lodged. It was shown on cross-examination of Yates that, when Weldon came to his house on Thursday night after the shooting, he was drinking. Yates was asked if Weldon was practically a wild man at the time, and answered, "Yes, he was drinking." The witness, in answer to further questions, stated that he gave down and went to sleep on the side of the road. On cross-examination of appellant, he stated, among other things, that he didn't get a light that night to see who the man was on whom he was lying when he came to himself. The shock came over him, and he left. He didn't know that the man was hurt. He could feel the blood on himself later. He changed his clothes over in the hills about two miles from his home, a couple of miles from where he left the gun. He threw his clothes under a brush-pile—they were bloody. He got a change of clothing before he left home. He knew that he had not cut the man or shot him. He could not have done anything to him. There was no chance for him to do anything.

Mrs. Jones testified for the State, in rebuttal, that she never knew of her husband drinking whiskey—never smelled it on his breath. Yates also testified that he never knew of Jones drinking. It was shown that there was a distillery within a mile and a quarter or a mile and a half of Bob Weldon's house. His house was the nearest house to the still.

The above are the salient facts developed at the trial of the cause.

The appellant prayed the court to instruct the jury to the effect that the mere proof of malicious killing of

the deceased by the appellant would not of itself constitute murder in the first degree; that it must appear from the evidence, beyond a reasonable doubt, that the slaying was done by the appellant of malice aforethought and after deliberation and premeditation; that, although the jury might find that appellant slew the deceased with a deadly weapon, still that would not justify the jury in returning a verdict of guilty of murder in the first degree, unless they believed from the testimony, beyond a reasonable doubt, that the appellant possessed sufficient mind at the time to, and did, deliberate and premeditate upon such act, and thereafter maliciously slew the deceased. The court refused these prayers, to which appellant duly excepted.

Among other instructions the court gave instruction No. 30, in part, as follows: "You may consider the testimony of liquor law violations also, if you find the defendant killed the deceased, as tending to shed whatever light it may shed, if it sheds any, upon the motive that prompted the defendant to kill the deceased, but consider this testimony for no other purpose." The appellant duly objected and excepted to the giving of this instruction.

1. The appellant testified that he did not kill Jones; that, on the night of the killing, he was aroused by some one calling him; that he was stupidly drunk, but, in response to the voice, he went to the northeast gate, and, when he got out of it, "some one cracked him over the head," rendering him insensible. When he came to himself he was getting up off of a man. He saw two men leaving, ran into the house and got his shotgun, and, in his excitement and for his protection, fired the same. There was testimony corroborating the testimony of appellant to the effect that a shotgun was fired in appellant's house and into the corner of his smokehouse, and there was also testimony to the effect that there were no evidences of a struggle where Jones' body was found. There was testimony also that there was some human

hair found on the gate-post which corresponded to the color of appellant's hair, and there was blood on the gate-post.

The appellant's contention therefore is that Jones was killed by other parties and placed in the position in which he was found on appellant's premises, and that appellant was knocked senseless, and placed on Jones' dead body. The appellant further contends that, even if the evidence were sufficient to prove that he killed Jones, there is no testimony to justify a verdict against him of murder in the first degree. On the other hand, it is the contention of the State that the circumstances established by the testimony are sufficient to prove that the appellant killed Jones by shooting him with a rifle or pistol and by cutting him with a knife, and that the jury was justified from the circumstances in finding that the killing of Jones by appellant was murder in the first degree.

The testimony was sufficient to justify the court in submitting to the jury the issue as to whether or not the appellant killed Jones and whether such killing was murder in the first degree. The court, in its instructions, correctly and clearly defined all the degrees of criminal homicide, and also correctly declared the law on justifible homicide. The court also fully and accurately instructed the jury on the issue as to whether or not the appellant, by reason of his intoxication, had sufficient mental capacity to deliberate and premeditate upon the act of killing Jones. The charge of the court on the law of criminal homicide, self-defense, presumption of innocence, reasonable doubt, credibility of witnesses, circumstantial evidence, and the effect of intoxication as a defense, was exceedingly comprehensive and accurate, and in conformity with many decisions of this court. Such of appellant's prayers for instructions as were correct were fully covered by instructions given by the court.

Learned counsel for appellant contends that the testimony for the State, at most, could only justify the jury in finding the appellant guilty of murder in the second degree; that the testimony showed nothing more than that the killing was done with a deadly weapon, from which the jury might infer malice, but that there was nothing in the testimony to warrant the jury in finding that the killing was done with premeditation and deliberation. When nothing more is shown than the mere fact that the killing was done with a deadly weapon, premeditation and deliberation will not be inferred or presumed from such fact alone. *McAdams* v. *State,* 25 Ark. 405; *Fitzpatrick* v. *State,* 37 Ark. 238; *Burris* v. *State,* 38 Ark. 221; *Greene* v. *State,* 51 Ark. 189; *Howard* v. *State,* 82 Ark. 102; *Ferguson* v. *State,* 92 Ark. 124. But there was far more shown here than the mere naked fact of the killing of Jones with a deadly weapon. The very manner in which the deadly weapons were used was sufficient to justify the jury in finding that whoever killed Jones used the weapons with a deliberate purpose to kill. Jones' body was perforated three times through the center with bullets from a pistol or rifle, and was also horribly mutilated with a knife. The manner, therefore, in which these deadly weapons were used tended to show that the death of Jones was the result of premeditation and deliberation.

In the case of *Howard* v. *State, supra,* Judge RIDDICK, speaking for the court, said: "But, though malice may be presumed, premeditation and deliberation are not presumed from the mere fact of a killing by the use of a deadly weapon, but must be shown by the manner of the killing and the circumstances under which it was done, or from other facts in evidence."

In 2 Brill's Encyclopedia, Criminal Law, ch. 19, § 644, it is said: "Premeditation and deliberation may be inferred as a matter of fact from the circumstances of the case, such as the character of the weapons used, the nature of the wounds inflicted, the acts, conduct and

language of the accused, and the like." See the many authorities cited in the note.

Now, the manner of the killing of Jones and the circumstances under which it was done, as disclosed by this record, fully warranted the jury in finding that the killing of Jones was murder in the first degree. The jury scouted, as well they might, the testimony and theory of appellant to the effect that Jones was killed by some one else and his dead body brought and placed where it was found, and that appellant, after being knocked insensible, was placed upon Jones' dead body. For it is reasonably certain, from the nature of the wounds on, and the great quantity of blood under and around, the body of Jones, that he was killed on or near the spot where his body was found. Not only the nature of the wounds inflicted, but likewise the acts and declarations of the appellant on the night of, and immediately after, the killing, and on the day following, as set forth in detail above, tended strongly to prove that he was the victim of those inescapable torments that usually come to one who is guilty of deliberate murder. Appellant told Yates that night that he had "left his troubles in the chip-yard," but it seems that they haunted him still, for, the next morning, when Yates returned with him to the spot, he pulled Jones' shirt bosom open and said, "By G—, I wish I knowed some way to get out of this." Appellant, as the jury might have found, lost his knife, and hid the gun with which the bloody deed was done; he feared the mob, and fled to the home of his friend Odom, and, while there, asked Odom, "How could you commit cold-blooded murder—with a knife?" On the night of, and immediately after, the killing, with blood still on his hands, arms and clothes, he exclaimed to Yates, "I can't hardly stand to smell this damn blood," and the next day he hid the bloody clothes under a brush-pile. The jury might have found that these circumstances were the manifestations and outcry of conscious guilt. This is a tendency not uncommon in those who

have deliberately committed murder, as shown by the greatest delineator of human character when he has Lady Macbeth to say:

"Out, damned spot! out I say! * * *Here's the smell of the blood still; all the perfumes of Arabia will not sweeten this little hand. Oh, oh, oh!"

Act fifth, sc. 1, Macbeth.

The jury were fully warranted in finding, from the circumstances above detailed, not only that appellant killed Jones, but that he did so with premeditation and deliberation.

2. The appellant also contends that the court erred in giving that part of instruction No. 30, set out above, telling the jury, in effect, that they might consider the testimony of liquor law violations as tending to shed whatever light it might shed, if any, on the motive that prompted the appellant to kill the deceased.

In *Sneed* v. *State,* 159 Ark. 65, we said: "While it is competent to prove the presence or absence of motive in determining the issue of guilt or innocence, and while such proof is always a cogent factor relative to that issue, yet, if the testimony be otherwise legally sufficient to prove guilt, a verdict of guilty cannot be set aside because of failure to prove a motive for the crime."

The testimony on the part of the State tending to show that Jones was a forest ranger whose duties required him to report violations of the liquor laws, and that the appellant was violating these laws, was competent and relevant on the issue as to whether or not appellant had a motive to kill Jones. The instruction complained of was predicated upon this testimony, and was so phrased as to leave the jury free to determine what weight they would give to it in considering whether or not appellant had a motive for the crime charged. The instruction was not on the weight of the evidence, and therefore did not invade the province of the jury. The instruction did not, as appellant's counsel contends, suggest that there was a motive for the killing, but only told

the jury that they might consider the testimony as tending to shed whatever light it might shed, if any, in determining whether there was a motive for the crime, and that it could be considered for no other purpose. The instruction in this form was not prejudicial.

The record presents no reversible error, and the judgment is therefore affirmed.

BROWN v. SOUTHERN GROCERY COMPANY.

Opinion delivered April 13, 1925.

1. ACCOUNT STATED—DEFINITION.—An account stated is an account balanced and rendered, with the debtor's assent to the balance, express or implied.
2. ACCOUNT STATED—FACTS STATED.—Where a cotton grower shipped 10 bales of cotton to his factor and received an advance thereon, separate statements from the factor showing the price received for each bale of cotton, the storage, insurance, commission and net proceeds of sale, not being intended as a final settlement, did not constitute an account stated.
3. FACTORS—RIGHT TO SELL ON OWNER'S FAILURE TO PUT UP MARGINS.—Where the market declined, and the owner of cotton on which a factor had made advances failed to put up sufficient margin to cover the decline in price, the factor had the right, acting in good faith and with reasonable discretion with regard to the reimbursement of himself and the interest of his principal, to sell the property after reasonable notice to the owner.
4. FACTORS—GOOD FAITH—EVIDENCE.—A chancellor's finding that a factor acted in good faith in selling his principal's cotton after the latter had failed to put up margin to cover advances, *held* not against the preponderance of the evidence.

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

STATEMENT OF FACTS.

This action was brought in the circuit court by the Southern Grocery Company against W. S. Brown to recover $702.35, alleged to be the balance of an account due the plaintiff by the defendant.

The suit was defended on the ground that the plaintiff was a cotton factor and had been guilty of bad faith in selling the cotton shipped to it by the defendant, and that it had also charged him an excessive amount for storage and insurance.

The record shows that the plaintiff was a cotton factor and wholesale grocer at Pine Bluff, Arkansas, and the defendant was engaged in farming in Monroe County, Arkansas. On December 13, 1919, Brown wrote to the Southern Grocery Company as follows:

"Gentlemen:

"Inclosed find B/L for 9 bales cotton which I shipped you on 12/11/19. Please send me check for $1,125, as I want to draw $125 a bale on it. As soon as this cotton arrives, please let me know what you can get for it, and let me know, and I will advise you whether to hold or sell it."

The cotton was duly received by the Southern Grocery Company, and, on December 16, 1919, it wrote to W. S. Brown at Brinkley, Arkansas, the following:

"Dear sir:

"We inclose check of $1,125 advance on nine bales of cotton which we have for your account."

On March 11, 1920, Brown shipped to the Southern Grocery Company another bale of cotton, and wrote the following:

"Gentlemen:

"Inclosed you will find B/L for one bale of nice white cotton. If you can get a good offer on this bale, let me know what it is, and I will tell you whether to sell it or hold a while longer."

On June 21, 1920, the Southern Grocery Company sold one of the bales of cotton for $238.36, and, after deducting commission and other charges, there was left a balance of $225.06. An account of sale was sent to Brown when it was made. In the fall of 1920 the Southern Grocery Company wrote to Brown that, on account of the serious decline in the cotton market, the banks

were calling on it for margins, and this forced it to call in turn on its customers. Brown was requested to send in $300 on the nine bales of cotton which he had previously shipped to it. On December 29, 1920, Brown wrote the Southern Grocery Company that he had had several letters from it in regard to his cotton, and that he had been trying to sell some new cotton in order to send the $300 to cover margin as requested. The letter also contained the following: "In the last letter you talked of selling it and applying to my account. About what can you get for it now?" The letter concluded by promising to remit the margin as requested as soon as he could make some collections.

Attached to the deposition of a bookkeeper of the plaintiff is a statement of account, showing a balance due on February 8, 1923, of $687.60. In it the Southern Grocery Company charged Brown with $1,125 and interest for three years, amounting to $212.25. Brown is given credit as follows: June 21, 1920, net proceeds of sale of one bale of cotton in the sum of $225.06; July 24, 1921, net proceeds of sale of one bale of cotton $26.62; July 30, 1921, net proceeds of sale of three bales of cotton $111.70; August 21, 1921, net proceeds of sale of one bale of cotton $24.54; September 9, 1921, net proceeds of sale of one bale of cotton $39.20, and January 31, 1922, net proceeds of sale of three bales of cotton, $158.58.

According to the evidence for the plaintiff, as each bale of cotton was sold an account of sale was sent to the defendant, showing the price for which it was sold and the insurance, storage, and commission charged.

J. W. Wilkins, president and general manager of the Southern Grocery Company, was a witness for it. According to his testimony, the first he knew that Brown was going to ship any cotton to his company was when the letter inclosing the bill of lading for the nine bales of cotton was received. On receipt of the cotton the plaintiff advanced to Brown the sum of $1,125 on December 16, 1919. The amount charged for insurance, stor-

age, and commission was the usual sum charged at that time by cotton factors. In 1920 there was a serious decline in the price of cotton, and the Southern Grocery Company had on hand three or four thousand bales of cotton of about the same staple as that shipped to it by Brown. The company suffered a considerable loss in selling the cotton, and, during the year 1920, tried to make the best sale of it possible in the principal markets of the United States. It also tried to sell some of it in Canada. The cotton of Brown was finally sold in good faith for the best price obtainable, after Brown refused to put up any more margin on it. No one anticipated the heavy decline in the price of cotton which occurred in 1920 and 1921.

The testimony of J. W. Wilkins was corroborated by that of his son, W. J. Wilkins, who was the treasurer of the company. According to his testimony, the account of sales accurately showed the weight of each bale, the price received, the charges for storing, insurance, and commission, and the net proceeds. The charges were the usual charges made at that time by cotton factors, and the sales were made in good faith after Brown had refused to put up any more margin on the cotton, and because cotton kept steadily declining. No one anticipated that the price of cotton would go as low as it did in 1920. There was no market for this class of cotton in 1920 and 1921.

W. H. Kennedy, another cotton factor, corroborated their testimony as to the reasonableness of the storage, insurance and commission charges of the plaintiff, and to the further fact that there was a serious and unexpected decline in the price of cotton during the year 1920. He further stated that there was no market for the class of cotton in controversy during the year 1920.

W. S. Brown was a witness for himself. According to his testimony, when he shipped the nine bales of cotton to the Southern Grocery Company, his instructions were as follows: "As soon as this cotton arrives, let me

know what you can get for it, and I will advise whether to hold or sell it." At that time Brown could have got forty-five cents per pound for his cotton at Brinkley, Arkansas. After that he called the plaintiff over the telephone and told it to let him know what it could get for his cotton. Some one in the office of the plaintiff answered the telephone, and told him that the cotton would not be sold until he was advised what he could get for the cotton and would authorize them to sell it. Brown told them he would instruct them whether or not he wanted to sell it for the price reported. On January 23, 1920, Brown wrote to the plaintiff the following:

"I called you over the telephone on 16th and asked you what you could get for my nine bales of cotton which I shipped you on December 11, 1919, and you promised me you would let me know sure not later than January 19, and up to date I have not heard a word from you. I want to know, because I have about 15 bales more and have had an offer on them here, and I wanted to see if it would pay me to ship them to you or sell them here. Please let me know what you can get for it at once."

Brown admitted that he was to pay 6 per cent. interest on the advance made to him by the plaintiff, but said that they chose the date at which cotton was selling for the lowest price to sell his cotton.

The case was transferred to the chancery court on the motion of the defendant, and tried there by consent of parties. The chancellor found the issues in favor of the plaintiff, and, from a decree in its favor, the defendant has duly prosecuted an appeal to this court.

Bogle & Sharp, for appellant.

W. T. Wooldridge, and *Lee & Moore*, for appellee.

HART, J., (after stating the facts). It is first sought to uphold the decree on the theory that the account of sales sent by the plaintiff to the defendant had become an account stated.

On this point the record shows that an account of sale for each bale of cotton was sent by the plaintiff to the

defendant, and the statement showed the price received for the cotton, the storage, insurance, and commission of the plaintiff, and the net proceeds of sale. These facts did not constitute a cause of action on an account stated. An account stated is an account balanced and rendered, with an assent to the balance, express or implied. Ten bales of cotton were shipped by Brown to the Southern Grocery Company to be sold by it for him, and an advance of $1,125 was made to him on the cotton. The account does not appear to have been intended as a final adjustment and settlement between the parties, and the facts do not show an agreement, express or implied, that it should be so regarded. *Glasscock* v. *Rosengrant*, 55 Ark. 376.

When Brown shipped the nine bales of cotton to the Southern Grocery Company on the 11th day of December, 1919, he told it that he wanted to draw $125 a bale on it. The letter also advised the plaintiff to let him know what it could get for the cotton, and he would advise it whether to hold or sell it. On the 23rd day of January, 1920, Brown wrote the plaintiff that he had called it over the telephone on December 16, 1919, and asked it what he could get for his nine bales of cotton, and that the plaintiff promised to let him know not later than January 19, 1920. He reminded the plaintiff that he had not heard from it, and wanted to know, because he had fifteen bales more that he wanted to sell. The plaintiff sold one bale of cotton for $228.36, and, on June 21, 1920, it sent the defendant an account of sales showing the net proceeds, $225.06. No objection was made to this sale. During the fall of 1920 there was a great decline in the price of cotton, and the plaintiff wrote several letters to the defendant demanding that he put up an additional margin of $300 to cover the advance made by the plaintiff to him. On December 29, 1920, Brown wrote the plaintiff that he would send the $300 as soon as he could sell some of his new cotton. In the letter he asked plaintiff what it could get for his cotton, and referred to the fact that, in its

last letter, the plaintiff had talked of selling his cotton and applying the proceeds to his account because he had failed to put up the additional margin requested by it. The plaintiff, in several letters, notified the defendant that it would sell the cotton unless an additional margin was put up to cover the fall in the price of cotton.

Under these circumstances the plaintiff had a right to sell the cotton in the usual course of trade to reimburse it for the advance already made by it, and was only bound to exercise good faith towards the defendant in selling the cotton.

The general rule is that, under circumstances of this kind, the factor has a right, acting in good faith, and with reasonable discretion, with regard both to the reimbursement of himself and the interest of his principal, to sell the property after reasonable notice to the owner. *Davis* v. *Kobe,* 36 Minn. 214; 1 Am. St. Rep. 663; *Phillips* v. *Scott,* 43 Mo. 86; 97 Am. Dec. 369; *M. M. Walker Co.* v. *Dubuque Fruit & Produce Co.,* 113 Iowa 428; 53 L. R. A. 775; *Blot* v. *Boiceau,* 3 N. Y. 78; Am. Dec., 345, and casenote in 58 Am. Dec., p. 160; 11 R. C. L. § 19, p. 767, and 25 C. J., p. 360. See also *Burke* v. *Napoleon Hill Cotton Co.,* 134 Ark. 580, and *Wynne, Love & Co.* v. *Bunch,* 157 Ark. 395.

If the defendant wished to prevent the plaintiff from selling the cotton to discharge the amounts advanced by it, he should have put up the margin demanded by the plaintiff, and, having failed, it would only be required to exercise good faith in the sale of the cotton. According to the testimony of the defendant, the plaintiff sold the cotton on the dates on which the price was the lowest. According to the evidence for the plaintiff, there was no market at all in the latter part of 1920 for the class of cotton in controversy. The plaintiff lost a considerable amount of money on this class of cotton because it was unable to sell it. While the account of sales does not constitute an account stated, for the reason given above, still it is a fact which tends to prove the good faith of the plaintiff in selling the cotton. The cotton was sold on

various dates in the years 1920 and 1921, and the last three bales were sold in the first part of 1922. On each date on which the cotton was sold the plaintiff sent a statement to the defendant showing the price for which it was sold, and the commission, storage and insurance charges. The defendant was thus advised of the price for which the cotton was sold and the net proceeds which he was to receive. He made no objection to any sale reported to him, and good faith on his part would seem to require that he should have objected to the sale of the cotton.

In any event, the sending of the statement by the plaintiff tended to show its good faith in the matter. The extreme decline in the price of the cotton seems to have resulted disastrously to every one, and certainly was not anticipated by the plaintiff. The record shows that it had three or four thousand bales of cotton of this same class or grade which it was unable to sell, and on which it suffered considerable loss. While the low price for which the cotton was sold is evidence of bad faith on the part of the plaintiff in selling the cotton, still it cannot be said that, when all the surrounding circumstances are considered along with the evidence for the plaintiff, the finding of the chancellor in favor of the plaintiff is against the weight of the evidence.

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

It follows that the decree will be affirmed.

DESHA v. ERWIN.

Opinion delivered April 13, 1925.

1. NAVIGABLE WATERS—EFFECT OF ACCRETION.—A riparian owner of land bounded by a navigable stream, the banks of which are changed by gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary.
2. NAVIGABLE WATERS—AVULSION.—Where a navigable stream suddenly and perceptibly abandons its old channel, the boundary line of a riparian owner is not changed, but remains at the former line.
3. DEEDS—DESCRIPTION WITH REFERENCE TO PUBLIC SURVEYS.—Deeds conveying land by sections and quarter sections are to be construed with reference to the public surveys.
4. DEEDS—CONSTRUCTION.—In the construction of deeds, the common law rule is that effect will be given to the intention of the parties as drawn from the language of the deed, if consistent with the rules of law.
5. DEEDS—GENERAL AND PARTICULAR DESCRIPTION.—A general description of the land intended to be conveyed, *held* not inconsistent with a particular description given where it appears that the general description was inserted to aid in the location of the land conveyed by the particular description.

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

STATEMENT OF FACTS.

Ben Desha instituted this action in the circuit court against Ida L. Erwin and R. L. Flinn to recover a tract of land in Independence County, Arkansas, of which he claims to be the owner.

The suit was defended on the ground that the land in question was an accretion to land owned by the defendants, and on the further ground that the plaintiff had no title to said land.

The record shows that originally two islands were formed south of the main channel of White River, and south and southwest of the town of Batesville, in Independence County, Arkansas. Both of these islands were formed by the waters of White River, and were separated from each other by a slough which ran into White River. One of these islands was known as

Little Island and the other as Big Island. Big Island was south of the city of Batesville and east and southeast of Little Island. In 1868 or 1869 the main channel of White River changed and cut through the center of Little Island and the northern part of Big Island. The land in controversy comprised 23.68 acres in the southeast fractional quarter of section 17 and four acres in lot 3 in section 20, and immediately south of the tract first described. Both of these tracts are in township 13 north, range 6 west, and in the northern part of Big Island as it was before the change in the main channel of White River in 1868 and 1869, as above described.

Ben Desha acquired title to the land in Big Island immediately south of the main channel of White River as it now runs, and also claims to have acquired title to the land in controversy, which is north of the river, by the same deed.

It is the claim of the defendants that the land in controversy was formed as an accretion to their land after the change of the channel in White River in 1868 or 1869. They also claim that the plaintiff acquired no title to the land in controversy, and therefore cannot maintain this action.

The evidence on this branch of the case will be set out and discussed under an appropriate heading in the opinion.

The circuit court directed a verdict in favor of the defendants, and from the judgment rendered the plaintiff has duly prosecuted an appeal to this court.

McCaleb & McCaleb and *Cole Poindexter,* for appellant.

Samuel M. Casey and *Ernest Neill,* for appellees.

HART, J., (after stating the facts). It is sought to uphold the judgment on the ground that the land in controversy formed as an accretion to the land belonging to the defendants and their grantors, and that the plaintiff, having no title to it, should not be allowed to maintain this action.

On the part of the plaintiff, it is contended that the land was originally a part of Big Island, and was cut off from the other land on Big Island by a sudden change in the main channel of White River in 1868 or 1869. White River is a navigable stream, and it is the established rule that a riparian owner of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased, he is not accountable for the gain, and, if it is diminished, he has no recourse for the loss. But, where a stream suddenly and perceptibly abandons its old channel, the title is not affected, and the boundary remains at the former line. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, and cases cited; *Wallace* v. *Driver,* 61 Ark. 429; and *Yutterman* v. *Grier,* 112 Ark. 366.

The undisputed evidence shows that the northern part of both Little Island and Big Island was south of the main channel of White River. It also shows that a sudden and unexpected overflow of White River caused its main channel to cut through the central part of Little Island and also the northwestern part of Big Island. Since that time the main channel of White River has flowed through this cutoff. The witnesses are not certain whether the change occurred in 1868 or 1869, but they are certain that the change was sudden, and resulted from an unprecedented overflow of White River. They say that a part of the northwest part of Big Island was left north of the river when the sudden change in its channel occurred, and that the land in question is either that part of Big Island which was left after the sudden change in the channel of White River, or that it is this land together with the accretion formed on its southern boundary. The northern part of this land comprises 23.68 acres, and is situated in the southeast fractional quarter of section 17, and immediately south and contiguous to this is the four-acre tract, which is situated south of the first-mentioned tract and immediately north of White River, in section 20.

As we have already seen, when the change in the stream is sudden and at once a new channel is formed, the title to the land remains the same. This sudden and rapid change of channel is termed in law an avulsion. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the main channel. On the other hand, an avulsion has no effect on the boundary, but leaves it in the center of the old channel. If we are correct in saying that the undisputed evidence shows that the land in question was formed by avulsion, the title to it remains the same as if no avulsion had occurred.

The circuit court seems to have had this view of the land and the law, but directed a verdict for the defendants on the theory that the land in controversy was not embraced within the description of the land in the deed under which the plaintiff claims title. In other words, in his opinion the whole case turned upon the construction of the deed from Theodore Maxfield and Sallie A. Maxfield to Ben Desha, executed on the 13th day of January, 1903. That part of the description in the deed just referred to which is material to this case is as follows:

"The southeast fractional quarter section seventeen (17) (in island) containing 42.72 acres, more or less; lot three (3) of the northeast quarter of section twenty (20), in island, containing 31.49 acres, more or less." * * * "All of said lands being in township thirteen (13) north, range six (6) west, it being the intention of the grantors herein to convey all of the lands on what is known as the Big Island devised to the said Sallie A. Maxfield by her father, John F. Allen, by last will and testament."

The will of John F. Allen was signed by him on the 23rd day of December, 1898. The will recites that the testator wills and bequeaths to Sarah, wife of Theodore Maxfield, the following described lands, to-wit:

"Also to Sarah, S. E. fraction of section 17, 13, 6; lots 3 and 4 of N. E. section 20, 13, 6, and the west part of N. W. fraction 21, 13, 6, on Big Island, Ind. Co."

Other land is given to Sarah A. Maxfield, a daughter of the testator, by the will, the description of which is omitted because it has no bearing on this suit.

The record also shows that John F. Allen acquired title by deed from Edwin T. Burr on the 23rd day of September, 1860, to the following land:

"The northwest fra'l quarter of section twenty, in township thirteen north, of range six west, containing one hundred and one 36/100 acres, more or less; and the southeast fr'l. part of the southeast fractional quarter of fractional section seventeen, of township thirteen north, of range six west, all on the Big Island, in White River, west of Batesville; and also the lots No. one, two and ten and eleven, of block No. four of the town of Batesville."

Thus it will be seen that John F. Allen had title to all the land comprising Big Island at the time of the sudden and visible change in the channel of White River in 1868 or 1869. The will of John F. Allen was not executed until after the avulsion in 1868 or 1869. Allen gave to his daughter, Sarah A. or Sallie A. Maxfield, the southeast fractional part of 17 and lots 3 and 4 of the northeast section of 20 on Big Island, in Independence County. This description embraced the land in controversy. Now in the deed from Sarah A. Maxfield and Theodore Maxfield, her husband, to Ben Desha the description is as follows: Southeast fractional quarter of section 17 (in island), and lot 3 of the northeast quarter of section 20 in island.

The land in controversy is included in this description, and, when land is described in this manner, by sections and quarter sections, we understand the language is to be construed with reference to the public surveys of the United States. As a general thing, lands in this State are described in deeds according to the subdivisions of the government surveys. The general rule is that the parties intend that these surveys shall be resorted to for the purpose of determining the location and quantity of the lands conveyed. It is also true that

the descriptions according to the government surveys are to ascertain the boundaries, and are the usual means resorted to to find the location and quantity of the land conveyed.

The circuit court proceeded upon the theory that the description was changed by the concluding part of the granting clause of the deed as follows:

"It being the intention of the grantors herein to convey all of the lands on what is known as the Big Island devised to the said Sallie A. Maxfield by her father, John F. Allen, by last will and testament."

We cannot agree with the circuit court in this conclusion. It is well settled in this State that the intention of a written instrument, gathered from all that is within its four corners, ordinarily controls, and, in the construction of deeds, the common-law rule is that effect will be given to the intention of the parties as drawn from the language of the deed, if consistent with the rules of law. *Doe* v. *Porter,* 3 Ark 18; *Beardsley* v. *Nashville,* 64 Ark. 240; *Abbott* v. *Parker,* 103 Ark. 425; and *Cummins Bros.* v. *Subiaco Coal Co.,* 150 Ark. 187.

Tested by this rule, we do not think the two descriptions of the land conveyed are inconsistent with each other, and we are of the opinion that the general description quoted above in the granting clause of the deed was intended as an aid in locating the land, and did not intend to restrict the quantity of land conveyed to a lesser quantity than that contained in the particular description according to the subdivisions of the government survey. The description according to the government survey could alone be resorted to to determine the quantity and location of the land. The general description was not intended to restrict the quantity of land conveyed, but was rather explanatory of the situation of the land and of the parties in relation to it and to each other. The description according to the subdivisions of the government survey showed the precise location and bounds of the land, and reflects the real intention of the parties.

There is nothing in the language of the deed whatever which would carry with it the idea that the general description was inserted for the purpose of curtailing and controlling the particular and definite description of the land.

Therefore we are of the opinion that the court erred in directing a verdict for the defendants.

The views we have expressed call for a reversal of the judgment, and the cause will be remanded for a new trial.

WISCONSIN & ARKANSAS LUMBER COMPANY *v.* SMITH.

Opinion delivered April 13, 1925.

1. MASTER AND SERVANT—SERVANT'S KNOWLEDGE OF RISK.—Where a servant was properly shown how to unclog ripsaws by using a stick, he will be deemed to have known of the dangers arising therefrom.
2. MASTER AND SERVANT—NEGLIGENCE OF SERVANT.—Where a foreman showed a servant how to unclog ripsaws by using a stick, an injury to the servant arising from unclogging was necessarily the result of his own carelessness.

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

STATEMENT OF FACTS.

This action was brought by F. W. Smith against the Wisconsin & Arkansas Lumber Company to recover damages for injuries sustained by him while engaged in feeding and operating a ripsaw machine in the defendant's mill.

F. W. Smith was a witness for himself. According to his testimony, he was twenty-one years of age on the 5th day of September, 1923, the day on which he was injured. He was injured on the third day after he commenced to work for the company, and was hurt while unclogging a ripsaw which he had been feeding. He was engaged in feeding ceiling about 18 inches long through the ripsaws, and it would cut the tongue and groove off of the piece of

ceiling so that it could be used for crates. The two saws in question were spaced three inches apart on the same shaft or axle, so that, when the pieces of ceiling were pushed through the space between the saws, the tongue and groove of the ceiling were cut off at the same time. The shaft on which the saws were fastened was underneath the top of a table, and the saws came up through a hole or groove in the top of the table. The section of the table through which the saws came up was a piece of timber bolted to the other part of the table top. The part of the table through which the saws ran was a piece of timber eight or ten inches wide, twelve or fifteen inches long, and was fastened to the table with bolts. While operating the ripsaws, the plaintiff stood in front of the saws, and there was a guard between him and the saws, made of pieces of 2 x 4 oak timber. The whole top of the table could be raised up, but it would take two men to raise it. When the section of the top of the table through which the saws came up was raised and let down while the saws were in motion, there was a tendency to cut off some of the board and enlarge the hole through which the saw came. When the saws were engaged in cutting the tongue and the groove off of the pieces of ceiling, the splinters and cut-off pieces would fasten or wedge themselves in the space between the saws and the board, so that the space would become clogged every twenty minutes. The foreman of the plaintiff told him to unclog the ripsaws by pushing out the splinters and pieces of wood with a stick. The foreman took a stick and showed him how to push out the splinters, before the plaintiff commenced to operate the ripsaws. He had seen the foreman take a stick and push out the splinters two or three times on the day that he was hurt, and he had punched them out himself for about twenty-five or thirty times before he was hurt. It usually took him two or three minutes to push or punch out the splinters. He was hurt about 11:25 o'clock in the morning, and at the time was engaged in pushing out the splinters with a pine

stick about twelve or fourteen inches long. He described the way the accident happened as follows:

"Q. What were you doing and what was it that caused your finger to be pulled into the saw? A. I was punching those splinters out with a stick, and the stick caught in the saw and it jerked my hand in there. Q. How long a stick did you have? A. About ten or twelve inches. Q. Did they have one that they kept there all the time? A. No sir, you just picked up one."

Again he stated that the left-hand saw choked with splinters, and that he was standing to the left of it while it was running, engaged in pushing out the splinters, when the stick that he was using got caught in the saw and jerked his hand down to it. When his hand came in contact with the running saw, the middle finger of his left hand was cut off at the second joint. His little finger and the one next to it were not cut.

The evidence for the defendant shows that the plaintiff was engaged in pulling the splinters out from the saw with his fingers at the time he was injured. That is, another servant of the defendant testified that he was working near the plaintiff, and, just about the fraction of a minute before he got hurt, he saw him pulling splinters out of the saw with his fingers, and that he did not have a stick in his hand. This servant walked about fifteen feet away, and did not see the plaintiff at the precise moment he was injured.

From a verdict and judgment in favor of the plaintiff the defendant has duly prosecuted an appeal to this court.

Buzbee, Pugh & Harrison, for appellant.

D. D. Glover and *W. R. Donham,* for appellee.

HART, J., (after stating the facts). The main question in the case is, was the defendant guilty of any negligence which caused the injury to the plaintiff?

The plaintiff's claim is that he was young and inexperienced, and that the machine was dangerous. He was injured on the third day after he commenced to work, and claims that he was doing the work as he had been

directed to do by his foreman. He was feeding pieces of ceiling through two ripsaws placed three inches apart. As the pieces of ceiling were pushed through the spaces between the ripsaws, the saws would cut off the tongue and groove of the piece of ceiling at the same time. The saws came up through holes in the top of the table, and the splinters which were cut off of the pieces of ceiling would accumulate and clog the saws about every twenty minutes. The foreman showed the plaintiff how to push the accumulated splinters away while the saws were runing, and thereby unclog them. He said that, while doing this with a piece of pine stick about twelve inches long, the stick caught in the saw and jerked his hand down to the saw and cut off a piece of his middle finger.

Thus it will be seen that, by the plaintiff's own testimony, he was shown how to do the work in question, and it is difficult to see what additional warning the defendant could have given which would in any manner have helped the plaintiff to avoid being hurt while unclogging the ripsaws. The plaintiff had just arrived at full age, and his testimony shows him to be a young man of fair intelligence. It is unnecessary to discuss the point made as to the groove having been cut larger than necessary by letting the table top up and down. The size of the groove had nothing whatever to do with the injury. The proximate cause of the plaintiff's injury was allowing his hand to be drawn against the revolving saw while engaged in pushing the accumulated splinters through the groove so that the saw would become unclogged. The plaintiff's own testimony shows that his injury was the result of an accident which could have been avoided by ordinary care on his part. As we have just seen, his foreman had shown him how to take a stick and push away the accumulated splinters. While he does say that no particular kind of stick was furnished him for that purpose, he testified that the stick he was using was ten or twelve inches long, and was not even broken while he was pushing the splinters away. It is difficult to see how the stick that he was using could have become fastened in the saws and

have jerked his finger down to the saw, if he had been exercising ordinary care in doing his work. After his foreman had shown him how to unclog the ripsaws by the use of a stick, he must be deemed to have known and to have fully appreciated the danger arising therefrom, and we fail to discover any testimony tending to show any negligence on the part of the defendant. The case is within the principles of law decided in *Fordyce Lumber Co.* v. *Lynn,* 108 Ark. 377. His foreman having shown him how to unclog the ripsaws, by pushing away with a stick the particles of wood which accumulated, it must be said that the method of doing the work was under the plaintiff's own control and that the accident was the result of his own carelessness.

It follows that the court erred in submitting the negligence of the defendant to the jury, and, for that error, the judgment will be reversed, and, inasmuch as the cause of action appears to have been fully developed, it will be dismissed here.

STATE *v.* CISSNA.

Opinion delivered April 13, 1925.

1. COURTS—EFFECT OF DECISION OF FEDERAL COURT ON LAND TITLES.—A decision of the federal courts on a question involving the title to land claimed by the State, while not binding on this court in a similar case, is highly presuasive.
2. EVIDENCE—JUDICIAL NOTICE.—It is a matter of common knowledge that islands in the Mississippi River are subject to overflow.
3. LEVEES—TITLE TO LANDS OF STATE WITHIN LEVEE DISTRICT.—Acts 1893, pp. 24, 172, donating all lands of the State within the limits of the St. Francis Levee District to that district, *held* to extend to the middle of the Mississipi River, and to include all islands within such territory.

Appeal from Crittenden Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

J. S. Utley, Attorney General; *Coleman, Robinson & House* and *R. G. Brown,* of counsel for appellant.

Ewing, King & King, and *S. V. Neely,* for appellee.

SMITH, J. It was alleged in the complaint filed on behalf of the State of Arkansas that the State owned certain lands described as fractional parts of sections 28, 32, 33, and 34, township 10 north, range 10 east, and of fractional sections 4 and 5, township 9 north, range 10 east, lying partly in Mississippi County and partly in Crittenden County. These lands collectively are referred to in the complaint as comprising Dean's Island, and, for convenience in referring to them, that description will be employed in this opinion.

It was alleged that defendant had, without right, entered upon these lands and cut a large quantity of valuable timber, and was about to cut more. There was a prayer that defendant be enjoined from cutting timber and that he be required to account and pay for the timber already cut.

A demurrer to this complaint was filed and sustained, it being adjudged by the court below that the State had previously granted the lands described to the St. Francis Levee District, and this appeal is from that decree.

There is quite an interesting discussion in the briefs of counsel as to the meaning and effect of the allegations of the complaint. On behalf of the State the insistence is that the complaint alleges that the land described was an island in place in the Mississippi River at the time of the admission of the State into the Union and of the adoption of our present Constitution, and that the land continued to be and was in fact an island at the time of the formation of the St. Francis Levee District by the special act of the General Assembly of 1893. On behalf of appellee it is insisted that the complaint alleges that the lands involved in this litigation were not an island, but were in fact lands forming the right bank of the Mississippi River at the time the St. Francis Levee District was created. We pretermit a discussion of this question, and treat the complaint as alleging that the land in ques-

tion was an island in the Mississippi River, situated partly in Crittenden County and partly in Mississippi County, at the time of the creation of the St. Francis Levee District by the General Assembly of 1893.

Giving the complaint this construction, it becomes necessary to construe two special acts passed by the General Assembly of 1893. The first of these acts, which became a law February 15, 1893, created the levee district and defined its boundaries. Section 1 of this act, which defined the boundaries of the levee district, was amended by the act of the same session of the General Assembly, approved March 28, 1893, but the amendment is unimportant in the consideration of the question presented for decision. The second act became a law March 29, 1893 (Acts 1893, p. 172), and, by its provisions, certain lands were granted by the State to the levee district.

What were the boundaries of the district and what lands were granted to it? The answer to this question is decisive of the question presented on this appeal.

Section 1 of the act of February 15, 1893 (Acts 1893, p. 24), defines the boundaries of the levee district as follows: "That all that part of area of this State known as a part of the St. Francis basin, and more particularly described as follows, to-wit: Beginning on the left bank of the 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, thence west with said 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."

The second act was entitled "An act to donate to the St. Francis Levee District all the lands of this State within the limits of said levee district, and for other purposes." By this act it was provided that, for the purpose of assisting the citizens of the State to build and maintain a levee along the St. Francis front, and in consideration of the general good of the State, "that all the lands of this State lying within said levee district, except the 16th section school lands, and all the right or interest the State has or may have within the next five years, by reason of forfeiture for taxes or to any lands within said levee district, except said 16th section school lands, is hereby conveyed to said levee district," under certain restrictions and limitations, which related to the classification and disposition thereof.

It thus appears that, after creating the levee district, the State granted to it, in aid of the proposed improvement, all of the lands in the district belonging to the State except 16th section school lands.

The grant was in the broadest terms, and operated as a present grant by the State of all State lands lying in the levee district except only 16th section school lands. This grant would, of course, include islands in the Mississippi River belonging to the State, if such lands were within the boundaries of the levee district and were not school lands. It therefore remains only to determine whether Dean's Island lies within the St. Francis Levee District.

The question now under consideration was expressly decided by the District Court of the United States for the Eastern District of Arkansas, and by the Circuit Court of Appeals for the Eighth Circuit, upon an appeal from the decision of the district court, in the case of *Lightfoot* v. *Williamson,* 282 Fed. 592. The parties to that litigation claimed an island in the Mississippi River opposite Mississippi County. The plaintiff claimed under a deed from the State made pursuant to the act of March 21, 1917 (Acts 1917, p. 1468), which appears as §§ 6796 to 6802, both inclusive, C. & M. Digest. By these

sections it was declared that islands which had formed in the navigable rivers of the State subsequent to the admission of the State were the property of the State, and were subject to sale and disposition in the manner provided by the act. The plaintiff in that case had obtained a deed from the State Land Commissioner pursuant to this act. The defendant claimed under a quitclaim deed from the St. Francis Levee District, and it was alleged that the levee district had acquired the title under the acts of 1893, above referred to.

After finding that the boundaries of the levee district was the decisive question in the case, the court said: "The east meander line of the levee district is 'along said right bank of the Mississippi River.' With this as the meander line, how far did the grant extend? The act of March 21, 1893, said the grant should contain 'all that area which has heretofore at any time, either directly or indirectly, overflowed by water from the Mississippi River.' The grant from the State to the levee district, according to all the authorities, extended to the middle of the Mississippi River, the eastern boundary of Mississippi County, the levee district, and the State of Arkansas."

Upon this construction the court held that the State had parted with its title by its grant to the levee district.

This adjudication is not, of course, binding on us, but it is highly persuasive, as the exact question presented here was decided there.

It is a matter of common knowledge that the islands in the Mississippi River are subject to overflow. The General Assembly defined the northern and southern boundaries of the levee district, and made the Mississippi River the eastern boundary of the levee district, and, by doing this, we think it was the purpose of the General Assembly to make the eastern boundary of the State coincident with that of the levee district between the southern point, where the boundary of the levee district begins, and the point where the northern boundary line ended, and, if this be true, the State's title to islands in

the Mississippi River which were not 16th section school lands lying between the southern and the northern boundaries of the levee district passed to the levee district by the donation act of 1893, *supra*.

The demurrer to the complaint was therefore properly sustained, and the decree of the chancery court is affirmed.

UNITED ORDER OF GOOD SAMARITANS *v.* BROOKS.

Opinion delivered April 13, 1925.

1. JUDGMENT—VALIDITY OF DEFAULT JUDGMENT.—A judgment by default rendered after the time fixed by statute (Crawford & Moses' Dig., §6092) for answer *held* not void because the summons stated that the complaint would be taken as confessed unless answered within 20 days (instead of 30 days) from service of summons, where defendant failed to plead within 30 days.
2. JUDGMENT—DEFAULT JUDGMENT—MERITORIOUS DEFENSE.—A motion to vacate a judgment by default must allege a meritorious defense to the cause of action.

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

J. R. Booker, for appellant.

T. J. Moher, for appellee.

SMITH, J. Appellant is a fraternal benefit society, organized and doing business under the laws of this State, and was the defendant in a suit brought by appellee to recover on a benefit certificate which it had issued.

The suit was filed on October 12, 1923, and summons was served on the following day. This summons read that an answer was required of the defendant "within twenty days from the service of the summons," or the complaint will be taken as confessed.

The suit was brought to the January, 1924, term of the Arkansas Circuit Court, Southern District, and, on the 21st day of January, the cause was heard before a jury, and a verdict was rendered in favor of the plaintiff for the face of the benefit certificate, and judgment was pronounced accordingly. On the following day the

defendant appeared and filed a motion to set aside the judgment and to quash the service. This motion was overruled, and the defendant society has appealed.

There is no bill of exceptions in the case, and the sole question presented is whether the court should have vacated the judgment and quashed the summons.

Section 6092, C. & M. Digest, provides the method of service of process on fraternal benefit societies such as the appellant company is, and, by this section, it is provided that "no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of mailing the copy of such service to such society."

We think there was no violation of this statute in the rendition of the judgment appealed from. The recitals of the summons were not effective to abridge the length of time given to plead, but it could and did apprise the defendant of the pendency of the action, and could not be ignored because of the erroneous recital that the allegations of the complaint would be taken as confessed after twenty days. The law gave the defendant thirty days in which to plead, and it was not in default until the expiration of that time. But the law gave only thirty days for that purpose, and this time was not extended by the erroneous recital contained in the summons.

The defendant knew, when the summons was served, that its time could not be shortened to twenty days, because the statute required a service of thirty days, but the defendant must also have known that the service would be complete after thirty days, because the statute so provides.

The defendant had full thirty days in which to plead, but failed to avail itself of this right. As a matter of fact, the judgment was not rendered until the 88th day after the service of the summons. Moreover, the defendant did not allege that it had a meritorious defense to plaintiff's cause of action. *Sovereign Camp Woodmen of the World* v. *Wilson,* 136 Ark. 546.

The present appeal is planted on the proposition that, inasmuch as the summons required that defendant plead within twenty days, it was not served at all, and the court acquired no jurisdiction to render judgment at any time.

Such was not the purpose of the statute. The summons advised the defendant where it was sued and the term of court in which it would be required to answer, and the law gave it thirty days in which to file such pleading as was thought appropriate. That time, and more, was afforded, and defendant was in default when the judgment was rendered, and the court committed no error in refusing to vacate the judgment, and it is therefore affirmed.

JOE LYONS MACHINERY COMPANY v. WIEGEL.

Opinion delivered April 13, 1925.

1. EVIDENCE—SELF-SERVING STATEMENT—EFFECT.—Where the purchaser of a truck, defending a suit for the purchase money on the ground that the truck was not in condition as represented, introduced a letter from the seller written after the sale stating that the understanding was that plaintiff's responsibility ceased after the truck reached a certain city, such letter was not conclusive as to the facts recited as against the purchaser, who introduced it merely to attack the credibility of a witness for the seller testifying that there was no understanding as to the condition of the truck.
2. SALES—FALSE REPRESENTATIONS.—Testimony *held* to sustain a finding that material and false representations were made by the seller in the sale of a truck, and that the buyer had a right to and did rely upon such representations.
3. SALES—FALSE REPRESENTATIONS IGNORANTLY MADE.—Though a seller was ignorant of the condition of a truck, and the buyer had equal opportunity to know the facts, this would not relieve the seller from liability for material representations which proved to be false, were intended to deceive, and were relied on by the buyer.
4. TRIAL—REFUSAL OF INSTRUCTION ALREADY COVERED.—Refusal of an instruction that representations as to the condition of the truck sold must have been "substantially" untrue to defeat re-

covery, *held* not error where another instruction required a finding of materially false representations.

5. SALES—FALSE REPRESENTATIONS.—A seller may not say that the buyer should not have believed statements made by him as to the condition of the truck sold, if investigation would have shown them to be untrue, especially when the defects were not discoverable until after the truck had been driven after the sale.

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

F. T. Murphy and *Emerson & Donham,* for appellant.

A party has no right to rely upon statements of the other when the means of knowledge is equally open to both. *Yeates* v. *Prior,* 11 Ark. 58; *Matlock* v. *Reppy,* 47 Ark. 148; *Gaty* v. *Holcomb,* 44 Ark. 216; *Johnson* v. *St. L. Butchers' Supply Co.,* 60 Ark. 387. Fraud is never presumed. *Russell* v. *Brooks,* 92 Ark. 509; 144 Ark. 87.

Carmichael & Hendricks, for appellee.

It is not necessary that the false representations should have been knowingly made; it is sufficient if defendant asserted them to be true of his personal knowledge and made them with intent to have appellee act on them, and that plaintiff did act thereon to his injury. *Bell* v. *Fritts,* 161 Ark. 371.

SMITH, J. On the 28th day of July, 1923, appellee, who was a road contractor, purchased from appellant a second-hand five-ton White truck, with dump body and steel wheels, for the price of a thousand dollars, of which $250 was paid in cash and the balance of $750 was represented by a check drawn by appellee on the bank in which he carried his account. Appellee became dissatisfied with his purchase, and stopped the payment of the check. Appellant thereupon brought suit for the amount of this check. Appellee filed an answer denying liability, and, by way of counterclaim, prayed judgment for the $250 cash he had paid. The allegations of appellee's answer and counterclaim were sustained by the jury, and there was a verdict and judgment in his favor for $250, from which is this appeal.

At the time of the sale of the truck a bill of sale was executed, which appellee contended was intended only to evidence the passing of the title, and that a blank form of contract was used which was not intended to evidence the terms of the sale made, but was a form of contract intended to be used when machinery was sold on partial payments, and that the provisions of this contract were inapplicable to appellee's purchase. Appellee insisted that there was an express warranty of the contract, which he sought to prove on the theory that the writing was not intended to and did not in fact cover the entire contract of sale. The court, however, held against this contention, and refused to permit appellee to engraft a warranty on the bill of sale.

Appellee defended on the ground that the sale of the truck was procured by fraud, and the cause was submitted to the jury on that issue.

On behalf of appellant the following testimony was offered: The truck was a second-hand one, and had been previously used by appellee for several days. The truck had been rebuilt in Memphis at a cost of $733.61, and was believed to be and in fact was in good condition. Appellee was familiar with machinery, and examined the truck before purchasing it, and no false representations to induce appellee to purchase were made.

Appellee admitted that he had used for several days a second-hand truck belonging to appellant, but he did not know whether this was the truck which he had purchased. He knew the truck he bought was a second-hand one, but he was told that it had been rebuilt and overhauled in Memphis, and was assured that it was in good order, and that he relied on and was deceived by this statement of fact, and that he was induced to buy the truck by his reliance on this statement of fact. He admitted that he was somewhat familiar with machinery, and had examined the truck before purchasing it, but he testified that no one could tell what the truck's condition was without seeing it run, inasmuch as it was second-hand, and that he bought it before running it, relying

on the representation that it was in good order. Appellee stated to appellant's salesman who made the sale that he intended to drive the truck from Little Rock to Shreveport, and, after the purchase, one of appellee's employees drove the truck from appellant's salesroom to appellee's home, a distance of only a few blocks, and the truck became overheated, and was driven to the shop by appellant's agent after appellant was notified of the trouble. Appellee was assured that the defect causing the trouble had been repaired, and the truck was again turned over to appellee's employee, who started on the trip to Shreveport, but, after getting out twelve or fourteen miles on the way, a bearing burned out. Appellant was notified of this fact, and a mechanic was sent to make the necessary repair, and one of appellant's representatives undertook to drive the truck, but the trouble continued, and, when a sandy place in the road between Benton and Malvern was struck, the truck stalled and could go no farther. Appellee had gone on ahead, and was in Arkadelphia when he was notified of the trouble, and he immediately stopped payment of the check, and wrote appellant that the truck was of no value. He stated in this letter that he would like to have the truck if it were in usable condition, and that he would carry out his contract if appellant would place the truck in condition to be used. Appellant replied by filing this suit.

Appellee further testified that he saw the bearing after it was taken out by the mechanic, and that no oil grooves had been cut in the bearings. A witness for appellant testified that the grooves had been stopped with dirt, but witnesses for appellee testified that the trouble developed in driving the truck only a few blocks, and that the engine heated at once, and that the bearing burned out at Red Gates, a point between Little Rock and Benton.

During the trial appellee offered in evidence a letter which he had received from appellant on August 11, 1923, which reads as follows: "The understanding was that, if the truck reached Benton, all responsibilities on our

part ceased, although this truck was sold to you to be delivered to you at our warehouse in the condition it was in at that time."

Appellant insists that, as appellee introduced this letter, he was bound by it, and that he could not, and did not, contradict the statement of fact therein contained that, if the truck reached Benton, appellant's responsibility ceased.

It appears, however, that this letter was introduced on the cross-examination of a witness for appellant, who had testified that there was no understanding whatever about the condition of the truck, and for the purpose of attacking the credibility of the witness. The letter was a self-serving statement of appellant, and we do not think it is conclusive of the facts therein recited. Moreover, it appears that the trouble developed before the truck reached Benton, first in Little Rock, where it was purchased, and later at Red Gates.

The testimony in the case cannot be reconciled, but, if that offered on behalf of appellee is credited, the jury was warranted in finding that appellee relied upon the representation that the truck had been overhauled and was in good condition, and that he was induced by this representation to purchase, and that these representations were material, and were false.

It is insisted by appellant that a verdict should have been directed in its favor, and that any statements made by its officers and agents in negotiating the sale were mere expressions of opinion, upon which appellee had not relied and did not have the right to rely, as he knew as much about the truck as did any one who participated in the sale upon behalf of appellant. But we do not think the jury's finding to the contrary, under the instructions, is unsupported by the testimony.

It is insisted that, if there was a defect in the truck, the testimony does not show that appellant knew of it. But it was not essential that this showing be made, as appellant was as much responsible for a material mis-

representation made in ignorance of the facts as for a representation which was known to be false. On this issue appellant requested the court to give the following instruction: "No. 2. Although you may believe that plaintiff's officers, or one or more of them, represented to defendant that the truck had been sent to the factory and overhauled, and that said truck was in good condition in every way, yet you are instructed that, unless said statements were false and fraudulent at the time of making them, and were made for the fraudulent purpose of deceiving, defrauding and misleading defendant, that defendant relied upon said false statements in purchasing said truck, and that he had not had an equal opportunity with plaintiff's officers to know the condition of said truck, still you should find for plaintiff."

We think no error was committed in refusing this instruction. The undisputed testimony shows that appellee made no test of the truck until it was driven out of the shop, and that the trouble developed before it reached appellee's home, a few blocks away. This trouble was apparently remedied by appellant's mechanic, who also undertook to remedy the additional trouble which developed on the way to Red Gates.

As has been said, the testimony does not affirmatively show that appellant knew of the defects in the truck, but, if it did not know, it had no right to make material misrepresentations concerning a fact of which it was ignorant, yet the requested instruction would have relieved appellant of liability for such misrepresentations if appellee had an equal opportunity with plaintiff's officers to know the condition of the truck. The parties may have had equal opportunities to know the condition of the truck, and yet neither may have known what that condition was, but such mutual ignorance would not relieve appellant from responsibility for material misrepresentations, if they were in fact relied on.

The case was submitted to the jury under the following instruction: "Gentlemen of the jury: This is a suit by the Joe Lyons Machinery Company against E.

N. Wiegel as defendant, in which the plaintiff seeks to recover $750, the admitted balance on the purchase price of a certain truck. The defendant claims in defense, gentlemen of the jury, that this contract—the contract for the purchase of the truck—was made by him because of the fraudulent representations by the plaintiff as an inducement to him to purchase this truck, and on which he relied in purchasing the truck. Gentlemen, the burden is on the defendant in this case to prove these fraudulent representations, as the court will hereafter instruct you. Representations, gentlemen, in order to be fraudulent, must be of a reliable character and hold out inducements calculated to mislead the purchaser and induce him to buy on the faith and confidence of such representations. In other words, gentlemen, if you find from the testimony in this case that the plaintiff made to the defendant false representations—material false representations—about the contract, and, at the time they were made, the plaintiff either knew that they were false, or, not knowing that they were false or true, nevertheless made them, and made them with the intention of deceiving the defendant, and that the defendant relied on those representations, then, gentlemen, that would be a fraud, and the plaintiff cannot recover. If, on the other hand, you find from the testimony that false and fraudulent representations, as the court has defined them to you, were not made, or that the defendant did not rely on such statements as were made, then they would not be fraudulent or fraud in this case, and you should find for the plaintiff."

It will be observed that this instruction told the jury that a representation to be fraudulent must be concerning a material fact, which the seller knew to be false, or, not knowing whether they were true or false, made them, and made them with intention of deceiving the purchaser, and that such representations must be calculated to mislead the purchaser and induce him to buy on the faith and confidence of such representations. In addition, the instruction told the jury that, if there were no false

representations, as defined in the instruction, or if the purchaser did not rely on such statements as were made, the representations would not be fraudulent, and to find for appellant—the plaintiff. In other words, the instruction required the jury to find that material false representations were made; that they were calculated to mislead the purchaser and to induce him to buy; that they were made with the intention of deceiving the purchaser, who relied on such statements as were made. If all these facts were found in favor of the purchaser, it would necessarily follow that he had the right to rely on the representations and had the right to say that the sale was fraudulent.

Another instruction requested by appellant required the jury to find that the representations made by appellant were substantially untrue. We think no error was committed in refusing this instruction, as the one given, set out above, required the jury to find that there were material false representations before finding for the purchaser.

The only other instruction requested by appellant, except a request that a verdict be instructed in its favor, was one in which the jury would have been told, had the instruction been given, that, if appellee was sufficiently skilled to investigate and determine the condition of the truck, and yet relied, not on investigation which he might have made, but upon the statements of plaintiff's officers, to find for the plaintiff. This instruction was properly refused. Appellant has no right to say that appellee should not have believed the statements of its officers, if an investigation would have shown that they were untrue, especially as the defects were discoverable only after the truck was tested by being driven, and such test was not made until after the sale.

The legal principles here applied have been often announced in the numerous cases cited in the briefs of counsel, and we think no useful purpose would be served by reviewing those cases, and, as we find no reversible error, the judgment of the court below is affirmed.

HYDE AND SMITH v. STATE.

Opinion delivered April 13, 1925.

1. INDICTMENT AND INFORMATION—OMISSION OF WORD.—Under the rule that the omission of words in an indictment which would not mislead the accused as to the nature and character of the charge will not vitiate the indictment, *held* that the omission of the word "did" before the word "take" in an indictment for robbery did not render the indictment fatally defective.
2. CRIMINAL LAW—INCONSISTENCY OF VERDICT.—A verdict convicting two of the defendants and acquitting a third, *held* not inconsistent, under the evidence.
3. ROBBERY—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of robbery.
4. WITNESSES—FOUNDATION FOR IMPEACHMENT.—Where a witness while on the stand was asked whether he had made a certain statement and denied having done so, a foundation for impeaching him was properly laid.
5. WITNESSES—IMPEACHMENT.—Where a witness testified that defendant did not rob prosecuting witness, proof of his statement that he did not go to the aid of the prosecuting witness because he did not have the courage was admissible to contradict him, after proper foundation was laid.
6. CRIMINAL LAW—INSTRUCTION.—Reading the omitted word "did" before the word "take" in an indictment for robbery in charging the jury, being a word obviously omitted, was no error.
7. ROBBERY—ALLEGATIONS OF VALUE.—It is not essential that the State prove the value of the goods stolen in a robbery case to be exactly that alleged in the indictment, and a conviction will be sustained, although the proved value is greater or less than the alleged value.

Appeal from Greene Circuit Court, Second Division; *W. W. Bandy,* Judge; affirmed.

Jeff Bratton, for appellants.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

HUMPHREYS, J. Appellants and Bruce Haley were separately indicted by the grand jury of Greene County for robbing Sam Levins. The charging part of each indictment is as follows:

"In the county and State aforesaid, on the 25th day of October, 1924, the said (naming the accused) unlaw-

fully, violently, and feloniously by force and intimidation take from the person of Sam Levins the sum of $150 in gold, silver and paper money, lawful money of the United State, of the value of $150, the property of him, the said Sam Levins." The cases were tried together by agreement, which resulted in the acquittal of Bruce Haley and the conviction of appellants. As a punishment for the crime, appellants were adjudged to serve a term of three years each in the State Penitentiary, from which judgment of conviction an appeal has been duly prosecuted to this court.

Appellants' first assignment of error for a reversal of the judgment is the alleged insufficiency of the indictments to charge a crime. It is argued that the indictments are fatally defective on account of the omission of the word "did" between the words "intimidation" and "take." The omission of the word "did" does not destroy the sense or meaning of the indictment when read as a whole, for, when so read, it is manifest that the intention was to charge a taking of the money by appellants, or that appellants took the money. It is impossible to read the indictments without supplying the word "did" or substituting the past for the present form of the verb. This being the case, appellants could not have misunderstood the purport and effect of the charge. The omission of words in an indictment which would not mislead the accused as to the nature and character of the charge will not vitiate an indictment, as such omissions do not prejudice his substantial rights. *State* v. *Ward,* 48 Ark. 36; *Rinehart* v. *State,* 160 Ark. 129; *Jackson* v. *State,* 160 Ark. 198.

Appellants' next assignment of error for a reversal of the judgment is because of an alleged inconsistency of the verdict in convicting appellants and acquitting Bruce Haley. Appellants' contention is based upon the assertion that the evidence against the three is identical. It is unnecessary to determine and declare the rule of law applicable in such cases, for a complete answer to appellants' contention is that the evidence against the

three is not identical. Appellants were found together early next morning after the alleged robbery, with money in their possession, identified by the chief prosecuting witness as the money which had been taken away from him. This was not so in the case of Bruce Haley. Again, each one of the accused parties testified accounting for his whereabouts and conduct on the night of the robbery, and the jury may have believed Bruce Haley's explanation and disbelieved the explanations of appellants.

Appellants' next assignment of error for a reversal of the judgment is the alleged insufficiency of the evidence to support the verdict. It is not contended that the evidence detailed by the chief prosecuting witness, Sam Levins, is not sufficient to support the verdict, if believed, but that his evidence is not of a substantial nature, for the alleged reason that he was crazy drunk prior to and at the time he claimed to have been robbed. Sam Levins testified that appellants and Bruce Haley robbed him of about $150 on the night of October 25, 1924, while on his way home, after he and a number of his associates left the home of Gus Hyde, where they had been imbibing liquors (white mule) and playing craps. He admitted that he drank freely during the night, but claimed that he was not drunk or under the influence of liquor to such an extent that he did not or could not understand what happened. Certain witnesses introduced by appellants testified that, on the night and occasion of the supposed robbery, Sam Levins was drunk beyond understanding. This conflicting testimony presented an issue of fact for determination by the jury. We cannot say as a matter of law that Sam Levins was drunk on the occasion of the alleged robbery, as the undisputed evidence does not disclose that fact.

Appellants' next assignment of error for a reversal of the judgment is the admission by the court of testimony by Sam Levins to the effect that Price Wax stated, on Monday following the alleged robbery, in the presence of Squire Hays and Charley Stepp, that the reason he (Price Wax) did not go to the aid of Sam when he called

for help during a conflict in the road a short time before the robbery was that he did not have the courage to do so. This evidence was admitted as contradictory of the testimony of Price Wax, who testified that appellants did not rob Sam Levins. When Price Wax was on the witness stand, he was asked whether he made such a statement, and he denied doing so. The foundation was properly laid, therefore, for impeaching the witness, and the testimony of Sam Levins was admissible for that purpose.

Appellants' next assignment of error for a reversal of the judgment is that the court, in reading the indictment into instruction No. 1, so as to inform the jury of the crime charged against appellants, supplied the word "did" between the words "intimidated" and "take" in the indictment. No prejudice resulted to appellants on this account, for the insertion of the word "did" added nothing to the meaning of the indictment. The insertion of the word amounted to nothing more than the correction of a clerical error or misprision.

Appellants' next assignment of error for a reversal of the judgment was the giving of instructions Nos. 4, 5 and 6 to the jury by the court. It is argued that the instructions were erroneous because not responsive to the allegations of the indictment, which alleged the taking of $150, and that Sam Levins was the owner thereof, whereas the proof tended to show that a different amount was taken, and also that only $89.25 of the amount belonged to Sam Levins, and that the remainder was money which he had won in the crap game.

"It is not essential that the State should prove the value of the stolen goods to be exactly that alleged in the indictment, and a conviction will be sustained, although the proved value is greater or less than the alleged value." 36 C. J., § 396, p. 858.

It is not necessary to determine in the instant case whether the ownership of the money won in the crap game was in those who lost it or in the winner, Sam Levins. The proof tended to show that Sam Levins had $89.25 of his own money before he won any in the crap

game. If any part of the money taken belonged to him, there was no variance between the allegation and the proof, except as to the amount, and this variation is immaterial. 23 R. C. L., § 27, p. 1160.

The last assignment of error for a reversal of the judgment was the giving of instruction No. 11 by the court, defining reasonable doubt. This instruction is assailed as being argumentative. While it is unnecessarily long, we are unable to discover any argumentation therein.

No prejudicial error appearing in the record, the judgment is affirmed.

DAVIS *v.* OSCEOLA LUMBER COMPANY.

Opinion delivered April 13, 1925.

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR MATERIAL USED IN REPAIRS.—Under a lease obligating a landlord to make certain improvements and requiring the tenant to personally attend to repairing the buildings, the tenant was the landlord's agent to make the improvements and purchase the materials at the landlord's cost, and the landlord was liable therefor, notwithstanding that cost should be deducted from the rent.

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

Bruce Ivy and *J. N. Thomason,* for appellant.

A. F. Barham, for appellee.

HUMPHREYS, J. The only issue presented by this appeal is whether appellant is responsible for the value of building materials purchased by her tenant with which to make repairs on her plantation in Mississippi County. She leased the lands in question to J. C. Young for the years 1920, 1921 and 1922, under a written contract, which contained the following paragraphs relative to repairs:

"The party of the first part (appellant) agrees to have improvements made on said place during the term of this lease to the amount of one thousand ($1,000) dollars, the same to be used in repairing houses, barns, etc.,

and, in addition thereto, to furnish sufficient wire, nails, and the timber to make the required posts to build a fence on the west side of said place from Brickey's corner to the road.

"The party of the second part further agrees to give his personal attention to the repairing of said premises, also to the cutting and sawing of the timber which he gets off of said place, if any, and the total amount to be expended for repairs is not to exceed $1,000, unless specifically agreed upon by the party of the first part."

During the year 1920 J. C. Young bought from appellee building materials in the total sum of $576.87, which he used in making repairs on said lands. The last item was furnished on the 30th day of November, 1920. The materials were charged on the books of appellee to J. C. Young.

J. C. Young shipped all the cotton he raised in the year 1920 to the credit of appellant, and was credited on his rent for same, and also credited for the bill of materials he had bought from appellee to make repairs, and, after receiving these credits, he still owed appellant a balance of $1,000 on his rent for that year. There was no specific authority or direction given J. C. Young to purchase the materials, and there was no direct contract or conversation between appellant and appellee with reference thereto. J. N. Thomason was appellant's agent for renting, collecting the rents and paying the taxes on said plantation during the year 1920. At the time J. C. Young rendered his statement to J. N. Thomason for the transaction of the year, a notation was made thereon to the effect that the bill of materials purchased from appellee had not been paid. The year before J. C. Young paid appellee's bill for materials to make repairs, and received credit on his rents for same. In the year 1920 J. C. Young bought some materials from other parties to make repairs, paid for them himself, and received credit for same on his rents. There was an oral agreement between appellant and J. C. Young that, whatever he should pay out for repairs, not exceeding $1,000,

should be credited on his rent account. When the account was not paid, Thomas Henderson, agent for appellee, went to see J. N. Thomason about it, and Thomason agreed to take the matter up with appellant, and, if there should be any money left in the bank belonging to her, after paying the taxes, he would get her to authorize him to pay it on the account.

Having failed to receive payment on the account, this action was instituted in the common pleas court, and, on appeal to the circuit court, Osceola District, was submitted on the pleadings and testimony to a jury. At the conclusion of the testimony the court instructed the jury to return a verdict for appellee, and rendered a judgment in accordance therewith, from which is this appeal.

Under the terms of the written contract the lessor, appellant herein, obligated herself to make improvements on the houses, barns, etc., located upon her plantation, not to exceed in cost $1,000, unless specifically agreed to by appellant; and the lessee obligated himself to give personal attention to repairing the buildings. The effect of this provision in the lease was to constitute the lessee the agent of the lessor to make the improvements. The oral understanding that the cost of the improvements should be deducted from the rent did not have the effect of limiting or abridging the agency to purchase the material and make the improvements at the ultimate cost to the lessor. While the materials were charged on the books of appellee to the lessee, they were bougth by him under authority from the lessor, to be used for making permanent improvements on her property, which had the effect of constituting him her agent in law for the purchase of the materials. The principle announced in the case of *Whitcomb* v. *Gans,* 90 Ark. 469, is applicable in the case at bar.

No error appearing, the judgment is affirmed.

MURPH v. CONSOLIDATED SCHOOL DISTRICT NO. 39.

Opinion delivered April 13, 1925.

1. SCHOOLS AND SCHOOL DISTRICTS—ORGANIZATION IN CITIES AND TOWNS.—Crawford & Moses' Dig. § § 8827-8, relating to the method of organizing and establishing single school districts in cities and towns, was not repealed by act 324 of 1919.
2. SCHOOLS AND SCHOOL DISTRICTS—CONSOLIDATION OF URBAN AND RURAL DISTRICTS.—Act 216 of 1911 (Crawford & Moses' Dig., §§ 8843-6) and the act of February 4, 1869, as amended, (Crawford & Moses' Dig., § 8949) are not inconsistent with each other and furnish co-ordinate methods for consolidating school districts, the former providing a method by which a part or all of a rural school district may be annexed to an urban single school district, while the latter provides for the consolidation as a whole of school districts of any character.

Appeal from Union Chancery Court, Second Division; *H. P. Smead*, Special Chancellor; affirmed.

C. L. Johnson, for appellant.

Mahoney, Yocum & Saye, and *W. B. Scott*, for appellee.

HUMPHREYS, J. This suit was filed by appellant, a resident and taxpayer in Consolidated School District No. 39 of Smackover, against appellees, in the chancery court of Union County, to enjoin them from mortgaging the real estate of said district, pledging the credit thereof, or issuing bonds as an indebtedness against said property, upon the ground that the district was not legally organized. It was alleged in the bill that the district was consolidated pursuant to and in conformity with act 116 of the Acts of the General Assembly of 1911, which act contained no authority for consolidating an urban school district with a rural school district, as was done in this instance, but provided a method for consolidating two or more rural school districts; also that, in organizing the town of Smackover into the Smackover Special School District before it was consolidated with Common School District No. 39 adjoining it, the method followed was prescribed in act No. 312 of the Acts of the General Assembly of 1909, instead of that prescribed by act No. 234 of the Acts of the General Assembly of 1919.

A general demurrer was filed to the bill by appellees, which was sustained by the court, and, appellant electing to stand upon his bill, the same was dismissed by the court for the want of equity, from which is this appeal. The demurrer concedes that an election was held by the mayor of Smackover in response to a petition lodged with him, signed by more than twenty voters residing therein, to determine the question of whether the territory embraced within the corporate limits of said town should be organized into a special school district, and that the Smackover Special School District was organized in strict conformity to act No. 312 of the Acts of the General Assembly of 1909, but the contention is made that said act was supplanted by act No. 324 of the Acts of the General Assembly of 1919, creating county boards of education, and that the county board of education should have called the election in the place of the mayor. The later act did not repeal the first, for it has relation to the organization of rural special school districts and the former to the organization of single or special school districts in cities and towns. This court said, in the case of *Brown* v. *Peach Orchard,* 162 Ark. 175, that "this act (referring to act No. 234 of the Acts of 1919) was passed subsequent to act 312 of the Acts of the General Assembly of 1909, and did not in express terms repeal the former act. We do not think it did so by implication. * * * The purpose of the later act was to substitute county boards of education for the county court as a tribunal to form local school districts, change district boundary lines, etc." Act 312 of the Acts of 1909 (Crawford & Moses' Dig., § 8827) is still in force and effect, so the town of Smackover was legally organized into a special school district.

The demurrer also concedes that the Smackover Special School District was consolidated with Common School District No. 39 adjoining it, in accordance with act No. 116 of the Acts of the General Assembly of 1911, but contends that said act only applies to the consolida-

tion of two or more rural or common school districts, and has no relation to the consolidation of a single or special school district with a common or rural school district. The first section of the act is as follows:

"Any two or more school districts in this State may be organized into and established as a single consolidated school district in a manner and with the power herein specified." (Crawford & Moses' Dig. § 8843.)

The language in the act is broad enough to include any kind of school districts, and should not be limited by construction to apply to any particular classes of districts. The argument is made that the act should be construed as being applicable to rural districts only, because another *modus operandi* for the annexation of territory to single or special school districts was provided by § 15 of act February 4, 1869, subsequently amended and digested as § 8949 of Crawford & Moses' Digest. It is provided in that section that the "county board shall annex contiguous territory to single school districts, under the provisions of this act, when a majority of the legal voters of said territory and the board of directors of said single school district shall ask, by petition, that the same shall be done." We do not think the provision quoted is inconsistent with or repugnant to the provisions of act No. 116 of the General Assembly of 1911. (Crawford & Moses' Digest §§ 8843-6). The *modus operandi* provided in the annexation act permits the annexation of a part of the rural district as well as all of it to a single district, whereas, under act 116 of the General Assembly of 1911, provision is made for the consolidation of school districts in their entirety only. The two acts furnish co-ordinate methods for consolidating school districts. The annexation act does not furnish an exclusive method for uniting a rural school district to a single school district.

For the reasons assigned, the decree is affirmed.

LEWIS v. STATE.

Opinion delivered April 20, 1925.

1. RAPE—EVIDENCE OF ASSAULT.—Evidence *held* to sustain a conviction of assault with intent to rape.
2. CRIMINAL LAW—PROOF OF COLLATERAL FACT.—In a prosecution for assault with intent to rape, defendant could not prove by another witness that the prosecutrix was engaged in selling whiskey, though it would be competent for him to prove that he knew that she was selling whiskey and went to her house to buy some.
3. WITNESSES—IMPEACHMENT—COLLATERAL FACT.—Where the State, on a trial for assault with intent to rape, proves by the prosecutrix that she did not sell liquor and never handled whiskey in her life, though defendant could cross-examine her as to such sales, he was bound by her answers and could not prove by another witness that she had made sales of liquor.
4. CRIMINAL LAW—DISCRETION AS TO RE-INTRODUCTION OF TESTIMONY.—While the trial judge should prevent misstatements of the testimony in arguments of counsel, he has the discretion to determine whether testimony should be reintroduced to determine a controversy between counsel as to its effect, and such discretion was not abused where the testimony sought to be reintroduced was incompetent and ought not to have been admitted.
5. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS.—A continuance for an absent witness was properly denied where it is not shown what the witness would have testified.

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

Jeff Bratton, for appellant.

H. W. Applegate, Attorney General, *John L. Carter*, Assistant, for appellee.

McCULLOCH, C. J. This is an appeal from a judgment of conviction for the crime of assault with intent to commit rape. Appellant was charged with committing the assault on Mrs. Joe Howard. Appellant and the woman alleged to have been assaulted resided in the same neighborhood in a remote part of Greene County. The woman and her husband lived together in a single-room log cabin. They had only been living there a very short time. Appellant lived about a quarter of a mile

distant, and was one of the nearest neighbors, another family, named Bond, living about the same distance.

The crime is alleged to have been committed on August 1, 1924, and the woman testified that, on that day, appellant came to the house, in the absence of her husband, shortly after the other neighbors had left for a trip to town, and that he seized her and carried her to the bed, attempted to have sexual intercourse with her, forcibly and against her will. She testified that appellant came into the house about 11:30, and that she struggled with him for nearly half an hour while he was attempting to ravish her, and that he only desisted and left the house when they heard her husband coming. The testimony of the woman was sufficient to sustain the charge in the indictment.

Appellant testified that he was called to the house by the woman, and that, after he went in, she proceeded to tell him about her troubles with her husband, as she had done on several other occasions, and pulled up her dress and showed where her husband had beaten her. He testified further that she asked him for a dollar to pay her expenses in going away, and that he finally gave her the dollar, and she gave him a bottle of whiskey. He denied that he assaulted the woman, or that he had intercourse with her, or attempted to do so. He testified that the woman put her arms around him and kissed him, but that there were no other acts of intimacy between them.

Appellant offered to prove by a witness named McDonald that the witness went to the home of Joe Howard and his wife, a few days before the day of the alleged commission of the offense under investigation, and there purchased from Mrs. Howard, in the presence of her husband, a bottle of whiskey. The court refused to permit this testimony to be introduced, and an exception was duly saved to the ruling of the court. It is first contended on behalf of appellant that he was entitled to introduce this testimony in support of his contention

that whiskey was being sold at the house, and that his purpose in going to the house was to buy whiskey. He does not claim that he went there for that purpose, but testified that he was called into the house by the woman, and that he merely accepted the whiskey from her when offered to him, after she had begged for the dollar with which to pay her expenses in leaving her husband. At any rate, it was not competent to prove, as a part of the defense, that whiskey was being sold in the house where the crime was alleged to have been committed. The purpose for which appellant went to the house was not an element of the crime, and it was not competent to prove a collateral fact for the purpose of establishing appellant's motive in going into the house. Appellant had the right to testify himself as to his purpose in going into the house and to support that by his own statement that he knew that whiskey was being sold there, but, it being purely a collateral fact, he had no right to prove it by independent testimony.

Again, it is insisted that appellant had the right to introduce the testimony, even though it was collateral, for the reason that the State drew out testimony on the subject as a part of its case, and counsel invoke the rule announced by this court in the following cases: *McArthur* v. *State*, 59 Ark. 431; *Howell* v. *State*, 141 Ark. 487; *Young* v. *State*, 144 Ark. 71. This calls for an examination of the record to determine whether or not the State drew out from a witness the collateral fact that whiskey was not being sold at the house. On examination in chief, after the witness, Mrs. Howard, testified about appellant's coming to her house and attempting to ravish her, the following testimony was drawn out:

"Q. Did he offer you anything? A. Yes sir, tried to make me drink some whiskey. Q. Did you take any? A. No sir. Q. How much liquor did he have? A. Almost a pint bottle full. Q. He says he bought that liquor from you; did he? A. Absolutely not. I never in my life handled a bottle of whiskey. Q. He said that was

Joe's whiskey, and you sold it to him. A. I did not. Q. Had he been drinking? A. Yes sir, he had. Q. How did he try to make you drink? A. He held me and tried to make me put the bottle in my mouth. Q. Was any of that liquor spilled in the room there on the bed? A. Yes sir. Q. Where? A. All over the bed."

On cross-examination appellant's counsel asked her if she did not furnish the liquor herself in exchange for the dollar which appellant gave to her, and she testified that he did not give her a dollar and that she did not furnish him any whiskey. Appellant's counsel also asked her about her husband being engaged in operating a still, which she denied.

This testimony does not bring the case within the rule stated in the cases cited above, holding that, where the State introduces proof of collateral facts as a part of its case, the defendant may introduce proof tending to controvert those facts. The State anticipated the claim of appellant that the woman had sold him liquor by asking her the direct question whether or not appellant had bought liquor from her. This was one of the circumstances immediately attending the commission of the crime, and the State had the right to propound that inquiry without opening up a collateral inquiry as to whether or not the woman had been engaged in selling liquor or that liquor had been previously sold at that place. This was, as before stated, a specific inquiry concerning one of the circumstances attending the crime, and it did not relate to any prior conduct on the part of the woman with reference to the sale of liquor. The defendant had the right to cross-examine her on this subject, and even to ask her whether or not she had been selling liquor before that time, but, as to such a collateral matter as that, the cross-examiner was bound by her answer. He could not then introduce independent testimony to contradict the witness as to the collateral matter. It is true the witness, in response to an inquiry of the prosecuting attorney as to whether the particular liquor used

on that occasion was sold by the woman to appellant, replied in the negative, and added that she had never in her life handled a bottle of whiskey. The State did not ask her whether she had ever handled liquor before, but merely inquired about that particular bottle of liquor, which both of the parties testified was present at the time of the alleged commission of the crime. The court was therefore correct in not permitting McDonald to testify concerning sales of whiskey alleged to have been made at that place on prior days.

There was an objection to a statement of the prosecuting attorney as to what the testimony was of a witness introduced by the State tending to prove a contradictory statement of the prosecuting witness to the effect that her husband, Joe Howard, was jealous of appellant and another man named Asbury. Appellant's counsel had stated in the argument that the witness had testified as to the contradictory statement of Mrs. Howard, and the prosecuting attorney asserted, in his closing argument, that the witness had not testified as to contradictory statements of Mrs. Howard, and appellant's counsel asked that the stenographer be required to read his notes as to the testimony of the witness mentioned. The court denied the request, and an exception was saved. The testimony of the witness mentioned in the argument was collateral, and ought not to have been admitted. It is the duty of the trial court to prevent misstatements of the testimony in argument of counsel, but it is a matter of discretion whether or not the court will permit the testimony to be reintroduced for the purpose of determining a controversy between counsel as to its effect. The controversy between counsel related to a matter which was not of sufficient materiality to justify the court in allowing time to be taken up in reintroducing the testimony, even if it had been competent.

One of the court's instructions to the jury is made the basis of an assignment of error, but we think it is not of sufficient importance to call for a discussion. The

instruction related to rules of weighing testimony, and the objection goes merely to the form of the instruction rather than to its substance, which is not in conflict with the decisions of this court on the subject.

There was a motion for a continuance for an absent witness, one Hovis by name, but all that the motion contained with regard to the substance of the testimony of the absent witness was that he knew important evidence on behalf of the accused, "but that the defendant is not advised as to just what the evidence consists of, as he was incarcerated in jail when Hovis left the State of Arkansas." It is manifest that this was not a statement of sufficient grounds to justify the court in postponing the trial.

No error being found in the record, the judgment is affirmed.

OZAN-GRAYSONIA LUMBER COMPANY v. SWEARINGEN.

Opinion delivered April 20, 1925.

1. LOGS AND LOGGING—EFFECT OF EXCEPTING TIMBER FROM CONVEYANCE.—The exception of timber from the operation of a deed is the same in effect as a reservation, and the effect would have been the same if there had been an absolute conveyance of the land without any exception or reservation and then a reconveyance of the timber.
2. LOGS AND LOGGING—DEED TO STANDING TIMBER—TIME FOR REMOVAL.—A deed to standing merchantable timber, which specifies no time for its removal, conveys a terminable estate in the timber, which ends when a reasonable time for its removal has expired, after which it becomes the property of the owner of the fee as a part of the land.
3. LOGS AND LOGGING—TIME FOR REMOVAL OF TIMBER.—Where, under a deed of standing timber, which specified no time for removal, the purchaser waited more than 16 years without taking steps to remove the timber when there was no physical hindrance or hardship preventing its removal, a finding by the court that the purchaser had not removed the timber within a reasonable time was not against the preponderance of the evidence.

Appeal from Montgomery Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

C. H. Herndon and *Tompkins, McRae & Tompkins* for appellant.

Appellee *pro se.*

McCULLOCH, C. J. This action was brought by appellee in the chancery court of Montgomery County to cancel a deed conveying to appellant the timber on land in that county. The tract of land involved in the controversy contains forty acres, and, on May 2, 1907, C. W. Belcher conveyed to L. Sparkman, appellant's grantor, all of the pine timber of certain dimensions growing on the land mentioned. The deed contained the following clauses:

"It is agreed that said party of the first part shall pay all taxes and assessments levied against said lands and timber and keep the same from all alienation and incumbrance, except such as may be subordinate and subject to * * *.

"It is agreed that, unless such timber shall have been removed within a period of fifteen years from the date hereof, the grantor, his heirs and successors or assigns, shall be responsible for and pay to the first party the full amount of taxes assessed against said land and timber after the expiration of said period of fifteen years from this date until such time as said timber is removed and said possession returned to said first party."

C. W. Belcher died, and his heirs conveyed the land to appellee by deed dated October 1, 1919, but the deed contained an exception of "the pine timber on the north 40 in section 15, which has been sold." The evidence in the case establishes the fact that the forty acres of land mentioned in the deed contained approximately 210,000 feet of pine timber, and that none of it had been removed by appellant when this action was commenced on November 27, 1923.

The chancery court rendered a decree in favor of appellee, canceling the timber deed, and an appeal has been prosecuted to this court.

It is contended by counsel for appellant, in the first place, that appellee has no interest in the timber and no right to maintain the action, for the reason that the timber was expressly excepted from the operation of the deed to him from the Belcher heirs. The exception of timber was the same, in effect, as a reservation, and the effect would have been the same if there had been an absolute conveyance of the land to appellee without any exception or reservation, and then a reconveyance of the timber. This court has frequently announced the law to be that a deed to standing merchantable timber which specifies no time for its removal conveys a terminable estate in the timber, which ends when a reasonable time for the removal of such timber has expired. *Liston* v. *Chapman & Dewey Land Co.,* 77 Ark. 116; *Garden City Stave & Heading Co.* v. *Sims,* 84 Ark. 603; *Fletcher* v. *Lyon,* 93 Ark. 5; *Earl* v. *Harris,* 99 Ark. 112. The real question, then, presented in the case is whether or not the timber has been removed within a reasonable time. If it has not been seasonably removed, and the time to do so has expired, it became the property of the owner of the fee as a part of the land itself.

It is unnecessary to determine in this case whether the effect of the deed from Belcher to Sparkman fixed the time of removal definitely at fifteen years from the date of the deed, for that many years expired before the commencement of the present action. The acceptance by appellee of the deed containing the exception constituted a new point of time, so far as the rights of appellee are concerned, during which the timber may be removed, and, in accordance with the doctrine of the cases cited above, there must have been a removal within a reasonable time after that date. More than four years elapsed without any of the timber having been removed, and the chancellor found that appellant's rights had ceased

by failure to remove the timber. We are of the opinion that the chancellor was correct in this conclusion, or, at least, that the decree is not against the preponderance of the testimony. The evidence tends to show that the timber could have been removed—that there were no physical hindrances—either by hauling to Womble, a distance of about sixteen miles, or hauling it to sawmills located in the neighborhood of this particular tract.

Witnesses testified that the land was high and dry and accessible at all times of the year—that the road from the land to Womble was fairly good at all times of the year. Appellant attempted to bring itself within the doctrine announced in *Burbridge* v. *Arkansas Lumber Co.,* 118 Ark. 94, by showing that it was essential in the management of its business to remove the timber by a log-road advanced from time to time from its mill out into the timber district. Appellant introduced one witness, an employee, who testified that it was not convenient to haul the timber to Womble, and that there were mountain ranges and rivers to cross, which impeded the transportation to the extent that it made it unprofitable, and that it was less expensive and more convenient to do the logging over the railroad constructed by appellant from its mill out into the timber. The testimony of this witness is contradicted more or less by the testimony of the other witnesses, and we do not think that the testimony brings the case within the operation of the Burbridge case, *supra.* The testimony rather brings the case within other decisions where the facts were that the timber had not been expeditiously removed. *Polzin* v. *Beene,* 126 Ark. 46; *Beene* v. *Green,* 127 Ark. 119. There is not sufficient reason shown why the timber was not removed within the four years from the date of the deed to appellee and the commencement of this action.

Decree affirmed.

HART and HUMPHREYS, JJ., dissent.

SOUTH ARKANSAS GROCERY *v.* LEE.

Opinion delivered April 20, 1925.

1. CORPORATIONS—FALSE CERTIFICATE AS TO STOCK PAID IN—LIABILITY OF OFFICERS.—Under Crawford & Moses' Dig., § 1711, requiring the officers of private corporations to file a certificate showing the amount of stock actually paid in, and making them liable for the debts of the corporation contracted during the period of their intentional neglect or refusal to comply with such provision, *held* that a director, who knowingly filed a certificate showing that one-fourth of the capital stock had been paid in, when nothing was paid, was liable for debts of the corporation under Crawford & Moses' Dig. § 1730.
2. CORPORATIONS—LIABILITY OF DIRECTOR SIGNING FALSE CERTIFICATE.—Where a director filed a certificate stating that $10,000 of the capital stock had been paid in, when he knew that none had been paid, he cannot escape liability under § 1730, on the ground that he understood the language of the certificate to mean that the stock had been subscribed, as it was his duty to inform himself as to the meaning of the language of the certificate.
3. CORPORATIONS—FALSE CERTIFICATE—LIABILITY OF DIRECTOR.—Where the director of a corporation who filed a certificate under Crawford & Moses' Dig., stating that $10,000 of the capital stock had been paid in by subscribers, knowing that no stock had been paid in, and no later certificate was filed under § 1715, *held* that the director was liable under § 1730, for debts of the corporation thereafter incurred; the liability being continuous because of failure to comply with the statute.
4. CORPORATIONS—FAILURE TO FILE ANNUAL CERTIFICATE—LIABILITY OF SECRETARY.—Where the secretary of a private corporation failed to file the annual certificate required by Crawford & Moses' Dig., § 1715, he was not liable, under § 1730, for debts incurred by the corporation after he had resigned as secretary, regardless of the fact that his resignation was not shown by the corporate records.
5. CORPORATIONS—LIABILITY OF STOCKHOLDERS.—Persons who were neither officers nor directors in a private corporation during the time a corporate debt was incurred cannot be held liable for its debt under Crawford & Moses' Dig., § 1730.

Appeal from Dallas Circuit Court; *Turner Butler;* Judge; reversed in part.

J. W. Warren, for appellant.

T. D. Wynne and *Brundidge & Neelly*, for appellee.

McCULLOCH, C. J. This is an action instituted by appellant as creditor of a bankrupt corporation, styled "Farmers' Supply Company," against appellees as former officers of the corporation, to recover debts of the corporation, for which appellees are alleged to be responsible by having failed to perform statutory duties with respect to filing certificates. Crawford & Moses' Digest, §§ 1711, 1715, 1730. There was a trial before a jury, but the court gave a peremptory instruction in favor of each of the appellees. The question which we have to consider is therefore whether or not there is evidence sufficient to sustain a verdict against either of the appellees.

Said corporation was organized for the purpose of conducting a general mercantile business in Dallas County, and the articles of incorporation and certificate of the president and directors were filed on March 22, 1919. J. Q. Adams, one of the appellees, was an original stockholder, and was elected director and secretary, and served in that capacity until September, 1919, when he resigned and moved away. Adams did not participate in the affairs of the corporation from then until his return to the county on January 7, 1921. The corporation was then insolvent, and went into bankruptcy a few months later. Adams participated in the organization of the corporation, and, as director, signed the certificate filed pursuant to § 1711, *supra*. It was certified therein that the capital stock of the corporation amounted to $40,000, divided into shares of twenty-five dollars each, and that $10,000 of the capital stock had been actually paid in by the subscribers. The evidence shows that the certificate was not correct as to the amount of capital stock paid in, and that, on the contrary, nothing had been paid on the stock. This certificate was never corrected, and no further certificate, either under § 1711 or § 1715, was filed. The other appellees were not stockholders at the time of the organization, but became stockholders later. Neither of them was an officer of the corporation during

the period of time during which appellant's debt was created. It appears from the undisputed evidence that the debt of the corporation to appellant was incurred between October, 1919, and September, 1920.

The three sections of the statute under which liability of appellees is asserted read as follows:

"Section 1711. Before any corporation formed and established by virtue of the provisions of this act shall commence business, the president and directors thereof shall file their articles of association, and also certificate, setting forth the purposes for which such corporation is formed, the amount of its capital stock, the amount actually paid in and the names of its stockholders and the number of shares by each respectively owned, with the county clerk of the county in which the corporation is to have its principal places of business; and shall file said articles and certificate, bearing the indorsement of the county clerk, in the office of the Secretary of State." * * *

"Section 1715. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particular, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts: the name and number of shares of each stockholder; which certificate shall be deposited on or before the fifteenth day of February or of August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose." *Id.*

"Section 1730. If the president, directors or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them, respectively, such of them as so neglect or refuse shall be

jointly and severally liable, in an action founded on this statute, for all the debts of such corporation contracted during the period of any such neglect or refusal." *Id.*

The facts with reference to the relation of appellee Adams with the corporation are different from the facts in regard to the attitude of the other appellees, and the question of his liability will be disposed of first.

It is undisputed that Adams was one of the directors of the corporation, and, as director, joined in the original certificate made under § 1711, *supra.* The statute (§ 1730) makes the directors and other officers liable for debts of the corporation contracted during the period of any neglect or refusal to perform their statutory duties. The filing of a false certificate, one known to be untrue, renders the officers liable. *O'Neil* v. *Eagle Generator Co.,* 92 Ark. 416. The only attempt at justification on the part of appellee Adams was that he did not understand at the time he signed the certificate that the language meant that the amount specified as capital stock had been paid in, and that he thought it merely meant that that much had been subscribed. He admits that he knew, and that all the other officers knew, that the stock had not been paid in. It was his duty to inform himself as to the meaning of the language of the certificate, and he cannot escape liability by saying that he misinterpreted the language. He was bound to know the meaning of the language used, and should have informed himself before assuming to join in the certificate. Adams is therefore responsible for the debts of the corporation thereafter incurred.

It will be observed from the sections of the statute quoted above that the only requirement placed upon the directors with respect to filing the certificate is as to the first certificate required by § 1711, and that thereafter the certificates concerning the condition of the corporation were to be filed under § 1715 by the president and secretary in annual reports. If this duty had been complied with by the officers mentioned at the end of the first annual period, correct information would have been fur-

nished the creditors, but we need not decide whether this would have excluded liability thereafter incurred by the original directors who failed to file a correct certificate originally. As we have already seen, no later certificate was filed, and there was therefore a continuous liability on the part of the original directors because of their failure to comply with the statute (§ 1711).

It is also contended that Adams is liable as secretary for failure to file annual certificate under § 1715, *supra.* We do not think that there is any liability shown, for the undisputed evidence is that Adams resigned as secretary before the debt to appellant was incurred. The records of the corporation fail to show his resignation, but he was not bound by the omission in the record, as he proved that he had in fact resigned and ceased to discharge the duties of the office, and moved away from the county.

As to the other appellees, it is sufficient to say that there is no testimony at all that they were directors or even stockholders at the time the original certificate was filed under § 1711, *supra,* and neither of them occupied the position of president or secretary during the period when the debt to appellant was incurred. The court was therefore correct in giving a peremptory instruction in their favor, and the judgment as to all of the appellees, other than Adams, is affirmed, but the judgment in the latter's favor is reversed, and the cause remanded for a new trial.

FAIR STORE NO. 23 *v.* DENISON.

Opinion delivered April 20, 1925.

1. SALES—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a finding for plaintiff in an action for goods and merchandise alleged to have been sold and shipped to defendant.
2. SALES—LOSS OF GOODS.—Where goods are shipped by a common carrier pursuant to the buyer's order, the sale is complete, and any subsequent loss or injury would fall on the consignee.

3. APPEAL AND ERROR—DEFENSE NOT RAISED BELOW.—In an action for goods sold, defendant cannot for the first time on appeal make the defense that the purchase was within the statute of frauds.

4. FRAUDS, STATUTES OF—DEFENSE NOT RAISED BY ANSWER WHEN.—Though a complaint for the price of goods sold, by not alleging the contract to be in writing, in effect pleaded an oral contract, an answer which neither denied the contract nor specially pleaded the statute of frauds did not raise the question that the contract was within the statute.

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

Strait & Strait, for appellant.

Edward Gordon, for appellee.

McCULLOCH, C. J. This is a suit by appellee against appellant on account for goods and merchandise sold and shipped to the latter. The case was tried before a jury, and the verdict was in favor of appellee for the amount of the account.

Appellee is engaged in the wholesale mercantile business at St. Louis, and appellant is operating a store at Morrilton. The account is for the price of a case of dress-goods, known as percale. It is undisputed that appellant ordered the goods from appellee through the latter's traveling salesman, but it does not appear that there was any written order signed by appellant. According to the testimony adduced by appellee, the case of goods was shipped by common carrier, addressed to appellant at Morrilton, but there is a conflict in the testimony as to whether the goods were actually received by appellant. The testimony introduced by appellee tends to show that the case of goods was delivered to a drayman employed by appellant and authorized to receive the same, and that the drayman paid the freight. Appellant's manager of the store at Morrilton testified that the case of goods was never received, and the court submitted the case to the jury on the sole issue as to whether the case of goods "was shipped to Morrilton and arrived in Morrilton," and, as above stated, the verdict was in favor of appellee.

The evidence was sufficient to sustain the finding of the jury on the issue submitted. If the goods were shipped by common carrier pursuant to appellant's order, then the sale was complete, and any loss or injury to the goods would fall on the consignee. *Burton & Townsend* v. *Baird & Bright,* 44 Ark. 556. The instruction given by the court was too favorable to appellant in stating that the jury must find that the goods arrived in Morrilton. It is contended, however, that there was no evidence of a written order or other written agreement with respect to the purchase of the goods, and that the purchase falls within the statute of frauds, but that question is raised here for the first time, which is too late. There was no plea of the statute of frauds. The language of the complaint is that "the Fair Store No. 23 of Morrilton, Arkansas, a corporation, is duly indebted to the plaintiff as consideration for goods, wares and merchandise, as shown by itemized account attached hereto, in the sum of $295.24." The answer of appellant (omitting caption and prayer) reads as follows: "Denies that the Fair Store No. 23 of Morrilton, Arkansas, is duly indebted to the plaintiff as consideration for goods, wares and merchandise, as shown by itemized account attached hereto, in the sum of $295.24. Denies that the said indebtedness is wholly past due and remains unpaid. Denies that said defendant has no just defense, set-off or counterclaim thereto, and denies that plaintiff is entitled to judgment for said account."

Appellant relies on decisions holding that a denial of allegations as to the existence of a contract constitutes a sufficient plea of the statute of frauds. *Stanford* v. *Sanger,* 141 Ark. 458. It will be observed that appellant's answer neither denies the contract of purchase nor specially pleads the statute of frauds, therefore the answer was not sufficient to raise the question of the contract being within the statute. The effect of the complaint was to plead an oral contract, there being no allegations with respect to a contract in writing. *Izard* v. *Connecticut Fire Ins. Co.,* 128 Ark. 433. So, in order to

plead the statute of frauds as a defense, it is essential that there either be a denial that there was a valid contract, or a special plea of the statute.

Judgment affirmed.

MAGNOLIA PETROLEUM COMPANY v. FREUDENBERG.

Opinion delivered April 20, 1925.

1. APPEAL AND ERROR—OBJECTION TO INSTRUCTION NOT RAISED BELOW.—*Objection to an instruction that it submitted an issue* not set forth in the complaint will not be considered on appeal where it was not raised in the court below, and where specific objection to the instruction was taken on another ground.
2. APPEAL AND ERROR—INSTRUCTION—GENERAL OBJECTION.—A general objection to an instruction that is substantially correct, though not well worded, will not be considered.
3. TRIAL—ABSTRACT INSTRUCTION.—In an action for damages for injury to plaintiff's engine, caused by the alleged negligence of defendant's agent in making a test of lubricating oil in an engine, an instruction which submitted the question whether the test was made upon condition that plaintiff's cylinders and piston rings were in good condition was properly refused where there was no evidence that the test was made upon any condition.

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

Cockrill & Armistead and *John W. Newman,* for appellant.

McCULLOCH, C. J. Appellee instituted this action against appellant to recover damages on account of injury to an engine owned by appellee, it being alleged that the injury was caused by negligence of appellant's agent in making a test of lubricating oil in the operation of the engine. Appellee alleged in his complaint that he was a rice grower, and was operating an engine in pumping water to flood the rice crop; that appellant's agent approached him, soliciting an order for a certain kind of lubricating oil put on the market by appellant, and induced appellee to permit a test of the oil. He alleged that he permitted the agent of appellant to make the test,

and that the agent was guilty of negligence in failing to give a sufficient flow of oil while the engine was running, thereby causing the cylinders and pistons to become scored. Appellee claimed damages for the cost of repairing the engine and for the usable value of the engine during the delay in making the repairs, and also claimed damages for injury to crops, the total amount of damages being the sum of $1,800. On the trial of the cause the court excluded from the consideration of the jury the element of injury to the rice crop, and submitted the cause on the question of damages for cost of repairs to the engine and the usable value of the engine during the period of delay. Appellant denied the allegations of the complaint with respect to negligence in making the test.

It is undisputed that appellee was operating his engine for the purpose of pumping water, and that appellant's agent, Mr. Van Hutches, solicited the purchase of oil, and asked permission to make a test of appellant's lubricating oil so as to demonstrate that the engine could be operated more economically with that oil than with any other. Appellant, through its agent, claimed that it had a very superior lubricating oil with a paraffine base, especially suitable for engines of that type, though not such as could be properly used in an ordinary automobile or tractor. Appellee agreed for the test to be made, and Mr. Van Hutches, with two other employees who accompanied him to appellee's farm, began making observations as to the operations of the engine then being lubricated with an oil which appellee was then using—a kind different from that offered for sale by appellant. These observations continued from early in the morning to shortly after the noon hour, when the oil then in use was withdrawn and the test was begun by use of the oil furnished by appellant. Van Hutches proposed to appellee that the engine be shut down so that the pistons and cylinders could be examined, but appellee declined to permit that to be done, for the reason that there was an urgent need for water on his rice crop. He assured Van Hutches, however, that the pistons and cylinders and pis-

ton rings were in good condition, and, with this assurance, Van Hutches proceeded with the test. He put the new oil in and adjusted it down to the lowest estimated amount necessary to lubricate the engine as the test progressed. This was all done in the presence of appellee, but, after the new oil was put into the engine, he decided to take a walk out through his rice field to look after the ditches, and he testified that, after he had gone a short distance, he looked back and saw black smoke coming from the exhaust of the engine, and he knew that there was something wrong. He immediately returned to the scene of the operations, and found that the engine was knocking very badly. Efforts were made to correct this trouble, without avail, and appellee testified that the engine was not fit to run any more until he had it overhauled, and it was found that the piston rings were stuck and that the pistons and cylinders were badly scored. The testimony of appellee was to the effect that the engine had been thoroughly overhauled, a short time before he began operating it for the season, and that it was in perfect condition, and ran without any apparent defects until it began knocking after Van Hutches put in the new oil. He testified that, as soon as he returned from the field and found that the engine was knocking badly, he made an examination and saw that the lubrication had been reduced after he had left the scene, and that this was done without his knowledge or consent; that he removed the plates and exposed the pistons and found the pistons scored and burned a sort of bluish-yellowish tinge. He said he did not realize at the time the full extent of the injury to the engine, but afterwards found out when he called in a repair man. He testified that, in operating the engine, he usually adjusted the oil pressure so as to give from 96 to 108 drops to each cylinder per minute, and that 52 drops per minute was too low to sufficiently lubricate the cylinders and pistons.

Van Hutches and other witnesses for appellant testified substantially the same as appellee with respect to the preliminary negotiations between the parties and the

progress of the test. There was no substantial conflict in the testimony of appellee and Van Hutches as to what occurred between them. Van Hutches testified that he requested appellee to shut down the engine so that the condition of the pistons and cylinders could be examined, and that appellee assured him that the engine was absolutely clean and "in good mechanical condition, the rings not stuck, and free of carbon." He testified further that he would not have made a demonstration on an engine that was not clean and in good running order. He also testified that he reduced the lubrication down to 52 drops to each of the cylinders. Other witnesses testified that, with the use of that oil, an engine of that kind in good running order could be sufficiently lubricated with as low a pressure as 42 drops to the cylinder.

The testimony introduced by appellee showed that it cost $700 to replace the damaged cylinders and pistons. The jury awarded damages to appellee in the sum of $567.

Error of the court is assigned in giving an instruction submitting to the jury the issue of alleged negligence on the part of appellant's agent in improperly making the test and in using unsuitable oil. It is contended that the question of suitability of the oil should not have been submitted. It is true that there was no direct testimony to the effect that the oil was unsuitable, and there was no allegation in the complaint as to negligence in that regard, but the instruction was to some extent ambiguous as to the submission of that issue—it being merely parenthetically inserted in the instruction—and there was no specific objection on that ground. There was, however, a specific objection on another ground. We think that appellant is not in an attitude to complain now of the instruction on that ground. That instruction was given orally, and, if it was thought at the time that it submitted an issue not set forth in the complaint, there should have been a specific objection calling the court's attention to it.

It is also claimed that the language of the instruction assumed that the agent of appellant was negligent and that unsuitable oil was used, but we do not think that the language is open to that criticism.

The next assignment of error relates to the giving of instruction No. 4, which reads as follows:

"There is some testimony here, gentlemen of the jury, relative to the representations claimed to have been made by the plaintiff to the agents of the defendant company as to the condition of the engine just prior to the test. It is admitted, as I recall the testimony, that the plaintiff, Freudenberg, represented that the engine was in proper mechanical condition and free of carbon, and the agent of defendant company relied upon these representations, and made the test without making the necessary examination to ascertain the truthfulness of such representations. If you find that such representations were made, and, whether believed in or not upon the part of the defendant, and if the evidence discloses that the engine was not in proper mechanical condition, that it was not free of carbon and other injurious substances, that would not relieve the defendant of liability in this case, if liability has been established, unless such representations were the cause of the defendant assuming to make this test, and, relying upon the representations, caused the injuries complained of, if any, to the engine of the plaintiff."

The objection to this instruction was general, and no defects in form or phraseology were specifically pointed out. The substance of the criticism of the instruction now is that it submitted the issue whether or not appellant's agent relied on the representations made to the agent concerning the condition of the engine, whereas it is claimed that the testimony is undisputed that the agent did so rely. Counsel are in error as to the substance of the instruction, for it did not in fact submit the issue whether or not such representations were relied on. The effect of this instruction was merely to tell the jury that, even if misrepresentations were made

and relied on, it would not be a defense unless the representations were the cause of defendant assuming to make the test, and the reliance upon those representations caused the injury complained of. This was just another way of saying that the representations as to the condition of the engine were not material unless they induced the test, which would not otherwise have been made, and that the misrepresented mechanical condition of the engine was the cause of the injury. The instruction is not well worded so as to accurately express the idea which the trial court appears to have intended to convey to the jury, but there should have been a specific objection.

It is next contended that the court erred in refusing to give the following instruction requested by appellant:

"No. 6. If you find from the evidence that the defendant consented to make the test or demonstration of its oil in plaintiff's engine only upon the condition that the plaintiff's cylinders and piston rings should be in good condition, and that plaintiff knew such conditions upon which defendant only would make such test or demonstration, and if you further find that the defendant asked permission of the plaintiff, before such test or demonstration, to make internal examination of the engine to ascertain whether such conditions existed, and if you find that the plaintiff forbade such internal examination, and if you find that plaintiff assured defendant that he knew of the internal conditions of his engine, and if you find that plaintiff assured defendant that the engine was in condition specified in the conditions aforesaid, and that plaintiff so represented, for the purpose of inducing defendant to make such test, then you are instructed that the defendant was justified in relying upon such representation of plaintiff, if plaintiff did so represent and if defendant did rely thereon; and if you further find that the engine was not in the condition specified above, and that if the engine had been in such condition, the oil of the grade and quantity used by the

defendant would not have injured the engine, then you will find for the defendant."

Appellant would have been entitled to an instruction stating the converse of the principles of law announced in appellee's instruction No. 4, but the trouble with instruction No. 6, requested by appellant, is that it incorrectly submits the question whether or not appellant's agent "consented to make the test or demonstration of its oil in plaintiff's engine only upon the condition that the plaintiff's cylinders and piston rings should be in good condition." Now, there is no testimony that the test was made upon any condition at all. There is testimony that appellee made representations concerning the mechanical condition of the engine, and the jury might have found that the injury resulted from the poor condition of the engine rather than from the quality or quantity of the oil used. But neither of the witnesses who testified on this subject stated that the test was made upon express condition as to the condition of the engine. The jury would not have been warranted in finding that there was a condition expressed in the agreement between the parties concerning the test, though the undisputed evidence shows that there were representations made on that subject, and the jury might have found that the representations were not true. Of course, the testimony adduced by appellee tended to show that the engine was in good condition up to the time appellee's agent put the new oil in, and we must treat the verdict as a finding in the affirmative on that question.

The assignments of error argued in the brief are not well taken, and it follows that the judgment must be affirmed, and it is so ordered.

O'BRYAN v. ZUBER.

Opinion delivered April 20, 1925.

1. FRAUDS, STATUTE OF—NECESSITY OF PLEADING.—Where plaintiff sued on an alleged contract of partnership between himself and defendant, whereby defendant was to take title to land in his own name, for the benefit of himself and plaintiff as partners, and defendant specifically denied the existence of such a contract, it was unnecessary for defendant to plead the statute specially, as it devolved on plaintiff to prove that the contract was in writing.
2. FRAUDS, STATUTE OF—CONTRACT TO BUY LAND.—An oral contract whereby defendant was to take title to land in his own name and hold same for the benefit of himself and plaintiff, plaintiff paying no money, was within the statute.
3. FRAUDS, STATUTE OF—CONTRACT TO BUY LAND.—In a suit by plaintiff on an alleged oral contract of partnership by which defendant was to take title to land in his own name and hold same for the benefit of himself and plaintiff as equal partners, evidence *held* not to establish such a partnership as to the ownership of the land as would take the contract out of the frauds.
4. TRUSTS—RESULTING TRUST.—An oral contract by which defendant was to take title to land in his own name for the benefit of himself and plaintiff, under which the land was purchased in defendant's name and with his money, and plaintiff executed no written obligation to defendant for his half of the purchase money, *held* not to create a resulting trust.
5. FRAUDS, STATUTE OF—AGREEMENT TO CULTIVATE LAND.—An oral agreement between plaintiff and defendant that certain land purchased in defendant's name was to be operated and cultivated by them for their joint benefit was not within the statute of frauds to that extent, though within the statute so far as it provided that plaintiff should have an interest in the land.

Appeal from Pike Chancery Court; *C. E. Johnson*, Chancellor; reversed in part.

Snodgress & Snodgress and *J. C. Marshall*, for appellant.

W. T. Saye and *J. N. Saye*, for appellee.

WOOD, J. This is an action by the appellee against the appellant in the Pike Chancery Court. The appellee alleged in his complaint that, on or about April first, 1923, he and the appellant associated themselves together as

partners for the purpose of buying, cultivating and operating certain lands in Pike County, Arkansas, consisting of 123.95 acres; that each should pay one-half of the purchase price of the land and share equally in the expense and profits in the cultivation and operation of the lands; that, pursuant to the agreement, the lands were purchased by them, title being taken in the name of the appellant in trust for the partnership; that, during the year 1923, peach orchards on the lands produced peaches of the gross value of $11,100; that the expenses incurred in cultivating the orchards and gathering and marketing the crop amounted to $3,200, leaving a net profit accruing to the partnership of $7,900; that appellee was entitled to receive one-half of such profit, amounting to the sum of $3,950; that appellant had repudiated appellee's interest in the partnership and had thus converted to his own use appellee's share of the profits. Appellee further alleged that he borrowed from appellant the sum of $1,500 at the time the lands were purchased, for which he agreed to pay the appellant eight per cent. interest from April 1, 1923, until the same was paid; that appellant was entitled to a set-off in the sum of $1,500 at eight per cent. interest from April 1, 1923, against the $3,950, appellee's share of the profits, leaving a balance due appellee from the appellant in the sum of $2,450. Appellee prayed for an accounting and a sale of the lands mentioned, and a division of the proceeds as their interests might appear, and for judgment against the appellant in the sum of $2,450, and that same be declared a lien upon the appellant's interest in the partnership. The appellant in his answer denied the allegations of the complaint.

The appellee testified substantially as follows: He and the appellant were both employed by the American Refrigerator Transit Company. Appellee and appellant agreed to associate themselves together for the purpose of buying 123 acres of land in Pike County, about thirty-three acres of which was a peach orchard. In pursuance of such agreement, they purchased the land about April 1,

1923, from the Caddo River Lumber Company, for a consideration of $3,000. The agreement between the appellant and appellee concerning the purchase of the land was oral. The appellee did not have the money to pay his part of the purchase price, and the appellant suggested that he would let appellee have the sum of $1,500, for which the appellee was to pay interest at the rate of eight per cent. The agreement between them was that they should purchase the land and each one own an undivided half interest in it. Appellant was to pay $1,500 and appellee $1,500. The deed was made out in appellant's name. Appellee further testified in detail to the effect that he had agreed to superintend the application of the spraying material on the orchard, and that he did so until the time the appellee's son came down on his vacation in June and relieved the appellee of supervision. There was no agreement between appellee and appellant to the effect that appellee was to be paid a salary for his services in connection with the peach crop. There was no agreement as to the time that either party would devote to the crop. On July 3, 1923, appellee had an operation for appendicitis, and, a few days after his release from the hospital, appellant advised appellee that the latter had not fulfilled his part of the transaction, and that appellee could either accept the *pro rata* payment of the amount he had put in on the orchard for expenses or drop out of it altogether. This occurred the day before the crop started moving. Appellee stated that the approximate value of the land was the sum of $3,000. On cross-examination he stated that appellant loaned him the $1,500 when the deed was made over in appellant's name. Appellant did not take any note or written memorandum as evidence of the loan. Appellant never gave the money representing the purchase price of the land into appellee's hands. The appellant purchased appellee's part of the land, and appellee was to pay him from the proceeds of the crop the principal sum of $1,500 *plus* eight per cent. interest, after the crop was harvested. If the crop had lost $10,000, appellee considered himself morally obli-

gated to fulfill his part of the agreement. Appellee did not claim that appellant actually loaned him $1,500 to pay for his half of the property. Appellee was to pay the appellant the $1,500, after the crop had been sold, out of appellee's half of the net proceeds of the crop. Appellee gave no security to appellant except his moral obligation to pay from appellee's half of the net proceeds or profits. The appellee was present when the arrangements were made for the purchase of the farm in controversy, but was not present when the appellant paid the cash for the land and the deed was turned over to appellant. Appellee had seen the deed. The appellee had no information about the cost of producing the crop or the gross or net return, except that given him by the appellant. All appellee had actually put into the farm or the peach orchard in actual cash was the sum of $338, which appellant had returned to the appellee. If appellant had not suggested to appellee that he would advance the $1,500 for appellee, appellee would have arranged otherwise to secure the money.

John T. Stinson testified that he was director of agricultural development for the Missouri Pacific Railroad Company, and that he was acquainted with the parties to the action and with the land in controversy. He made a trip with the parties, inspecting the orchards and strawberry fields. At that time they inspected the orchard in controversy. Previous to that time witness had an arrangement with the appellee by which they hoped to purchase the orchard jointly, and witness and appellee had made an offer for the same, but afterwards witness found that he could not raise the money to pay for his half. On the day witness and the parties to the action went to inspect the orchard, witness remained at the motor car while appellee and appellant made the inspection. After the inspection, appellee and appellant went into the office of the Caddo Company, and, when they came out, witness asked appellee, in the presence of the appellant, if they had purchased the farm, and appellee answered in the affirmative. Witness then

asked appellant if he was going in with the appellee on the purchase, and talked with the appellant about the prospects of the peach crop, etc., and the appellant answered that he was going in with the appellee on the purchase. Witness had conversed with the appellant a number of times since the purchase, during the summer, in his office, because witness was interested in the proposition. He had endeavored to purchase a half interest in it, and was naturally interested in the outcome. He never lost an opportunity to ask appellant how things were coming. Witness was asked the following question: "In speaking to him (appellant) about that orchard after that, did you refer to it as the property which he and Mr. Zuber had purchased?" Witness answered, "I never dreamed of anything else. Q. Well, did he (appellant) ever deny that to you? A. Oh, never. Q. Or did he ever claim to you that Mr. Zuber didn't have any interest in it? A. No, no." Further on the witness stated that the appellant furnished appellee half of the money at six per cent. to purchase the land, under an iron-clad agreement that appellant would carry the appellee, so that appellee would not have to go outside to get the money. The iron-clad agreement witness referred to was a "gentlemen's agreement." Witness didn't know of any agreement in writing between the parties. It was a verbal agreement. Witness was under the impression, from his conversation with the appellant, as well as with the appellee, that it was a company orchard. Witness knew the appellee to be a man on the square, who could go out in Little Rock and get the money, and who would carry out his agreement.

Kelley testified that he was a lawyer. He had no interest in the subject-matter of the litigation. His opinion concerning the agreement between the appellant and the appellee as to the purchase of the land in controversy came from a statement made by them in his presence about the middle of July, 1923. Witness, at the appellee's request and in his interest, went with him to see the appellant. Witness penciled the memorandum of

the agreement as it was stated by the appellee and admitted by the appellant. Appellee stated that he could pay his half of the purchase price the next day if necessary, as he did not intend to lose his half interest. It was agreed that this was not necessary, as appellee's half of the purchase price and the expenses would be taken from the returns of the fruit crop, and the balance was to be divided *pro rata* between them, and thereupon the appellant was to make the appellee a deed to appellee's half interest in the property. It was agreed that appellant should furnish the appellee the money at eight per cent., and appellee should repay him and attend to the orchard. It was stated in the conversation that it was the previous agreement between the parties that each should have a half interest in the property. Appellant admitted that the property was purchased in that way. The appellee and the witness had made arrangements to borrow $1,500 cash from Mr. Sterling Tucker, president of Fones Hardware Company, to pay appellee's part of the purchase money. Witness jotted down a statement of the prior agreement reiterated that day, for the purpose of future reference. At the time of this conference one carload of peaches was ready for shipment, and the parties estimated that there would be eleven or twelve cars.

Lee Cazort testified that he was acquainted with the parties to the action; that he was in appellant's office about the first of June, 1923; that he went there to carry a piece of a spraying machine that appellee had asked him to bring down. Witness and appellant conversed for some time about the orchard. Appellant stated that he and appellee had bought the orchard in partnership. The details of the transaction he did not relate to the witness. Witness understood from the conversation that appellant and appellee had bought the orchard jointly. In another conversation with appellant, the day before witness testified, appellant stated to witness that the appellee had no interest as a partner; that they had only bought the crop together.

The appellant categorically denied the testimony of the appellee and his witnesses as to the purchase of the land jointly by appellant and the appellee. The appellant testified that he alone purchased the land and paid for it; that appellee had nothing to do with the purchase. There was no agreement between them as to the place whatever. The appellee agreed to go down and look after the spraying and cultivation of the peach crop. He was to be paid for this work in proportion to the money he put up. He was not to receive any interest in the property, but only an interest in the net proceeds of the crop, if there were any. If there had been no net proceeds, then appellant and appellee would have lost what they spent on the crop. Appellant reimbursed appellee for what he put in, and appellant owed him about ten per cent. of the net proceeds. Appellee gave the correct figures as to the proceeds of the crop. The appellee did not faithfully perform his contract to look after the spraying and cultivation. The orchard was not properly cared for; it did not get the proper spraying during the month of May. Appellant sent his son down on June 6, 1923.

The testimony of appellant's son, and also of a witness by the name of Oscar Raines, who was in the employ of the appellant, in looking after the orchard, corrobated the testimony of the appellant to the effect that the appellee did not properly spray the orchard; that, on account thereof, the orchard did not yield the crop it would have done had it been properly sprayed.

The court found that the appellant and the appellee, on the first of April, 1923, associated themselves together as partners for the purpose of buying the land in controversy and that they did so purchase the land; that the deed, on the 19th of April, 1923, was executed to the appellant, and he was vested with the legal title in trust for the partnership; that it was agreed that each should own a half interest in the land; that appellant paid the purchase price for $3,000 and loaned the appellee $1,500 to pay his part of the purchase price, on which appellee

was to pay interest at the rate of eight per cent. per annum; that the crop for the year 1923 netted the sum of $4,900, and that the appellant owed the appellee $2,450, with interest, of $41.08, leaving a balance due the appellee, with interest, from the date of the decree in the sum of $884.27. The court thereupon entered a decree in favor of the appellee against the appellant for that sum, and declared the same a lien on the real estate described in the complaint, and decreed that the partnership be dissolved and that the lands mentioned in the complaint be sold and the proceeds be equally divided between the parties; that appellant pay the expenses and costs and also pay the appellee the sum of $884.27 out of his half of the proceeds of the sale. From that decree is this appeal, and the appellee cross-appeals.

1. The appellee, by the allegations of his complaint and the testimony adduced in his behalf, seeks to establish an interest in certain lands described in his complaint, which he claims were purchased under a contract of partnership between appellant and appellee by which the appellant was to take the title in his own name for the benefit of himself and appellee as equal partners. The appellant, in his answer, specifically denies that there was any such contract.

In *Stanford* v. *Sager,* 141 Ark. 458-466, we said: "Where a defendant in his answer denies making the contract which plaintiff declares on and seeks to have specifically performed, it is not necessary in such case for the defendant to specifically plead the statute of frauds, for the reason that it devolved upon the plaintiff to show that he had a valid contract as alleged." We cited the cases of *Wynne* v. *Garland,* 19 Ark. 23, and *Trapnall's Admr.* v. *Brown,* 19 Ark. 39. In the latter case we held, quoting syllabus: "Where the defendant denies the agreement or contract relative to the real estate alleged in the bill, it is not necessary for him to insist in his answer upon the statute of frauds as a bar."

Taking the allegations of the complaint as a whole, it was tantamount to an action for a specific perform-

ance of an alleged partnership agreement by which the appellant and the appellee were to purchase a certain tract of land in Pike County, Arkansas, as partners, and operate and cultivate the same as such. The complaint, in effect, alleged that the contract had been performed in part by the purchase and cultivation of the lands, but that the appellant refused to further carry out the partnership agreement by recognizing appellee's right and title to a half interest in the land as well as in the net proceeds of the fruit crop produced thereon; and appellee prayed in effect that the chancery court require appellant to complete the performance of his contract by an accounting and a sale of the lands, and that the appellant be required to pay over to appellee a half interest of the proceeds from the sale of the lands, and also that appellee have a decree for his half interest in the net proceeds of the fruit crop, and that this decree be declared a lien upon the appellant's half interest in the land. The appellant, having denied specifically in his answer that there was any contract of partnership for the purchase of the land in controversy, it was unnecessary for him to plead the statute of frauds, because it devolved upon the appellee to prove that the alleged contract was in writing under which he claims the appellant had agreed to advance the purchase money for the joint benefit of himself and the appellee, in order to establish his title to a half interest in the land. The contract, so far as appellee's alleged half interest in the lands is concerned, was clearly within the statute of frauds, and the appellant, under the issue raised by the pleadings, as well as the proof, had a right to avail himself of the statute. There is no testimony in this record to warrant a finding that the parties had entered into a contract of partnership for the purchase of the land in order to share in the profits and resale of the land itself. There is nothing to show that the parties contemplated a resale of the land. According to the testimony of the appellee himself, they were to own the land jointly and to share as partners in the operation and cultivation of the land.

The case therefore does not fall within the doctrine of *Beebe* v. *Olentine,* 97 Ark. 390, so as to remove the case, as far as the ownership of the land is concerned, out of the operation of the statute of frauds. In the case of *Schultz* v. *Waldons,* 60 N. J. Eq. 71, 47 Atl. 187, it is held that: "Where there is no previous partnership or joint enterprise between two parties, A and B, and they agree, by parol, that B shall purchase and take title in his own name to a single piece of real estate, and hold the same for the benefit of both, and A contributes no money to the enterprise, and there is not written proof of the contract, the statute of frauds prevents A from successfully claiming an interest in the land." See also *Scheuer* v. *Cochem,* 126 Wis. 209, 4 L. R. A. 427, and case note in which the above case of *Schultz* v. *Waldons* is cited, and also the leading case on the subject of *Smith* v. *Burnham,* 3 Sumn. 435, Federal Cases No. 13,019. See also *McClintock* v. *Thweatt,* 71 Ark. 323.

Now, there was no previous partnership between the appellant and the appellee for the purchase and sale of lands and to share equally in the profits from such transaction. There were no partnership funds created for that purpose. On the contrary, the purchase of the land was the first and only transaction for which it is alleged the partnership was formed. The evidence is not sufficient to establish a partnership, so far as the ownership of the land is concerned, so as to take the case out of the statute of frauds. See *Nestor* v. *Sullivan,* 111 N. W. (Mich.) 85, 9 L. R. A. 1106; *Norton* v. *Brink,* 110 N. W. (Neb.) 669, 7 L. R. A. 945.

2. Nor, under the facts of this record, can it be said that the appellee had established a resulting trust in his favor to an undivided half interest in the lands. The most that the appellee's own testimony proves in regard to the purchase and ownership of the real estate is that he and appellant were to purchase the land jointly as partners; that appellant was to advance the money to pay appellee's half of the purchase price, for which he was to pay interest at the rate of eight per cent.; that the

land was purchased in appellant's name and with his money, and that the deed was taken in appellant's name; that appellee executed no note or other written obligation to appellant for his half of the purchase money. At one place in his testimony the appellee, in answer to a question, stated that he did not claim that appellant actually loaned him the money to pay his half of the purchase price of the land. Appellant paid the purchase price, and the appellee was to repay him, with interest from his half of the net proceeds of the crop of 1923. It will thus be seen that the appellee neither paid any money nor entered into any written obligation evidencing a contract to pay money to the appellant for his alleged half of the purchase price before or at the time the deed to the appellant was executed; nor was there any agreement between them to the effect that appellant, when the deed was taken in his name, should have a lien on appellee's alleged half interest in the lands as security for the money alleged to have been advanced by appellant for the appellee. The appellee himself testified that he was only under a *moral* obligation to pay out of his half of the proceeds of the crop. Such security was *in futuro et nubibus,* and was no security at all. This testimony was not sufficient to constitute a resulting trust in favor of the appellee to an undivided half interest in the land.

In *Reeves* v. *Reeves,* 165 Ark. 505, it is said: "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." See also *Pumphrey* v. *Furlough,* 144 Ark. 219; *Bland* v. *Talley,* 50 Ark. 71. A succinct statement of the doctrine is found in *McGovern* v. *Knox,* 21 Ohio St. 547-552, where it is said: "The foundation of a resulting trust is the payment, or the securing to be paid, by the *cestui que trust,* out of his own means, [of] the consideration of the conveyance, or some part thereof, at its completion." 15 Am. & Eng. Enc. (2nd. ed.) p. 1145; *Furber* v. *Page,* 143 Ill. 622; *De Roboam* v. *Schmidtlin,* 50 Ore. 388.

3. It does not follow, however, that, because there was no resulting trust in favor of the appellee for an undivided half interest in the lands and no enforceable contract of partnership between the appellant and appellee whereby appellee had title to an undivided half interest in the land in controversy, there was likewise no enforceable contract of partnership between appellee and appellant whereby the appellee was entitled to a half interest in the net profits of the products of the land for the year 1923. The contract was a severable one. See *McClintock* v. *Thweatt, supra.* As we have seen, the statute of frauds precludes the appellee from enforcing the alleged contract of partnership by which he was to acquire an undivided half interest in the fee to the lands in question. But the trial court found, not only that there was a partnership entered into between the parties for the purchase of the land, but also that "it should be cultivated and operated by the partnership for the joint benefit of both parties." We are convinced that these findings of fact are sustained by a preponderance of the evidence, and that the contract is enforceable as to the operation and cultivation of the land.

In *Personette* v. *Prynne,* 34 N. J. 26, it is held that a parol agreement of partnership for working lands is not within the statute of frauds. In *Everhart's Appeal,* 106 Pa. 349, it was alleged that there was a partnership business in the buying and selling of lands for the purpose of carrying on a farm, and the prayer of the complaint was that one of the alleged partners be required to account to the other for a "one-half part of the net profits and gains arising from said business and to convey one-half part of the lands remaining unsold." The court held that one of the partners could not establish his interest in the lands by parol evidence, where the statute of frauds was set up, requiring agreements relating to lands to be in writing, and further held that that rule did not apply to an agreement for a division of the profits arising from a sale of the lands so purchased by the partnership. We have recognized this doctrine where

there was a partnership established for the purchase and sale of lands. *McClintock* v. *Thweatt, supra; Beebe* v. *Olentine, supra.* In both these cases we held that a contract of partnership to *divide the profits* arising from the sale of lands was not within the statute of frauds, and could be enforced. The doctrine of the above cases is applicable here to that part of the complaint of the appellee which seeks an accounting and a specific performance of the contract to divide the profits arising out of the cultivation and operation of the lands in controversy during the year 1923. See also *Bates* v. *Babcock,* 16 L. R. A. 745, and cases cited in note. The authors of the note in that case, speaking of an oral agreement for a partnership in the *profits* of buying and selling real property, say: "As a rule, contracts for such partnership are held valid, and all suits recognizing the existence of the partnership and seeking relief, which may be legitimately sought by a partner, are upheld, while, on the other hand, parol contracts for an interest in land are ignored and suits brought to enforce them dismissed, although they may constitute a part of the partnership agreement."

The trial court found, and the finding is sustained by a preponderance of the evidence, that the net profits accruing to the partnership from the peach crop produced on the land for the year 1923 was the sum of $4,900, and that therefore appellant was due the appellee the sum of $2,450 for his share of such crop, and that appellant should have paid to the appellee his proportion of the profits not later than September 1, 1923. While this is not an action for the profits derived from the partnership in the buying and selling of lands, it is an action for the profits derived from a partnership in the operation and cultivation thereof. If an accounting for the former is authorized, and it is according to the doctrine of the above cases, then, *a fortiori,* is an accounting in the latter authorized.

It follows that the trial court erred in entering a decree the effect of which was to hold that the appellee had an equal interest with the appellant in the lands in

controversy and in directing an accounting between the parties pursuant to such holding. The trial court instead should have entered a personal decree in favor of the appellee against the appellant for his half interest in the net profits from the peach crop of 1923, which, according to the testimony abstracted by counsel for both parties, was the sum of $4,900. The decree therefore should have been in favor of the appellee for the sum of $2,450, with interest at the rate of six per cent. from the first of September, 1923. The decree is therefore reversed, and the cause will be remanded with directions to enter a decree in accordance with this opinion.

MISSOURI PACIFIC RAILROAD COMPANY v. KELLAR.

Opinion delivered April 20, 1925.

APPEAL AND ERROR—ADMISSION OF INCOMPETENT EVIDENCE—HARMLESS ERROR.—Error of the court in admitting the testimony of a child under ten years of age, in violation of Crawford & Moses' Dig., § 4146, is cured by emphatic and unmistakable direction to the jury to disregard such testimony for all purposes, where there was other testimony sufficient to sustain the verdict.

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

Thomas B. Pryor and *Vincent M. Miles,* for appellant.

Edward Gordon, for appellee.

WOOD, J. This is an action by the appellee, the father and next friend of Cecil Faye Kellar, a minor, against the appellant, to recover damages for a personal injury. Cecil Faye Kellar was offered by his counsel as a witness. Thereupon counsel for appellant stated that he was not familiar with the statute, and asked counsel for appellee what was the age of the witness. Counsel for the appellee then asked the witness his age, and witness stated that he was nine years old. The court then read the statute prescribing that "infants under the

age of ten years, and over that age if incapable of understanding the obligation of an oath, shall be incompetent to testify. Section 4146, Crawford & Moses' Digest. The court then asked the attorney for the appellee if he insisted on taking the testimony, and, upon an affirmative answer, the court instructed him to proceed. Counsel for appellant thereupon objected, and the court stated that he was of the opinion that the testimony was incompetent, but he would reserve a ruling until later, and, in the meantime, the witness might proceed with his testimony.

Several other witnesses testified on behalf of the appellee and the appellant. At the conclusion of all the testimony the record shows the following occurred:

"Mr. Miles, attorney for defendant: Here is what I want. At the conclusion of the testimony, counsel for the plaintiff agreed with the court that the court should exclude the evidence of this witness (Cecil Faye Kellar), and that they would not save an exception to the action of the court in that regard. The defendant stands on its former objection and exception to the testimony of Cecil Faye Kellar.

"By Mr. Gordon, for plaintiff: Let the record show that the defendant did not, at the conclusion of the testimony, request the court to rule upon the question of whether the testimony of Cecil Faye Kellar was admissible or ask any instruction of the court upon that question.

"By Mr. Miles: The defendant, at the conclusion of all the testimony in the case, asks the court, if it changes its former ruling and holds that the testimony of Cecil Faye Kellar is incompetent, to withdraw the case from the jury and declare it a mistrial, because the testimony of Cecil Faye Kellar is incompetent. The defendant has objected and saved its exceptions. If the court lets the case go to the jury with the exception, the defendant is satisfied. If the court withdraws the testimony from the jury, the error already committed cannot

be cured, and the defendant asks the court to declare a mistrial and continue the case for the term.

"Ruling by the Court: Gentlemen of the jury, the court reserved a ruling on the admissibility of the evidence of the little boy, who was shown to be nine years old, I believe, by some of the testimony; and Mrs. Kellar his mother, testified that he was eight years old when he was injured, but he is nine years old now. The law provides that, in civil cases, an infant under ten years of age is not capable of testifying. The court has notified the attorneys of his opinion on that; and the attorney for the defendant in this case asks the court to declare a mistrial, and the court overrules that request, and instructs you not to consider that testimony at all for any purpose, because it is inadmissible. It isn't the law. And if it were to go to you without this admonition, why, the court is of the opinion that the Supreme Court would reverse the case if you found a judgment in favor of the plaintiff—that it would be reversible error, and the court made a mistake in permitting it to be introduced until he further investigated it. And, on further investigation, the court is convinced that he was right in his first impression, declaring it incompetent. There may be some difficulty some time to eradicate from the mind the impression that is made from testimony that is already introduced. The court tells you now to disregard everything that the little boy who was injured, or alleged to have been injured—disregard everything that he said in his testimony, because it was a mistake in admitting it in the first place."

The jury returned a verdict in favor of the appellee in the sum of $500. The court rendered judgment against the appellant for that sum, from which is this appeal.

Two witnesses testified, corroborating the testimony of young Kellar, to the effect that he was at the railroad crossing, waiting for the train to pass, when the employees on the engine caused the steam to be emitted therefrom that caused the injuries to young Kellar. If there

had been no other testimony than that of young Kellar himself as to the place and manner of his injury, then, to be sure, the rulings of the trial court, as disclosed by the above record, would be prejudicial error. But the erroneous ruling of the trial court in permitting the witness to testify, and any effect that such testimony might have had on the minds of the jury in favor of the appellee, were completely eradicated by the emphatic and unmistakable direction of the court to the jury to disregard everything that young Kellar had said, and not to consider his testimony at all for any purpose. To hold otherwise, it occurs to us, would be to impeach the jury of a lack of that intelligence and impartiality which the ordinary juror always is presumed to possess.

We see nothing in the conduct of the counsel for appellee or the trial court that is calculated to prejudice the rights of the appellant. The error was not of that flagrant character which could be said to have inflamed the minds of the jurors and aroused their passions or prejudice so as to cause them to disregard the trial court's instructions, which they were sworn to obey. The facts do not bring the case within the doctrine of the exceptional class of errors at the trial recognized in the case of *Kansas City Southern Ry. Co.* v. *Murphy*, 74 Ark. 256-70, relied upon by appellee. The judgment is therefore correct, and it is affirmed.

MALOY v. MALOY.

Opinion delivered April 20, 1925.

APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—Where the Supreme Court finds that it is wholly unable to determine where the preponderance of the evidence lies, it treats the findings of the chancellor as persuasive and adopts such findings as its own.

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

J. Paul Ward, for appellant.

Ben F. Williamson and *Ben B. Williamson*, for appellee.

WOOD, J. This is an action by the appellant against the appellee in the Stone Chancery Court. The appellant alleged that he and the appellee were the sole owners of certain tracts of land in Stone County, amounting in all to 283.61 acres, which are described in the complaint. The appellant alleged that he owned an undivided three-fourths and the appellee an undivided one-fourth; that it would be to the interest of the parties to have the lands partitioned, and prayed that this be done by a division in kind, but, if this could not be done, the lands be sold and the proceeds divided between them in proportion to their respective interests.

In his answer the appellee admitted the allegations as to the ownership and that it would be to the best interest of the parties to have the lands divided, and that they were susceptible of subdivision. Appellee, by way of cross-complaint, alleged that there was due him the sum of $900 for improvements on and care of the farm for five years.

The court entered an order for a partition of the lands according to the respective interests of the parties, and appointed commissioners to make the partition. The commissioners made their report to the court, setting up a description of the lands as divided between the parties respectively. They allotted to the appellant 211.61 acres and to the appellee 72 acres. A plat containing a description of the respective allotments was filed as a part of the report of the commissioners. Exceptions were filed by the appellant to the report of the commissioners, setting forth, first, that the lands were divided in quantity without taking into consideration the quality of the lands; second, that the lands allotted to appellant were in seven fields, on which there were four water-gaps, and that the lands were washed and worn, whereas appellee's lands were in one fertile field with fewer water-gaps; third, that none of the uplands

susceptible of cultivation were given to appellant, while fifteen acres of such lands were given to the appellee; fourth, that the lands allotted to the appellant were fenced with "old rotten rails," while that allotted to the appellee was fenced with woven wire with barbed wire at the top, which was comparatively new; fifth, that appellant was entitled to lands of three-fourths the total value and appellee to one-fourth, but the commissioners gave the appellant only two-thirds of the total value and the appellee one-third. The appellant further alleged in his exceptions that the lands were not susceptible of division giving to each one his proportionate part, taking quantity and quality into consideration. The appellant prayed that the report of the commissioners be set aside and that the lands be sold and the proceeds divided.

The appellee responded to the petition setting forth appellant's exceptions, and denied all the allegations thereof. Appellee set up that appellant was not living on the lands, and that appellant wanted to have the lands sold in a body because he realized they would bring a better price if so sold. Appellee alleged that he made his home on the lands, with his four little orphan children, and that, if the lands were sold from under him, he could not take the money realized from his share of the proceeds and purchase another place of the same kind. He alleged that the division made by the commissioners was fair and equitable, and prayed that their report be in all things confirmed.

The appellant and the appellee are brothers. The lands in controversy originally belonged to the ancestral estate of their deceased father. Each of the parties joined in the original application for a partition, stating that the land was susceptible of division in kind, but, when the report of the commissioners was made, the appellant filed his exceptions thereto, and stated that the land was not susceptible of division in kind, and prayed that the same be sold and the proceeds divided in proportion to their respective interests. Each of the brothers testified to facts tending to sustain their contentions, as shown

in the exceptions to the report of the commissioners and the response to the exceptions. The appellant testified to the effect that the commissioners gave the appellee twenty acres in cultivation off of the west end of the farm, which was about one-fourth of the lands in cultivation, and that these twenty acres were much better land than the tillable land allotted to the appellant; that the lands set apart to appellant are washed in ditches, which is not the case with the lands allotted to the appellee; that, while there were three houses on the land allotted to the appellant, they were all not worth more than the sum of $300; that there were only about nineteen or twenty acres of timber lands worth anything for cultivation, and that of this the commissioners allotted to the appellee fifteen acres, and four or five acres to appellant, whereas the allotment should have been just the reverse; that, during the year 1922, appellee raised on the lands allotted to him 342 bushels of corn and the appellant raised on the lands allotted to him 482 bushels; that the appellee gathered 3½ bales of cotton and appellant 5½ bales.

Several witnesses testified to the effect that they had known the land for many years—some of them for more than fifty years; that the lands allotted to the appellee on the west end of the farm were far more valuable than the lands on the east end. One of these witnesses stated that there were only twenty-three acres of fertile land allotted to appellant and seventeen acres of good land allotted to appellee; that twenty acres of the land allotted to the appellant were so poor that they were almost worthless, and that the house, the main building, allotted to appellant was not worth more than $175; that of the uplands three acres were allotted to appellant and fifteen acres to appellee, suitable for cultivation; that appellant got less than two-thirds, whereas he should have had three-fourths of the total value. One of the witnesses stated that he would just as soon have the land allotted to the appellee as all of the land allotted to the appellant. One witness stated that the buildings were worth $250. These witnesses stated that they did not

believe the lands could be equitably divided; that the lands allotted to the appellee adjoined his homestead, which was to the detriment of appellant, resulting in 25 or 30 acres of good land to appellant and 18 or 20 acres to appellee, and about thirty acres of poor land to appellant.

Appellee and his witnesses testified to the effect that the one main building on the place allotted to appellant was worth about $1,000; that the lands adjoining the homestead of the appellee were allotted to him, and, unless it had been so allotted, his homestead would have been of little value. Other witnesses for the appellee testified to the effect that the allotment was fair. They corroborated the testimony of the appellee to the effect that the main house allotted to appellant was worth $1,000; that the other two houses on the farm were worth $300. Another witness testified for the appellee to the effect that all the buildings were worth the sum of $1,100. The effect of the testimony of the witnesses for the appellee was that appellant got all the improvements and a fair division of the land in cultivation and in the woods.

The appellee testified in detail concerning the value of the lands and the buildings, and stated that the main building on the land allotted to appellant, including the barn, orchard and garden, were worth $1,000; that, if the commissioners had not given to the appellant the improvements on the land in question, the value of appellant's land would have been lessened by reason of losing the improvement.

The above is a summary of the salient features of the testimony developed at the hearing. After hearing the testimony, the court approved the report of the commissioners and entered a decree approving and confirming same, from which decree is this appeal.

After a careful consideration of the testimony, we are convinced that the findings and decree of the trial court are not clearly against the preponderance of the evidence. It is most difficult, in cases of this kind, where there is a decided conflict in the testimony, to determine

where the preponderance lies, and, where this court finds that it is wholly unable to determine where the preponderance lies, it treats the findings of the trial court as persuasive, and adopts such findings as its own. See *Leach* v. *Smith,* 130 Ark. 465-470, and cases there cited.

The decree is therefore correct, and it must be affirmed. It is so ordered.

HUDSON v. STATE.

Opinion delivered April 20, 1925.

1. HOMICIDE—ADMISSIBILITY OF DYING DECLARATION.—Admission of a statement of deceased as a dying declaration in a murder case was not error where it was shown that he realized that he was in a dying condition.
2. HOMICIDE—HARMLESS ERROR.—Admission of dying declaration tending to show murder, if erroneous, was not prejudicial where the jury found defendant guilty of involuntary manslaughter.
3. HOMICIDE—ABSTRACT INSTRUCTION—PREJUDICE.—Where the evidence in a murder case tended to show that defendant was guilty either of murder or voluntary manslaughter, an abstract instruction on involuntary manslaughter could not have prejudiced the defendant.

Appeal from Union Circuit Court; *L. S. Britt,* Judge; affirmed.

H. W. Applegate, Attorney General, and *John L. Carter*, Assistant, for appellee.

WOOD, J. In December, 1924, J. N. Hudson was indicted in the Union Circuit Court for the crime of murder in the first degree in the killing of one Louie Primm, in Union County, Arkansas. He was tried and convicted of the crime of involuntary manslaughter, and sentenced by judgment of the court to one year in the State Penitentiary, from which judgment he appeals.

The testimony adduced by the State tended to prove that the appellant and Primm had a fight about eight o'clock on Thanksgiving night. The appellant was

arrested, and, while he was being carried to the police station, he said to the officer, "Primm jumped on the wrong boy. I don't bother nobody, and I will get the son of a b———." Afterwards, about ten o'clock, the appellant was seen walking back and forth in the space between the sidewalk and the curbing for thirty or forty minutes. As Primm came along, the appellant fired upon him with a pistol. Primm ran, and appellant followed, shooting him until Primm entered the Central Hotel, and appellant fired one shot after Primm got into the hotel. Appellant began shooting at Primm when the latter was about twenty or twenty-five feet from the entrance of the hotel. The appellant fired four shots. Primm did not have a pistol on his person at the time the appellant fired upon him.

The testimony, in brief, for the State tended to prove that, after the fight, which occurred about eight o'clock, between the appellant and Primm, the appellant armed himself and stationed himself on the street, waiting for Primm to come along, in order to kill him. Primm was shot in the back and right side. He died the next morning about five o'clock. A witness, who was called to attend Primm after he was shot, stated that Primm asked witness what he thought of his condition, and witness told Primm that it was pretty bad. Witness was asked: "Q. Do you know whether or not he had been informed by you or Dr. Niehuss, in your presence, that his wounds were fatal?" Witness answered, "Yes sir; I remember of telling him that he was in a serious condition." Primm asked witness a time or two if witness thought there was any hope for him. Primm said he hoped there was a chance.

The justice of the peace was requested by the prosecuting attorney to attend at the bedside of Primm to hear his dying declaration. The prosecuting attorney asked Primm if he realized that he was fatally shot, and Primm answered that he did. Witness then wrote down the statement of Primm, which was to the effect that appellant shot him twice with a pistol. They were in a fight

about forty-five minutes before, and Primm was only fighting with his fists. Primm started out of the hotel on the street, and met appellant, who shot him before he could get away. Appellant had threatened to whip Primm about three or four days before the fist fight. When Primm started out of the hotel, he met appellant; and when he saw appellant go for his pistol, Primm ran.

The testimony of appellant and the witnesses in his behalf tended to show that the appellant shot Primm in self-defense; that he heard, after he and Primm had the fight in the early part of the evening, that Primm was looking for him with a knife, and that Primm came around the corner and had his right hand dropped down by his side. Appellant saw something bright in his hand, which he took to be a knife, and began to shoot. He shot to protect himself. He shot four times.

The court gave instructions on the degrees of criminal homicide and on the law of self-defense. The appellant, in his motion for a new trial, objected to the giving of several of these instructions, which we have examined, and find that they correctly declared the law in accordance with many previous decisions of this court. It is therefore unnecessary to comment further upon them.

One of the grounds of appellant's motion for a new trial is that the court erred in admitting the dying declarations of Primm. There was no error in the ruling of the court in admitting such declaration, and, besides, the verdict of the jury finding the appellant guilty of only involuntary manslaughter shows conclusively that the dying declarations had no weight with the jury. If appellant was guilty at all, and the jury found that he was guilty, then, under the evidence, he could not have been properly convicted of a lower grade of homicide than murder in the first or second degree, or voluntary manslaughter. The killing of Primm, under the circumstances, could not have been involuntary manslaughter, because the appellant shot him with the intent to kill him. The instruction on involuntary manslaughter,

under the undisputed testimony, was abstract. But this error was not prejudicial to the appellant, but, on the contrary, the ruling was in his favor, and therefore he has no right to complain of it.

Finding no reversible error in the record, the judgment must be affirmed.

BRATTON v. UNION SAWMILL COMPANY.

Opinion delivered April 20, 1925.

1. HOMESTEAD—ABANDONMENT.—Removal from a homestead without an intention to return and preserve it as a homestead amounts to an abandonment.
2. LIMITATION OF ACTIONS—PAYMENT OF TAXES.—Where the statute of limitations began to run before the owner's death by payment of taxes on uninclosed and unimproved land, it continued to run against his minor children after his death.
3. ADVERSE POSSESSION—UNIMPROVED AND UNINCLOSED LAND.—Evidence *held* to justify finding that land originally inclosed and partly improved had returned to the state of unimproved and uninclosed land before the owner's death and at the time the statute began to run against him by virtue of the payment of the taxes thereon.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity to quiet their title to certain land and to cancel certain deeds to said land to appellee as a cloud on their title.

Appellee defended the suit on the ground that the land was unimproved and uninclosed, and that it acquired title to the same by the payment of the taxes for more than seven years in succession, under § 6943 of Crawford & Moses' Digest.

The record shows that V. A. Bratton was the owner of eighty acres of unimproved land in Union County, Arkansas, and, on the 5th day of December, 1906, S. N. Stow conveyed to him an adjoining eighty acres of land,

which was also uninclosed and unimproved. Bratton executed a mortgage to Stow to secure the purchase money in the sum of $400, and the further sum of $100 which he had borrowed from Stow. On the 19th day of December, 1909, S. N. Stow and wife executed a mortgage on said land, together with other land belonging to him, to John W. Harmon, as trustee, to secure the sum of $2,000 which he owed Mrs. A. L. Alphin. One of the tracts of land belonging to V. A. Bratton was in section eight and the other in section nine.

According to the evidence of Mrs. V. A. Bratton, her husband, V. A. Bratton, died February 9, 1914, leaving surviving him his widow and five children. Two of these children were minors at the time this suit was instituted, on the 14th day of October, 1922. V. A. Bratton cleared eight acres of each eighty-acre tract. A small log house was erected on the eighty acres, in the section nine, which was the tract that V. A. Bratton purchased from S. N. Stow in December, 1906. V. A. Bratton lived on the land in question for two years, and he constituted it his homestead. He then left the land and resided elsewhere with his family until the date of his death. His family has never returned to the land. No one has occupied it since V. A. Bratton left, about the first of the year 1910. The land was sold for taxes on the 13th day of June, 1910, for the nonpayment of taxes for the year 1909, and J. S. Alphin having become the owner of the certificate of purchase, received a tax deed to said land on the 14th day of June, 1912. The Union Sawmill Company became the owner of said land by mesne conveyances from J. S. Alphin. The Union Sawmill Company and its predecessors in title have paid the taxes on said land from the year 1910 to 1922 inclusive. Other facts will be stated in the opinion.

The chancellor found that appellants were barred of recovery by the statute of limitations, and their complaint was dismissed for want of equity, and the title to said land was quieted in appellee.

The case is here on appeal.

Harry W. Stewart, Hamp P. Smead, W. T. Saye and *J. N. Hayes,* for appellant.

Gaughan & Sifford, for appellee.

HART, J., (after stating the facts). The record shows that the land in question was sold in 1910 for the nonpayment of the taxes of 1909, and that, two years thereafter, a tax deed was executed to J. S. Alphin, who had become the owner of the certificate of purchase issued to the purchaser at the tax sale. The clerk's tax deed was executed to him on the 14th day of June, 1912. V. A. Bratton had moved away from the land with his family, at the beginning of the year 1910, and lived away from there until his death in February, 1914. Thereafter Bratton did not pay the taxes on the land and did not exercise any act of ownership whatever over it. He owed S. N. Stow $500, $400 of which was for the purchase price of one of the eighty-acre tracts of land in question, and he made no effort whatever to pay off this mortgage on the land. After his death, his widow and children continued to remain away from the land, and have not attempted to exercise any acts of ownership over it until about the time this suit was instituted.

The effect of the decree of the chancellor was to hold that Bratton had abandoned his homestead. We think the facts and attendant circumstances show that, when V. A. Bratton left his homestead, he had no intention whatever of returning to it and preserving it as a homestead. Under such circumstances his removal from the land constituted an abandonment of it as a homestead. *Stewart* v. *Pritchard,* 101 Ark. 101; *Whipple* v. *Keith,* 134 Ark. 202; and *Puckett* v. *Glendenning,* 135 Ark. 551.

It is conceded that the clerk's tax deed to said land to J. S. Alphin constituted color of title under our decisions. *Wheeler* v. *Foote,* 80 Ark. 435; *Moore v. Moore,* 118 Ark. 516; and *Lightle* v. *Laws,* 123 Ark. 537.

The record shows that a clerk's tax deed was executed to J. S. Alphin in June, 1912, and that V. A. Bratton did not die until February, 1914. The proof also shows that appellee and its predecessors in title com-

menced to pay taxes on the land in 1910, and continued to pay them each successive year thereafter until, and including, the year 1922. It is true that neither appellee nor its predecessors in title ever had actual possession of the land, but they paid the taxes for more than seven years in succession, under § 6943 of Crawford & Moses' Digest, which provides that unimproved and uninclosed land shall be deemed to be in the possession of the person who has paid the taxes thereon, if he has color of title thereto. This court has held that, when the statute of limitations in such cases begins to run before the death of the owner, it continues to run against his minor children after his death. *Bender* v. *Bean,* 52 Ark. 132, and *Freer* v. *Less,* 159 Ark. 509.

Counsel for appellants concede the correctness of the principle of law above announced, and seek to reverse the decree mainly on the ground that the land in controversy is not uninclosed and unimproved land within the meaning of § 6943. In making this contention they rely upon the case of *Fenton* v. *Collum,* 104 Ark. 624, where the court held that the statute providing that one who, having color of title, pays taxes for seven years upon unimproved and uninclosed land, acquires the title thereto by limitation, does not apply to land cleared, fenced, or in cultivation. In discussing the question in that case the court said:

"It may be that, when fields, once cleared and cultivated, have been abandoned and permitted to go to waste and grow up in briars and brush and the fences become delapidated and destroyed, the lands will be regarded as unimproved and uninclosed, as though they had never been, but we think this condition must be shown before the title to lands, once improved and inclosed, can be acquired by the payment of taxes in accordance with said law. In other words, if the lands are shown to have been improved or inclosed during any of the seven years, the successive payment of taxes for which would have conferred title upon the person paying the taxes if they had been unimproved and uninclosed, it would defeat the claimant's title thereto.

This brings us to a consideration of whether the land was unimproved and uninclosed land within the meaning of § 6943 of Crawford & Moses' Digest at the time V. A. Bratton died, so that the statute of limitations had commenced to run against him.

It appears from the record that V. A. Bratton cleared eight acres of land on each eighty-acre tract, and inclosed the same under one fence. He built a little log house on the cleared land in section nine, and occupied it with his family as a homestead. He made one or two crops on the cleared land, and then left the land, and never afterwards returned to it. At the time he left there was a mortgage of $500 on the land, and Bratton never attempted to pay any part of the mortgage debt. He never paid the taxes nor exercised any acts of ownership over the land. S. N. Stow, who held a mortgage on the land, never exercised any acts of ownership over it after Bratton left the land. Bratton left the land during the latter part of 1909, or the first part of 1910. He died in February, 1914. Thus it will be seen that, for four years, no attention whatever was paid to the land, and no one attempted to exercise any ownership over it.

When we consider the smallness of the clearing compared with the whole 160 acres, and the fact that there was only a little log house built on it, we think the chancellor was justified in finding that it had returned to a state of nature before V. A. Bratton died, and that the land was unimproved and uninclosed within the meaning of the statute. The surrounding circumstances indicate that the land would soon grow up with briars and bushes after it was abandoned, and the chancellor was justified in finding that one payment of taxes at least was made before the death of Bratton, after the land had returned to a state of nature, and became unimproved and uninclosed land within the meaning of the statute. The undisputed evidence shows that more than seven successive payments of taxes were made, and the chancellor was justified in finding that appellants were barred by the statute of limitations.

Therefore the decree will be affirmed.

WILLIAMS v. PETTY.

Opinion delivered April 20, 1925.

1. FORCIBLE ENTRY AND DETAINER—WHEN UNLAWFUL DETAINER LIES.—The action of unlawful detainer will not lie on the right of possession merely, but the relation of landlord and tenant, express or implied, must exist in order to maintain the action.
2. FORCIBLE ENTRY AND DETAINER—UNLAWFUL DETAINER NOT REMEDY WHEN.—Where lessees failed to show that they were ever in possession of the land, or that the defendant held under them by virtue of any contract, or that the relation of landlord and tenant existed between them and defendant, they were not entitled to maintain unlawful detainer, but might bring ejectment or pursue their remedy against the landlord.
3. FORCIBLE ENTRY AND DETAINER—DAMAGES.—Where lessees though entitled to possession, failed in unlawful detainer, the defendant, though having no right to possessin, was entitled to recover the land and his costs, but not to recover damages for being wrongfully dispossessed

Appeal from Marion Circuit Court; *J. H. Shinn,* Judge; affirmed.

STATEMENT OF FACTS.

This is an action of unlawful detainer brought by Ambrose Williams and Arvie Ingram against W. J Petty.

The suit was defended on the ground that the plaintiffs had never been in possession of the land, and that the relation of landlord and tenant had never existed between the plaintiffs and the defendant.

The record shows that Ambrose Williams and Arvie Ingram rented a farm in Marion County, Arkansas, for the year 1923, known as the Hill Fontaine land. For two years prior thereto the land had been rented to J. F. Williams, the father of Ambrose Williams. J. F. Williams had rented a part of the farm to W. J. Petty for the year 1922. After the plaintiffs rented the land they gave Petty a written notice to quit for the time provided by the statute.

W. J. Petty was a witness for himself. According to his own testimony, he went into possession of a part of the Hill Fontaine farm, about the first of the year 1922,

as a tenant of J. F. Williams. He admitted that he held over for the year 1923 until he was dispossessed, and that he informed the plaintiffs that he was holding under J. F. Williams, and that this holding was under the contract which he had made with J. F. Williams. He knew that J. F. Williams had not rented the land for the year 1923. Petty also testified as to the amount of damages suffered by him when he was dispossessed of the land.

The court instructed the jury that the plaintiffs were not entitled to recover, and submitted to the jury the question of damages suffered by Petty on account of being wrongfully dispossessed of the land.

The jury returned a verdict for $50 in favor of the defendant, and from the judgment rendered the plaintiffs have duly prosecuted an appeal to this court.

J. H. Black, for appellant.

HART, J., (after stating the facts). The circuit court was right in holding that the plaintiffs were not entitled to maintain the action. The action of forcible entry and unlawful detainer lies only in the cases pointed out by the statute, and the main purpose of the statute is to give a speedy remedy to a landlord against his tenant, who holds possession without right.

In this case the facts do not show that the plaintiffs were ever in the possession of the land, or that the defendant held under them by virtue of any contract, or that the relation of landlord and tenant in any manner, express or implied, existed between them.

We have held that the action of unlawful detainer will not lie on the right of possession merely, but the relation of landlord and tenant, express or implied, must exist in order to maintain the action. *Dortch* v. *Robinson,* 31 Ark. 296; *Necklace* v. *West,* 33 Ark. 682; and *White River Land & Timber Co.* v. *Hawkins,* 128 Ark. 277.

The plaintiffs, under the evidence, were entitled to the possession of the premises, but should have brought ejectment instead of unlawful detainer, or should have demanded that their landlord put them in possession of

the premises, and, if he failed to do so, they might have maintained an action against him for a breach of their rent contract.

The case of *Cherry* v. *Kirkland,* 138 Ark. 33, has no bearing on this case, and is not in conflict with the views we have expressed. In that case the plaintiff in the action acquired title from the lawful owner, and stood in his shoes as owner of the land for all purposes. The court expressly recognized that the relationship of landlord and tenant must exist, but said that the statute was broad enough to include the grantee of the owner. In other words, by acquiring the legal title to the property, the grantee took the place of the original owner, who was the landlord, and succeeded to his rights under the statute. Not so with the lessee of the original landlord, who, as we have already seen, only acquired the right of possession during the term of his lease, and did not become owner of the legal title to the land.

Therefore we are of the opinion that the court was right in dismissing the action of the plaintiffs.

The court was wrong, however, in submitting the question of damages to the jury. In the case of *White River Land & Timber Co.* v. *Hawkins,* 128 Ark. 277, it was held that, under our statute, the defendant in an action for unlawful detainer, where his occupancy is without right, cannot recover damages from the true owner. The reason is that the statute does not authorize such recovery, and the court said that it is only where the defendant disputes the right of possession that he can introduce before the jury evidence showing damages he has sustained by reason of being dispossessed.

According to the uncontradicted evidence, the defendant was not entitled to the possession of the land in controversy, and the failure of the plaintiffs to recover possession was due entirely to the form of the action in which they sought relief.

It follows that the judgment in the defendant's favor should only have been for the restitution of possession of the land and for the recovery of the costs of the action. To that extent only will the judgment be affirmed, and the judgment for recovery of damages will be reversed and dismissed. It is so ordered.

MURRELL v. EXCHANGE BANK.

Opinion delivered April 20, 1925.

1. VENUE—COUNTY HAVING TWO DISTRICTS.—Under Crawford & Moses' Digest, § 1176, providing that transitory actions may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned, a suit on a promissory note against the maker and payee may be brought in the Northern District of Arkansas County, where the payee resides, and the maker be sued in the Southern District, though Acts 1913, p. 192, establishing the two districts provides that residents of one district shall not be sued in the other, as the latter act refers only to actions in which all the defendants are residents of the same district.
2. JUDGMENT—EFFECT OF DISCONTINUANCE AS TO CO-DEFENDANT.—Where suit was brought against the maker and the payee of a promissory note, in the Northern District of Arkansas County where the payee resided, the maker being summoned in the Southern District where he resided, *held*, upon the suit being discontinued as to the payee upon his death, no judgment could thereafter be had against the maker, under Crawford & Moses' Digest § 1178.
3. BILLS AND NOTES—NEGOTIABILITY.—Promissory notes, to be negotiable, must be payable unconditionally and at all events and at some fixed period of time, or upon some event which must inevitably happen.
4. BILLS AND NOTES—NEGOTIABILITY.—The negotiability of a note is not destroyed by the fact that it contains a provision for retention of the title to the property for which the note is given until the note is paid.
5. BILLS AND NOTES—NEGOTIABILITY.—The element of certainty is not wanting in a promissory note where it contains a clause making it payable before the due date at the option of the maker, or where it gives the holder the right to declare all of the series of

the notes due when the maker fails to pay the principal or interest of any note when due.

6. BILLS AND NOTES—NEGOTIABILITY.—Negotiable paper for all practical purposes passes by delivering as money and is representative of money.

7. BILLS AND NOTES—NEGOTIABILITY.—A promissory note given for the purchase price of a pump with retention of title in the payee until the note is paid, and providing that the payee, if he deemed the property unsafe, might take possession of the property, whether the note was due or not, and sell same, the maker agreeing to pay the balance remaining unpaid after application of the net proceeds of the sale, *held* non-negotiable, since the maker's obligation was not absolute and unconditional for the payment of a definite sum of money at all events and without any contingency.

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

STATEMENT OF FACTS.

The Exchange Bank sued A. D. Murrell, National Pump & Well Company and J. C. Lloyd, to recover $1,193.15 and the accrued interest alleged to be due it upon a promissory note. A. D. Murrell defended the suit on the ground that the note was given by him to the National Pump & Well Company, for the purchase money of a pump, and that the pump failed to furnish the quantity of water which the company warranted it would furnish. The note sued on is as follows:

"Stuttgart, Arkansas, April 13, 1920.

"$1,193.15

"On or before the 1st day of December, 1920, for value received, I promise to pay to the order of National Pump & Well Company eleven hundred ninety-three and 15/100 dollars, with interest at the rate of 8 per cent. per annum from date until maturity, and 10 per cent. from maturity until paid, payable annually, if not so paid to become principal and bear the same rate of interest.

"It is expressly understood that this note is given for the purchase money of pump, well and appurtenances thereto, title and right of possession to which is reserved in the payee until this note be fully paid. If at any time the payee shall deem the said property to be in any way

unsafe, he may take possession thereof at once, whether this note be due or not, and sell same at public or private sale, and, in consideration and use of said pump, well and appurtenances thereto, I hereby agree to pay the balance of note remaining unpaid after net proceeds are applied. This note is one of a series of one (1) notes, and, in the event default is made in the payment of this note at maturity, all remaining notes shall be and become due at once, at the option of the holder. The maker hereof and all indorsers hereby waive demand, protest and notice. A. D. Murrell."

The note contained indorsements as follows: "National Pump & Well Co., by J. C. Lloyd; J. C. Lloyd." The National Pump & Well Company was the trade name under which J. C. Lloyd operated.

The note was assigned to the Exchange Bank in June, 1920. It was given to it, along with a lot of other notes of J. C. Lloyd, as collateral security for money owed by him to the bank. The bank did not at the time know of any defense to the note.

According to the testimony of A. D. Murrell, he purchased a pump from the National Pump & Well Company, and agreed to pay $4,772.60 for the pump and its equipment. He paid all of the purchase price, except $1,193.15, and executed the note sued on for that sum. There was a written contract for the sale of the pump and its equipment, and the seller warranted that, when it was installed under the contract, it would furnish not less than 1,000 gallons of water per minute. The highest amount of water that was ever furnished by it was 700 gallons, and it ordinarily threw from 500 to 600 gallons of water per minute. J. C. Lloyd was informed of this fact.

One of the representatives of the National Pump & Well Company testified that he saw the pump after it was installed, and that it produced, in his judgment, in the neighborhood of between 700 and 800 gallons of water per minute. It did not come up to the contract under which it was sold.

Other witnesses corroborated the testimony of Murrell to the effect that the pump would not throw more than 700 gallons of water per minute. Other facts will be stated in the opinion.

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

John W. Moncrief, for appellant.

Pettit & Leach, for appellee.

HART, J., (after stating the facts). The first assignment of error is that the court erred in not quashing the service of summons upon A. D. Murrell. The suit was filed on the 6th day of July, 1922, in the circuit court for the Northern District of Arkansas County, Arkansas. Summons was duly issued and served upon A. D. Murrell and J. C. Lloyd. J. C. Lloyd lived in the northern district of Arkansas County, and transacted business under the trade name of National Pump & Well Company. A. D. Murrell lived in the southern district of Arkansas County. The Legislature of 1913 established two judicial districts in Arkansas County, called the Northern and the Southern districts. Acts of 1913, p. 192.

Section four of the act provides that the authority and territorial jurisdiction of the circuit and chancery courts shall extend over the northern district in the same manner as if said district was a constitutional county, and that the circuit and chancery courts shall have original and exclusive jurisdiction of all such cases as are now vested by law in the circuit and chancery courts of the State. The section also contains the following: "Provided, that no citizen or resident of the northern district shall be liable to be sued in the southern district; nor shall any citizen or resident of said southern district be liable to be sued in the northern district in any action whatever."

Section six provides that, in order to ascertain in which of the respective districts actions cognizable in the circuit and chancery courts shall be tried, the said districts shall be considered as separate and distinct

counties, and the mode and place for trying suits shall be determined by the general law applicable to different counties.

When all the provisions of the act are considered together, it was the evident purpose of the Legislature to prevent the inhabitants of each district from being sued outside of their district, where one or more of the inhabitants of the same district were made defendants in the same suit. In other words, the proviso copied above has reference only to actions where all the defendants are residents of the same district. *Pryor* v. *Murphy,* 80 Ark. 150.

It is manifest from the provisions of the act that, where two persons are sued jointly and one of them lives in the northern district and the other in the southern district, the venue may be laid and the service of summons had under the general statutes.

Section 1176 of Crawford & Moses' Digest provides that transitory actions may be brought in any county in which the defendant or one of several defendants resides or is summoned.

J. C. Lloyd resided in the northern district of Arkansas County. A suit on a promissory note is a transitory action. Hence the plaintiff might bring the suit in the northern district of Arkansas County and serve Lloyd with summons in the northern district, where he lived, and Murrell in the southern district, where he resided.

Judgment was rendered in favor of the Exchange Bank against A. D. Murrell on February 20, 1924. J. C. Lloyd had died during the first part of November, 1923.

Section 1178 of Crawford & Moses' Digest is as follows: "Where any action embraced in § 1176 is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them resided, or were

summoned in that county, the action is discontinued or dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him."

The section provides that, when any action embraced in § 1176 is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of summons in any other county than that in which the action is brought, where the action is discontinued or judgment is rendered in favor of the defendants summoned in the county where the action is commenced. As we have already seen, the two districts in this respect are treated as separate counties, and judgment could not be rendered in the northern district against Murrell, who was a resident of the southern district, where the action was discontinued as to Lloyd, who resided in the northern district, and was summoned there, or where judgment was rendered in his favor. J. C. Lloyd died before judgment was rendered against Murrell. This caused a discontinuance of the suit as to him. In law, discontinuance means to abandon or terminate an action. No revival of the action was had against the administrator of J. C. Lloyd after his death, and this operated as a discontinuance of the action against him. Hence the plaintiff was not entitled to judgment against Murrell.

In this connection it may be stated that, if the suit should be revived against the estate of J. C. Lloyd, no judgment could be rendered against Murrell if there should be a judgment in favor of the administrator of the estate of J. C. Lloyd, deceased.

The reliance of Murrell for a reversal of the judgment on the merits is that the note sued on is non-negotiable, and that the court erred in instructing the jury that it was negotiable. In this contention we think counsel is correct. In the first place, it may be stated that this court has held that the negotiability of a note is not destroyed by the fact that it contains a clause merely

providing for the retention of title to the property for which the note is given until the note is paid. *Exchange National Bank* v. *Steele,* 109 Ark. 107. That this holding is in accord with the great weight of authority will be seen by reading the decisions cited in the case-note to 14 Ann. Cas. at p. 1129, and 28 A. L. R. at p. 699. The reason is that the agreement reserving the title of the property in the seller until it is paid for does not affect the note in the least, nor make the time of payment or the amount to be paid in any wise uncertain. It is a distinct and independent agreement, incidental to but not a part of the note. In other words, the clause retaining title in the seller until the property is paid for only relates to the security and not to the indebtedness itself.

In *Chicago Ry. Equipment Co.* v. *Merchants' Bank,* 136 U. S. 268, it was held that a contingency under which a note may become due earlier than the date fixed is not one that affects its negotiability. In that case a series of notes was given for the purchase price of property, and they provided that, upon the failure of the maker to pay the principal or interest of any note in the whole series, the other would become due and payable. That is to say they were due and payable at the option of the holder; but the notes were nevertheless for the payment of money at a fixed period of time, or at least upon an event which must inevitably happen.

Again, in *Ackley School Dist.* v. *Hall,* 113 U. S. 135, it was held that municipal bonds issued under a statute providing that they should be payable at the pleasure of the district at any time before due, were negotiable. The court said that, by their terms, they were payable at a time which must certainly arrive, and that the holder could not exact payment before the day fixed in the bond. Therefore the debtor incurred no legal liability for nonpayment until that day passed, and the option of the debtor to pay sooner was nothing more than a payment in advance of its legal liability.

It is well settled that a promissory note, in order that it may be negotiable in accordance with the law

merchant, must be payable unconditionally, and at all events, and at some fixed period of time, or upon some event which must inevitably happen. The element of certainty is not wanting in a promissory note where it contains a clause making it payable before the due date at the option of the maker, or where it gives the holder the right to declare all of the series of notes due when the maker fails to pay the principal or interest of any note when due. In either event, there is no time in which the precise amount due on the note and the time when the maker was compelled to pay could not have been determined by an inspection of the instrument itself.

In the case first mentioned, the additional promise of the maker to pay the money before the date fixed in the note does not abrogate or interfere with his absolute promise to pay at the date fixed. In other words, if the conditional promise is not performed, the absolute promise remains in full force. The option to pay before due, if exercised by the maker, would only be a payment in advance of the legal liability to pay on the date due. In like manner, the right given the payee to declare all the notes of the series due upon the failure of the maker to pay any one of them, does not make the time of payment uncertain and render the note non-negotiable. The maker of the note knows in advance that, if he fails to pay any of the notes or the interest as it falls due, the whole amount may be declared due. His compliance with his unconditional promise to pay would prevent the notes from falling due. In either event the maker of the note could tell from the face of it the exact date upon which he must pay it.

Such is not the case where the note, in addition to a provision for the retention of title, provides that the payee may declare the note due at any time that he deems himself insecure, before maturity, and sell same at public or private sale. This clause renders a note not only payable upon a contingency, but renders the time of payment uncertain. The note not only recites that it is expressly understood that it is given for the purchase price of a

pump, and that the title and right of possession is reserved in the payee until the note is paid, but it also provides that if, at any time, the payee shall deem the property to be in any way unsafe, he may take possession of it at once, whether the note is due or not, and sell the same at private sale. The note further provides that the maker agrees to pay the balance of the note remaining unpaid after the net proceeds are applied.

It is clear that the maker's obligation is not then an absolute and unconditional one for the payment of a definite sum of money at all events and without any contingency. By the law merchant, negotiable paper, for all practical purposes, passes by delivery as money, and is the representative of money. *People's Saving Bank* v. *Bates,* 120 U. S. 556. Therefore a note providing that the vendor may retake possession of the property at any time that he deems himself insecure and sell the same and apply the proceeds to the payment of the note is non-negotiable. An obligation of this character is too uncertain to serve the purpose of commercial paper. By the weight of authority it is held that a condition of this sort introduces an element of uncertainty as to the time of payment and the amount to be paid, and renders the note non-negotiable. The maker cannot at any time tell from the face of the instrument how much he will be compelled to pay, or at what time his liability becomes absolute. *Kimpton* v. *Studebaker Bros. Co.* Idaho 552, 14 Ann. Cas. 1126, and note at p. 1130; *Moyer* v. *Hyde,* 35 Idaho, 204 Pac. 1068, 28 A. L. R. 695, and note at p. 703; *Third National Bank of Syracuse* v. *Armstrong,* 25 Minn. 530; *Killam* v. *Schoeps,* 26 Kan. 310, 40 Am. Rep. 313; *Smith* v. *Marland,* 59 Iowa 645, 13 N. W. 852; *South Bend Iron Works* v. *Paddock,* 37 Kan. 510, 15 Pac. 574; *W. W. Kimball Co.* v. *Mellon,* 80 Wis. 133; *Lincoln Nat. Bank of Lincoln, Ill.,* v. *Perry* (Circuit Court of Appeals, Eighth Circuit), 66 Fed. 887; *First National Bank of Port Huron* v. *Carson,* 60 Mich. 432; *First National Bank of New Windsor* v. *Bynum,* 84 N. C. 24, 37 Am. Rep. 604;

and *Carroll County Sav. Bank* v. *Strother,* 28 S. C. 504, 6 S. E. 313.

There is some conflict in the authorities upon this point, but we think the holding that a condition of this character renders a note non-negotiable is in accord with the weight of authority. It is true that, under the law merchant, many rules respecting negotiable paper may be classed as arbitrary, but they have always been rigidly enforced. It has always been held to be a necessary quality of negotiable paper that it should be certain, unconditional, and not subject to any contingency. There is nothing in our negotiable instrument act which changes the rule established by the law merchant as above set forth.

Having reached the conclusion that the note sued on is not negotiable, and for that reason the judgment must be reversed, it becomes unnecessary for us to pass upon other assignments of error which will not likely be in the record upon a retrial of the case.

For the errors indicated in the opinion the judgment will be reversed, and the cause will be remanded for a new trial.

MEEKINS v. MEEKINS.

Opinion delivered April 20, 1925.

1. EVIDENCE—DECLARATIONS OF GRANTOR.—Where plaintiff's grantor and his cotenant divided the land held by them in common, declarations of the grantor and cotenant that the former took the south half of the tract in the division was competent in a suit to reform the grantor's deed, which by mistake undertook to convey the north half.
2. REFORMATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.—To justify reformation of a deed for a mutual mistake in description, the evidence need not be undisputed, but is sufficient if the testimony in its entirety clearly shows that a mutual mistake was made.

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

Goodwin & Goodwin, for appellant.

SMITH, J. Appellee was the plaintiff below, and, for his cause of action, alleged that on June 15, 1907, Reuben Meekins was the owner of the southwest quarter of the southwest quarter and the south half of the northwest quarter of the southwest quarter of section 33, township 15 south, range 16 west, Union County, Arkansas, and, for the consideration of a hundred dollars, sold and agreed to convey these lands to appellee. A deed was prepared, but, by a clerical error in the preparation of the deed, the lands were erroneously described as the southwest quarter of the northwest quarter and the north half of the northwest quarter of the southwest quarter of section 33, township 15 south, range 16 west. Reuben Meekins was dead at the time of the institution of this suit, but was survived by a son, named William, who was the father of appellee, and by a number of other grandchildren besides appellee. These other grandchildren resisted the granting of the relief prayed, and filed an answer in which they denied that any mistake had been made, and, in addition, alleged that Reuben Meekins, by reason of his advanced age and feeble health, did not have mental capacity to execute the deed.

The court found that the allegations of the complaint were sustained by the testimony, and decreed accordingly.

Appellants correctly contend that the relief prayed could only be granted upon testimony showing clearly that a mistake had been made, and they insist that the testimony offered in behalf of appellee did not measure up to this requirement of the law.

It appears, from this brief statement of the case, that the question presented by this appeal is one of fact.

On behalf of appellee the testimony was to the following effect: Reuben Meekins and one Charles Goodwin owned, as tenants in common of equal interests, 120 acres of land, consisting of three 40-acre tracts, described as follows: Southwest quarter of the northwest quarter, northwest quarter of the southwest quarter, and southwest quarter of the southwest quarter, section 33, town-

ship 15 south, range 16 west. Reuben Meekins and Charles Goodwin divided the land, and, by the terms of the division, Meekins took the south half of the tract and Goodwin the north half. By the terms of this division Meekins took title in severalty to the south half of the northwest quarter of the southwest quarter and southwest quarter of the southwest quarter, which was the south half, and Goodwin took the title to the north half of the northwest quarter of the southwest quarter and southwest quarter of the northwest quarter, which was the north half, and they went into possession of their respective parts, and Meekins remained in possession of the south half until the time of the execution of the deed sought to be reformed.

One of the grounds upon which reversal of the decree below is sought was the refusal of the court to exclude certain testimony given by M. J. Goodwin. This witness testified that he had lived in Union and an adjoining county for sixty-five years; that his father had furnished Meekins and Goodwin, who were both colored men, for a number of years; that Meekins and Goodwin bought the 120 acres together from a man named Roseman, and witness' father advanced the money to pay for it. The land was bought about 1870, and Meekins and Goodwin lived on it together until they divided the land. This witness was asked: "Do you know anything about the division made between Charles Goodwin and Reuben Meekins," and answered: "Only what they said. They said Charles Goodwin took the north end and Reuben Meekins the south end." This testimony was competent, as it was permissible to prove the declarations of the parties that a division had been made and what the division was.

This witness further testified that, after the division, Goodwin bought some other land and moved away, and that Meekins remained in possession of the south half of the land and cultivated a portion of it. This witness was on the land frequently to see about the crops, on which his father was making advances, and, after the division,

Reuben Meekins was in exclusive possession of the south half, and did not claim to own any other land.

Reuben Meekins paid taxes in his own name down to 1908 on all of the south half only, and did not pay on any other land, and, after 1908, the taxes were paid in the name of appellee.

The witness, M. J. Goodwin, further testified that Reuben Meekins told him he had deeded this land (the south half) to his grandson, Robert Meekins, who was taking care of him.

The testimony of several other witnesses makes it appear certain that Reuben Meekins and Goodwin had divided the land, and that Meekins had taken the south half as his part, and that he owned no other land except the south half at the time he executed the deed describing the north half.

William Meekins, the father of appellee and the son of Reuben, testified as to the division of the land between his father and Goodwin, and the subsequent convevance to his son of the portion assigned on the division to his father, and the circumstances of the execution of the deed. A justice of the peace was called in to prepare the deed, and he was given the tax receipts to secure the description, and, after the deed had been executed and acknowledged, it was delivered to the appellee. None of the parties appear to have been familiar with the land descriptions, and the error was made by the justice of the peace. At the time of the execution of this deed Reuben Meekins owned no land except the south half of the 120-acre tract, according to the testimony of William Meekins and other witnesses who testified on behalf of appellee.

On behalf of appellants there was some testimony to the effect that Reuben Meekins did not have mental capacity to execute the deed, but this defense is not relied upon. The chief defense of appellants is that the testimony is not sufficiently clear to reform the deed, and that the testimony does not show that appellee claimed title to this land, and that he and certain other heirs at law of Reuben Meekins occupied the land jointly.

Without setting out all the testimony, we think it clearly appears that Goodwin and Reuben Meekins divided the 120-acre tract; that Meekins took the south half thereof, and that he intended to convey this land to appellee, his grandson; that appellee accepted the deed describing the north half as a conveyance of the south half, and that he has since occupied it as sole owner, and not as tenant in common with the other heirs.

These findings are not established by the undisputed evidence; but it is not required that the mistake be established by testimony that is undisputed. It suffices if the testimony, in its entirety, clearly shows that a mutual mistake was made, and we think the testimony, in its entirety, meets that requirement.

The decree of the court below will therefore be affirmed.

MARYLAND MOTOR CAR INSURANCE COMPANY v. NEWELL CONTRACTING COMPANY.

Opinion delivered April 20, 1925.

1. INSURANCE—EVIDENCE OF DAMAGE.—In an action on a fire policy insuring a motor truck, where there was an issue as to whether in fact an award of damages had been made, it was not error to admit evidence of damage, as against the objection that it impeached the award.
2. INSURANCE—AWARD—FINDING.—In an action on a fire policy on a truck where an award relied on by defendant was denied to have been authorized, evidence *held* to sustain finding that the award was not binding.

Appeal from Crittenden Circuit Court; *G. E. Keck*, Judge; affirmed.

Hughes & Hughes and *R. L. Bartels*, for appellant.

Scott & Burnett, for appellee.

SMITH, J. This is the second appeal in this case, the opinion on the first appeal being found in 156 Ark. 424. The suit was brought on a fire insurance policy issued by the defendant insurance company to recover the

damage by fire to an automobile truck owned by the plaintiff.

As appears from the former opinion, the suit was brought on the theory that there had been an arbitration of the damages and an award fixing the loss at $1,675.

It appears that the plaintiff had selected M. L. Aldridge as his representative, and the insurance company had selected J. K. Dobbs to represent it, and that, in the agreement for the arbitration, the name of Phil Wilenzick had been inserted as the umpire. At the first trial the court, over the objection of the defendant, submitted the cause to the jury on the sole issue whether an award was made by Wilenzick, who had been selected by both parties as umpire. We there said that the agreement for the appraisal provided that the award should be in writing and signed by any two of the appraisers, and that, as the Wilenzick award failed to comply with this requirement, it was error to submit the question whether there had been an award in which Wilenzick participated.

It was the contention of the insurance company that W. W. Harris had been substituted as umpire for Wilenzick, and that there had been a written award made by Harris, in which Aldridge and Dobbs had participated, and we said the issue whether the Harris award conformed to the submission agreement should have been submitted to the jury.

Upon the remand of the cause the plaintiff elected to abandon the allegation of the complaint that there had been an award, and sued directly on the policy, and the court treated the complaint as being so amended. The defendant objected to this change in the plaintiff's cause of action, but the objection does not appear to have been based on the ground of surprise.

The policy was for $2,500, and there was testimony legally sufficient to support the verdict of the jury that the damage by fire was as much as $2,000, for which

amount the jury returned a verdict, and from the judgment pronounced thereon is this appeal.

The testimony on behalf of the insurance company was to the effect that the Wilenzick award was never completed, and, by consent of both Aldridge and Dobbs, Harris was selected as umpire. According to appellant, Aldridge suggested Harris as the third man, and the suggestion was accepted by Dobbs, and the name of Wilenzick was stricken from the agreement and that of Harris was inserted. The testimony on behalf of appellant is to the further effect that N. A. Carter, a mechanic, was employed to inspect the car and to estimate the damages to the various parts thereof, and, according to Carter's estimate, the damage was $650, but, when Aldridge dissented, $100 was added, and an award was drawn up in the sum of $750, which was signed by Dobbs and Harris.

If the facts thus stated were undisputed, there would be nothing to this lawsuit. The insurance company would have been entitled to have the court instruct the jury to return a verdict in the plaintiff's favor for $750, the amount for which the insurance company offered to confess judgment.

The defendant objected to much of the testimony offered by the plaintiff, and especially to that tending to show the extent of the damage, this being done on the theory that the award could not be thus impeached. The defendant also excepted to the refusal of the court to instruct the jury that the award was presumptively valid, and that the award, valid upon its face, and presumptively good, could not be impeached except by testimony that was clear and convincing.

We think no error was committed in admitting the testimony objected to, and in refusing the requested instruction, for the reason that the sole question in issue, aside from the damages, was whether there had in fact been an award.

Upon this issue the cause was submitted to the jury under an instruction reading as follows: "If you find from the evidence in the case that the appraisers selected by the parties, namely, J. K. Dobbs and M. L. Aldridge, agreed upon and selected W. W. Harris to act as umpire, and if you further find that any two of the three parties named, that is, J. K. Dobbs, M. L. Aldridge and W. W. Harris, made an award in writing by which the amount of damage of the car was determined, you should find that that is the amount for which the plaintiff is entitled to a verdict in this case."

In another instruction the court told the jury that, although Aldridge did not participate in the selection of Harris as umpire, yet "if, after Harris began to act as such umpire, Aldridge and Dobbs acquiesced and concurred in his acting as such, and proceeded with the appraisement, participating and concurring in same, and recognized him as the duly acting umpire, then in that event Harris would be authorized to act as such umpire the same as if he had been duly appointed before he began to act."

Defendant could not ask that the issue be submitted under more favorable instructions.

Aldridge testified that he participated in only one arbitration, and that was the one in which Wilenzick participated. The plaintiff undertook to prove by this witness that an award was arrived at under the first submission, but that it was not signed by himself and Wilenzick because Dobbs was not satisfied with the award. This testimony was excluded by the court, and the witness was not permitted to testify that an award had been made in which Wilenzick participated, because, under the decision of this court on the former appeal, that award was not according to the agreement for the arbitration.

But the witness did testify that he did not agree to the selection of Harris as umpire; that he and Dobbs signed the agreement naming Wilenzick as umpire, and

that, after he had signed this agreement, Dobbs drew a pen through the name of Wilenzick and inserted that of Harris, but that this was done without his consent. He admitted that Dobbs asked him to name a good man, and that he suggested the name of Harris, and was present when the truck was examined and the damage figured up, but he testified that he was never a party to this arbitration, and that he assigned then as his reason for refusing to participate the fact that the matter had already been arbitrated.

Under the conflict in the testimony the court was correct in holding that the award signed by Dobbs and Harris was not conclusive and binding, and the question whether Harris had been selected was properly submitted to the jury, and the testimony of Aldridge, if credited, is sufficient to support the finding of the jury that Harris had never been selected as umpire, and, if this is true, there was, of course, no award.

No error appears, and the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RAILROAD COMPANY v. ALVERSON.

Opinion delivered April 20, 1925.

1. APPEAL AND ERROR—NECESSITY FOR MOTION FOR NEW TRIAL.—Where plaintiff filed no motion for new trial, her cross-appeal will not raise the question whether the court erred in directing a new trial on one of the counts of her complaint.

2. CARRIERS—PENALTY FOR EXCESSIVE CHARGE.—Where the first conductor on defendant's train on which plaintiff was a passenger failed to punch plaintiff's ticket and return it to her, and the second conductor required plaintiff to pay a second time, the defendant was responsible for the acts of both conductors, and plaintiff, being required to pay excess fare, was entitled to recover the statutory penalty provided by Crawford & Moses' Dig., § 887.

3. CARRIERS—PENALTY FOR EXCESSIVE CHARGE—DEFENSE.—Where defendant's conductor deliberately and intentionally charged excessive fare from a passenger, it is no defense to an action to

recover the statutory penalty that the conductor promised to return the money if the fare had been paid and did offer to return it after ascertaining that it had been paid.

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

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

E. H. Timmons, for appellee.

SMITH, J. On August 8, 1923, appellee, a young lady, and Howard Gentry, a young man, who is her cousin, bought tickets from the appellant railroad company from North Little Rock to Geridge, a station on appellant's railroad, for which they each paid the sum of $1.44. After purchasing the tickets they boarded the train and became passengers in a coach which went through from North Little Rock to Gillette, a station beyond Geridge. This train passed through England en route to Geridge, and at England the car in which appellee was a passenger was attached to a train which ran from England to Gillette. After the train left North Little Rock the conductor in charge of the train took up the tickets of appellee and her cousin, and placed a ticket check in the curtain of the window by which they were seated. The conductor should have punched these tickets to show that they had been used to England, and should have returned them, as there was a change of conductors at England.

The appellee did not leave the coach at England. The railroad company has a rule that no one is allowed to enter a train without exhibiting to some employee of the company a ticket entitling the holder to passage on the train. An employee of the company performed this service for it at England.

After the train left England the new conductor, whose name was Williamson, went through the train collecting fares, and, when he came to appellee, he demanded her fare. She explained that she had no ticket, as she had given it to the conductor in charge of

the train out of North Little Rock. Conductor Williamson said it was strange that the first conductor had not returned the ticket, as he should have done. Appellee explained that she did not know this, and that she supposed the first conductor knew what he was doing, and she called the attention of Conductor Williamson to the ticket check in the window curtain which the first conductor had placed there. Notwithstanding this explanation, Conductor Williamson stated that appellee and her companion would each have to pay 58 cents—the fare from England to Geridge—or he would put them off the train. They told the conductor that they did not have that much money, but he said that made no difference, as he was not running an excursion train. A passenger sitting near appellee and her companion stated to the conductor that he had seen them buy tickets in North Little Rock, but the conductor told this passenger to keep his bill out of it.

The conductor told appellee and her companion they would have to get off, and gave a signal for the train to stop. The conductor opened the door of the coach and told appellee and her companion to come on out, and they got up and went to the door of the coach, and, as young Gentry was about to get off, appellee asked the conductor to put her baggage off at Geridge. The conductor asked her if she had a baggage check, and she told him she had, and she exhibited it to him. The conductor examined the baggage check, and, after doing so, told appellee and her companion to go back and sit down, that he would let them go on to Geridge, but that he would put the trunk off at Humnoke and hold it for the $1.16, the amount of the two fares to Geridge.

Appellee and young Gentry, her cousin, were on their way to visit Tom Alverson, a brother of appellee. Mr. Alverson boarded the train at Humnoke to meet his guests, and they explained what had happened to him, and he told the conductor he would pay the two fares the next morning on the return trip of the train, as

he did not have with him the amount of money required to pay the two fares. This was not satisfactory to the conductor, and the trunk was put off at Humnoke. The conductor testified that he did this because there was a station agent at Humnoke, who could collect the $1.16 when the trunk was called for, while there was no agent at Geridge who could make the collection.

Mr. Alverson met this train the next morning on its return trip, and paid Conductor Williamson the $1.16. Williamson stated to Alverson at the time that he had wired the first conductor to ascertain if a mistake had been made, and that, if a mistake had been made, he would refund the money. After paying these fares Alverson hired an automobile, for which he paid $1.75, and drove over to Humnoke for the trunk. In passing through Humnoke Conductor Williamson told the station agent at that place to release the trunk, and this was done, and Alverson carried it to his home.

As soon as Williamson saw the first conductor, he told him what had occurred, and the first conductor admitted that he had neglected to return the tickets to appellee and her companion. On his next trip through Geridge, Williamson looked around for Alverson, but he failed to see him. He did this on each successive trip through Geridge for several days. Williamson then told the railroad section foreman at Geridge what had happened, and requested the foreman to tell Alverson that the money would be returned to him. This message was delivered by the foreman, but Alverson stated that he had not made the mistake, and that he would not meet the train. About a week afterwards Williamson himself saw Alverson at Geridge and tendered him the $1.16. Alverson declined to accept the money, and stated to Williamson that the matter had been placed in the hands of his attorney.

Williamson testified that he had no intention of collecting any excess fare from appellee and her companion, and that he demanded the fare because they had no

tickets. He admitted that his attention was called to the conductor's train check in the window curtain, and that it may have had the letter "G" on it, but that the letter "G" did not necessarily stand for Geridge. He testified that, when he explained to Alverson what he proposed to do about the trunk, assent was given. This was denied by Alverson, who testified that he had no alternative, and could only do what the conductor required.

Appellee prayed for judgment for the statutory penalty for an overcharge by a carrier on account of the 58-cent overcharge of fare, and in a second count she prayed for the penalty on account of the $1.75 she was required to pay for delivery of the trunk to the destination to which it had been checked. Young Gentry also sued for the statutory penalty, and the cases were tried together. The jury returned a verdict for appellee on the first count of her complaint in the sum of $52.33, and, under the direction of the court, found against her on the second count of her complaint. In the case of Gentry there was a verdict and judgment for the sum of 58 cents.

The railroad company has appealed from the judgment in favor of appellee on the first count of her complaint, and she has prayed a cross-appeal on the second count.

This cross-appeal will be disposed of by saying that appellee filed no motion for a new trial. Gentry did not appeal. It remains therefore only to determine whether the judgment in appellee's favor on the first count of her complaint should be affirmed.

The railroad company made a tender to appellee of $2.33, this being the amount of the excess fare and the sum required to haul the trunk from Humnoke, and, in the instructions requested by the railroad company, the recovery would have been limited to that amount.

Under the instructions given by the court the question submitted to the jury was whether the conductor Williamson had acted as a reasonable, careful and pru-

dent person in deciding whether appellee had paid her fare and in demanding the additional fares.

This instruction was more favorable to the railroad company than the law requires. It is an undisputed, admitted fact that appellee had paid her fare, and it was only through the negligence of the first conductor that the question arose.

The doctrine of the case of *St. L. I. M. & S. R. Co.* v. *Frisby,* 95 Ark. 281, is controlling here. In that case there was a question whether the ticket agent or the train auditor had made a mistake which resulted in the auditor collecting from the passenger an additional fare. It was there said that the statute under which the suit was brought (§ 6620 Kirby's Digest, which is now § 887 C. & M. Digest), and which is the same section under which appellee brought the instant case, was intended "to compensate the party injured for his expenses in the prosecution, and to compel the payment of such a sum by the company violating the law as will effectually stop the practice."

It was there further said: "The language of the statute is 'shall charge, demand, take or receive from any person or persons any greater compensation,' etc., and is referable to the company itself, and not to its agents. Of course, a corporation can only act through agents; but where it is, in direct and explicit terms, forbidden to do a thing, the acts of all its agents who contributed to the thing done must be considered the acts of the corporation itself. The thing forbidden by the statute under consideration is charging or receiving fare in excess of the maximum rate provided by law. The tickets in question seem to have been of the kind merely naming the places between which they were good for passage, and, as such, were in the nature of receipts for the passage money. 1 Fetter on Carriers of Passengers, § 275; Moore on Carriers, p. 806.

"The undisputed evidence shows that the tickets were exchanged by mistake. The plaintiff's evidence

shows that the mistake was explained to the train auditor, and that she was entitled to have the mistake corrected. When that is done, we have the case of a passenger presenting to the auditor a receipt for passage money of the amount the company was allowed by law to charge. The auditor refused it, and demanded and received an additional sum in excess of the amount so tendered. The ticket seller and the auditor were each entitled to receive money for passage, and their acts must be deemed to be those of a single agent; and, when so treated, it is evident that a greater fare than that allowed by law was demanded and received by the railroad company."

So here the first conductor, as well as the second, was entitled to collect fares, and the first conductor took from appellee the ticket which was intended to evidence the payment of the fare to appellee's destination. Each conductor acted for the railroad company, which was as much responsible for the acts of one of the conductors as it was for the other, and the joint action of the two conductors resulted in appellee being required to pay excess fare. She was, of course, a party aggrieved within the meaning of the statute. *St. L. I. M. & S. R. Co.* v. *Frisby, supra; St. L. I. M. & S. R. Co.* v. *Freeman,* 95 Ark. 218.

It is insisted, however, that the undisputed testimony shows that there was in fact no intention of exacting an excess of fare; that, when Conductor Williamson collected the $1.16, he announced that he would return the money if he found that the fare had been paid, and that he did offer to do so within a reasonable time after ascertaining that a mistake had been made.

We have held that a railroad company is liable for the penalty prescribed by the statute only when its agent intentionally charged a passenger an excessive fare, and that if the excess was collected as a mere inadvertance, the penalty could not be imposed. *St. L. I. M. & S. R. Co.* v. *Baker,* 118 Ark. 69, and cases there cited.

Here, however, there was no such inadvertence as existed in the case cited. The excess was collected by Conductor Williamson, and was done deliberately, under circumstances which, according to the verdict of the jury, under the instructions given, would have satisfied a reasonable man that appellee had paid her fare.

It is true Conductor Williamson said he would return the fare if he found a mistake had been made, and that he later offered to do so; but this did not justify the collection of the excess fare. If a railroad company could defeat an action of this kind by saying that it would rectify any mistake it might make after ascertaining that a mistake had been made, passengers would be deprived of much of the protection which the statute was intended to afford.

Here there was a young lady, referred to by some of the witnesses as a girl inexperienced in traveling, who surrendered her ticket to the agent of the railroad company who had the right to demand it. She did not ask its return, because she did not know that she would have further use for it. Like many other passengers might be, she was not fortified with funds to meet any illegal exactions, and, but for the fortuitous circumstance that she had a check evidencing her right to the possession of a trunk which was being transported on the train, and which the conductor regarded as sufficient collateral for the $1.16 railroad fare, she would have been subjected to the inconvenience, discomfort and humiliation of being put off the train, and this trunk, which was put off the train before it reached its destination, was not surrendered until the excess fare was paid.

The act of the first conductor in failing to return to appellee her ticket was, no doubt, an act of carelessness, but the railroad company was responsible for that act, as it was done by the conductor in the discharge of his duties as such, and it proximately resulted in the second conductor demanding and deliberately receiving

58 cents in payment of a fare which had already been fully paid.

Under the circumstances of the case no error would have been committed had the jury been directed to return a verdict in appellee's favor for the penalty. The verdict of the jury was for the minimum amount of the penalty prescribed by the statute, and, as no error appears, the judgment is affirmed.

WHITE COMPANY v. BRAGG.

Opinion delivered April 20, 1925.

1. TRIAL—IMPEACHMENT OF VERDICT—EVIDENCE OF JUROR.—A juror will not be heard to say that he never assented to the verdict after an opportunity had been given him to express his dissent when the verdict was rendered.
2. SALES—CONDITIONAL SALE—LIABILITY OF SELLER ON RESALE.—Under a Tennessee statute providing that, in case of a conditional sale with retention of title, "should the seller, having regained possession of said property, fail to advertise and sell the same as provided by this article, the original purchaser may recover from said seller that part of the consideration paid," *held* that where the seller failed to advertise and sell the regained property in the manner and time required by the statute, the original purchaser may recover from him the entire amount paid on the contract, without set-off or abatement for the use, hire or rent of the property; the statute providing a right which by comity will be enforced in other States.
3. APPEAL AND ERROR—CHANGE OF THEORY ON APPEAL.—A party cannot on appeal, contend for a theory of the case different from that for which he contended in the trial court.

Appeal from Crittenden Circuit Court; *G. E. Keck*, Judge; affirmed.

Canada & Williams, and *S. V. Neely*, for appellant.

Caraway & Isom, for appellee.

HUMPHREYS, J. Appellant brought this suit in the circuit court of Crittenden County against appellee to recover a balance of $1,760 upon a note given for the purchase money of an automobile bus. It was alleged

in the complaint that appellant sold the bus to appellee in Memphis, Tennessee, under a conditional sales contract, for $6,134, of which sum $1,134 was paid in cash, the balance being payable in installments, evidenced by seven promissory notes; that the conditional contract provided that the title to the bus should remain in appellant until the purchase money was paid in full, and that, upon failure to pay same at maturity, appellant should have the right to repossess and sell it at public auction, credit the amount received on the purchase money, and recover the balance from appellee; that, on December 12, 1922, there remained due and unpaid $2,288.08, whereupon appellant seized and sold the bus at public sale, at which sale it brought $528.08, and that said amount was applied upon the debt, leaving a balance of $1,760.

Appellee filed an answer admitting all the allegations in the complaint, except the allegation that appellant sold the bus at public sale in the manner provided under the law in Tennessee, and also filed a cross-bill to recover $4,000 which he had paid appellant on the purchase price of said bus, upon the ground that appellant had rescinded the contract by failing to advertise and sell the bus in accordance with the laws of Tennessee.

The cause was submitted to a jury upon the pleadings, testimony, and instructions of the court, which resulted in a verdict in favor of appellee on his cross-bill for $4,200, which was reduced by the court to $3,900. A judgment was rendered in accordance with the verdict as reduced, from which is this appeal.

A motion for a new trial was filed upon several grounds, one of which was that the verdict returned by the foreman was not the verdict of the jury. Appellant introduced two of the jurors in support of his motion, who testified, in substance, that the verdict agreed upon by the jury was to the effect that neither appellant nor appellee should recover anything from the other, and that neither had assented to the verdict returned into court by the foreman of the jury. On

cross-examination, however, they admitted that, when the verdict was returned and read by the clerk, the court asked if it was the verdict, and they, with the other jurors, held up their hands in approval. Section 1300 of Crawford & Moses' Digest provides a method for testing the correctness of a jury's verdict. The statute reads as follows:

"The verdict shall be written, signed by the foreman, and read by the court or clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but, if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case."

The purpose and intent of this statute was to prevent a juror from impeaching the verdict after it had been returned into and accepted by the court.

"It is well settled that a juror will not be heard to say that he never assented to the verdict after an opportunity has been given him to express his dissent, when the verdict was rendered." 3 Enc. Ev., 228; 8 Enc. Ev., 973. The motion to set aside the verdict was properly overruled.

The statutes of Tennessee covering conditional sales of property, digested in Shannon's Code, is as follows:

"When any personalty is sold upon condition that the title remains in the seller until that part of the consideration remains unpaid, it shall be the duty of the seller, having regained possession of said property because of the consideration remaining unpaid at maturity, to, within ten days after regaining said possession, advertise said property for sale to the highest bidder, by printed notice, said notice to be posted at least ten days before the day of sale, and contain a description of the property to be sold and the time and place of sale, under the debt unsatisfied before the day of sale, then it shall be the duty of said original seller to sell said property, and, with the proceeds of said sale, satisfy the amount of

his claim arising from said conditional sale, and the expenses of advertisement, if any, and the remainder of said proceeds, if any, he shall pay over to the original purchaser; but the said original seller and purchaser may, at any time, by agreement, waive the sale provided in this article.

"Should said property, at the sale provided by this article, fail to realize a sufficient sum to satisfy the claim of the seller, the balance still remaining due on said claim shall be and continue a valid and legal indebtedness as against said original purchaser."

"Should the seller, having regained possession of said property, fail to advertise and sell the same as provided by this article, the original purchaser may recover from said seller that part of the consideration paid, in an action before any justice of the peace or court having jurisdiction."

The Supreme Court of Tennessee upheld this act as constitutional, and construed it as meaning that "it is the positive duty of the original vendor to resell the property upon his reclamation thereof, under the contract, and, for his failure to do so within the manner and time required by the statute, the original purchaser may recover from him the entire (amount) paid on the contract, without setting off or abatement for the use, hire or rent of the property."

The undisputed testimony shows that on December 12, 1922, default was made in the payment of the balance of the purchase money due on the notes; that the balance due thereon was $2,288.08, and that appellant took possession of the bus in Memphis for the purpose of selling it in accordance with the terms of the contract and the laws of Tennessee. There is a conflict in the testimony as to whether the sale of the bus was advertised and made in accordance with the law. This issue was submitted to the jury, under correct instructions, and decided adversely to appellant. The finding of the jury is therefore conclusive upon it.

Appellant makes the further contention, however, that, because appellee had sold his equity in the bus to O. B. Cook, he had no right to recover the amount he paid appellant as purchase money for the bus. The record does show that, by and with the consent of appellant, appellee sold his equity in the bus to O. B. Cook, but also shows that appellant did not release appellee from the original contract. On the contrary, appellant brought suit against appellee upon the original contract. We are unable to see why appellee cannot maintain a cross-action under the original contract, if still bound by the contract. The Tennessee statute provides that the original purchaser may recover the purchase money paid to the vendor if said vendor retakes the property and fails to sell it at public sale after advertising the sale in the manner and for the time prescribed by the statute. The statute created a right and not a remedy, and the right will be enforced, through comity, by courts of other States.

No error appearing, the judgment is affirmed.

HUMPHREYS, J. (on rehearing). Our attention has been called to the facts that appellee sold his equity in the bus to O. B. Cook, and that his right as original purchaser under the statute of Tennessee to recover the amount he paid appellant had passed to the subvendee. Appellant has cited the case *Tschopik* v. *Lippincott* (Tenn.) 48 S. W., p. 130, in support of its contention that appellee had no right to recover on his cross-bill because he had sold his equity in the property to O. B. Cook before filing same. This question was not made an issue in the trial court by the pleadings, testimony, and instructions of the court. It is well settled in this State that "a party cannot, on appeal, contend for a theory of the case different from that which was contended for in the trial court." *Southern Ins. Co.* v. *Hastings,* 64 Ark. 253; *Shinn* v. *Plott,* 82 Ark. 260. In view of this rule, it is unnecessary for us to discuss the effect of the decision cited upon the Tennessee statute involved in the instant case.

The motion for a rehearing is therefore overruled.

WILLIAMS v. LAYES.

Opinion delivered April 20, 1925.

1. BILLS AND NOTES—PURCHASE OF PATENTED MACHINE—"MERCHANT" DEFINED.—The manufacturer of a patented cotton press *held* not a "merchant," within Crawford & Moses' Dig., § 7959, so as to be able to accept a negotiable note in payment, without showing on face of the note that it was executed in consideration of a patented machine, as required by § 7956, a "merchant" within the meaning of § 7959 being a regular dealer in the mercantile business.
2. BILLS AND NOTES—ILLEGALITY OF NOTE—ESTOPPEL.—The fact that the maker of a note which was invalid because given in consideration of a patented machine without showing that fact on its face, assured a purchaser of the note that it would be paid at maturity, did not estop him from setting up its illegality as a defense.

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

Kincannon & Kincannon, for appellant.

White & White, for appellee.

HUMPHREYS, J. Appellant brought this suit in the Northern District of the Circuit Court of Logan County, against appellee, to recover judgment upon a note executed on February 7, 1922, by appellee, to the order of Ginners' Compress Trust of Milwaukee, Wis., in the sum of $1,000, bearing interest at the rate of 6 per cent. per annum from date, which had been assigned to him for a valuable consideration before maturity.

Appellee filed an answer admitting the execution of the note, but alleging its invalidity because given in consideration for a complete double system cotton press with condenser, for baling cotton in round bales, a patented thing, in violation of § 7956 of Crawford & Moses' Digest, which is as follows:

"Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatever, when the said vendor of the same effects the sale of the same to any citizen of this State, on credit, and makes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on

a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void."

Appellant filed a reply alleging: first, that the payee in the note was a regular merchant or dealer, and sold the patented thing to appellee in the regular course of business, and was excepted from the provisions of the statute quoted above § 7959 of Crawford & Moses' Digest, which is as follows: "This act shall not apply to merchants and dealers who sell patented things in the usual course of business." And second, that appellee was estopped from repudiating the note by making the following statement to appellant before he paid for the note, towit: "If nothing bad happens, I am for sure that I will be able to pay the note when due, or before, which I hope I will."

The cause was submitted to the jury upon the pleadings, testimony adduced by the respective parties, and the instructions of the court, which resulted in a verdict for appellee, and a consequent judgment dismissing the complaint of appellant, from which is this appeal.

The record reflects the following facts: The note was executed in part payment for a patented cotton press to the manufacturer thereof, a Wisconsin corporation, that sold same to appellee through its traveling agent, who was president of said corporation. The patented machine was sold directly from the factory. For some reason not appearing, the press was never delivered to appellee. The note did not show on its face that it was executed for a patented thing. Appellant purchased the note and procured an assignment thereof, and, before sending a check in payment of it, he wrote a letter to

appellee to ascertain whether the note would be paid, in which he stated that he did not know the payee in the note, and was relying for payment thereof on appellee. He requested, in the letter, that appellee reply on the bottom of the letter, and return same to him. The reply to appellee appears in the reply appellant filed to appellee's answer, heretofore set out. After receiving appellee's reply, appellant mailed a check to Ginners' Cotton Compress in payment of the note.

Appellant first contends for a reversal of the judgment because the patented machine was sold by a merchant or dealer to appellee in the regular course of business. We do not think the manufacturer and the seller of the patented cotton baler was included in the class of business permitted by § 7959 of Crawford & Moses' Digest to sell patented things and accept negotiable notes in payment thereof which do not show on their face that they were in consideration of patented machines, etc. The persons referred to in that section are regular merchants or dealers in the mercantile business.

Appellant's next and last contention for a reversal of the judgment is that appellee estopped himself from interposing his statutory right of defense to the note by writing appellant that he was sure that he would be able to pay the note before or when due, if nothing bad happened. Under § 7956 of Crawford & Moses' Digest, this note was void because it was not stated in the face thereof that it was given for a patented thing. This court is committed to the doctrine that contracts made in violation of law are not converted into valid obligations by subsequent promises to perform them, and that the maker of a void note will not estop himself from or waive his right to set up the illegality thereof as a defense thereto. *City National Bank* v. *DeBaum,* 166 Ark. 18.

No error appearing, the judgment is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. HAYNIE.

Opinion delivered April 20, 1925.

1. RAILROADS—INJURY TO STOCK—BURDEN OF PROOF.—In the absence of allegation and proof that stock was injured by contact or collision with a train within the State, no presumption of negligence arose, and it devolved on plaintiffs to show affirmatively by a preponderance of the evidence that the injury was caused by the negligent operation of defendant's train.
2. APPEAL AND ERROR—INSTRUCTION HARMLESS WHEN.—An intruction that if the jury believed from a preponderance of the testimony that plaintiff's stock was injured on defendant railroad's right-of-way because of the negligent running of defendants' train, the burden was on defendant to show that the injury was not due to the negligent operation of the train, *held* not prejudicial to defendant, though meaningless.
3. RAILROADS—NEGLIGENCE IN FRIGHTENING ANIMALS.—Evidence *held* to warrant finding that stock injured on defendant's right-of-way were needlessly frightened and stampeded across a cattle-guard and thereby injured through the negligent operation of defendant's train.

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

June R. Morrell, Jos. R. Brown, and *Jas. B. McDonough,* for appellant.

DuLaney & Steel, for appellee.

HUMPHREYS, J. This is an appeal from a judgment, rendered in the circuit court of Little River County, against appellant in favor of appellees, for $315, based upon an injury upon nine head of mules and horses caused through the alleged negligent running of appellant's passenger train No. 4, leaving out of Wilton about 1 o'clock in the afternoon of June 10, 1923.

Appellant contends for a reversal of the judgment upon the alleged ground that there is no substantial evidence in the record tending to show that the injury of the stock resulted from the negligent operation of its train. It was not alleged, and there was no evidence in the record tending to show, that the stock was injured by contact or collision with appellant's train while running in the State, so no presumption of negligence arose, and

it devolved upon appellees to affirmatively show by a preponderance of the evidence that the injury to the stock was caused by the negligent operation of appellant's train. *Earl* v. *St. L. I. M. & S. R. Co.*, 84 Ark. 507; *Central Ry. Co.* v. *Lindley*, 105 Ark. 294; *J., L. C. & E. Ry. Co.* v. *Kilgore*, 108 Ark. 308. This issue was clearly submitted to the jury in instruction No. 2, requested by appellee, and instruction No. 2, requested by appellant. Instruction No. 1, requested by appellee and given by the court, does not contradict either of the instructions referred to above, as it leaves the burden upon appellee to show that the injury was caused by the negligent operation of appellant's train. For this reason, although practically meaningless, the instruction was not harmful. It is as follows:

"The court instructs the jury that, if you believe from a preponderance of the testimony in this case that the stock alleged to have been injured in plaintiff's complaint was injured on the right-of-way of the defendant's road, and that such injury was due to the negligent running of defendant's train, then the burden is on it to show that such injury was not due to its negligence in operating such train."

The only objection urged to the instruction requested by appellees and given by the court is that they are abstract. These objections will be considered and determined in considering and determining whether there is any substantial evidence in the record supporting the verdict.

Appellees were road contractors, and owned a number of horses and mules with which they were constructing a road near Wilton. Some one left the lot gate open where they were kept, and nine head of them got out and wandered onto the railroad right-of-way, which was fenced. The railroad ran north and south and curved slightly to the west, north of Wilton. There was a cattleguard across the track, in a slight cut anywhere between a quarter and a half-mile north of Wilton. There was

nothing to obstruct the view of the engineer and fireman between Wilton and the cattle-guard. Passenger train No. 4 left Wilton, going north, at a speed of about twenty miles an hour, and, after traveling two hundred yards, sounded the stock alarm. This attracted the attention of T. S. Haynie, who was out looking for his mules and horses, and J. A. Miller, who was traveling toward the railroad right-of-way in a lane leading in the direction of the cattle-guard.

T. S. Haynie testified, in substance, that he followed after the train, which made a short stop after the engine crossed the cattle-guard; that he observed the tracks of mules and horses, which had apparently torn up the ground between the rails and on the dump, so as to indicate that they had been running before they reached the cattle-guard from the south; that there was fresh blood on both sides of the cattle-guard, and, just after crossing same, he observed his mules and horses standing on the right-of-way; that a part of them became frightened at a freight train approaching from the north, and ran over the cattle-guard and off the right-of-way; that he had no way to get the others out except to drive them back over the cattle-guard, which he did, with the assistance of J. A. Miller; that he found from one to four holes in the hoofs of his mules and horses made by spikes in the cattle-guard, which reduced their market value about $1,000 or more.

J. A. Miller testified that he heard the stock alarm, and thought his mules were upon the right-of-way; that he could see the train, but could not see the mules and horses from where he was standing until they reached a distance of about twenty feet north of the cattle-guard; that, when he first discovered them, they were running north; that, when he assisted in driving them out, he observed a mare and two other animals limping, and he observed fresh blood on both sides of the cattle-guard.

Several other witnesses testified to the spike holes found in the hoofs of the mules and horses and to the

difference between the market value of the animals before and after the injury.

Learned counsel for appellant argued that all the testimony shows that a proper lookout was kept, because the stock alarm was sounded and the train stopped; also that there is an entire lack of evidence to show that the train was negligently operated so as to frighten the horses and mules across the cattle-guard from the south to the north side thereof. In fact, it is argued that it was not shown that the horses and mules were over on the south side of the cattle-guard.

The fact that the stock alarm was sounded and the train was stopped, either just before it reached the cattle-guard or after it got upon it, is not conclusive proof that a proper lookout was being kept at the time the animals were discovered, or that the lookout was properly maintained after they were discovered. It might be that they could have been discovered and the train stopped sooner had a proper lookout been kept and maintained. The cattle-guard was from one-quarter to one-half mile ahead of the train when the stock alarm was sounded, and there was no obstruction to prevent the engineer or fireman from seeing the animals if they were on the south side of the cattle-guard, so the jury may have drawn a reasonable inference that, by keeping and maintaining a proper lookout, the animals could have been discovered and the whistling and the train stopped in time to prevent the frightened animals from running over the cattle-guard. It is argued, however, that there is no evidence showing that the animals were on the south side of the cattle-guard when discovered, or when they might have been discovered if a proper lookout had been kept. There are some very substantial circumstances tending to show that they were on the south side of the track at the time the train approached the cattle-guard. These were the only animals seen by Haynie and Brown upon the right-of-way which caused the trainmen to sound the stock alarm. Horse and mule tracks made by running

animals in the direction of and south of the cattle-guard were discovered by these witnesses. Brown first saw the animals running from the south toward the north, about twenty feet north of the cattle-guard, which indicated that they had come across it. Fresh blood was found upon both sides of the cattle-guard before the animals passed over it going out. Brown also noticed that three of the animals were limping before they were driven out over the cattle-guard. Spike holes were found in the hoofs of the animals, indicating that they were made while they were running. We think the circumstances warranted the jury in concluding that the animals were on the south side of the cattle-guard when discovered, and were needlessly frightened and stampeded over and across the cattle-guard through the negligent operation of the train.

The evidence being sufficient to support the verdict and the hypothesis upon which each instruction was given, the judgment is affirmed.

WARREN v. MARTIN.

Opinion delivered April 20, 1925.

1. DEEDS—FRAUDULENT MISREPRESENTATIONS.—In a suit to cancel a quitclaim deed, evidence *held* to sustain a finding that the deed was procured by fraudulent misrepresentations.
2. DEEDS—RATIFICATION.—Where plaintiff was induced to execute a quitclaim deed through misrepresentations on which she had a right to and did rely, acceptance and retention by her for a week or ten days of money subsequently received therefor did not constitute a ratification, where plaintiff was not fully apprised of the real situation during the time she retained the money.
3. MINES AND MINERALS—WAIVER OF FORFEITURE OF OIL AND GAS LEASE.—Since a surviving widow was entitled to receive payment of the rents under an oil and gas lease covering the homestead property, acceptance by her of payments thereof at a time and place other than that designated in the lease was a waiver of forfeiture for failure to pay rent at the time and place designated.
4. HOMESTEAD—RIGHT OF WIDOW TO RECEIVE RENTS.—By virtue of her homestead rights, a widow is entitled to receive the rents and

profits under an oil and gas lease executed on the homestead property in the husband's lifetime.

5. HOMESTEAD—SALE BY WIDOW OF MINERAL RIGHTS.—A sale by a widow of her interest in the oil, gas and minerals in the homestead constituted an abandonment of her interest therein by virtue of her homestead right, as much as if she had sold a part of the land constituting her homestead.

6. HOMESTEAD—ABANDONMENT BY WIDOW—RIGHT OF HEIR.—Where a widow abandoned her interest in the mineral rights in the homestead by a sale and conveyance thereof, an heir of her husband became entitled to receive the rents and profits therefrom, and to have an accounting for amounts collected as royalties from the land since the date of such conveyance.

Appeal from Ouachita Chancery Court, First Division; *J. Y. Stevens,* Chancellor; reversed.

John P. Streepey, for appellant.

T. J. Gaughan, J. T. Sifford, J. E. Gaughan and *E. E. Godwin,* for appellee.

HUMPHREYS, J. Two suits were instituted by appellant in the First Division of the Chancery Court of Ouachita County, one against C. M. Martin *et al.* to cancel a quitclaim deed executed by her to Mandy Johnson on July 26, 1922, for an undivided one-fourth interest in the S½ SW¼ section 29, township 15 S., range 15 W., in said county, containing 80 acres, upon the ground that it was procured through fraud; and the other against the Standard Oil Company of Louisiana *et al.,* to cancel the oil, gas, and mineral lease upon the same lands, and which S. L. Johnson, the husband of Mandy Johnson, executed to E. P. Edwards on May 19, 1919, for the term of six years, upon the ground that same automatically forfeited for failure to pay rents in accordance with the provisions in the lease.

Many pleadings were filed in the cases, but, when completed, the issues joined were whether the quitclaim deed had been obtained through fraud, whether the lease had been forfeited for nonpayment of rentals, and whether appellant was entitled to an accounting for her share of the oil which had been taken from the land. It was agreed that the cases might be tried together and

that all the testimony introduced in either case and in the case of *Jane Warren* v. *Sun Oil Company et al.* might be used in all of the cases, when pertinent and relevant.

Upon a hearing of the cause the court found that the quitclaim deed and lease were valid binding instruments upon all parties, but that C. M. Martin was indebted to appellant in the sum of $225 for her proportion of the purchase money he paid Mandy Johnson for sixty-three sixty-fourths interest in the oil, gas and mineral in said land. Pursuant to the finding, the court dismissed the bills and substituted bills for the want of equity, and rendered judgment against C. M. Martin in favor of appellant for $225, and declared a lien on the interest of C. M. Martin in the lands to secure the payment of same, from which decree appellant has duly prosecuted an appeal to this court.

The record reflects, without dispute, that S. L. Johnson, a negro, was the owner by purchase of the land in question and an adjoining forty-acre tract; that he occupied the eighty-acre tract with his wife as their homestead until his death, on October 22, 1919; that his wife has resided thereon since his death; that he left surviving him his wife, L. A. (Mandy) Johnson, his sister, Jane Warren, and his half brother, Jesse Johnson, as his only heirs; that on May 9, 1919, S. L. Johnson and wife, Mandy, executed an oil, gas, and mineral lease on said lands, including the 40-acre tract, to E. P. Edwards, trustee, in which it was provided that the lease should become *ipso facto* null and void if a well were not drilled upon the land within one year, unless the time should be extended by payment of ten cents per acre in advance as rental, the rental money to be mailed to S. L. Johnson at Louann, Arkansas, or to be deposited to his credit in the Camden National Bank of Camden, Arkansas, and that the lease should extend to his heirs as to all conditions; that the lease was assigned by E. P. Edwards, trustee, to the Standard Oil Company, in July, 1922, and

by the Standard Oil Company to the Gulf Refining Company on August 8, 1922; that Jane Warren executed a quitclaim deed for her interest in said land to Mandy Johnson on July 26, 1922; that Mandy Johnson conveyed a sixty-three sixty-fourths interest in all the oil, gas and mineral in or under said land to C. M. Martin for $2,000, subject to the gas, oil and mineral lease therein to E. P. Edwards, trustee; that S. L. Johnson executed a deed of trust upon said land to W. P. Watts & Brothers to secure a loan of $1,099 due October 1, 1918, which was assigned to E. P. Edwards on January 13, 1922; that on August 5, 1922, C. M. Martin conveyed an undivided one-half interest in sixty-three sixty-fourths of all the oil, gas, and mineral on said land to R. E. Davidson for $4,800; that on July 31, 1922, E. P. Edwards released the Watts Brothers' deed of trust to R. E. Davidson as to the one-half interest bought by him in sixty-three sixty-fourths interest in all the oil, gas and mineral in said land from C. M. Martin, which release contained a recital that R. E. Davidson obtained the conveyance of said one-half interest in said oil, gas and mineral on said land from C. M. Martin on July 28, 1922; that on July 27, 1922, Jane Warren assigned a one-half interest in said land to J. F. Driesback in consideration of his agreeing to assist her in clearing the title of said land by employing counsel to prosecute a suit to set aside the quitclaim deed she had executed to Mandy Johnson; that, after the institution of the suit, Jane Warren assigned for a valuable consideration all of her interest in said land to the said J. F. Driesback in case she should prevail in the litigation; that the rents were paid upon the Edwards lease in the following manner: the first rental payment, due May 19, 1920, was placed to the credit of S. L. Johnson in the Camden National Bank within the specified time; the second payment, due May 19, 1921, was paid directly to Mandy Johnson either in June or July, 1921; the third rental payment, due May 19, 1922, was deposited to the credit of Mandy Johnson in the Ouachita Valley National

Bank at Camden on May 17 or 18, 1922, but was not delivered to Mandy Johnson until July, 1922; that on August 3, 1923, C. M. Martin sent $125 to Jane Warren, purporting to be in full payment of her interest in sixty-three sixty-fourths interest in all the oil, gas and mineral sold in the land after paying off the deed of trust for $1,099 and accrued interest thereon; that she returned the money by postal order to C. M. Martin in about a week or ten days after receiving same, upon the advice of J. S. Driesback; that, at the time he sent the money, he also sent her a letter informing her of her interest in the land and oil, but withheld from her that the V. K. F. discovery well of the Smackover oil field had come in and was producing a large amount of oil, and also withheld the fact that oil, gas, and mineral interest in lands near the well had greatly enhanced in value. The letter contained several paragraphs indicating that the oil, gas and mineral interests in the land were of little value and that the oil boom was insignificant. The two following paragraphs are indicative that the writer intended to make such an impression upon appellant:

"There is a little oil boom on here, and Mandy Johnson has sold a part of the royalty on this land for $1,600, which is sufficient to pay off the mortgage and have $500 left to divide as follows: one-half to herself and the other one-half to be divided equally between you and your brother, Jesse Johnson. Your part of the money would be $125."

"If the oil boom amounts to nothing, then Mandy Johnson will deed back to you your interest in this land or buy it from you if you and she can agree upon a price." The letter also indicated that it was necessary to have executed the quitclaim deed to prevent Mandy from losing her home, when, in fact, the real purpose of obtaining the deed was to clear up the title of oil interests in the land which Martin had bought or intended to buy from Mandy. The price of the interests sold, or intended to be sold, was also incorrectly stated in the letter.

The record reflects a conflict between appellant's and appellee's witnesses relative to representations made to procure the quitclaim deed from appellant and Mandy Johnson.

Appellant, Pinkney Warren and Estella Warren, testified that Allen Fortch, a negro man, and Sam Evans, a white man, came to appellant's home on July 26, 1922, which was 40 miles from Camden and about 20 miles from Smackover, and obtained a quitclaim deed from appellant to Mandy Johnson for her interest in the 80-acre tract of land, upon the representation that Mandy was in distress; that there was a mortgage of $2,500 on her home, which was about to be foreclosed, and that she would lose it unless appellant conveyed her interest in the land to Mandy; and that she yielded to their entreaties and executed a quitclaim deed in order to help Mandy. These witnesses were corroborated by the testimony of Jesse Johnson, the brother of appellant, and L. J. Cook, who is a lawyer in Texarkana. Immediately after obtaining the quitclaim deed from appellant to Mandy Johnson, Fortch and Evans proceeded to Texarkana, where they found Jesse Johnson. Jesse testified that they made the same representation to him with reference to Mandy being in distress for fear she would lose her home, which, they said, was under mortgage for $2,500. He said that they represented that he would have to pay the mortgage himself unless he signed the quitclaim deed; that he asked them to go with him to the office of his lawyer, Mr. L. J. Cook, to talk the matter over; that his lawyer advised him to do nothing until they found out definitely about the mortgage, and suggested to the men that they get a verified copy of the mortgage and a certificate from the circuit clerk that it had not been satisfied.

L. J. Cook testified that Jesse Johnson came to his office in company with Allen Fortch and Sam Evans, and, when he asked them what they wanted, Evans told him that he wanted a quitclaim deed from Jesse Johnson

to Mandy Johnson in order to prevent a foreclosure of the mortagge held by Watts Brothers, who were represented by C. M. Martin; that he advised Jesse Johnson not to execute the quitclaim deed until they looked into it, and requested Evans to get a verified copy of the mortgage and sworn statement of the deed, and a certificate of the circuit clerk that the mortgage had not been satisfied; that, the next morning, Evans came to his office and told him that he had been back that night to Camden to get the papers which he requested; that, during the conversation the day before, Evans had represented to him that the mortgage was for $2,500; that, after examining the papers and a letter which C. M. Martin had written him, he told Evans that he would not let Jess sign the quitclaim deed under any circumstances; that he asked Evans if it was not a fact that he was trying to cure title to oil lands in Ouachita County, and that he said "yes;" that Evans told him Jane Warren had signed a quitclaim deed under the same representation which he had made to Jess. The letter which he received from Martin is as follows:

"C. M. MARTIN
Camden, Ark.
Attorney at Law.
July 28, 1922.,

"Mr. L. Jean Cook, Att'y at law,
"Texarkana, Ark.-Tex.

"Dear sir: I have been employed by Mr. Sid Umstead of this city to foreclose a mortgage executed by Sam L. Johnson and wife, Mandy Johnson, to M. P. Watts & Bro., for $1,099, which mortgage Mr. Umstead has paid. Mr. Umstead does not desire to foreclose this mortgage, if the brother and sister of Sam Johnson will execute a quitclaim deed to this land, then he will give the widow of Sam Johnson more time to pay off this mortgage. If they do not sign at once, I will foreclose this mortgage, and all of the heirs of Sam Johnson will be forever barred.

"Kindly see Jesse Johnson for me and explain the facts to him, and, of course, he will sign this quitclaim deed to help out his brother's widow.

"Your friend,

(Signed) "C. M. MARTIN.

"P. S. I would not give the amount of this mortgage for the land, but it is close to some land Mr. Umstead owns, and he may be able to use it, if the mortgage is not paid."

Sam Evans testified, in substance, that he and Allen Fortch were employed by C. M. Martin to obtain a quitclaim deed to said land from Jane Warren to Mandy Johnson, and, in order to procure same, told her there was a mortgage of about $1,200 on it; that her brother had leased it, and that Mandy, her brother, Jesse, and she owned the land and oil interests, subject to the mortgage and lease; that there was some oil excitement over there, and the only thing to do was to execute a quitclaim deed to one person and sell the oil interests; that the mortgage would have to be paid off before they would get anything out of it; that she agreed to make the deed, so he left Allen Fortch there and went after a notary public; that, on account of a storm, he did not get back until next day, July 26, at which time Jane executed the quitclaim deed, after the notary read it to her; that he returned in about ten days and delivered her $125 and the letter which Mr. Martin sent to her; that he read the letter to her and her husband; that she kept the letter and accepted the $125, stating that she was glad she had done the right thing.

Allen Fortch testified, in substance, that he informed Jane Warren of her brother's death, of which she had not heard, and the interest she owned in the land; that he did not know the exact amount of the mortgage, but thought it was between $1,000 and $2,500; that, if they thought he was trying to persuade them into anything, to come down and pay off the mortgage; that they backed off from that; that she agreed to and next day did sign

the quitclaim deed, saying that Mandy could sell the land, pay off the mortgage, and keep the balance to live on; that, when they took her the $125 and letter from Mr. Martin, she accepted the money, saying she was glad she did right.

The notary testified that he read the deed to Jane Warren, and that she understood what she was signing.

The taxi driver who took them to Jane Warren's home testified that Jane accepted the $125, after the letter from Mr. Martin had been read and explained to her.

C. M. Martin testified that he tried to buy the oil interests in the land from Mandy Johnson, who referred him to Sid Umstead, who was looking after her interest; that Mr. Umstead agreed to let him have a sixty-three sixty-fourths interest in the oil, gas, and mineral in the land for $2,000, which he agreed to pay, and that Mr. Umstead requested him to clear the title to the land; that, in order to do so, he employed Evans and Fortch to get a quitclaim deed from Jane Warren and Jesse Johnson, who owned a one-fourth interest each in the land, and directed them particularly to inform said parties of the oil situation in the Smackover field, of their interest in the land, and to tell them, if they would make a quitclaim deed for their interest therein to Mandy, she would sell the oil, gas, and mineral interest in the land for as much as possible, pay off the mortgage and divide the balance, if any, between herself and them, according to their several interests; that, about two weeks after Jane Warren executed the quitclaim deed, he wrote her a letter explaining that Edwards was about to foreclose the mortgage, but that Mandy had sold an interest in the oil, gas, and mineral in the land for $1,600, which was more than enough to pay the mortgage, and that her share of the excess was $125, which amount Mandy had turned over to him to send her; that Mandy would hold the land in trust for her, and, after selling the oil, gas and mineral in the land and dividing the proceeds according to their

several interests, Mandy would either buy the land from her or deed her interest therein back to her; that the value of the oil, gas and mineral in the land was uncertain, and that he paid Mandy a high price for a sixty-three sixty-fourths interest therein.

Sid Umtead testified that he and Edwards owned the lease, and that they purchased the mortgage from Watts Brothers in January, 1922; that he got the best price possible for the oil, gas and mineral therein for Mandy.

E. P. Edwards testified that he was a brother-in-law of Sid Umstead; that they owned the lease and bought the mortgage together.

After a careful reading and analysis of the testimony, our conclusion of the whole transaction is as follows:

C. M. Martin, who had kept in close touch with the V. K. F. discovery well in the Smackover oil field, near the land in question, came into the possession of evidences indicating that the well would become a producer, which it did. Relying upon these evidences, he set about to buy oil, gas, and mineral interests in lands near the well, and, in carrying out these policies, entered into a contract with Mandy Johnson, through her representative, Sid Umstead, to purchase a sixty-three sixty-fourths interest in the oil, gas and mineral in said land for $2,000. and, in order to clear up the title, employed Sam Evans and Allen Fortch to procure a quitclaim deed to said land from appellant and her brother, who had inherited a one-fourth interest each therein, subject to Edwards' lease and the Watts Brothers' mortgage, for a nominal sum. The only way the deed could be obtained for a nominal consideration was to make it appear that the equity in the land was of little value and would be swallowed up by the Watts Brothers' mortgage unless appellant, her brother and Mandy should dispose of the oil, gas, and mineral interest in the land immediately. This plan was in the mind of Martin when he sent his agents, as representatives of Mandy, to appellant and

her brother to get the deed, as was evidenced by the postscript to the letter he wrote to L. J. Cook, and in the clauses quoted above in his letter to appellant. The postscript is as follows:

"I would not give the amount of this mortgage (referring to the Watts Bros.' mortgage) for the land, but it is close to the land Mr. Umstead owns, and he may be able to use it, if the mortgage is not paid."

At the time the letter was written Martin was under contract to pay $2,000 for a sixty-three sixty-fourths interest in the oil, gas, and mineral in the land, and knew that the discovery well near the land was a producer. The well came in on July 26, 1922, and the letter was written on July 28, 1922. At the time Martin wrote the letter to appellant he knew that the discovery well had become a producer, and, according to the recitation in the lease of the Watts Brothers' mortgage by E. P. Edwards to R. E. Davidson, Martin had contracted to sell one-half of sixty-three sixty-fourths interest in the oil, gas, and mineral in said land that he had bought from Mandy to R. E. Davidson for $4,800.

At the time Evans and Fortch procured the quitclaim deed from appellant, she and C. M. Martin were not on an equal footing. The same opportunity to ascertain and know the value of the land was not open to each. Martin was upon the ground, with knowledge of recent oil developments in the field, and appellant was residing at a distance, without information or knowledge that the oil well located near the land was about to, or had, come in, and that oil, gas, and mineral interests in every direction from the discovery well were in demand and being purchased. Appellant could neither read nor write and had not even heard of the death of her brother. The development in the oil field, also known to Martin, was withheld from appellant, and she was induced to execute a quitclaim deed either upon the representation that the land was of little value and that it was necessary to sign the deed immediately in order for her, her brother

and Mandy to get anything more than the mortgage out of it, or to prevent Mandy, who was in distress, from losing her home. According to Fortch's own admission, he led this woman to believe that, unless she signed the deed, she might have to pay the mortgage herself, which information seemingly produced an effect, for Fortch said "she got back from that." We are convinced by a preponderance of the evidence that appellant was induced to execute the deed through misrepresentation on which she had a right to and did rely.

Appellees contend, however, that appellant ratified the transaction by accepting and retaining $125 for a week or ten days. If she had been fully apprised of the real situation, her act in accepting and keeping the money for that length of time would have amounted to a ratification on her part. The letter, however, accompanying the money was a continuation of the misrepresentations. The oil situation was characterized in the letter as a little boom. It did not inform her that the discovery well had become a real producer. Neither did it contain information that a sixty-three sixty-fourths interest in the oil, gas, and mineral in said land had been sold to Martin himself by Mandy for $2,000, and that he had immediately sold one-half of what he purchased for $4,800. On the contrary, it was stated in the letter that Mandy had sold a part of the oil, gas, and mineral interest in said land for $1,600. The purport of the letter was to the effect that Mandy had to sell said interest in the land to prevent the mortgage from being foreclosed, when, in fact, no such urgent necessity existed. Under these circumstances the receipt and retention of the money did not constitute a ratification of the transaction by appellant.

The next question arising for solution is whether the oil, gas, and mineral lease had been forfeited for failure to pay rent at the time and place designated in the lease. S. L. Johnson and his wife executed this lease to Edwards on their homestead. Johnson died on the

—— day of October, 1919, and his wife continued to reside on the home place. After the death of her husband, two payments of rent were made to and accepted by her, one of which was out of time and the other made at a place different from that designated in the lease. An oil well was commenced on the property before the fourth rental was due, so it was unnecessary, under the terms of the lease, to make further payments on rent. The drilling of the well operated to keep the lease alive. While the last two payments of rent were not made in accordance with the terms of the lease, and while the lease contained an automatic forfeiture clause, we know of no legal reason why the forfeiture could not be waived by Mandy if she was entitled to receive the payment of the rents after the death of her husband. We think she was entitled to receive the rents by virtue of her homestead right in the property. It is true that the well was not drilled until after the death of her husband, but the law is that "a mine lawfully leased to be opened is an open mine within the reason of the rule permitting a life tenant to work open mines." *Koen* v. *Bartlett,* 31 L. R. A. 128; *Poole* v. *Union Trust Company,* 157 N. W. 432, and a long list of cases cited therein to this point.

The payments of rent were made and received before Mandy sold a sixty-three sixty-fourths interest in the oil, gas, and mineral in said land to C. M. Martin. Up to that time she was entitled to receive the rents or production of the soil above or below the surface of the land by virtue of her homestead right therein. *Russell* v. *Berry,* 70 Ark. 317. When Mandy Johnson, however, sold a sixty-three sixty-fourths interest in and to all of the oil, gas, and mineral in, on or under said land, to C. M. Martin, she abandoned her interest therein by virtue of her homestead right as much so as if she had sold a part of the land constituting her homestead, for it was a sale of the body or corpus of a sixty-three sixty-fourths interest in all the oil, gas, and mineral in the land. *Gatlin* v. *Lafon,* 95 Ark. 256; *Felton* v. *Brown,* 102 Ark.

658. Having thus abandoned her homestead right in a sixty-three sixty-fourths interest in all of the oil, gas, and mineral in, on or under said land, appellant, as an heir, became entitled to her interest therein, and to have Mandy Johnson and C. M. Martin account to her for any amounts collected by them, as royalties for oil taken from said lands, belonging to her, since the date of said conveyance, less her proportionate part of the mortgage paid by Martin for her.

On account of the error indicated the decree is reversed, with directions to enter a decree canceling the quitclaim deed, and for further proceedings according to law not inconsistent with this opinion.

McCULLOCH, C. J., (dissenting). I do not agree with the conclusion reached by the majority as to the facts in the case, but it would serve no useful purpose to set forth the proof in the record upon which my own conclusions is reached that the finding of the chancery court should not be disturbed. Suffice it to say that my opinion is that the finding of the chancellor was not against the preponderance of the evidence, and that the decree should for that reason be affirmed.

I dissent from that portion of the opinion of the majority which holds that the execution of the mineral deed by Amanda Johnson to appellee Martin constituted an abandonment of the former's homestead right. It is, I think, a misapplication of the rule of law which has often been announced by this court that a conveyance by a widow of the homestead constitutes an abandonment of the homestead right, to say that a mineral deed or a sale of royalties without denuding herself of the occupancy or surface rights operates as an abandonment. This is an extension of the rule which is not warranted by anything said in our former decisions on the subject, but, on the contrary, is, I think, in hostility to the very reason upon which the rule is based. The first opinion on this subject was written by Judge BATTLE in the case of *Garibaldi* v. *Jones*, 48 Ark 230. In declaring the law as to the right of the widow to alienate the homestead, he said: "The

law is not concerned about the precise locality of the family at any time, but it is concerned that, wherever they be carried by convenience, chance or misfortune, there shall be a place, a sanctuary, to which they may return to find the shelter, comfort and security of a home. * * * One of the objects of the Constitution is to secure to the widow and orphans the family roof-tree as a fixed home during the widowhood or life of the widow, and minority of the children. It would be clearly against the policy and spirit of the Constitution, in thus providing a home for her, to permit her to alienate it, and to allow others to enjoy the benefits of the homestead of a deceased husband and father, which were only intended for the widow and orphan. If she could do so, the exemption which passes, under the Constitution, to the widow and minor children upon the death of the husband and father, would not be a reservation of a homestead, but a reservation of land of a certain quantity or value, irrespective of its uses."

It is thus seen that the reason upon which the rule is based, that an attempted alienation constitutes an abandonment, is that it deprives a widow of the very thing which is guaranteed to her by the Constitution. The widow has the right, however, to the complete and full enjoyment of the homestead with all of its uses, and by making use of the benefits in any manner short of a conveyance which would deprive her of those uses, she does not abandon that right. The sale of mineral rights with a reservation of royalties is in effect the same as a lease. It does not deprive the widow of any surface rights except those specially granted in order to enjoy the mineral rights, and the right of occupancy is not substantially restricted or cut off. The enjoyment by her of mineral rights is restricted, the same as any life tenant, to wells or mines already opened, and if she goes beyond her rights and attempts to open new wells or mines, she can be restrained by the remainderman, but the attempt to go beyond her rights in that respect does not constitute an abandonment, so long as she does not denude herself of the right of occupancy.

There is still another reason why the execution of the mineral deed by Amanda Johnson should not be treated as an abandonment. The mineral deed was executed after the execution of the deed to her from appellant conveying the title in fee, and, if that deed is set aside, the mineral deed falls with it and should not be treated as an abandonment of the homestead right which the widow had independent of the deed executed to her by appellant. A court of equity, in setting aside the deed executed by appellant and restoring her to her rights, should not grant to her greater rights than she enjoyed before the execution of the deed. To do so is to convert the arm of the court into a sword rather than a shield.

I am in entire accord with the court in holding that the acceptance of rentals by Amanda Johnson after the stipulated date of maturity prevented a forfeiture of the original lease executed by S. L. Johnson to Edwards. The property was the homestead and passed to the widow after the death of the husband. The widow was entitled to the rentals as long as she lived or until she abandoned the homestead, and since the rentals went to her exclusively, she had the right and power to waive the date of payment. She could have exonerated the lessee from paying at all as long as she was in possesson of the homestead, enjoying her rights as widow. It would be otherwise, of course, if the forfeiture was based upon failure to perform some condition made for the benefit of remaindermen and the widow. Where it related to the performance of a condition which inured exclusively to the benefit of the widow, it was in her power to waive the performance of those conditions so long as she was the beneficiary.

The Kentucky case relied on by counsel for appellant (*Jenkins* v. *Williams,* 191 Ky. 229 S. W. 94) is not directly in point, in that the property involved does not appear to have been the homestead, and the rentals did not become exclusively the property of the widow. The point of that case was whether or not the widow was a

joint obligee so as to have the right to accept rentals at any time or waive the payment thereof. There was a dissenting opinion in the Kentucky case, but we are not concerned with the correctness of the decision. In the present case it is undisputed that the leased property fell to the widow as her homestead after the death of her husband, and that the rentals belonged exclusively to her.

Mr. Justice HART concurs in this dissent.

MUTUAL AID UNION v. ALEXANDER.

Opinion delivered April 27, 1925.

INSURANCE—ASSIGNMENT OF LIFE POLICY—INSURABLE INTEREST.—A life insurance which is valid in its inception will not be invalidated by a subsequent assignment to one having no insurable interest.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

J. V. Walker and *Duty & Duty,* for appellant;

Starbird & Starbird, for appellee.

McCULLOCH, C. J. Appellant is a fraternal life insurance association, organized under the laws of this State for the purpose of doing business on the assessment plan, and this is an action on one of its certificates of benefit or policies issued to Simon Simmons, one of its members. Simmons became a member and certificate holder in the association on August 1, 1914, and the original benefit certificate was made payable to his wife, Willie Simmons, but, on March 21, 1917, the designation of the beneficiary was changed, and, on the application of the member and of the old beneficiary, appellee, M. C. Alexander, was properly designated in the manner prescribed by the laws of the organization as the new beneficiary, and the matter thus stood until the death of Simon Simmons, which occurred in the year 1923. Appellee M. C. Alexander and also Willie Simmons joined in

this action, and the judgment below was in favor of Alexander. Willie Simmons has not appealed.

Appellee testified at the trial that he had paid all the assessments on the policy from the time it was issued, and that he did this because Willie Simmons was his aunt. This was not disputed. He was asked by appellant's attorney whether or not there had been any agreement, when the policy was issued, that he was to eventually become the beneficiary, and he answered in the negative. He testified that the change of beneficiary was made pursuant to a family council, and that the reason for making the change was that his aunt, Mrs. Simmons, was in bad health, and it was thought she would not survive her husband, and it was the desire of all that, in the event of the death of the member, the benefit should go to the collateral heirs of Willie Simmons rather than the collateral heirs of Simon Simmons.

The case is defended on the alleged ground that appellee Alexander had no insurable interest, and that the new designation of beneficiary, which was in effect an assignment of the policy, constituted a wager contract, and was void, and counsel rely on the decision of this court in the case of *McRae* v. *Warmack,* 98 Ark. 52. That case does not, however, have any application to the facts of the present case, for the court there merely held that an assignment of a policy to one having no insurable interest was void if made pursuant to an agreement at the time of the issuance of the policy. In later cases this court has decided that, if the policy was valid in its incention, it was not invalidated by a subsequent assignment to one having no insurable interest. *Page* v. *Metropolitan Life Ins. Co.,* 98 Ark. 340; *Prudential Insurance Co.* v. *Williams,* 113 Ark. 373; *Langford* v. *National Life & Acc. Ins. Co.,* 116 Ark. 527; *United Assurance Assn.* v. *Frederick,* 130 Ark. 12. The same ruling has been made by the Supreme Court of the United States. *Grigsby* v. *Russell,* 222 U. S. 149.

Counsel for appellant contend that the rule of our recent cases should not be applied, because Alexander

procured his own designation as the beneficiary, or, at least, participated in the arrangement. This contention is not sound, for there is no proof that the change was brought about by any fraudulent conduct or misrepresentation on the part of Alexander. Besides that, the former beneficiary, Mrs. Simmons, makes no complaint about the change—in fact it was made at her own request, and appellant is in no attitude to raise that question.

There are numerous assignments of error with regard to the court's charge, but the material facts of the case are undisputed, and the verdict is correct, regardless of any instructions the court may have given or refused, so it is unnecessary to discuss them.

Judgment affirmed.

LANE v. ALEXANDER.

EX PARTE LANE.

Opinion delivered April 27, 1925.

1. GAMING—RECOVERY OF MONEY LOST.—Under Crawford & Moses' Dig., § 4899, an action is maintainable to recover money or property lost at any game or gaming device or on any bet or wager.
2. REPLEVIN—SUFFICIENCY OF COMPLAINT.—A complaint in replevin which alleges that plaintiff is the owner of the property described, and that defendant unlawfully has possession thereof and refuses to deliver same up to plaintiff on demand, is a sufficient allegation that plaintiff is entitled to the immediate possession of the property.
3. PLEADING—SUFFICIENCY OF COMPLAINT ON DEMURRER.—In determining the sufficiency of the complaint on demurrer, it is proper to consider the facts pleaded in the answer.
4. GAMING—REMEDY FOR RECOVERY OF PROPERTY LOST IN GAMBLING.—Rev. Stat., c. 68, § 1, providing that property lost at any game or gambling device may be recovered by action of detinue or trover, has been modified by the Code provision abolishing forms of action (Crawford & Moses' Dig., § 1031), and such property may now be recovered in an action of replevin.

5. BAIL—LIABILITY OF SURETIES.—The liability of sureties on an appearance bond, within Crawford & Moses' Dig., § 8645, does not mature unless there is a breach of condition by the failure of the defendant to submit to the judgment, and until after a return by the proper officer of an execution against the body of the defendant showing that he could not be found.
6. CONTEMPT—POWER OF COURT TO ENFORCE JUDGMENT.—Under Crawford & Moses' Dig., § 8644, providing for the arrest of the defendant in replevin where the property has been removed or concealed, *held* that where the court finds that the defendant so arrested has in his possession bonds belonging to the plaintiff which he refuses to deliver up, he may be committed to jail until he makes delivery thereof, or executes a bond to make such delivery or to pay the value of the bonds so removed or concealed.
7. CONTEMPT—POWER TO IMPRISON CONTEMNOR.—The power of a superior court to imprison a defendant in replevin who refuses to deliver property of plaintiff wrongfully in his possession continues as long as his contumacy persists.
8. REPLEVIN—DELIVERY OF PART OF THE PROPERTY.—Delivery by defendant of part of the property involved in an action of replevin did not abate the power of the court after judgment to compel delivery of bonds still held and found to be in defendant's possession.
9. JUDGMENT—MERGER.—A judgment of contempt, growing out of a civil action of replevin to recover bonds lost in a gambling transaction, *held* not to merge in a judgment of conviction of larceny of such bonds where the latter was suspended by execution of a supersedeas bond.

Appeal from Greene Circuit Court, and certiorari to Greene Circuit Court; *W. W. Bandy,* Judge; affirmed.

Little, Buck & Lasley and *Huddleston & Little,* for appellant.

Block & Kirsch, for appellee.

McCULLOCH, C. J. Appellee instituted an action against appellant in the circuit court of Greene County to recover possession of certain United States bonds, accurately and particularly described, of the aggregate value of $20,100. Appellee alleged in his complaint that he is the owner of the bonds described, and that "the defendant unlawfully has possession thereof, and refuses to deliver the same up to plaintiff upon demand."

Proper affidavit was filed for immediate delivery of the property, and the affidavit contained an allegation, as provided by statute in cases of replevin (Crawford & Moses' Digest, § 8642), to the effect that the property had been by the defendant "sold, removed or disposed of, with intent to defeat the plaintiff's action," and an order of delivery was issued by the clerk with a capias clause for the arrest of appellant. The officer in whose hands the writ was placed for service failed to find the property, and he arrested appellant, who gave bond with surety as provided by statute (Crawford & Moses' Digest, §§ 8644, 8645), and was released. The sureties on appellant's bonds subsequently surrendered him into custody, and he was brought into court and appeared by attorney and filed his answer, tendering as a defense that he had won the bonds from appellee at the gaming table.

The court sustained appellee's demurrer to the answer, and, appellant declining to plead further, rendered judgment against appellant for the delivery of the bonds, after hearing oral evidence as to the actual possession and the value of the bonds. Appellant was present in court when the judgment was rendered, and the judgment of the court contained a recital that "defendant is in open court, admitting that he has possession of said bonds, and refuses to deliver the same up to plaintiff," and the court thereupon adjudged appellant to be in contempt of court, and committed him to jail, "there to remain until he should deliver all of said bonds, with the coupons thereto attached, to plaintiff, or pay the value of said bonds as found by the court, unless defendant shall immediately execute bonds in the sum of $20,000 to plaintiff, conditioned that he will deliver said bonds or pay the value thereof, or execute supersedeas bond on appeal as required by law."

The grand jury had previously returned an indictment against appellant for the crime of grand larceny, alleged to have been committed by stealing the bonds from appellee, and the judgment in the replevin suit

was rendered during an intermission in the trial of the criminal case. No objection to that procedure was made, however, by appellant, and no postponement of the trial was requested. Later, during the same day, appellant was convicted in the criminal case and sentenced to a term in the penitentiary, but he prosecuted an appeal to this court from that judgment, and executed an appeal bond in an amount fixed by the trial court. Appellant was, however, held in custody under the court's order in the replevin case, and, on January 20, 1925, a month after the former proceeding, he presented to the circuit judge in vacation a petition for writ of habeas corpus praying for discharge from custody. There was a hearing before the circuit judge in chambers, and a judgment was rendered refusing to discharge appellant from custody and remanding him to the custody of the sheriff, to be confined until discharged by the circuit court. Appellant also secured a writ of habeas corpus from the chancellor of that chancery district, but, on a hearing of the writ, the chancellor refused to discharge appellant from custody, and remanded him to the custody of the jailer, to be held under the order of the circuit court.

The record in both of the proceedings last mentioned has been brought here by writ of certiorari, and, by agreement of counsel on both sides, has been consolidated with the appeal from the judgment in replevin and the order of the court holding appellant to be in contempt for failure to deliver the bonds. The questions in all the case have been briefed together and can be disposed of in one opinion.

It is contended, in the first place, that the judgment in the replevin suit is void for the reason that the complaint fails to state a cause of action, in that it does not allege that appellee is entitled to the immediate possession of the bonds, and that the question of the insufficiency of the complaint was raised by the demurrer to the answer, which reached back to the complaint.

Dallas v. *Moseley,* 150 Ark. 210. The answer tendered no valid defense, for the statutes of this State expressly authorize the maintenance of an action for the recovery of money or property lost at any game or gaming device or on any bet or wager. Crawford & Moses' Digest, § 4899. Our conclusion on this feature of the case is that a cause of action is stated in the complaint, notwithstanding that there is no express allegation that appellee is entitled to immediate possession of the property in controversy. There is no statutory requirement that a complaint in replevin must contain allegations, in precise words, that the plaintiff is the owner of the property in controversy and is entitled to immediate possession thereof. Therefore it is sufficient if the complaint contains those allegations in express words, or contains language from which there is the necessary implication of ownership and right to immediate possession. *Climer* v. *Aylor,* 123 Ark. 510; *Grever* v. *Taylor,* 53 Ohio St. 621, 42 N. E. 829. The complaint now under consideration contains a specific allegation that appellee is the owner of the property, and this constitutes a plea of general ownership, and that appellant is in unlawful possession thereof. There is a necessary implication from these two allegations that appellee is entitled to immediate possession, for, if appellee is the owner, right of possession follows general ownership, unless otherwise shown, and the allegation of unlawful possession by appellant negatives the legal right of possession otherwise than in appellee as the owner. In addition to that, it is clear that the answer supplies the omission in the complaint by the allegation that appellant won the property from appellee at the gaming table. This constitutes an affirmative allegation that the title and likewise the actual possession was with appellee at the time the property unlawfully passed into the hands of appellant. Therefore the inference is conclusive from the pleadings, when read together, that appellee is not only the owner but is entitled to the immediate possession.

It is proper to consider the facts pleaded in the answer in determining the sufficiency of the complaint when called in question by a demurrer. *Thompson* v. *Jacoway,* 97 Ark. 509.

It is also contended that the judgment is void for the reason that the statute which created the right of action for the recovery of money or property lost in gaming prescribed the particular remedy, and that replevin was not the prescribed remedy. The statute in question was a part of the Revised Statutes (chap. 68, § 1), and read as follows:

"Any person who shall lose any money or property at any game or gambling device, or any bet or wager whatever, may recover the same by action of debt, if for money, and, if for property, by action of detinue or trover, against the person winning the same; but such suit shall be instituted within ninety days after the paying over of the money or property so lost."

Later digesters, beginning with Gantt's Digest of 1874, omitted from the section the words, "by action of debt," and the words, "by action of detinue or trover," and in all the digests down to Crawford & Moses' Digest, § 4899, those words are deleted. It is argued that it was error to eliminate those words, but we are of the opinion that the change was authorized by the Code provision (Crawford & Moses' Digest, § 1031) abolishing all forms of action. Counsel rely on the case of *Nealy* v. *Powell.* 20 Ark. 164, holding that replevin would not lie for the recovery of property lost in gaming, for the reason that the statute creating the right prescribed detinue or trover as the form of action. At that time there was no statutory provision abolishing forms of action, and all of the common-law forms were in vogue. In fact, the Revised Statutes and Gould's Revision of 1858 contained provisions for both detinue and replevin as forms of action, notwithstanding the fact that the definition of replevin as a form of action overlapped that of the action of detinue by providing the remedy of replevin where

property was wrongfully detained as well as where wrongfully taken. Revised Statutes, chap. 12, § 1; Gould's Digest, chap. 145, § 1.

The grounds for the decision in *Nealy* v. *Powell, supra,* were that detinue as a form of action was still preserved and the statute creating the right prescribed that remedy, which was exclusive. The fact that there were concurrent remedies did not change the rule, but, now that the Code has abolished forms of action, thereby eliminating the distinction between purely concurrent remedies, the digesters have properly eliminated from the statutes the common-law action of detinue, as it is entirely supplanted by the enlarged remedy of replevin conferring a right of action which embraced the form of action described as detinue. The change wrought by the Code provision referred to above necessarily gives a right of action in cases of this kind, and the form of action is included within the remedy defined in the scope of an action of replevin. This disposes of the contention with reference to the invalidity of the judgment for the recovery of the property.

The action of the court in ordering the retention of appellant in custody until he makes delivery of the bonds pursuant to the judgment of the court is challenged on several grounds. It is first insisted that there is no statutory authority for personal detention of a defendant in replevin after the judgment of the court. The pertinent sections in the chapter on replevin are as follows:

"Section 8642. The order for the delivery of the property to the plaintiff shall be addressed and delivered, with a copy thereof, to the sheriff. It shall state the names of the parties to the action, and the court in which the action is brought, and direct the sheriff to take the property, describing it, and stating its value as in the affidavit of the plaintiff, and deliver it to him, and make return of the order on a day to be named therein, and to summon the defendant to appear on such day in the court and answer the plaintiff in the premises; and, if

the plaintiff shall file an additional affidavit that he believes the property has been concealed, removed or disposed of in any way, with intent to defeat the plaintiff's action, the clerk or magistrate shall insert a clause commanding the sheriff, or other officer, that, if the property mentioned in the order cannot be had, to take the body of the defendant, so that he appear at the return day of the order to answer the premises. The order shall be made returnable as an order of arrest is directed to be returned." Crawford & Moses' Digest.

"Section 8644. If the property described in the order shall have been removed or concealed, so that the officer cannot make delivery thereof, he shall (when the order contains a capias clause) arrest the body of the defendant and hold him in custody, in the same manner as on a *capias ad respondendum* in a personal action, until he shall execute the bond prescribed in the next section, or be otherwise legally discharged." *Id.*

"Section 8645. The defendant shall be entitled to be discharged from such arrest, at any time before final judgment had in the cause, upon executing to the officer who shall have made such arrest, with the addition of his name of office, a bond in a penalty of at least double the value of the property described, as sworn to in the affidavit, with such security as shall be approved by such officer, conditioned that such defendant shall abide the order and judgment of the court in such action, and that he will cause special bail to be put in, if the same be required." *Id.*

It has been repeatedly decided by this court that the bond provided for in § 8645 is an appearance bond, and not a bond to perform the judgment of the court. *Duncan* v. *Owens,* 47 Ark. 388; *Daniels* v. *Wagner,* 156 Ark. 198; *Jones* v. *Keebey,* 159 Ark. 586. The manifest design of this provision of the statute is to procure the personal attendance of the defendant at the time of the rendition of the judgment, and to allow him to give bond for his appearance. Liability of the sureties on the bond does not mature unless there is a breach of the condi-

tions of the bond by the failure of the defendant to submit himself to the judgment and a return by the proper officer of an execution against the body of the defendant, showing that he could not be found. *Duncan* v. *Owens, supra.* It is true that there is no express provision in the statute authorizing the court to deal personally with a defendant who submits himself in judgment or who is brought before the court pursuant to process, but the fact that the statute contains express authority for subjecting the defendant in person to the authority of the court necessarily implies the power of the court to deal with him in any appropriate manner to compel obedience of the court's judgment. In other words, the statute provides a means whereby the court may act upon the person of the defendant in the enforcement of its judgment, and it is among the inherent powers of all courts of superior jurisdiction to enforce there judgments and orders. Works on Jurisdiction of Courts, p. 170; 7 R. C. L., p. 1034. "A court having jurisdiction to render a judgment or decree, has authority and jurisdiction," it is said in R. C. L., *supra,* "to make such orders and issue such writs as may be necessary and essential to carry the judgment or decree into effect and render it binding and operative." This power was recognized by the decision of this court in *Meeks* v. *State,* 80 Ark. 579, where we upheld an order of the chancery court committing the appellant for contempt on account of failure to comply with an order of the court for the delivery of property. That was an order made by the chancery court, but there is no distinction between the inherent powers of courts of superior jurisdiction in regard to the enforcement of their judgments. Courts of chancery afford peculiar remedies not available at law, but the power to enforce a decree or judgment inheres in all courts of superior jurisdiction, regardless of the peculiar remedies which may be offered by each. In the case just cited we held that the effect of such an order was not imprisonment for debt, and the authorities on that subject were fully reviewed. In *Hand* v. *Haughland,* 87 Ark.

105, we held that courts of probate possess power to enforce, by contempt proceedings, orders of distribution. There is a statute authorizing it (C. & M. Dig. § 200), but the statute is only declaratory of the inherent power of the court. It was, as before stated, decided in *Duncan* v. *Owens, supra,* that liability of the sureties on an appearance bond could not be enforced until after return of the writ, and it is argued from this that the court had no power to commit the defendant until there was a return of an execution or writ of possession under the judgment. There is no analogy between the two questions, for liability of sureties is not involved in the present case, the sureties having surrendered appellant into custody, and the record recites that the court found from the evidence that appellant had possession of the property and that he refused to deliver them. These recitals of the court show that appellant was committed, not for offensive demeanor in the presence of the court, but for his recalcitrancy in refusing to comply with the order of the court, and this constituted a civil contempt which authorized the court to resort to the detention of appellant in custody as a means of enforcing its judgment. Appellant was then in the presence of the court, brought there pursuant to the original capias for the very purpose of requiring him to answer the court's orders and judgment. The statutory provision would therefore be an empty formality if the court possessed no power to compel the appellant to obey the orders of the court by surrendering the property. Of course, the judgment would be erroneous unless it was shown that appellant had possession of the property and was able to comply with the court's orders, but this fact is shown by the recitals of the court, which we must presume were supported by sufficient evidence. The power of the court over the person of the appellant therefore remains so long as his contumacy persists, and the fact that a few of the bonds were delivered to plaintiff before judgment does not abate the power of the court after judg-

ment to enforce the same as to the bonds still held by appellant and found to be in his possession.

Finally, it is insisted that the judgment for contempt was merged in appellant's judgment of conviction for larceny. Counsel rely on the case of *Williams* v. *State*, 125 Ark. 287, but that case has no application, for the reason that it was an attempt on the part of the trial court to postpone the severer punishment of conviction of felony until the expiration of an indefinite order of confinement for contempt. In the present case appellant, though convicted, gave bond for appeal, which suspended the execution of the judgment of conviction, therefore there could be no merger into the suspended judgment. The question of priority in enforcing two judgments, one of conviction for felony and the other for contempt, does not arise.

Our conclusion is that there was no error in any of the proceedings, and the judgment in the civil case is affirmed, and in each of the habeas corpus cases brought here by certiorari the judgment is affirmed and the writs of certiorari quashed. It is so ordered.

HART, J., dissents.

PERKINS v. STATE.

Opinion delivered April 27, 1925.

1. CRIMINAL LAW—WITHDRAWAL OF EVIDENCE—PREJUDICE.—Where defendant in a prosecution for assault with intent to kill, asked the prosecuting witness concerning such collateral matters as whether the witness had killed his brother, assaulted a deputy sheriff, or cut off some of his fingers to avoid draft during the war, he was bound by the negative answer of the witness, and was not prejudiced by court withdrawing such testimony from the jury.
2. WITNESSES—CROSS-EXAMINATION AS TO BIAS.—It was not error on cross-examination of a State's witness, who had testified that she disliked the defendant, to refuse to permit her to be asked why she disliked him.
3. HOMICIDE—ASSAULT TO KILL—INTENT.—Specific intent to take life is an essential ingredient of an assault with intent to kill.

4. HOMICIDE—INTENT—STATEMENT OF DEFENDANT.—In a prosecution for assault with intent to kill, a statement made by defendant two months after the shooting that he intended to kill the posecuting witness, and if he had had the pistol that he was then carrying he would have killed him, was competent to show defendant's intent at the time of the shooting.

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

James S. Steel, DuLaney & Steel, and *Otis Gilleylen,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

HART, J. J. U. Perkins prosecutes this appeal to reverse a judgment of conviction against him for the crime of assault with intent to kill.

Briefly stated, the facts are that, in January, 1924, J. U. Perkins shot Malvin Hudson three times with a pistol, at the railroad station at Foreman, in Little River County, Arkansas. Both parties were engaged in operating service cars, and both solicited the same passengers as they alighted from the train. Hudson secured a passenger which Perkins was trying to get. After Hudson had helped the passenger in his car, Perkins commenced to shoot at him. The first shot struck Hudson in the back, and two others also lodged in his body. Perkins afterwards stated that, if he had a better pistol, he would have killed Hudson. Hudson, at the time, was unarmed and was making no attempt whatever to assault Perkins. The jury fixed the punishment of Perkins at three years in the State Penitentiary. No reversal of the judgment is asked on the ground that the evidence is not legally sufficient to support the verdict, or that his punishment is excessive.

The only ground relied upon by the defendant for a reversal of the judgment is that the court erred in admitting and excluding evidence.

In the first place it is earnestly insisted that the court erred in excluding the testimony of Malvin Hudson with reference to killing his brother, to assaulting a

deputy sheriff, and as to cutting off his own fingers in order to avoid the draft.

On cross-examination Hudson was asked if he had not killed his brother. He replied that he had not; but that, when he was a little boy about nine years old, he had gone hunting with his brother and, while going through a fence, his gun was accidentally discharged and killed his brother. He was then asked if he did not assault a certain deputy sheriff, and he replied that he had not. He was then asked if he had not cut off some of his fingers in order to avoid the draft during the World War. He answered that he had not. These were all collateral matters, and the defendant was bound by the answers of the witness. *McAlister* v. *State,* 99 Ark. 604; *Pearrow* v. *State,* 146 Ark. 201; and *Tullis* v. *State,* 162 Ark. 116.

The object of cross-examining a witness in collateral matters is to enable the jury to comprehend just what sort of a person they are called upon to believe. The defendant being bound by the answers of the witness on these collateral matters, it is manifest that he was not prejudiced by withdrawing the testimony from the jury.

In this connection it is also insisted that the court erred in excluding all the testimony with reference to the antecedents and associates of the prosecuting witness, Malvin Hudson. The only other matters that were excluded were where the witness had answered no to the questions propounded to him, and his answers in the negative show that his character was not in the least affected by the questions and answers. Hence no prejudice resulted to the defendant, and it is well settled that this court only reverses for prejudicial errors.

The next assignment of error urged for a reversal of the judgment is that the court erred in not allowing Mrs. J. C. Ward to state the particular matter which caused her to have ill feeling against the defendant. She had been asked whether or not she had any ill feeling against the defendant, and had answered no. She was

then asked if she disliked him, and replied that she did. This was sufficient, and the court did not err in refusing to allow her to be asked the particular matter which caused her to dislike the defendant. Her dislike of him, and not the reason for it, would be the cause which might affect her credibility as a witness.

The next assignment of error is that the court erred in allowing Mrs. J. C. Ward and Mrs. Jennie Prichett to state that, two months after the shooting, the defendant told them that he intended to kill Malvin Hudson, and, if he had had the pistol that he was then carrying, he would have killed him.

One of the essential ingredients of the offense of assault with intent to kill is the specific intent to take life, and this testimony was competent, with the other evidence, to show that the defendant intended to kill Hudson when he shot him. *Davis* v. *State,* 115 Ark. 566. No other assignment of error is relied upon for a reversal of the judgment.

It follows that the judgment will be affirmed.

RICHARDSON v. STUBERFIELD.

Opinion delivered April 27, 1925.

1. VENDOR AND PURCHASER—CONTRACT NOT COMPLETED WHEN.—Where defendant's offer by letter to purchase plaintiff's land stated that if defendant's terms were acceptable to plaintiff he would close the deal on a certain date, and if he did not hear from plaintiff before that time he would consider the offer refused, but defendant by letter withdrew the offer and refused thereafter to purchase the land, there was no completed contract.
2. FRAUDS, STATUTE OF—SALE OF LAND—MEMORANDUM.—A letter offering to purchase land for a certain price is not of itself a sufficient memorandum to satisfy the statute of frauds where it in no way described or gave any means of identifying the land.
3. VENDOR AND PURCHASER — SALE — DESCRIPTION.—Every contract for the purchase of land must define its identity and fix its

locality, or there must be such a description as by aid of parol evidence will readily point to its locality and boundaries.

4. FRAUDS, STATUTE OF—SALE OF LAND—CERTAINTY.—An agreement for the sale of land, which is required to be in writing by the statute of frauds, must be certain in itself or capable of being made certain by reference to something else.

5. SPECIFIC PERFORMANCE—INSUFFICIENCY OF DESCRIPTION OF LAND.—Specific performance of a contract for the sale of land will not be decreed where it in no way described or identified the land.

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

STATEMENT OF FACTS.

James W. Stuberfield and others brought this suit in equity against Charles Richardson for the specific performance of the sale of a tract of land in Cleveland County, Arkansas. The defendant denied that he had made a contract with the plaintiffs to purchase the land, and also pleaded the statute of frauds.

It appears from the record that J. W. Stuberfield and Rufus Stuberfield had purchased from C. K. Elliott and C. K. Elliott, Jr., 1,636 acres of land lying in the Saline River bottoms in Cleveland County, Arkansas. Charles Richardson came down from Camden, Arkansas, to look at the land with the view of purchasing it. He was shown over the cultivated land, and the high-water marks were pointed out to him. Upon his return home, Charles Richardson wrote to J. W. Stuberfield of the date of October 28, 1922, a letter the body of which is as follows:

"Dear sir: After thinking over the condition of the houses on your holdings, which are in very bad condition, and realizing that the expenditure I will very necessarily have to make in repairing said improvements, I have decided that I am willing to close out with you for the said 1,636 acres, together with all movable property, for the sum of ($60,000) sixty thousand. Now if this is acceptable to you, write me by return mail, and I will be up there next Thursday, November 2, to close out with you as heretofore agreed to.

"If I do not hear from you by letter or in person before this date, I shall take and accept your silence as meaning that you do not accept the term, and I will therefore consider the matter closed.

"Yours very truly."

This letter was received by J. W. Stuberfield at Rison, Arkansas, in due course of mail. On the 30th day of October, 1922, Richardson wrote Stuberfield another letter in which he notified him that he would not buy the land. Stuberfield did not receive this letter in due course of mail, because he had gone to see Richardson for the purpose of closing the deal with him after he had received the first letter. When Stuberfield arrived at Richardson's house, he told him that he had received his letter and had come down at once to let him know that he accepted the proposition that had been made him for the purchase of his land. Richardson told Stuberfield that he had written him another letter. Richardson's daughter married that night, and nothing more was said between the parties until the next morning. Stuberfield again told Richardson that he had come down to accept his proposition, and Richardson then told him that he had bargained for another place, and could not take his farm. Stuberfield later met Richardson at Camden, and Richardson told him that he would not take his place.

Charles Richardson was a witness for himself. According to his testimony, J. W. Stuberfield had represented to him that the farm which he looked at did not overflow, and, after he had written the first letter, which is copied above, Richardson found out that the land did overflow, and, for that reason, declined to purchase it. Evidence was introduced by him to corroborate his testimony. Richardson told Stuberfield, when he came to see him to accept his proposition for the purchase of the land, that he could not take the place, and that he had previously written him to that effect. Stuberfield replied to him that he had not gotten the letter.

On the part of Stuberfield evidence was introduced tending to show that the land in question did not overflow.

The chancellor found the issues in favor of the plaintiffs, and a decree of specific performance was entered of record in their favor against the defendant. The case is here on appeal.

Gaughan & Sifford, for appellant.

Danaher & Danaher, for appellee.

HART, J., (after stating the facts). The decree was wrong, for two reasons. In the first place, there was no completed contract of any kind between the parties for the purchase and sale of the land. It is the theory of the plaintiffs that the contract was completed when J. W. Stuberfield orally accepted the proposition contained in the letter written to him by Charles Richardson on the 28th day of October, 1922. It will be noted from the terms of this letter that there was something more to be done between the parties. Richardson stated that, if his terms were acceptable to Stuberfield, he would be up there on November 2, 1922, to close out with him as theretofore agreed to. The letter showed that the contract was not complete and something else remained to be done between parties.

It is true that Stuberfield went to see Richardson and told him that he had come to accept his proposition. Richardson, however, at once told Stuberfield that he had changed his mind, and did not intend to purchase the land. Stuberfield could not, by parol, accept the written offer made to him by Richardson while the latter was, at the same time, telling him that he had withdrawn his offer and would not purchase the land. The letter of Richardson was nothing more than an offer to purchase the land from Stuberfield, and he could withdraw it at any time before it was accepted. Stuberfield could not make an oral acceptance of the proposition while Richardson was, for all practical purposes, at the same moment of time withdrawing his offer.

Moreover, the letter of Richardson was not of itself a sufficient memorandum to satisfy the statute of frauds,

because it in no way described or gave any means of identifying the land sold. *Fordyce Lumber Co.* v. *Wallace,* 85 Ark. 1, and *Skinner* v. *Stone,* 144 Ark. 353. It is well settled by these and other decisions of this court that every contract for the purchase of land must define its identity and fix its locality, or there must be such a description as, by the aid of parol evidence, will readily point to its locality and boundaries. An agreement for the sale of land which is required to be in writing by the statute of frauds must be certain in itself, or capable of being made certain by reference to something else.

In the case at bar there is nothing to point out or locate the land. It does not specify the county or State in which the land is situated. It does not state that it lies on any particular stream, or that it is situated near any well known place. It does not even refer to it as a farm known by a certain designated name. No natural object or permanent monument is referred to in the writing. Therefore, a court of equity will not specifically enforce a contract for the purchase or sale of land with such an uncertain description of the land as the one here sought to be enforced.

Our decisions cited above are in accord with the general trend of authorities on the subject. *Hall* v. *Cotton,* 167 Ky. 464, 180 S. W. 778; L. R. A. 1916C, 1124; *Allen* v. *Kitchen,* 16 Idaho 133, L. R. A. 1917A, p. 563; and other cases cited in 25 R. C. L., p. 650.

In *Allen* v. *Kitchen, supra,* the court said: "The distinction, however, should always be clearly drawn between the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property, and that of supplying and adding to a description insufficient and void on its face."

It follows from the views we have expressed that the decree must be reversed, and the case will be remanded with directions to dismiss the complaint of the plaintiffs for want of equity.

AVERA v. BANKS.

Opinion delivered April 27, 1925.

1. TENANCY IN COMMON—WHEN CREATED.—Where a widow became entitled to one-half of her husband's land, on his dying intestate and without children, under Crawford & Moses' Dig., § 3536, her heirs upon her death became tenants in common with the heirs of her husband.

2. TENANCY IN COMMON—EFFECT OF TAX PURCHASE.—Assignment of a certificate of purchase of land under a tax sale to a tenant in common and issuance of a tax deed to him amounts to a redemption by him from the tax sale.

3. EQUITY—LACHES.—A court of equity may, in the exercise of its inherent powers, refuse relief where it is sought after undue and unexplained delay and where injustice would be done in the particular case by granting the relief asked.

4. EQUITY—LACHES—UNREASONABLE DELAY.—Where a party, knowing his rights, unreasonably delays in asserting them, and suffers another to enter into obligations or by inaction lulls suspicion of his demand to the harm of the other, assertion of his rights in equity will be barred by laches.

5. TENANCY IN COMMON—RECORD OF TAX TITLE AS NOTICE.—Where a tenant in common acquired a tax title, and placed his deed on record this was constructive notice to his co-tenants that he was claiming the land as his own.

6. PARTITION—LACHES.—Where the widow of an intestate and her son paid his debts amounting to the value of the land at that time, of which she then took charge and one-half of which she inherited, and on her death her son claimed the land as his own, and secured and recorded a tax title thereto, other heirs of intestate who made no assertion of rights to the land nor offered to pay taxes during 15 years *held* barred by laches from equitable relief by partition of the property.

7. JUDGMENT—CONCLUSIVENESS OF DECREE CONFIRMING TAX TITLE.—A suit by tenants in common to cancel and set aside a cotenant's gas and oil leases and mineral deeds and for partition *held* precluded by a decree confirming the co-tenant's tax title, which was regular on its face, there being no contention that the decree was obtained by fraud.

8. JUDGMENT—CONCLUSIVENESS OF DECREE CONFIRMING TAX TITLE.—A decree confirming a tax title is conclusive against an absent claimant as well as against an intervener who contests petitioner's right, the proceeding being in the nature of one *in rem.*

9. JUDGMENT—DECREE CONFIRMING TAX TITLE—MINORS.—Under Crawford & Moses' Dig., § 8391, a decree confirming a tax deed will not bar the right of minors to redeem.

10. EQUITY—LACHES.—Minors are not barred by laches.

Appeal from Ouachita Chancery Court, Second Division; *George M. LeCroy*, Judge; reversed.

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to set aside certain deeds and gas and oil leases, and to partition the land described in the complaint between the appellees and the appellants.

The suit was defended on the ground that appellees had no title to the land in controversy, and also that they were barred of recovery by laches.

Louis J. Banks died intestate on the 19th day of August, 1907, owning 120 acres of land in Ouachita County, Arkansas. Several years prior to his death, Louis J. Banks married the mother of M. J. Avera, and lived with her on her farm adjoining the land in controversy until his death. No children were born of their marriage. At the time Mrs. Avera married Louis J. Banks, she had three children, including her son, M. J. Avera. At the time Louis J. Banks died he owed $275, which was paid by his widow and M. J. Avera. They took charge of the land in controversy and held it until the widow died on May 9, 1911. After his mother died, the two sisters of M. J. Avera executed to him a quitclaim deed to the land in controversy. M. J. Avera has paid the taxes on the land since the date of his stepfather's death until the present time. About five acres of the land was cleared, and M. J. Avera made, or caused to be made, four or five crops on it. He first sold the timber for $75, and the purchaser failed to pay for it. In 1922 M. J. Avera again sold the timber on the land for $617. The land was sold on the 8th day of June, 1914, for the nonpayment of the taxes of 1913. T. C. Joyce became the purchaser at the tax sale, and received a certificate of purchase. On the 10th day of May, 1915, T. C. Joyce

assigned his certificate of purchase to M. J. Avera, and, on the 13th day of June, 1916, a clerk's tax deed was executed to M. J. Avera. This deed was duly acknowledged and filed for record on the 7th day of July, 1916. In 1922 the chancery court of Ouachita County entered a decree of record confirming the title of M. J. Avera, based on the sale of taxes for the year 1913. In 1922 oil was discovered in the neighborhood in which the land was situated, and M. J. Avera executed oil and gas leases on said land to different parties, and, in said leases, warranted that he had a good title to said land.

The consideration for the oil and gas leases amounted to considerable more than $5,000 in money, and also a part of the royalties from the oil and gas which might be found on said land. After his mother's death, M. J. Avera claimed the land as his own, and appellees never asserted any title or claim thereto.

According to the evidence for appellees, they are either the brothers and sisters of Louis J. Banks, deceased, or the descendants of such brothers and sisters. The husband of one of the sisters admits that he and his wife visited Louis J. Banks during the last year of his life and that he pointed out the land in controversy as belonging to him. After his death none of the brothers and sisters of Louis J. Banks or their children ever made any claim to the land or paid the taxes thereon. Some time in 1922 M. J. Avera told David Nation, the husband of a sister of Louis J. Banks, deceased, that he had acquired a tax title to the land. The collateral heirs of Louis J. Banks, deceased, did not know, until that time, that the land had been sold for the nonpayment of the taxes. In fact, they never paid any attention whatever to the land, and did not know anything about it. The proof shows that the land was not worth more than $2 per acre until oil and gas was discovered in the neighborhood, in 1922, when the price at once rose to $50 or $60 per acre.

The chancellor found the issues in favor of appellees, and it was decreed that they had an undivided one-half interest in said land. Judgment was also rendered in favor of the defendants who held oil and gas leases from M. J. Avera, for damages sustained by them on account of the breach of the covenants of warranty contained in their leases.

The case is here on appeal.

Gaughan & Sifford, for appellant.

George R. Haynie and *Thomas W. Hardy*, for appellee.

HART, J., (after stating the facts). The record shows that Louis J. Banks died intestate on the 19th day of August, 1907, owning 120 acres of land in Ouachita County, Arkansas. He left a widow and no children. His widow, under the statute, became entitled to one-half of the land. Crawford & Moses' Digest, § 3536. The widow died intestate on May 9, 1911, and left surviving her her son, M. J. Avera, and two daughters as her sole heirs at law. The two daughters executed to M. J. Avera a quitclaim deed to their interest in the land in controversy. In June, 1914, the land was sold for the nonpayment of taxes of 1913, and T. C. Joyce bid in the land at the tax sale and received a certificate of purchase. He transferred his certificate of purchase to M. J. Avera, and the latter received a clerk's tax deed to the land on June 13, 1916. M. J. Avera and appellees held the land as tenants in common, and the purchase by M. J. Avera amounted to a redemption from the tax sale. *Cocks* v. *Simmons*, 55 Ark. 104, and *Inman* v. *Quirey*, 128 Ark. 605.

The land was never in the actual possession of M. J. Avera after he acquired title under the clerk's tax deed, and the record does not show that he ever acquired title to the undivided one-half interest of appellees by holding adversely to them for the statutory period. This brings us to a consideration of the main question in the case, and that is whether or not appellees are estopped

by reason of laches from maintaining this action. There is no hard and fast rule as to what constitutes laches. It is well settled that a court of equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case by granting the relief asked. It is usually said that the two most important circumstances in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other in so far as it relates to the remedy. *Jackson* v. *Becktold Printing & Book Mfg. Co.*, 86 Ark. 591; *Davis* v. *Harrell*, 101 Ark. 230; *Tatum* v. *Arkansas Lumber Co.*, 103 Ark. 251; *American Mortgage Co.* v. *Williams*, 103 Ark. 484; and *Dickinson* v. *Norman*, 165 Ark. 186.

If a party, knowing his rights, unreasonably delays in asserting them and suffers his adversary to enter into obligations, or in any way by inaction lulls suspicion of his demand, to the harm of the other, then equity will ordinarily refuse to aid him in the establishment of his claim. It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to believe, by the silence or conduct of the plaintiff, that there would be no assertion of title in opposition to his claim.

In the case at bar there is no excuse whatever for the delay of appellees in asserting their claim. They knew of the death of Louis J. Banks, from whom they claim to inherit, and knew that his widow and her son took charge of his land. If they had been interested in the matter at all, they could have known, by inquiry, that M. J. Avera and his mother paid the debts of her husband to the amount of $275, and that the land was not worth more than this amount. When M. J. Avera acquired his tax title, he at once placed it of record. This at least showed his good faith in the matter, and gave appellees constructive notice that he was claiming the

land as his own. They never at any time offered to contribute to the payment of the taxes. The land was not worth more than $2 per acre at any time until oil and gas were discovered in the neighborhood, in 1922. M. J. Avera first sold the timber on the land for $75, and the purchaser refused to make the payment and complete the sale. It is true that he sold the timber for $617 in 1922, but this was after oil and gas had been discovered in that vicinity. During all of the period of time from the death of his stepfather, in August, 1907, until the bringing of this suit, on the 11th day of April, 1923, M. J. Avera paid the taxes on the land. During all of this time appellees did not offer to contribute to the payment of the taxes and did not in any way assert any interest whatever in the land. M. J. Avera informed one of the appellees, in the early part of the summer of 1922, that he had acquired a tax title to the land. No denial of his right to the land was asserted, and, under the circumstances detailed, he had a right to assume that appellees had abandoned any claim to the land. After this time he executed seven or eight oil and gas leases to various parties, and the leases contained a covenant of warranty of title in himself. It is fairly inferable that he incurred these obligations upon the faith that appellees had abandoned or waived any claim to an interest in the land. He was justified in so believing, from their long continued silence and conduct in the matter. They remained silent when it was their duty to speak. They do not claim to have been misled in any way by any act of M. J. Avera. No excuse whatever is given for their delay in asserting title to the land, and it may be attributable to their own culpable negligence.

In this connection it may be stated that M. J. Avera did not take possession of the land by permission of appellees. He occupied no relation of trust or confidence to them, except that he and they owned the land as tenants in common. He acquired his interest by inheritance from his mother, and appellees inherited

directly from Louis J. Banks. These facts render appellees guilty of laches in not sooner asserting their rights and making it inequitable to divest numerous purchasers of the rights which they had acquired under their oil and gas leases. It will be remembered that what appeared to be a valid tax title to M. J. Avera in 1916 was of record, and appellants had a right to believe that appellees had acquiesced in its validity by their delay and negligence in failing to have it set aside, or to contribute in any way to the payment of taxes or the amount necessary to have redeemed the land from the tax sale. This tax deed was of record, and was constructive notice to appellees as well as to the purchasers, securing rights under the oil and gas leases of the title claimed by M. J. Avera.

Appellees brought this suit against appellants. The relief sought by them is equitable. They ask that numerous oil and gas leases and mineral deeds to said land, executed by M. J. Avera to various persons, be canceled and set aside, in so far as their right and interest in the land are concerned. They also ask for partition of the land. They allege that the leases and mineral deeds to said land executed by M. J. Avera to various persons are a cloud upon the title of appellees. Having sought equitable relief, the doctrine of laches applies, and appellants had the right to interpose it as a defense to the action. *Rowland* v. *McGuire,* 67 Ark. 320; *Berg* v. *Johnson,* 139 Ark. 243; and *Beattie* v. *McKinney,* 160 Ark. 81.

Moreover, the appellees are precluded from maintaining this suit by the decree confirming the tax title of M. J. Avera, which was entered of record in the chancery court on September 18, 1922. That decree is regular on its face, and every question with respect to the assessment of the land in controversy, or the nonpayment of taxes, or the regularity of the proceedings of the sheriff and collector, is concluded by it. *Worthen* v. *Ratcliffe,* 42 Ark. 330, and *Cocks* v. *Simmons,* 55 Ark. 104.

Of course, the decree to confirm the tax title of M. J. Avera might be assailed on the ground that it was

obtained by fraud, or, what would amount to the same thing, a concealment of the facts from the court rendering it. The decree of confirmation, however, is not attacked on that ground, and there is nothing in the record to show that it was obtained by fraudulent representations.

The decree recites on its face that M. J. Avera claims title under a tax deed basis on the sale of the land for the taxes for the year 1913. He filed the original tax deed with the proceedings. The tax deed recites that T. C. Joyce bid in the land at the tax sale in June, 1914, and transferred his certificate of purchase to M. J. Avera. On the 13th day of June, 1916, the clerk made a tax deed to said M. J. Avera. This deed was duly filed for record on the 7th day of July, 1916. M. J. Avera complied with the statute in every respect in seeking to confirm his tax title.

It is true that the purchase by M. J. Avera of the certificate of purchase issued to T. C. Joyce amounted to a redemption of the land from the tax sale, if his tenants in common had elected to so treat it. The sale to him, however, was not absolutely void. It was only voidable at the election of his tenants in common. They might think the land was not worth paying taxes on, or they might have known that Banks owed $275; that the widow and M. J. Avera had paid this debt, and that the land was not worth more than this sum. Hence they had the right to refuse to contribute anything to its redemption from the tax sale. Such an action on their part would amount to an abandonment or waiver of their rights in the land. The record of the tax deed gave appellees constructive notice of its existence. One of the appellees was actually notified by M. J. Avera, in the first part of the summer of 1922, that he had a tax deed to the land. This was before the decree in the confirmation suit. Hence it cannot be said that there is anything in the pleadings or proof to show that the confirmation decree was obtained by fraud.

This court has held that the petition in a suit to confirm a tax title is like a proceeding *in rem,* where the jurisdiction of the court over the controversy is founded on the presence of the property, and the decree becomes conclusive as well against the absent claimant as against any who may intervene and contest the petitioner's rights.

The views we have expressed call for a reversal of the decree of the chancery court, and the case will be remanded with directions to dismiss the complaint of appellees for want of equity.

HART, J., (on rehearing.) Counsel for appellees in their motion for a rehearing insist that under § 8391 of Crawford & Moses' Digest the confirmation of the tax deed by appellants does not bar those of the appellees who are minors. In this contention counsel are correct. In addition to the section of the statute just referred to is cited the case of *Smith* v. *Thornton,* 74 Ark. 572, in which it was held: "A decree confirming a tax title cuts off attacks on the title for informality or illegality in the proceeding in reference to the sale, but does not cut off the right to redeem from the sale which is reserved by the statute to insane persons, minors or persons in confinement, and which may be exercised within two years from and after the expiration of such disability."

This holding, however, does not help the case of appellees any. They insist that minors cannot be barred by laches. In this contention they are also correct; but the trouble about this contention is that the parents of the minors were barred by laches, and therefore the minors never acquired any rights in the land by descent from their parents. Some of the minors are descended from William Banks, who was a brother of Louis J. Banks, deceased. William Banks died in the month of November, 1887. He left surviving him several children, all of whom were adults. One of his children, Belva Kelley, who was twenty-six years old at the date of her father's death, died in the year 1913, leaving sur-

viving her several minor children who are plaintiffs in this action. Adrian Banks, a son of William Banks, deceased, was thirty-two years of age at the time his father died. He died in 1914, leaving surviving him several minor children who are also plaintiffs in the action. Mrs. N. V. Nation, a sister of Louis J. Banks, deceased, died in December, 1919. Some of her grandchildren who are minors are also plaintiffs in the action.

Now it will be remembered that Louis J. Banks died about the first of August, 1907. He owned no property except the tract of land in question in this lawsuit, and it was wild and unimproved. He owed debts which the undisputed evidence shows were something more than the value of the land. Under our statute lands are assets in the hands of an executor or administrator for the payment of the debts of the testator or intestate. Crawford & Moses' Digest, § 152, and cases cited. There being no personal property left by Louis J. Banks, the tract of land in question became at once subject to the payment of his debts. His brothers and sisters knew of the fact of his death, and failed to assert any rights in the land.

M. J. Avera and his mother, who was the widow of Louis J. Banks, deceased, took charge of his land and paid his debts. If the brothers and sisters of Louis J. Banks, deceased, wished to assert their rights in the land, they should have done so, and Avera and his mother might have had the land sold for the payment of his debts and have thus acquired the legal title thereto.

Under the circumstances, it became the duty of the brothers and sisters of Louis J. Banks to assert their claim in the land after his death. They were all adults and lived for six or seven years after his death. Therefore, they were barred by laches at the date of their death and their minor children and grandchildren never acquired any interest in the land.

Belva Kelley died first, and she did not die until over six years after the death of Louis J. Banks. Her

brother died the next year, and Mrs. Nation did not die until 1919. Therefore, we are of the opinion that the ancestors of all the minors were barred by laches of any right of recovery of the land in question at the date of their death, and for that reason their minor descendants never acquired any interest in it.

It follows that the petition for a rehearing must be denied.

HELTZEL STEEL FORM & IRON COMPANY v. FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Opinion delivered April 27, 1925.

HIGHWAY—LIABILITY OF SURETY ON CONTRACTOR'S BOND.—One who sells tools, implements and appliances for use in constructing a road is not entitled to recover on the contractor's bond given under Crawford & Moses' Dig., § 5446, to indemnify persons supplying labor and materials used in the prosecution of the work.

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

John M. Rose, for appellant.

Horace Chamberlin, for appellee.

SMITH, J. This is a suit to recover the purchase price of material furnished by appellant to Machen & Thompson, road contractors, in the construction of roads in Improvement District No. 10 of Pulaski County, Arkansas. The construction contract was let by the improvement district to the Standard Paving Company, which sublet certain portions of the roads to Machen & Thompson. The Fidelity & Deposit Company of Maryland, appellee herein, executed bonds, pursuant to the statute under which the improvement district was organized, requiring the contractor to give bond. Machen & Thompson were adjudged bankrupts, and this suit is against appellee as surety on the contractor's bond, guaranteeing the payment of all bills for labor and material on said work.

A demurrer was filed to the complaint, which was sustained, and, as the plaintiff elected to stand on the complaint, it was dismissed, and this appeal raises the question of the sufficiency of the complaint against appellee as surety on the bond of the road contractors.

The material allegations of the complaint are as follows: "Plaintiff further states that the goods and material supplied by it to the contractors aforesaid consist of rigid steel road rails, angle-face rails, patented pedestals, flat stakes and stake pullers. That none of said material actually entered into said road so as to become a component part thereof, but that all of it was used in each and all of the aforesaid sections of said road, and that each and all of said bonds render the bond company liable for payment thereof. That the material aforesaid was used in the construction of concrete bridges, culverts, and the like, and became greatly worn and depreciated by said use; and that the aforesaid material furnished by plaintiff is practically worthless by reason of the use aforesaid."

The question presented on this appeal is one which we have frequently and recently considered. These cases are cited in the recent opinion in the case of *Pierce Oil Corporation* v. *Parker,* 400, and what was there said is decisive of this appeal.

That case, like this, was based on § 5446, C. & M. Digest, which provides that contractors shall be required to give bond for the faithful performance of construction contracts awarded them, and that such contractors shall promptly make payment to all persons supplying labor or material in the prosecution of the work contemplated by such contract.

In that case Parker, the contractor, executed the bond required by law in the performance of his contract, and a subcontract was let to Stephens to haul all of the crushed stone to be used in the construction of the road. Stephens hauled a large amount of stone, which was used

in the construction of the road, in motor trucks, and bought from the plaintiff in the case the oil and gasoline which was used in operating the trucks. Stephens failed to pay, and plaintiff brought suit against the contractor and the road improvement district for the price of the oil and gasoline which had been furnished Stephens. The court below directed a verdict in favor of the defendant, from which the plaintiff appealed.

Our opinion in that case recognized the sharp division in the authorities as to the line of demarcation between liability and nonliability for materials furnished in the construction of such improvements. After pointing out that certain courts had held that, under similar statutes requiring contractors of public works to furnish bonds to pay for materials or supplies furnished, recovery may be had on the bond for gasoline used in trucks to haul gravel, etc., for road construction, we cited cases holding to the contrary, and adopted their reasoning as declaring the true rule of liability under such bonds.

After stating that all the cases had held that there was a lien for dynamite employed directly to the earth which had to be removed, because it was an essential part of the construction to break up the earth, and the dynamite used for that purpose entered primarily in the construction of the improvement, we said that fuel used for portable engines and machinery used in the construction work are merely an incident in the operation of the machinery and partake of the same characteristics as it does, and that the item of fuel is one step further removed from the actual work of construction, and did not have any immediate connection with the structure at any time. We said further: "Courts must stop somewhere in the construction of these statutes. Otherwise, repairs on the machinery used in the construction of the improvement and the diminished value of the machinery and tools used in such construction will be deemed to be lienable claims. If matters which are only remotely con-

nected with the construction of the public improvement should be held to be lienable, the protection of the bond to the class intended by the statute would be greatly impaired" (citing cases).

The material here furnished and sued for no doubt performed an essential service, but this material must be regarded and treated as any other essential tool, implement or appliance would be which was used in the construction of the improvement. These tools, implements and appliances may be essential in the construction of the improvement, but they do not enter into it, and form no part of the completed improvement, and, under the line which we drew in the recent case from which we have quoted, the plaintiff was given no cause of action by the statute on the bond of the contractors, and the demurrer to the complaint was therefore properly sustained, and the judgment of the court below is therefore affirmed.

EADY v. STATE.

Opinion delivered April 27, 1925.

1. INTOXICATING LIQUORS—EVIDENCE OF SELLING.—Evidence *held* to sustain a conviction of selling whiskey.
2. CRIMINAL LAW—ADMISSION OF EVIDENCE—REVIEW.—The admission of evidence must be reviewed in the light of the circumstances at the time of the objection and ruling.
3. CRIMINAL LAW—ADMISSION OF EVIDENCE—REVIEW.—In a prosecution for selling whiskey, admission of a witness' testimony that another had bought whiskey from defendant for him was not objectionable as relating to a transaction had in the witness' absence, where that fact did not appear until subsequently, upon that fact being developed, the remedy was by motion to exclude the testimony.
4. CRIMINAL LAW—INSTRUCTIONS ALREADY GIVEN.—Refusal to give written instructions covered by oral instructions given was not error, in the absence of a request that they be reduced to writing
5. CRIMINAL LAW—REPUTATION OF ACCUSED.—While accused's good reputation may be considered along with the other evidence in the case in determining whether he is guilty, it is not error to

refuse to charge that his good reputation may be considered as a circumstance in his favor.

6. CRIMINAL LAW—TRIAL—CONDUCT OF COURT.—The court's action in asking a jury to state how they were divided as to numbers, without indicating how they stood as to parties, to which they answered that nine were for conviction, and three against, *held* not reversible error as intended to influence or as actually influencing the verdict.

Appeal from White Circuit Court; *E. D. Robertson,* Judge; affirmed.

John E. Miller and *Cul L. Pearce,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

SMITH, J. Appellant was convicted for selling whiskey. The testimony on behalf of the State abundantly sustains the jury's verdict, as several witnesses testified that they had made a number of different purchases of whiskey from appellant.

The principal assignment of error is that the court erred in admitting certain testimony of Lilburn Malott. This witness testified that he had bought whiskey from appellant within three years of the date of the indictment, and, in his examination by the prosecuting attorney, he testified as follows:

"Q. Do you know anything about Harry Burkett buying any whiskey from him? (I object to that; objection overruled; I except.) A. Yes sir. Q. What do you know about that? (I object to that. The objection is overruled. I except.) A. I got Harry to—(I object to that. Objection is overruled. I except.) Q. Don't tell what you said to Harry Burkett now, but what arrangements or what was done by you and Harry Burkett? A. Harry Burkett bought some whiskey from Jim Eady for me. (I except to that.)"

The objection urged to this testimony is that the witness was allowed to testify concerning a transaction which took place between himself and Harry Burkett in appellant's absence.

The ruling of the court must be reviewed in the light of the circumstances as they appeared at the time the testimony was objected to and the ruling made. The witness was first asked if he knew anything about Harry Burkett buying any whiskey from appellant, which was, of course, competent, and the objection was properly overruled. The witness was next asked what he knew about a sale, a question which was likewise competent, and, after being admonished not to tell any conversation he had with Burkett, he answered that Burkett had bought whiskey for him from appellant.

There was nothing in the objections made to this testimony to call the attention of the court to the fact that the witness was testifying to a transaction between Burkett and appellant in the absence of the witness. So far as the court may have known from the questions asked and the answers given, the witness may have been testifying to a transaction which he had witnessed, and, if it be said that the subsequent testimony of this witness, together with his cross-examination, makes it plain that the witness was in fact testifying to a transaction which occurred between appellant and Burkett in the absence of the witness, and about which the witness could have no personal knowledge, it may be answered that, after this fact was so developed, there was no motion to exclude the testimony, which was apparently competent at the time it was given.

Appellant asked instructions, which the court refused to give, but which were covered by the oral instructions given by the court. The objection to this action was not that the instructions were not reduced to writing, but that the requested instructions were not given. Inasmuch as the points embraced in the requested instructions were covered by the oral instructions, no error was committed in refusing the instructions requested.

Moreover, it may be said that the instructions refused dealt with the presumption of innocence and the right of the defendant to testify, and the manner of

weighing that testimony. These instructions were simple in their nature, and there was no opportunity for disagreement about what the court had declared the law to be on these subjects.

As was said in the case of *Merrill* v. *City of Van Buren,* 125 Ark. 248, this is not a case where a copy of the instructions refused and given would have been required in a discussion before the jury of the law of the case as applying to the evidence, nor one in which there was opportunity for disagreement in settling the bill of exceptions, and it may be said here, as was said there, that it affirmatively appears that no prejudice resulted from the failure of the court to reduce the instructions given to writing.

Appellant requested an instruction numbered 5, reading as follows: "If you find from the evidence that the defendant has, prior to the filing of the indictment herein, borne a good reputation in the community in which he lives as being a law-abiding citizen, that you may consider this fact as a circumstance in his favor."

The court refused to give this instruction, and it is insisted, upon the authority of the case of *Rhea* v. *State,* 104 Ark. 162, that this action was error.

A comparison of this instruction with the one approved in the case cited will show a material difference. The instruction in that case told the jury that the evidence of good character should be considered, along with the other evidence in the case, in determining whether the accused was in fact guilty of the offense charged.

The instruction requested contained no such qualification, but would have told the jury as a matter of law to consider good reputation as a circumstance in the accused's favor, whereas the rule, as stated in the Rhea case, is that evidence of good character should be taken into consideration, with all the other evidence in the case, in passing upon the guilt or innocence of the accused, and that if, upon the whole evidence, that of

good character with the other testimony, the jury believed the guilt of the defendant was proved beyond a reasonable doubt, the defendant's good character would not constitute a defense.

It is proper for the jury to consider such testimony, but it should be considered in connection with all the testimony in the case, and it would not be proper in any case for the court to tell the jury what weight to attach to such testimony.

The record recites that, after the jury had been considering the case about half an hour and the adjourning time had arrived, the court directed the sheriff to bring the jury into court, and thereupon the court asked the jury if a verdict had been reached, and, upon being informed that no verdict had been arrived at, the court said: "Gentlemen of the jury, without indicating how you stand as to parties, you can state how you are divided as to numbers," whereupon the foreman, in open court, said: "We stand 9 for conviction and 3 for acquittal," to which said action of the court and the statement of the foreman of the jury in the presence of the court the defendant at the time excepted.

While we have said that this was not a practice to be commended, we also said, in the case of *Evans* v. *State,* 165 Ark. 424, that reversible error was not committed where the court asked how the jurors stood numerically, but did not ask for a statement as to the side on which the majority stood, and a juror, in response to the question, stated the number voting for acquittal and the number voting for conviction, if there was nothing in the remarks of the court eliciting the response which was calculated to unduly influence the jury in arriving at a verdict.

We have set out the recitals of the record in regard to the court's question, and we think it affirmatively appears that this action of the court was not intended to, and did not, influence the verdict of the jury.

It is finally insisted that, during the trial, the jury was permitted to separate without being admonished,

as required by the statute, that it was their duty not to permit any one to speak to or communicate with them on any subject connected with the trial, and that all attempts to do so should be immediately reported to the court, and that they should not converse among themselves on any subject connected with the trial or to form or express any opinion thereon until the case was finally submitted to them. There appears, however, to be nothing in the record upon which to base this assignment of error.

No error appearing, the judgment is affirmed.

COTTON v. DOWNS.

Opinion delivered April 27, 1925.

1. REWARDS—RIGHT TO PARTICIPATE IN.—Persons pursuing robbers in an effort to secure rewards offered for their capture, working independently of each other with no agreement for concerted action, are not entitled to participate in such rewards where the capture was effected by others.
2. REWARDS—RIGHT TO SHARE IN.—Where bank robbers were being pursued by parties working independently of each other, one who first discovered the robbers, and, in attempting to effect their capture, pursued them into the hands of others, was entitled to share in the reward, it being clear that but for his pursuit they would not have been captured at that time and place.

Appeal from Benton Chancery Court; *G. T. Sullins*, Special Chancellor; reversed.

Vol T. Lindsey, Rice & Rice and *W. O. Young*, for appellant.

A. L. Smith, for appellee.

HUMPHREYS, J. This suit was commenced in the chancery court of Benton County by Henry Cotton against the Benton County Bankers' Association, the Maryland Casualty Company, and the Protective Rewards Committee of the Arkansas Bankers' Association, to recover the several standing rewards offered by each of them for the capture and conviction of any bank

robber. He alleged that he effected the capture of Perry Ingram and Fred Martin, who robbed the State Bank of Decatur, between one and two o'clock on the afternoon of February 28, 1923, and who afterwards pleaded guilty to the crime and were sentenced to serve a term in the penitentiary as punishment therefor. C. A. Downs and A. Brogdon filed their interplea, alleging that they captured the robbers, and were entitled to the rewards. J. S. Scott, Pat Howard, W. L. Strickland, Ray M. Scroggins, Louis Miller, Walter Bryson and J. S. Strickland filed their interventions alleging that the capture of the robbers was the direct result of the efforts of the plaintiff, the interpleaders and interveners, and prayed for an equal *pro rata* share of the rewards.

Zack Cotton also filed an intervention, alleging that he participated in the capture of the robbers, and prayed for a portion of the rewards. The defendants entered their several appearances, and were permitted to pay the several rewards in to the clerk of the court, under the terms of the offers to the effect that, where more than one person should claim the rewards, the rights of the claimants should be adjudged by the chancery court.

Pursuant to the terms of the offers, the cause was submitted to the chancery court upon the pleadings and testimony adduced by the several claimants, which resulted in a decree adjudging the entire amount of the several rewards to the interpleaders, C. A. Downs and A. Brogdon, after deducting the cost of the proceeding, from which decree an appeal has been duly prosecuted to this court.

The robbers, several other parties, and all the appellants except the Stricklands, testified in the case; so the record is quite voluminous. It would extend this opinion to an unusual length to set out the substance of the testimony of each witness, so only a general summary of the testimony as a whole will be attempted.

The robbers were inexperienced young men in crime, Perry Ingram being a railroad man from Harrison, Ark-

ansas, and Fred Martin being a miner from Weir, Kansas. They entered the State Bank of Decatur between one and two o'clock on February 28, 1923, and successfully effected a daylight robbery. They escaped with more than $2,000, consisting of five sacks of silver and a large amount of greenbacks. They hurriedly left Decatur in an automobile, driving in a northwesterly direction toward the Oklahoma line, into a wild, mountainous region, where they might easily conceal themselves in the woods, ravines, and gorges, and which region would serve as a shield or protection against their probable pursuers until the darkness of the night would enable them to get out of the country. After driving very rapidly for a distance of seven miles, they abandoned the car, first setting it on fire, and hastened with the money and their firearms into the woods. News of the robbery was telephoned to Gentry, other nearby towns, and throughout the country. As soon as the robbery was noised abroad, four separate parties of men, acting independently, procured arms and hotly pursued the robbers towards the Oklahoma line. Two of these parties left out of Decatur, and two out of Gentry. The first party to leave Decatur was headed by Henry Cotton, a man between sixty and seventy years of age, weighing over 200 pounds. He hastily procured a shotgun and eight cartridges loaded with No. 4 shot. There were three other armed men in the party, viz., Zack Cotton, his son, Pat Howard, and Carl Strickland. The second party to leave Decatur was headed by the constable of the township, J. S. Scott. There were four others in the party, viz., Walter Bryson, Luther Strickland, Ray Scroggin and Louis Miller. Miller owned the car in which they traveled, and was unarmed. The first party to leave Gentry was Marion Wasson, in company with Dan Pyeatt. Marion Wasson was the president of the Benton County Bankers' Protective Association. The second party to leave Gentry was headed by C. A. Downs. There were three other men in the party, viz., A. Brogdon, Arthur

Steele, and Clarence Ratcliff. George Maples, the sheriff of the county, also joined in the chase. The several parties pursued the robbers in automobiles, and none of them knew that the others were in pursuit of the robbers, except as they came upon each other at different times in the chase. Cotton and his men first discovered the burning car which the robbers had abandoned. While they were engaged in putting out the fire and saving the car, Marion Wasson and Dan Pyeatt drove up. They concluded to go on west and try to head the robbers off before they reached the Oklahoma line. After Wasson and Pyeatt had gone on, and during the time Cotton and his party were putting out the fire, Scott and his party arrived on the scene. After rolling the car into Mrs. Tibbs' yard, near by, the Cotton party and Scott party returned to their cars and drove in a westerly direction, to a point at the end of the ridge, from which they could get a good view of the surrounding country. After Marion Wasson and Dan Pyeatt left the Cotton party, they came upon Downs and his party, some distance to the west, in the vicinity of Coon Hollow. Wasson informed Downs and his party that the robbers had abandoned and set fire to the car at the Tibbs place, and had entered the woods. Wasson again concluded to go further west, and Clarence Ratcliff and Arthur Steele decided to follow Wasson and Pyeatt. Downs and Brogdon decided to leave the car and search for the robbers in Coon Hollow; so they got out of the car and proceeded to do so. Several of the men in the Cotton and Scott parties thought they saw the robbers in the large hollow adjacent to the high point where they had driven to get a good view of the country, but the men they took to be the robbers immediately passed out of their sight. These two parties broke up into smaller parties of twos and threes and searched out the woods in different directions for the robbers. Henry Cotton and those with him returned to the point where they had left the cars, and decided to go in Miller's car down to the Keith place, about one-half mile distant. After getting to the Keith

place, Cotton proceeded to the top of a hill, where he could get a better view of the surrounding country. Scott was of the opinion that they could catch the robbers at the bottom of the hill as easily as they could on top. Miller followed Cotton about half-way up the hill, and stopped. Scott remained at the bottom of the hill. After reaching the top, Cotton observed two men with Winchesters at a distance of about 100 yards from him. He thought they belonged to his party, but, when they had approached within fifty yards, he concluded that they were the robbers; so he asked Miller, who was in hearing distance, to come to him. The robbers heard him, turned in the direction of Coon Hollow, and began to run. He ordered them to halt, and, when they refused to do so, he fired at them, and continued to shoot until he lost sight of them. On account of his weight he was unable to keep up with them, but he followed them and shot his gun in the air from time to time to attract the attention of those whom he had left behind in his party. C. A. Downs and A. Brogdon, who had been searching for the robbers in Coon Hollow, heard a shot. They talked about it, and finally concluded that it was fired by a squirrel hunter, as they heard no others. While sitting near a creek which runs through the hollow, they observed two men hurriedly coming toward them off the mountain. They concluded that they were the robbers, since they were heavily armed; so Downs advised Brogdon to move away from him a short distance, and not to shoot. They both stooped down, and waited until the men came across the creek into an open space about forty or fifty feet from them. Downs then arose and leveled his rifle upon them, and demanded that they drop their guns and throw up their hands. They dropped their guns, but one of them hesitated about throwing up his hands. Downs then resorted to the ruse of ordering, in a loud voice, every one to close up. The other then raised his hands. Downs continued to cover them with his rifle, and requested Brogdon to take their pistols. Brogdon immediately

complied with his request, and, after taking their pistols, covered them with same until Downs relieved them of the greenbacks they had stolen from the bank. The prisoners requested cigarettes, which were given them, with the understanding that they should not lower their hands. While they were smoking, Downs gave a blast of his horn, and shot rapidly into the air to attract the attention of Wasson, Pyeatt, Steele and Ratcliff, who had left them shortly before and gone in a westerly direction in the hope of heading the prisoners before they reached the Oklahoma line. The testimony is conflicting as to the order in which the various parties arrived in response to the call. Cotton testified that he was in hot pursuit of the fugitives when they ran into Downs and Brogdon, and that he was the first to arrive. Others testified that quite a crowd had gathered when Cotton reached the scene. Miller and Scott came up in a short time. The sheriff arrived, and took charge of and handcuffed the prisoners. The prisoners testified that they were captured about fifteen minutes after Cotton discovered and shot at them, and that they had run a little over a quarter of a mile in an endeavor to escape from him. They were taken back to the large hollow where they were first seen, for a few moments, by three men in Cotton's and Scott's parties. The prisoners had hidden the five bags of silver over in the large hollow, and they were found, and returned along with the greenbacks, to the bank.

It is apparent from the *resumé* of the testimony, which we think substantially correct, that no concert of action had been agreed upon when the several parties entered upon the endeavor to earn the rewards by complying with the terms of the offers. The fact that Marion Wasson and his companion, Dan Pyeatt, as well as Arthur Steele and Clarence Ratcliff, claimed no part of the rewards, is significant as showing that no agreement for concert of action had been entered into between the several parties before an endeavor was made to earn the rewards. Only a short time before the capture was

effected, Wasson and Pyeatt had come in contact with Downs' party, and had informed them that the robbers had abandoned their car and were on foot in the woods. Arthur Steele and Clarence Ratcliff had brought Downs and Brogdon to Coon Hollow. This points to the fact that no concert of action was agreed upon between the several members of the Downs party, which left Gentry together, much less that any arrangement for concert of action had been agreed upon between the Downs, Cotton, and Scott parties. In fact, the record reveals that, when these several parties were organized and went in pursuit of the robbers, neither party knew of the action of the other or that the other had entered upon the search. The record therefore clearly presents a case of parties acting independently of each other in an endeavor to earn rewards by capturing and convicting bank robbers. This being the case, we cannot agree with the contention of the interveners that all parties participating in the search should receive an equal share of the rewards. There was no agreement upon which to base such a contention.

The rule of law applicable to the facts in the case is that "a reward may be apportioned equally among several claimants whose efforts contributed to produce the result for which the reward was offered." It seems to us that this is the only fair and just rule to apply where the joint acts of several claimants who acted independently of each other resulted directly in the capture of the robbers. 23 R. C. L. 1133; 73 Am. Dec. 638; *Roger* v. *McCoach,* 66 Miss. Rep. 85, 120 N. Y. S. 686; *Elkins* v. *Wyandotte County Commissioners,* 92 Kan. 299. We think the acts of Henry Cotton contributed directly to the capture of the robbers. He met them face to face in the woods, and attempted to arrest them, single-handed. When they refused to yield, he fired upon them four times in quick succession, and hotly pursued them into the very hands of Downs and Brogdon. The prisoners themselves admit that they were attempting to avoid arrest by Henry Cotton when captured by Downs and Brogdon. It is quite

apparent from the record that Downs and Brogdon would not have come in contact with the robbers had they not been driven into their hands by Henry Cotton. They changed their direction from north to west when he fired upon them.

He is therefore entitled to an equitable apportionment of the rewards, and the decree is reversed and remanded, with directions to apportion the amount of the rewards equally between Downs, Brogdon and Henry Cotton.

BLACKBURN v. BROWN.

Opinion delivered April 27, 1925.

1. ADVERSE POSSESSION—INCLOSURE.—Acts of defendant and his grantor in constructing a fence of substantial nature around land which they used for cultivation and pasture, and in placing the same upon the tax books in their names, *held* acts of ownership evidencing adverse holding on their part.
2. ADVERSE POSSESSION—CONTINUITY.—The continuity of defendant's possession by means of a fence is not broken because a part of the fence across a slough is broken where defendant built a new fence around the slough with the consent of the adjacent owner.

Appeal from Johnson Chancery Court; *W. E. Atkinson*, Chancellor; affirmed.

Jesse Reynolds, for appellant.

Hays, Priddy & Hays, for appellee.

HUMPHREYS, J. Some thirteen years before the institution of this suit appellant became the owner by purchase of the fractional NW¼ of section 24, township 8 north, range 23 west, in Johnson County, Arkansas, abutting on what was formerly the north bank of the north channel of the Arkansas River, according to the government survey made in the year 1829. Opposite this land, and across the north channel of said river, there was a well-defined island, containing about 200 acres, which the government engineers surveyed and platted as a part of the government domain and which was described in

the patent from the United States to Styles P. Corlin in 1855 as being in sections 14, 23, and 24, in township 8 north, range 23 west, on the island. This island was bounded on the south by the south channel of said river. The north channel was about one-half mile wide, but, as time passed, it filled up and formed low bottom lands between the island and mainland, some of which became useful for purposes of pasturage, except during periods of high water, and the balance susceptible to cultivation. S. M. Brown, the father of appellee, purchased the island in 1912, and took immediate possession thereof. Appellee purchased one-half of it from him in 1918 and the other in 1921, paying full value therefor. At the time of his purchase his father's fence on the north and east included about fifty-five acres of the land adjacent to the island, which formed a part of the north channel of the river when the government survey was made. After his purchase of a part of the land in 1918, high water washed out parts of fifteen or twenty rods of the fence across a slough, and appellee got permission from appellant's tenant to run a new fence around the slough so as to include same in his pasture for stock water. This rendered it unnecessary to repair the fence running through the slough, so it remained standing in its place across the slough in its broken condition.

On the 28th day of June, 1922, appellant brought this suit against appellee in the chancery court of said county, claiming that fifty-five acres of land in the possession of appellee was an accretion to the mainland, and, because of that fact, belonged to him, and praying that appellee be restrained from trespassing thereon.

Without making objection to the jurisdiction of the court, appellee filed an answer denying that the land inside his old fence, which formed a part of the north channel of said river at the time of the government survey, was an accretion to the mainland, but alleging that same was an accretion to the island; and, by way of further defense, pleading that he and his grantors had acquired title thereto by seven years' adverse possession.

The cause was submitted to the court upon the pleadings and testimony adduced by the respective parties, which resulted in a decree quieting and establishing the title to the fifty-five acres of land in question in appellee, from which is this appeal.

We deem it unnecessary to determine whether the land in controversy was an accretion to the mainland or to the island, as it is revealed by a decided preponderance of the evidence that appellee and his father inclosed and held the land adversely for a period of more than seven years before the institution of this suit, claiming title thereto.

There is little or no dispute in the testimony that S. M. Brown, the father of appellee, inclosed the land in controversy with a substantial wire fence, and that thereafter he and appellee used a part thereof for purposes of cultivation and the remaining portion for purposes of pasturage; the real conflict in the testimony being whether the fence was built in the spring of 1915 or of 1917.

Appellant introduced eight witnesses who testified that the fence was not built until the spring of 1917 or later, but twelve witnesses were introduced by appellee, who testified just as positively as the others that the fence was built in the spring of 1915. The witnesses on both sides based their several recollections as to when the fence was built upon incidents which had happened in the past and data at hand, indicating just when the fence was constructed. We have considered the testimony of all the witnesses in the light of these incidents and data in arriving at our conclusion. In doing this we attached considerable importance to the fact that the fence was built within a week or ten days after S. M. Brown had the lines on his land run by the county surveyor for the purpose of building the fence. Ezra Adkins was the county surveyor, and had been for many years. He testified by reference to his field-notes, which showed that he made the survey for S. M. Brown on the 1st and 2nd days of February, 1915. V. R. Brown, who is the

appellee, his two brothers, Favin and Clifford, and his mother, Mrs. S. M. Brown, testified that the fence was built in the spring of 1915, while V. R. Brown was attending Scarritt College at Morrisville, Missouri, during his senior year. His diploma shows that he graduated from the college with the degree of Bachelor of Arts and Science on June 8, 1915. In arriving at our conclusion we also attached much importance to the fact that two of the witnesses who built the fence testified that it was finished some time in March, 1915.

Appellant suggests that the acts of ownership and occupancy exercised by appellee and his father over the land were not of sufficient notoriety to put him upon notice that they were claiming the land as their own. The character of the acts consisted in constructing the fence out of cedar and mulberry posts and wire. The fence therefore was of a substantial nature. They used the land for purposes of cultivation and pasturage. They placed the land upon the taxbooks in 1919. These acts of ownership evidenced an adverse holding on their part. *Carpenter* v. *Smith,* 76 Ark. 447; *McCombs* v. *Saxe,* 92 Ark. 321.

Appellant also suggests that the continuity of possession was broken when the high water in the spring of 1918 washed out, at places, a few rods of the fence, which were not repaired. That part of the fence referred to ran across a small slough. It became unnecessary to repair this part of the fence in order to preserve the continuity of the possession, because appellant's tenant permitted appellee to run a new fence around the north side of the slough so as to leave the whole slough within appellee's pasture for stock water. No part of the land or slough north of the old line fence was claimed by appellee, and no part of that small strip of land was embraced in the decree quieting his title. *Robinson* v. *Nordman,* 75 Ark. 593. In the case cited the fence in question was repaired, but the necessity of making the repairs in the instant case was obviated by the construction of the new fence around the slough with the assent of appellant.

No error appearing, the decree is affirmed.

FORE v. CHENAULT.

Opinion delivered April 27, 1925.

1. JUDGMENT—COLLATERAL ATTACK.—A defendant aggrieved by a judgment rendered against him without summons and in his absence is not entitled to have it vacated where he knew of the pendency of the action and of the proceedings thereunder in time to make a defense, and did not appeal from the judgment or use any diligence in seeking to vacate it.
2. JUDGMENT—COLLATERAL ATTACK.—An error in the form of a judgment may be corrected on appeal, but not on collateral attack.

Appeal from White Circuit Court; *E. D. Robertson*, Judge; affirmed.

John D. DeBois and *John E. Miller*, for appellent.

J. N. Rachels, for appellee.

HUMPHREYS, J. Appellant herein and Harry Collins were defendants in a replevin suit brought by appellees herein on April 27, 1921, in the Circuit Court of White County, to recover one Cole Eight automobile car No. 61816, which was in said appellant's possession, at Bald Knob, in said county. It was alleged in the complaint and affidavit for the order of delivery in the replevin suit that appellees herein sold said automobile to Harry Collins, and, for the balance of the purchase money, amounting to $3,125, took his promissory notes, and to secure same a mortgage upon said automobile, which was recorded in Wilbarger County, Texas, where the sale was made and car delivered; that said automobile was removed to Bald Knob, Arkansas, by said appellant and Harry Collins, through some arrangement between them, without the knowledge or consent of appellees, in violation of the terms of the mortgage; that default was made in the payment of the notes, and that said appellant was in the unlawful possession thereof under a false claim of ownership. On Monday, July 8, 1921, the following judgment was rendered by default in said replevin suit.

"Now on this day this cause coming on to be heard, and the plaintiffs appearing by their attorney, J. N. Rachels, and the defendants having been called three

times before the bar of the court and failing to answer; and it appearing that the defendants have been served with process as required by law, and that the writ of replevin heretofore issued herein has been served and the property hereinafter described has been delivered to the plaintiffs; it is therefore considered, ordered and adjudged by the court that the plaintiff herein, Chenault & Wheat, are the owners of and are entitled to retain possession of the said 1920 model Cole Eight automobile, car No. 61816, and that they have judgment against the defendant, R. M. Fore and Harry Collins, for all their costs in and about this suit in their behalf expended, for which execution may issue."

On July 27, 1922, this suit was brought by appellant against appellees in the same court to set aside and vacate the judgment in the replevin suit, upon the alleged ground that it was rendered without service upon said appellant and his codefendant, Harry Collins. It was also set forth in the complaint that said appellant had a meritorious defense to the replevin suit. The substance of the alleged meritorious defense was that appellees executed an outright bill of sale for the automobile to Harry Collins in Dallas, Texas, and placed said bill of sale on record in Dallas County, Texas, and then permitted Harry Collins to sell the car to appellant for cash, without informing appellant that they held or claimed a mortgage thereon.

The cause was submitted upon the pleadings and testimony, at the conclusion of which the court, over the objection and exception of appellant, instructed a verdict for appellee, and rendered a judgment dismissing appellant's complaint, from which is this appeal.

The evidence showed that appellant was out of the State at the time the summons and order of delivery in the replevin suit was issued and placed in the hands of the sheriff, and that the delivery of the order and summons by the sheriff of White County to appellant, and the statutory period allowed appellant in which to make

bond to retain the automobile, was waived in writing by Cul L. Pearce, who, at the time, was under the impression that he represented appellant, growing out of a conversation over the telephone with appellant's wife. Pursuant to this waiver the sheriff made the following return upon the order and summons, to-wit: "I have served the within order of delivery and summons by delivering a copy thereof to Cul L. Pearce, attorney, of Bald Knob, who represents to me that he is counsellor and attorney for defendant, R. M. Fore. This April 27, 1921. Ben Allen, sheriff."

Appellant testified that Pearce had no authority to represent him or waive service for him in the replevin suit, but admitted that he knew of the pendency of the suit and of the seizure of the automobile under the order in time to have made a defense before the judgment was rendered in said suit.

It will be observed that this suit is a collateral attack upon the judgment rendered in the replevin suit. This court is committed to the rule that "one who is aggrieved by a judgment rendered in his absence must show not only that he was not summoned, but also that he did not know of the proceedings in time to make a defense," in order to obtain relief. *State* v. *Hill,* 50 Ark. 458; *Moon* v. *Price,* 101 Ark. 142; *Quigley* v. *Hamilton,* 104 Ark. 449; *First National Bank* v. *Dalsheimer,* 157 Ark. 464. In the instant case it affirmatively appears that appellant knew of the pendency of the replevin suit and of the proceedings thereunder in time to have made a defense before the judgment was rendered. He did not appeal from the judgment, and used no diligence in seeking to vacate the judgment. Appellant also contends that the judgment in the replevin suit is also void and should be vacated because it did not follow the form prescribed in § 8654a of Crawford & Moses' Digest, which is as follows:

"In any action in a justice court or circuit court of this State, where it is attempted to foreclose any mort-

gage, deed of trust, or to replevy, under such mortgage, deed of trust or other instrument, any personal property, the defendant or defendants in said action shall have the right to prove or show any payment or payments or set-off under such said mortgage, deed of trust or other instrument, and judgment shall be rendered for property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten days, and satisfy the judgment and retain the property."

The judgment did not specify the amount due upon the mortgage nor adjudge the possession of the automobile to appellees in case the amount due should not be paid in ten days. On the contrary, immediate possession of the automobile was adjudged to appellees, regardless of what amount was due or when it should be paid. Appellant cited the case of *Shoffstall* v. *Downey*, 87 Ark. 5, in support of his contention that the judgment is void. The case does not go to the extent claimed for it by appellant. In that case an appeal was prosecuted to this court to correct errors committed in the trial of the cause. This court held that the trial court erred in the form of the judgment, and reversed same in order for a judgment to be rendered in accordance with the provisions of § 8654a of Crawford & Moses' Digest. The rendition of the judgment in the wrong form was treated by the court as an error which could be corrected on appeal, but not on collateral attack.

No error appearing, the judgment is affirmed.

CAIN v. ROBERTSON.

Opinion delivered April 27, 1925.

1. COURTS—SPECIAL TERM—PRIMARY ELECTION CONTEST.—Crawford & Moses' Dig., § 3773, requiring the calling of a special term for the trial of a primary election contest, applies not only to the first trial after the contest is filed, but also to a trial after appeal and reversal, and it is immaterial that the general election had passed and the contestee had been elected to office.
2. COURTS—SPECIAL TERM—DISCRETION AS TO TIME.—While Crawford & Moses' Dig., § 3773, providing for calling a special term for the trial of primary election contests is mandatory, it does not deprive the circuit judge of discretion in determining the date on which the special term shall be held, and the Supreme Court will not control his action in calling a special term for trial of such contests, in the absence of apparent abuse of discretion.
3. MANDAMUS—ORDER TO CALL SPECIAL TERM OF COURT.—Mandamus will lie to compel a circuit judge to call a special term for the trial of a primary election contest on his refusal to do so.

Mandamus to Woodruff Circuit Court; *E. D. Robertson*, Judge; writ awarded.

Roy D. Campbell, for appellant.

PER CURIAM: The petitioner, W. R. Cain, was a candidate in the Democratic primary election on August 12, 1924, for the office of county judge of Woodruff County, and E. M. Carl-Lee and J. L. Bronte were his opponents. Carl-Lee was returned by the canvassing board as the successful candidate, and the petitioner received the next highest number of votes. Petitioner filed his contest against Carl-Lee in the circuit court, and, at a special term of the court, held on October 2, 1924, there was a trial of the contest, which resulted in a judgment against petitioner. He prosecuted an appeal to this court, and the judgment of the circuit court was reversed on account of erroneous rulings of the trial court, and the cause was remanded for a new trial. As soon as the judgment of reversal became final, petitioner caused the mandate of this court to be filed in the circuit court on March 18, 1925, the regular term of the circuit court having adjourned on March 7, 1925. Petitioner

then presented to respondent circuit judge his petition praying that a special term of the court be called to try the cause, in view of the fact that the next regular term of the court would not be convened until the first Monday in September. The petition was heard by the circuit judge, and the prayer thereof was denied, and there was an express refusal to call a special term of the court. Appellant now has presented his petition to this court for a mandamus to require the circuit judge to call a special term of the court.

Petitioner bases his right to relief by mandamus on a section of the primary election law which reads, in part, as follows:

"Section 3773. If the complaint is sufficiently definite to make a *prima facie* case, the judge shall, unless the circuit court in which it is filed is in session or is to convene within thirty days, call a special term, which shall possess the powers of a court convened in regular term, and shall proceed at once to hear the case. If the case comes in regular term, it shall be given precedence and be speedily determined. The judge may adjourn other courts in order to hear such cases, and may call another judge in exchange to sit in other courts, or vacate the bench in other courts and cause a special judge to be elected to hold the same; and the session of the special term to hear such cases shall not interfere with the validity of other courts proceeding at the same time in said circuit. * * *." Crawford & Moses' Digest.

The circuit judge filed a response to the petition, stating, as justification for his refusal to call a special term of court to try the contest, that, "in the event the petitioner should prevail in the new trial, the office would be declared vacant," and that "the general election having been held, the reason for calling a special term no longer exists." The question that first arises is, we think, whether the section quoted above applies to any trial of the contest or merely to the first trial after the contest is filed. We find nothing in the statute which

would justify the interpretation that it was intended to apply only to the first trial, but, on the contrary, it was the manifest purpose of the statute to hasten the trial of a contested election case whenever the time for the trial arrives, whether originally or after an appeal and reversal. The fact that the case has been once tried and the judgment reversed does not lessen the importance of expedition in disposing of the case. It is a matter of public concern as well as one of private right, and the policy of the law is to hasten those trials, and this is done by a mandatory provision for the calling of a special term. Nor does the fact that the general election has passed and the contestee has been elected to the office afford any reason why the statute is not applicable. Another section of the primary election law (Crawford & Moses' Digest, § 3776) provides that, if a contest for office shall not be finally determined until after the election, and results in a judgment in favor of the contestant, such judgment shall operate as an ouster of the contestee from office, and that "the vacancy in it shall be filled as provided by law for filling vacancies in such office in case of death or resignation." It is thus seen that the lawmakers provided for just such a situation as may be presented if the petitioner is successful in the contest and the necessity of calling a special term to try the case still continues. The statute is, as before stated, mandatory, but it does not deprive a circuit judge of discretion in determining the particular date on which the special term shall be held. The statute contemplates reasonable expedition, and, unless there is an apparent abuse of discretion, this court will not control the action of the circuit judge. However, where, as in the present case, there has been a refusal to call a special term, the petitioner has the right to apply to this court for mandamus to compel action in that regard.

The writ of mandamus will therefore be awarded directing the circuit judge to call a special term of the court to try the contest between petitioner and contestee. It is so ordered.

BANK OF EUDORA v. ROSS.

Opinion delivered May 4, 1925.

1. APPEAL AND ERROR—ORDER DISMISSING GARNISHMENT FINAL.—An order dismissing writs of garnishment terminates the proceedings as to the garnishees and is final and appealable.
2. VENDOR AND PURCHASER—LIEN—RIGHT TO PERSONAL JUDGMENT.—A vendor foreclosing his lien for the purchase money is entitled to personal judgment against the purchaser in the first instance and not merely after report of sale, and may have an ancillary remedy, such as garnishment, without waiting to exhaust his security.
3. GARNISHMENT—LIABILITY OF GARNISHEE.—Final judgment should not be rendered against a garnishee until plaintiff's right to recover from the defendant is established.

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

W. W. Grubbs, for appellant.

Cook & Trice, for appellee.

McCULLOCH, C. J. T. E. Ray conveyed certain lands in Chicot County to S. A. Wilson by warranty deed, which recited notes executed by Wilson to Ray for unpaid purchase money. These notes were assigned by Ray to appellant, and Wilson subsequently conveyed the land to appellee Ross and one Van Ness, the grantees expressly assuming payment of said purchase money notes. The notes were not paid, and appellant instituted this action against Van Ness and appellee Ross to recover the amount of the notes and to enforce the vendor's lien. At the commencement of the action appellant filed allegations and interrogatories to the Monroe County Bank and the First National Bank of Fort Smith, respectively, as garnishees, and writs of garnishment were duly issued and served, and each of the garnishees reported that it had funds in its hands belonging to appellee Ross. Ross appeared by attorneys and filed an answer on the merits, denying the allegations of the complaint with respect to his having assumed the payment of the notes held by appellant, and also filed a motion to quash the garnishments. The court sustained the motion and dismissed

the garnishments, and an appeal has been prosecuted to this court.

The effect of the dismissal of the garnishments was to end the proceedings as to those parties, and was a final order, and appealable. *Helton* v. *Howe,* 162 Ark. 243.

Appellee relies on the rule in some jurisdictions, and the one said to prevail generally in the absence of statute, that a personal judgment should not be rendered in a suit to foreclose a mortgage or other lien except for the deficiency after the report of the sale of the property showing that the amount realized from the sale was not sufficient to pay the debt. Cases in support of that contention are cited in the brief of counsel. Conceding that such is the general rule, it is changed by the statutes of this State. Crawford & Moses' Digest, §§ 6240, 6242, 6244. The first section mentioned above provides that it shall not be necessary in such proceeding to enter an interlocutory judgment, "but final judgment may in such cases be given in the first instance." Section 6242 reads as follows: "In an action on a mortgage or lien, the judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally." Section 6244 provides that, if the mortgaged property "does not sell for a sum sufficient to satisfy the amount due, an execution may be issued against the defendant, as on ordinary judgments." The purpose of the latter provision was to continue the right to have process as to any deficiency, but it does not bar any other available remedy.

In the recent case of *McCormick* v. *Daggett,* 162 Ark. 16, we recognized the right of the plaintiff in a lien foreclosure to have personal judgment in the first instance. There is no reason why this should not be so, for the remedies are not inconsistent. A plaintiff is entitled to only one satisfaction, but he is entitled to pursue all available concurrent remedies not inconsistent with each other. There is no reason for holding that the plaintiff in a foreclosure suit is not entitled to ancillary remedies,

such as attachment and garnishment. The statutes conferring these remedies are each emphatic, and contain no exceptions. The garnishment statute (§ 4906) in express language extends the remedy to "all cases where any plaintiff may begin an action in any court of record."

There is no principle of equity which requires the holder of a security to exhaust his security before resorting to other remedies for the enforcement of personal liability of the debtor. Final judgment should not be rendered against the garnishee and in favor of the plaintiff until the latter's right to recover from the defendant is established. *Norman* v. *Poole,* 70 Ark. 128; *St. L. I. M. & S. Ry. Co.* v. *McDermitt,* 91 Ark. 112; *Smith* v. *Spinenwebber,* 114 Ark. 384; *Smith* v. *Bank of Higden,* 115 Ark. 216. But the garnishee is held bound from the time of the service of the writ, and this remedy is available in a foreclosure proceeding as well as in any other action for debt.

The decree of the chancery court is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SHREVE CHAIR COMPANY *v.* MANUFACTURERS' FURNITURE COMPANY.

Opinion delivered May 4, 1925.

1. CORPORATIONS—EFFECT OF DISSOLUTION.—At common law the dissolution of a corporation operated as an abatement of actions pending against it, and judgments thereafter rendered against it were nullities, and that rule applied to a foreign corporation after its dissolution brought about in accordance with the laws of the State which created it.

2. CORPORATIONS—JUDGMENT AGAINST DISSOLVED CORPORATION.—The State in which a judgment is rendered against a foreign corporation may provide by statute for the continuation of the life of such corporation until its assets in such State have been administered, but a judgment rendered after dissolution of the corporation has no extra-territorial effect.

3. ABATEMENT AND REVIVAL—DISSOLUTION OF CORPORATION.—Crawford & Moses' Dig., § 1819 *et seq.*, *held* not to abrogate the common-law rule as to the abatement of actions pending in foreign jurisdictions against dissolved corporations of this State, nor does comity or the full faith and credit clause require that the validity of a foreign judgment against such corporations be recognized.
4. PLEADING—AMENDMENT—NEW CAUSE OF ACTION.—A judgment obtained by plaintiff against defendant in a foreign State, after commencement of an action in this State, cannot be brought into the case by amendment as an additional cause of action.
5. SALES—BREACH OF CONDITION.—A breach of condition as to the time for delivery of goods ordered absolves the buyer from performance and entitles him to cancel the order, unless the breach was waived.
6. SALES—REVOCATION OF ORDER—EVIDENCE.—The chancellor's finding that the buyer canceled orders before shipment after breach of condition as to time of delivery *held* not against preponderance of the evidence.
7. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—Where a buyer was entitled to cancel orders because of seller's breach of condition, notice of cancellation to the seller's authorized sales agent, in charge of seller's business and receiving orders for goods, was binding on the seller, whether the agent had authority to, and did, accept the cancellation or not.

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

Rogers, Barber & Henry, for appellant.

Abner McGehee and *John F. Clifford,* for appellee.

McCULLOCH, C. J. Manufacturers' Furniture Company (hereinafter referred to as the old corporation) was a domestic corporation, domiciled at the city of Little Rock and engaged in the mercantile business there. This corporation was dissolved on November 1, 1922, by voluntary resolution adopted by the majority in value of the holders of stock, as prescribed by statute. Crawford & Moses' Digest, § 1823. Prior to the dissolution, this corporation sold all of its assets to a new domestic corporation called The Manufacturers' Furniture Company (hereinafter referred to as the new corporation), composed of the same managing officers and some of the same stockholders as the old corporation.

Appellant is a foreign corporation, and instituted the present action against the old corporation in the Pulaski Circuit Court, on November 1, 1922, to recover the sum of $10,810.58, alleged to be due on account for three carloads of chairs shipped by appellant to the old corporation on March 25, 1920, March 26, 1920, and April 26, 1920, on orders previously given by the old corporation to appellant's salesman. Summons was served on the president of the old corporation on the day the suit was commenced, but there is a controversy as to whether or not the service was before or after the filing with the Secretary of State of the resolution dissolving the corporation. The conclusion we have reached in the case, as will be seen later on, renders it unnecessary to decide the controversy as to when the summons was served. Later the new corporation was brought in as garnishee, and afterwards was treated as a defendant in the action. The president of the old corporation, who was likewise the president of the new one, appeared in behalf of the old corporation, and, without entering appearance, filed a motion to quash the service on the ground that the service was had after the dissolution of the old corporation had been perfected. The circuit court overruled that motion, and both corporations answered. The cause was transferred to the chancery court, and proceeded to a final decree, which was in favor of appellees (both of the corporations), dismissing appellant's complaint for want of equity.

The effort in the litigation against the new corporation is to hold it liable for the debts of the old corporation on various grounds; first, that the new corporation was organized merely as a successor of the old one; next, that there was an agreement, either expressed or implied, that the new corporation should pay the debts of the old one; and finally, that there was a violation of the statute known as the bulk sales law. Appellees defended on the ground that there was no liability on the part of the old corporation, for the reason that the order

for the three carloads of chairs was canceled before shipment, on account of violation of the condition upon which the order was given, and that the shipments were refused on arrival of the cars at destination. It is also denied that the new corporation either expressly or impliedly agreed to pay all the debts of the old corporation, and it was also denied that there was any failure to comply with the terms of the bulk sales law.

In July, 1920, appellant instituted an action in the circuit court of Cook County, Illinois, against the old corporation on the same account which is the basis of the present action, and there was service of summons on Mr. T. B. Jacobs, the president of the corporation, who was at that time visiting in Chicago, according to the undisputed evidence, on private business or pleasure. Judgment was rendered in that case in favor of appellant against the old corporation on December 18, 1922, for the full amount of the account. Appellant then filed, in the present action, a duly authenticated copy of the above-mentioned proceedings in the circuit court of Cook County, Illinois, and pleaded the same as conclusive of its rights to recover against the old corporation. Appellees filed a motion to strike out the record of the Illinois judgment on the ground that, if it was a valid adjudication at all, it was rendered after the institution of the present action. There is a controversy as to whether or not the old corporation authorized entry of its appearance in the Illinois court, but we deem it unnecessary to pass upon that controversy, for the reason that we find that, on other grounds, the judgment is not conclusive of the rights of the parties.

The first question to be considered is the effect of the Illinois judgment. It will be observed, from the recital of facts, that the action was commenced in the Illinois court long before the dissolution of the old corporation, but the judgment was not rendered until after the dissolution of the old corporation in the manner prescribed by the statutes of this State. The rule at common law

was that the dissolution of a corporation operated as abatement of actions pending against it, and judgments thereafter rendered were nullities (*State* v. *Arkansas Cotton Oil Co.,* 116 Ark 74), and that rule applied to a foreign corporation after its dissolution brought about in accordance with the laws of the State which created it. 34 C. J. 1149; 5 Thompson on Corporations, § 6563; *Rodgers* v. *Adriatic Fire Ins. Co.,* 87 Hun (N. Y.) 384, 42 N. E. 515; 2 Morawetz on Private Corporations, 1031; *Marion Phosphate Co.* v. *Perry,* 74 Fed. 425, 33 L. R. A. 252. The State in which the judgment is rendered against a foreign corporation can provide by statute for a continuation of the life of the corporations doing business there until the assets in that State are administered, but a judgment rendered after the dissolution of a corporation has no extraterritorial effect. *Rodgers* v. *Adriatic Fire Ins. Co., supra.*

By operation of the statutes of this State (Crawford & Moses' Digest, § 1819 *et seq.*) the common-law rule is abrogated so as to prevent the abatement of an action against a domestic corporation in the courts of this State. *Des Arc Oil Mill* v. *McLeod,* 141 Ark. 332. The statute does not, however, avert the effect of the dissolution further than to provide against abatement and for the distribution of the assets of the corporation. Therefore the common-law rule as to abatement still applies to actions pending in foreign jurisdictions. We are not required by any rule of comity or by the requirement to give full faith and credit to judicial proceedings of other States to recognize the validity of a judgment rendered in another State against a dissolved corporation of this State. *Rodgers* v. *Adriatic Fire Ins. Co. supra; People* v. *Knickerbocker Life Ins. Co.,* 106 N. Y. 619; *Marion Phosphate Co.* v. *Perry, supra; Sewing Machine Co.* v. *Radcliffe,* 137 U. S. 287.

It follows that the Illinois judgment was a nullity and had no binding force upon the rights of the parties. Even if it had been valid, it could not have have been

brought into this case by amendment as an additional right of action, for the reason that it was not mature at the time of the commencement of this action. *Hornor* v. *Hanks,* 22 Ark. 572.

Appellant's right to recover in this action against either of the appellee corporations depends upon the existence of the alleged debt of the old corporation, and the remaining features of the case may be disposed of in deciding the fact whether or not appellant had a valid claim against the old corporation.

There is a conflict in the testimony upon a vital point in the case, but some of the material facts are undisputed. The orders for the three carloads of chairs which were shipped by appellant to the old corporation were given in July, 1919, by Mr. Jacobs, the president and manager of the corporation, to one of appellant's salesmen. The order was verbal, but subsequent correspondence between the parties was sufficient to take it out of the operation of the statute of frauds. It is claimed by appellees that these orders were given to appellant on condition that they would be filled in time for the succeeding Christmas holiday trade. There is very little, if any, dispute on that point, and the evidence abundantly warrants a finding that the orders were given upon that condition. It is undisputed that the condition was not performed, for the shipments by appellant did not begin until the latter part of March, 1920. There was no waiver of this condition, if, as claimed by appellees, the orders were canceled after the condition was broken. In fact, the breach of the condition on the part of appellant absolved the other party, under well-settled principles of law, from performance, and, unless the breach was waived, the purchaser under the contract had the right to cancel. *Keith* v. *Herschberg,* 48 Ark. 138; *Sunshine Cloak & Suit Co.* v. *Roquette,* L. R. A. 1916, E. 932. There is a conflict in the testimony as to whether or not the old corporation actually canceled the orders before shipment, or whether it acquiesced in the shipments, but we

think that the finding of the chancery court on that issue is not against the preponderance of the evidence. Jacobs testified positively and directly that he met one of appellant's agents in charge of one of its places of business in Chicago in January, 1920, and directed the cancellation of the orders, and that the agent acquiesced in the cancellation, and at the same time accepted an order from the old corporation for a carload of stuff of a different quality. This is denied by appellant's agent, who testified that nothing was said about cancellation of the old order. The cancellation was oral, and no one heard the conversation between the two men, but Marshall, another witness, testified that he was present with Jacobs when the latter claims this conversation took place, and that he did not remember the conversation, or was not close enough to hear it. Hubbell, appellant's agent, testified that Marshall was not present at the time. So there is a slight contradiction of Hubbell's testimony, which is not without some force in determining where the preponderance of the testimony lies.

It is further contended, however, by appellant that Hubbell had no authority to accept a cancellation, and it was therefore ineffectual against appellant. We are of the opinion that the evidence was sufficient to show that Hubbell was clothed with authority in that respect, or at least there is enough to show *prima facie* authority, and this has not been overcome. It appears from the testimony affirmatively that Hubbell was an authorized sales agent of appellant, and was in charge of certain space in Chicago where appellant was publicly exhibiting its manufactured articles. It is not essential to the effectiveness of the cancellation that appellant or its authorized agent should have accepted it, for, as we have already seen, the old corporation had the absolute right at that time to cancel the orders on account of appellant's failure to perform the condition. So it is not a question whether Hubbell had authority to affirmatively accept the cancellation, but whether or not the notice

of cancellation to him was sufficient to bind appellant. We think that the evidence shows that Hubbell at least had authority to receive the notice of cancellation, and that it was his duty to communicate it to his principal. At the time the cancellation was made as claimed by Jacobs, Hubbell was in charge of the business of appellant, and was actually receiving orders for goods, and did at that time accept another order from Jacobs. There having been a cancellation of the order and a refusal thereafter to accept the shipments, it follows that there was no liability on the part of the old corporation, and, there being no liability on that score, none can be asserted against the new corporation on any grounds whatever.

The decree of the chancery court is therefore affirmed.

SCOTT v. STEPHENSON.

Opinion delivered May 4, 1925.

1. APPEAL AND ERROR—CROSS-APPEAL AGAINST DEFENDANT NOT APPEALING.—A cross-appeal is not available, under Crawford & Moses' Dig., § 2166, against a defendant who is neither appellant nor coappellee; and, where such cross-appeal is asked more than six months after the date of the decree, it could not be treated as an orginal appeal.
2. INSANE PERSONS—SUITS ON BEHALF OF.—Under Crawford & Moses' Dig., § 1116, relating to suits on behalf of persons of unsound mind, even if the appointment of a guardian for an insane person by the probate court was void for want of jurisdiction, the chancery court had power to allow a suit by next friend of insane person against one receiving property from such incompetent under power of attorney.
3. INSANE PERSONS—VALIDITY OF DECREE IN SUIT FOR ACCOUNTING.—In a suit by a guardian of an insane person for an accounting against one receiving an incompetent's property, the fact that the court did not appoint a next friend of such person or otherwise disturb the status of the guardian, whose appointment was claimed to be illegal for lack of jurisdiction of the probate court, did not affect the validity of the decree.
4. INSANE PERSONS—AUTHORITY OF GUARDIAN.—While the power of an alleged guardian of an insane person to enforce a decree in

favor of his ward is affected by a question as to the validity of his appointment, such question became moot upon his being subsequently appointed guardian by a valid order.

5. PRINCIPAL AND AGENT—ACCOUNTING.—An agent should be required to account for the difference in amount collected on an endowment policy at maturity and the amount for which it was charged to her, for money received from timber sold, for excess in value over amount charged to her for stock sold, and for revenues received from the principal's estate.

6. PRINCIPAL AND AGENT—ACCOUNTING—INTEREST.—Where an agent made no investments of principal's property other than in worthless stock, he should account for interest at the highest legal rate on amount found to be due in her hands.

7. PRINCIPAL AND AGENT—ACCOUNTING.—An agent should not be charged for an automobile worn out in the service of the principal, where it was necessary for the latter's comfort.

8. PRINCIPAL AND AGENT—ACCOUNTING.—An agent receiving credit for the price paid for an automobile cannot include it in the list of property turned over.

9. PRINCIPAL AND AGENT—ACCOUNTING.—The fact that an agent, who had received credit for price paid for an automobile for use of the principal, turned it over to the principal's guardian, from whom she bought it second-hand for less than the original cost, did not justify excluding the full purchase price from the amount credited to such agent.

10. PRINCIPAL AND AGENT—ACCOUNTING.—In a suit against an agent for an accounting, she is not entitled to list, at more than par value, stock turned over to her at par value.

11. PRINCIPAL AND AGENT—ACCOUNTING.—In a suit against an agent for an accounting, she may be allowed credit for worthless securities bought in good faith where many people of the community made similar investments.

12. PRINCIPAL AND AGENT—ACCOUNTING.—In a suit against an agent for an accounting, she is entitled to credit for the price paid for tracts of land purchased for and turned over to her principal.

13. PRINCIPAL AND AGENT—ACCOUNTING.—In a suit against an agent for an accounting, she is not entitled to credit for rent notes for which there was no corresponding charge against her.

14. PRINCIPAL AND AGENT—RIGHT TO COMPENSATION.—An agent who made no proper use of her principal's estate, and who did not invest personal property except in worthless stocks, was not entitled to compensation.

15. MANDAMUS—DISCRETION OF COURT TO SET CASE FOR TRIAL.—On failure to show that the circuit judge refused to hear a proceeding by certiorari to quash an order of the probate court, man-

damus will not issue, since the matter of setting a case down for trial is a matter of discretion, which will not be controlled by the court.

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

Wilson & Norrell, for appellant.

Williamson & Williamson, for appellee.

McCULLOCH, C. J. Ruth Harris, an adult female residing in Drew County, Arkansas, was, on March 5, 1923, adjudged by the probate court to be a person of unsound mind, unable to conduct her own business affairs, and Guy Stephenson was appointed by said court as the guardian of her estate. On April 25, 1923, the Drew Probate Court adjudged, from testimony of physicians adduced before it, that it was best for the physical and mental welfare of Ruth Harris that she be placed in a sanatorium kept for the treatment of mental diseases, and, pursuant to that order, she was taken to a sanatorium in Cincinnati, Ohio, where she remained up to the time of the decree in this case and since.

The present action was instituted in the chancery court of Drew County on behalf of Ruth Harris, by Stephenson, as her guardian, against appellant, Mrs. Della Scott, to require her to account for the property of the ward received by appellant under power of attorney. In the complaint it was charged that there was mismanagement and negligence on the part of appellant in the management, as well as a willful failure to account for the whole of the estate. Appellant answered denying the charges of negligence and mismanagement, and alleged that she had turned over to the guardian the remainder of all the property which belonged to Miss Harris and which had come into her hands and control. Later, F. H. Scott, the husband of appellant, was made a party defendant on allegations that, among the assets of the estate of Miss Harris, there had been a mortgage executed by him to secure a debt for borrowed money

and that his wife, the appellant, had wrongfully and without consideration released the mortgage.

A final decree was rendered in the case on December 11, 1923, in favor of appellee against appellant, Mrs. Scott, for the recovery of the sum of $14,674.40 and all costs of the action. Mrs. Scott appealed from that decree, and appellee has cross-appealed. There is nothing in the record to show that the effort to secure relief against F. H. Scott was pressed before the court, and nothing is said in the decree on that feature of the case. Appellee requested and obtained a cross-appeal against F. H. Scott, but, as Scott was neither an appellant nor a co-appellee, a cross-appeal against him was not available under the statute. Crawford & Moses' Digest, § 2166. The cross-appeal was asked for too late (more than six months after the date of the decree) to be treated as an original appeal. Hence the only questions to be determined on the appeal and cross-appeal relate to the right of recovery against appellant, Mrs. Scott.

After the rendition of the decree against appellant, but at the same term of court, appellant filed in the lower court a motion to vacate the decree on the ground that the order of the probate court adjudging Ruth Harris to be insane and appointing Stephenson as guardian was void and of no effect. Before the court passed upon this motion the probate court of Drew County made another adjudication to the effect that Ruth Harris was a person of unsound mind, then being confined in a sanatorium in Cincinnati, Ohio, and Guy Stephenson was reappointed as her guardian. The record of that additional proceeding in the probate court was filed in response to appellant's motion to vacate the decree, and the court overruled the motion to vacate the decree, and there has been an appeal from that order or decree.

It is insisted by counsel for appellant that the decree should be reversed and the cause dismissed on the ground that the record of the probate court adjudging

the insanity of Ruth Harris and appointing the guardian was void for want of jurisdiction in that court. Counsel rely upon the decision of this court in *Monks v. Duffle,* 163 Ark. 118, holding that an adjudication of insanity by the probate court without having the person before the court is void. We deem it unnecessary, however, to enter upon a discussion of the question of the validity or invalidity of the original order of the probate court, for the validity of the decree of the chancery court could not be assailed on the ground that the order appointing the guardian was void. The invalidity of the order did not affect the jurisdiction of the chancery court. An action brought by a guardian or a next friend of a person under disability, is, in effect, a suit by such person under disability, and a change in the character of the representative does not operate as a change of parties, for, as before stated, the person under disability is the real party, and not the representative. Our statute provides that an action on behalf of a person judicially found to be of unsound mind must be brought by his guardian, or, if he has none, by his next friend, and that, when the action is brought by the next friend, it is subject to the power of the court. Crawford & Moses' Digest, § 1116. The jurisdiction of the chancery court over the subject-matter of litigation and of the persons of the respective parties draws to it jurisdiction to inquire into the status of the parties and of the representatives who appear for them. Hence it follows that, if there was no legally appointed guardian, or, in other words, if the appointment of the guardian was void for want of jurisdiction of the probate court, it was within the jurisdiction and power of the chancery court to permit the action to be prosecuted by a next friend. *Peters* v. *Townsend,* 93 Ark. 103. If the question had been raised before decree, and the invalidity of the appointment shown, it would have been the duty of the court to inquire into the fact whether or not the plaintiff was a person of unsound mind, and, if found

so to be, to permit the action to continue in the name of some person as next friend. The fact that the court did not appoint a next friend or otherwise disturb the status of Stephenson as guardian does not affect the validity of the decree. It would have constituted no encroachment upon the jurisdiction of the probate court for the chancery court to inquire into the status of the plaintiff, Ruth Harris, to determine whether or not the action in her behalf could be prosecuted by a representative instead of in her own name. *Peters* v. *Townsend, supra.* Of course, the right to enforce the decree in the name of the guardian is affected by the question of the validity of his appointment, but the question of the enforcement of the decree is not involved in this appeal, and, besides that, it has become entirely moot, for the reason that, since the question was raised by a motion to vacate the decree below, there has been a valid adjudication of the insanity of Ruth Harris and another appointment as guardian. One of the sections of the statute regulating the appointment of guardians for insane persons reads as follows: "Section 5837. Whenever any insane person is confined in the insane asylum of this State or in any institution or asylum for the insane outside of the State, the probate court of the county of which such person is a citizen and resident shall have power to appoint a guardian for such person, without requiring the presence of such person before the court." Crawford & Moses' Digest.

When the last order was made reappointing the guardian for Ruth Harris, she was, according to the undisputed proof, in an asylum or sanatorium for the care and treatment of insane persons outside of the State, and the presentation of a petition to the court conferred jurisdiction to hear and determine the question of insanity. If there was any fraud practiced upon the court or upon the insane person by causing her to be removed from the State, so that the court could acquire jurisdiction without her presence in open court, that

could be shown in a direct attack to set aside the judgment of the probate court or by an appeal in apt time from the order. There is, however, no intimation in the present record of such a state of facts. There is no suggestion anywhere in the record that the conduct of the guardian towards Miss Harris, or of her kindred who instituted the proceedings, was prompted by other than a purpose to best serve her interests. The last order is therefore valid.

There remains yet to consider the merits of the litigation. Appellant is the mother of Ruth Harris. She was formerly the wife of A. E. Harris, who died in the year 1892, shortly after the birth of his daughter Ruth. C. T. Harris, a brother of A. E. Harris, became the guardian of the infant Ruth by appointment from the probate court, and he continued to be her guardian until she became of age, and he made his final settlement in the year 1910. A. E. Harris left considerable property, of which Ruth inherited her portion, consisting mostly of land. The settlement accounts of A. E. Harris show that, when the guardianship began, he had in his possession, in addition to the real estate of his ward, personal property of the value of $2,790.94, and that, by careful attention and judicious management, he turned over to his ward at the end of his guardianship the sum of $38,357.51.

Ruth Harris, upon coming of age and receiving from her guardian her inheritance, executed to her former guardian, C. T. Harris, a power of attorney authorizing him to manage her property, which he continued to do until March 11, 1918. Miss Harris and her mother, the appellant, joined in an action in the chancery court to cancel the power of attorney formerly executed by Ruth to her former guardian, and the chancery court granted the prayer of the complaint, and canceled the instrument. At that time Miss Harris had executed another power of attorney to her mother, the appellant, revoking the former power to her uncle and authoriz-

ing her mother to receive and manage her estate. Upon the rendition of the decree of the chancery court canceling the power of attorney to Mr. Harris, he turned over all the property to appellant as the agent and attorney in fact of his former ward. In addition to the real estate turned over to appellant, Mr. Harris delivered to her personal property to the amount of $40,420.05. This consisted of the sum of $12,679.25, money deposited in bank, and the remainder in bank stock, an endowment insurance policy, and notes for money loaned and secured by mortgages on real estate. The whole estate was of unquestioned value of the amount named and all consisted of what, in banking circles, would be termed liquid assets, except an item of $1,000 for an automobile. Part of the assets consisted of forty shares of preferred stock in a corporation known as the Monticello Cotton Mills, of par value of $1,100, and also eighty shares of the Union Bank & Trust Company, of a par value of $4,000. These two items are specially mentioned because they have been subsequently returned by appellant to the guardian of Miss Harris.

Appellant, upon receiving the property of her daughter from C. T. Harris on March 11, 1918, began the management of the estate, and continued to manage it until the probate court of Drew County made the first order adjudging Miss Harris to be insane, and appointing her guardian, when, in compliance with the order of the probate court, she delivered to the guardian the property which she conceded that she had in her hands belonging to Miss Harris.

Appellant had, during her stewardship, purchased two additional tracts of land for Miss Harris, situated in Drew County, near Monticello, and these were turned over to the guardian, and appellant, of course, claimed credit in her settlement for the amount paid for those tracts of land. She also turned over to the guardian bank stock and cotton oil stock of the par value of $5,100, as hereinbefore stated, and also corporation

stock of the par value of $4,687.50, conceded to be worthless. These were oil and gas stocks, with the exception of $350 in a defunct grocery company, and $1,000 in a defunct lumber company. She claimed credit also for a new automobile recently purchased for Miss Harris at the price of $1,900. There were several other items, consisting of rent notes and a few other notes. The aggregate amount of the personal property thus turned over, as estimated by appellant herself, was $14,720.50. This included the worthless oil stock at its par value. Appellant also rendered an account showing that she had received during the five years of her stewardship gross revenues to the amount of $7,022.50, which included all rents received and dividends on stock. She also accounted for amounts received on the various securities originally delivered to her by C. T. Harris. She claimed credit for amounts expended for the use of Miss Harris, showing a total expenditure of $27,953.29 for the five years, including $500 a year as compensation for her own services.

The evidence shows that Miss Harris spent most of her time at sanatoriums and other institutions for treatment of those who are physically and mentally ill, and the account rendered by appellant, if correct, shows that all the places were very expensive. For instance, there is an item of expense of $1,000 for a trip of Miss Harris and a nurse from Monticello to Memphis and from Memphis to Baltimore, including railroad fare, hotel bills, doctors' fees and hospital fees. There is an item of $2,300 for about six months' treatment at Flint, Michigan. The account contains credit also for taxes and insurance and for certain improvements made on a store building in Monticello and the cost of building a new house on one of the farms owned by Miss Harris.

An attack is made by appellee on the accounts of appellant, both as to the amount of revenues received and also the expenditures made on behalf of the ward.

The proof shows on the part of appellee and the direct testimony of Mr. C. T. Harris that, for several years before he turned over the property and estate to appellant, it had been yielding a net revenue of about $6,000 a year, and that he had paid lavish expenses for Miss Harris out of the revenues, and still the personal estate had increased from year to year. The showing made by appellant for the five years is an average of about $1,400 a year revenue, and this consists of rents on store building, $600 a year, and the farms and dividends on corporation stock which had been turned over to her by Miss Harris. There is no account of revenues from investments made of the other personal estate, particularly money turned over to her by Miss Harris.

The proof on the part of appellee shows that the expenses of Miss Harris were much less under the management of her uncle, the former guardian, who allowed her to spend money lavishly, and everything reasonable was provided for her comfort and luxury.

The evidence shows very clearly, we think, poor management on the part of appellant. She could have realized more from the estate if she had exercised proper care. It would serve no useful purpose and would extend this opinion too far to discuss all the items in the various accounts, so we devote the discussion to the particular items, which we think, must be controlled by the decision.

Appellant must, of course, be charged with the gross amount of personalty which she received from C. T. Harris, conceded to be the total sum of $40,327.50. This included an endowment policy in one of the standard life insurance companies, and was listed in the above valuation at $2,472, whereas the proof shows that appellant collected on this policy at its maturity the sum of $4,200. She should be chargeable with the difference of $1,728 not included in the amount turned over to her by Mr. Harris. It is undisputed that she sold timber on the lands of the ward, receiving in cash the sum of $2,700.

She, of course, must be charged with that amount, which is not included in the list of personal items turned over to her by C. T. Harris. The proof shows that she sold stock in a certain bank in Little Rock, which had been turned over to her, for the sum of $750 in excess of the par value at which it was listed in the inventory made to her by Mr. Harris. She should be charged with that item. The revenues received by her in the sum of $7,022.50, as shown by her own account, should of course be charged to her. These items aggregate the sum of $52,528. The question whether or not she should be charged with additional revenues which she ought to have received from the estate is a difficult one. The proof is not especially directed to the question whether or not she could have received more rent on the farm lands or on the store building in Monticello. There is no effort made on the part of appellee to prove that she could have received more rent, and all that the proof shows and all that was attempted to be shown is that appellant had secured no returns from investments other than on the stocks which had been turned over to her by Mr. Harris, and that she made no use of the available cash on deposit which was turned over to her, and the collections on outstanding mortgages. All the investments that she made were in worthless stocks, which yielded no return. We have concluded that there is no proof which would justify us in finding any specific amount which should have been received on investments, but we are of the opinion that because of the fact that appellant made no investments other than in worthless stocks, she should account for interest at the highest rate on the amount found to be due in her hands at the time of the decree. That amount will be stated at the conclusion of the discussion when arriving at the amount due.

The next thing to be considered is the amount of credits which should be allowed appellant. She is charged in the account with $1,000 for an automobile, turned over by the former guardian for the use of Miss

Harris. It is shown that Miss Harris was provided with automobiles, both by Mr. Harris and by appellant, and that no question was raised as to their being a proper item of charge. It is conceded that it was necessary for Miss Harris' comfort to have an automobile. This one which was turned over by the former guardian to appellant was used and worn out in the service of Miss Harris, and it should not be charged to appellant in the account.

Shortly before appellant surrendered the estate to the guardian she purchased a new automobile at a cost of $1,900, and this was part of the estate that she turned over to the guardian. She claimed credit for the full amount of the price of the automobile, and, of course, it should not be again included in the list of property turned over to the guardian, as the effect of that would be to give her credit for the amount twice. It is contended by counsel for appellee that she should not receive credit for the full price of the automobile, for the reason that she purchased it back from the guardian for the sum of $750. That is a matter between appellant and the guardian and the probate court. The fact that she bought the car back from the guardian, after it had been used, for a price less than the original cost does not justify excluding the full purchase price from the amount to be credited to appellant.

Appellant in her account puts in the bank stock and the cotton mill stock which was returned to the guardian at a higher par value than that listed in the inventory of the property turned over to her by the former guardian and with which she stands charged. In order to balance the account, her credit must be simply for the amount of the original par value, $5,100.

The question of allowance of credit for the worthless stock is a matter which gives us much concern. It is conceded that the stocks are worthless, but the proof shows that many people, including business men of that community, made similar investments. From the present viewpoint, investments in that character of securities

were obviously improvident, but, considering all the circumstances of the case, we find nothing that will justify the conclusion that appellant's conduct was in bad faith, and we have concluded that she should be allowed credit for the amount paid for these stocks, notwithstanding the fact that they proved worthless.

She is also entitled to credit for the price paid for the additional tracts of land which she purchased for Miss Harris and turned over to the guardian.

Appellant is not entitled to credit for rent notes for the year 1923, for there was no corresponding charge against her for those items, and they were not collectable until after her stewardship ended.

Notwithstanding many of the apparently exorbitant items in appellant's account for living expenses and traveling expenses and expenses of medical treatment for Miss Harris, we have concluded to let the account stand as rendered, with the exception of the item of $500 for each year's compensation to appellant for her services. The chancellor took this view of the account, and we accept his finding as not against the preponderance of the evidence. Appellant made no proper use of the estate of her principal, she made no investment of the personal property except in worthless stocks, as before stated, and she earned no compensation, and is entitled to none. *Greer* v. *Craig*, 165 Ark. 209. It is an elemental principle of law that an unfaithful agent is entitled to no compensation for services rendered. The deduction of $2,500 reduces appellant's account to the sum of $25,453.29 and makes the total credits aggregate the sum of $39,990.79. Deducting this from the amount of total debits against appellant, $52,528, leaves a balance unaccounted for of $12,537.21. Interest on this sum at ten per cent. per annum from March 11, 1918, to the date of the decree on December 11, 1923, makes $7,209.04, and, adding this to the amount found to be in the hands of appellant, it makes an aggregate of $19,747.25. A statement of the account is tabulated as follows:

DEBITS AGAINST APPELLANT.

Personalty delivered to Mrs. Scott by guardian	$40,327.50	
Additional amount collected on life policy	1,728.00	
Amount collected on sales of timber	2,700.00	
Additional amount collected on sale of bank stock	750.00	
Receipts 1918-1922	7,022.50	$52,528.00

CREDITS.

Inventory price of old automobile	$ 1,000.00	
Bank stock and mill stock returned to guardian	5,100.00	
Worthless stock returned to guardian	4,687.50	
Price 2 tracts of land bought for ward	3,750.00	
Account against ward for 1918-1923, less claimed compensation	25,453.29	39,990.79
Balance due ward		12,537.21
Add interest from Mar. 11, 1918, to Dec. 11, 1923, at 10 per cent, 5 yrs. 9 mos.		7,209.04
		$19,746.25

The decree will therefore be reversed on the cross-appeal of appellee, and judgment will be entered here in favor of appellee against appellant for the sum mentioned above ($19,746.25) with interest at the legal rate (6 per cent. per annum) from the date of the decree below.

Appellant has also filed a petition here for a mandamus against the circuit judge to compel him to hear a proceeding instituted in that court by writ of certiorari, to quash the order of the probate court. It appears from appellant's petition for mandamus and the

statements of counsel here that the circuit judge acted under the conception that the question of the validity of the probate proceedings was involved in the present appeal from the decree in the civil case, and, for that reason, postponed any hearing in the circuit court until this court could reach and dispose of the civil case. There is no showing that he has absolutely refused to hear the proceedings in his court. Counsel rely on the decision of this court in *Road Improvement District* v. *Henderson,* 155 Ark. 488, as supporting their contention that the circuit judge should be compelled to give an immediate hearing of the proceedings in his court. That case has no application, as is shown by the decision in the more recent case of *Village Creek Drainage District* v. *Ivie, ante* p. 523. The question of setting a time for trial is a matter of discretion, and such discretion will not be controlled by this court by mandamus. The prayer of the petition is therefore denied.

CUMNOCK v. LITTLE ROCK.

Opinion delivered May 4, 1925.

1. CONSTITUTIONAL LAW—ISSUANCE OF BONDS—SELF-EXECUTING AMENDMENT.—Constitutional amendment No. 11, authorizing counties, cities and towns to issue bonds to pay outstanding debts, and providing for a tax levy not exceeding three mills until the indebtedness is paid, *held* to be self-executing.
2. CONSTITUTIONAL LAW—ISSUANCE OF BONDS—VALIDITY OF ORDINANCE.—Where an ordinance was passed providing for the issuance of bonds by a city to pay outstanding indebtedness, as authorized under amendment No. 11, which was self-executing, it was immaterial whether the enabling act of March 30, 1925, was in force.
3. MUNICIPAL CORPORATIONS—PROCEEDING FOR SALE OF BONDS.—A proceeding by a city to sell bonds to pay outstanding indebtedness under amendment No 11 *held* not in conflict with the provisions of the enabling act of March 30, 1925.
4. MUNICIPAL CORPORATIONS.—In proceedings by a city for issuance of bonds to pay outstanding indebtedness, a taxpayer may not

complain that bids for such bonds were received on the day following the day advertised for such purpose.

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

Isgrig & Dillon, for appellant.

A. Boyd Cypert, and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

McCULLOCH, C. J. Proposed amendment No. 11, prohibiting counties, cities and towns from making contracts or allowances in excess of the revenues for the current fiscal year, was declared adopted under the decision of this court in *Brickhouse* v. *Hill,* 167 Ark. 513, and it contains a proviso authorizing counties, cities and towns to issue bonds for funds to pay debts outstanding at the time of the adoption of the amendment. The proviso reads as follows:

"Provided, however, to secure funds to pay indebtedness outstanding at the time of the adoption of this amendment, counties, cities and incorporated towns may issue interest-bearing certificates of indebtedness or bonds with interest coupons for the payment of which a county or city tax, in addition to that now authorized, not exceeding three mills, may be levied for the time as provided by law until such indebtedness is paid."

Pursuant to this amendment, the city council of Little Rock passed an ordinance authorizing the mayor, city clerk and board of public affairs to contract for the sale of bonds to secure funds with which to pay existing indebtedness. After the passage of the ordinance, notice was given for receiving competitive bids on March 31, 1925, for the issuance of bonds. Bids were received on the day mentioned, but there was an adjournment over to the next day and additional bids were received, and a contract was entered into for the sale of bonds. Appellant, as a citizen and taxpayer, instituted this action in the chancery court to restrain the performance of the contract by the issuance of bonds.

The General Assembly enacted an enabling statute putting the amendment into force, in "any city of the first class which has taken proceedings and published notice of sale to issue bonds." Act 292, session 1925. This statute contains what purports to be an emergency clause and was approved by the Governor on March 30, 1925, which, it will be observed, was after the passage of the ordinance by the city council authorizing the issuance of bonds and one day before the advertised day for receiving bids. The contention of appellant is that amendment No. 11 is not self-executing, that the emergency clause was not properly attached to the bill, and that an emergency was not sufficiently expressed in the clause, and that, even if the statute went into full force and effect on the day it was approved by the Governor, the proceedings of the city council prior thereto were void.

The first question presented, and the one which we think is determinative of the present case, is whether or not the proviso in the amendment relating to the issuance of bonds by counties and municipalities is self-executing. We therefore confine the decision, so far as concerns the effect of the amendment, to that question alone.

In the case of *Griffin* v. *Rhoton,* 85 Ark. 89, we quoted from Judge Cooley the following test: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Cooley's Const. Lim. (7th. ed.) p. 121. We decided in that case, in an analysis of a certain provision of the Constitution in regard to limitation upon salaries of public officers, that it was not self-executing. In the case of *Arkansas Tax Commission* v. *Moore,* 103 Ark. 48, we held that the initiative and referendum

amendment adopted in 1910 was self-executing, and in reaching that conclusion the opinion quoted with approval Judge Cooley's test, the same as in *Griffin* v. *Rhoton, supra.* In addition to that, we quoted with approval the following language from the Supreme Court of Minnesota in *Willis* v. *Mabon,* 48 Minn. 140:

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature—does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing * * *."

Applying those tests to the present case, we are of the opinion that the proviso in amendment No. 11 is self-executing. Its language satisfies each of the above tests prescribed for a self-executing provision. It "supplies a sufficient rule by means of which the right given may be enjoyed and protected," and it does not merely indicate principles "without laying down rules by means of which those principles may be given the force of law." The proviso, in unmistakable terms, confers powers upon counties, cities and incorporated towns, power to issue "interest-bearing certificates of indebtedness or bonds with interest coupons" to secure funds to pay indebtedness outstanding at the time of the adoption of the amendment, and it also authorizes an additional levy of taxes not exceeding three mills, "until such indebtedness is paid." The limitation upon the power to issue bonds is fully stated in the proviso itself,

and the power is completely conferred without any additional legislation. The county courts and municipal authorities were already clothed with complete authority over the levying of taxes and the control of their financial affairs with the constitutional prohibition against the issuance of interest-bearing evidences of indebtedness and levying a tax in excess of five mills. So the effect of this proviso was to remove those restrictions to a certain extent and to permit counties and municipalities to exercise those powers for the purpose of raising funds to pay indebtedness outstanding at the time of the adoption of the amendment. The words, "as provided by law," refer to levying of additional taxes and not to the exercise of the power of issuing bonds. The power to levy taxes was already provided for, and the authority to levy additional taxes being conferred, the language just quoted had reference to the method of levying taxes.

Our conclusion is that the proviso is self-executing and that additionl legislation is unnecessary, and it is therefore unimportant to inquire whether or not the enabling act passed by the Legislature was in force at the time, unless it is found that the proceedings for the sale of the bonds are in conflict with some provision of the statute. We do not find any such conflict.

It is contended that the statute requires an advertisement for bids, and that this necessarily implies that the bids must be received on that day and negatives any authority to adjourn over to another day. This argument is, we think, unsound, even if it be conceded that the statute requires advertisement for the receipt of bids on a particular day. There is certainly nothing in the statute which, expressly or by implication, prohibits adjournment from the advertised day over to the next day for the purpose of receiving bids. Such a postponement would not, in any event, affect the validity of a bond issue, and a taxpayer would have no right to intervene for the purpose of preventing the issuance of bonds

on that ground unless it be shown that an actual loss may result.

The decree of the chancery court was correct, and the same is affirmed.

HART, J., (dissenting) I agree to the general rule of law that a constitutional provision may be said to be self-executing when it takes immediate effect, and ancillary legislation is not necessary to the enjoyment of the rights given. The reason is that, if a constitutional provision is complete in itself, it executes itself.

Tested by this rule, the proviso of section one of amendment No. 11 is not in my opinion self-executing. The proviso is in effect an independent provision of the section and necessarily requires legislation of some sort to put it into effect. When it comes to issuing bonds under the proviso, legislation is required to provide what length of time they shall run, what rate of interest they shall bear, who is to execute them, whether they shall be sold privately or at public auction, in what denominations they shall be issued for, and whether they shall be sold below par, etc.

It is claimed that these matters are provided for by existing acts of the Legislature and ordinances of the city. The fact that it is necessary to supplement the proviso by acts of the Legislature or ordinances of the city council in order to carry it into effect shows that the proviso in question is not self-executing. *Lanigan v. Gallup,* 17 N. Mex. 627, 131 Pac. 997.

It is well settled in this State that counties, cities and towns or municipal corporations are created by the Legislature and derive all their powers from it unless otherwise provided by the State Constitution. *Eagle v. Beard,* 33 Ark. 497, *Harrison v. Campbell,* 160 Ark. 88.

Having reached the conclusion that the proviso is not self-executing, it becomes necessary for me to pass upon the validity of the act of the Legislature of 1925 attempting to put proviso in question in operation. Section six provides that the act is immediately necessary for the

preservation of the public peace, health and safety and that the same shall take effect and be in force upon its passage.

The reason given that it is declared an emergency is that by reason of the heavy indebtedness hanging over many cities of the first class, they will be unable to procure proper facilities for the extinction of fires, proper police protection, and proper safeguards for the public health. This declaration on the part of the Legislature is a mere conclusion on its part. By an amendment to the Constitution of the State adopted on the 11th day of November, 1920, the limitation upon the legislative power in declaring an emergency to exist is made. The section specifically provides that it shall be necessary to state the facts which constitute the emergency allowing the Legislature to put an act into immediate effect. The mere fact that cities and towns are largely in debt contains no statement of the facts of an emergency.

I do not think that the legislative declaration of an emergency is final under the provision of the Constitution referred to and am of the opinion that its action is subject to judicial review. The authorities on both sides of the question are cited in a case note to *Payne* v. *Graham,* 118 Me. 251, 7 A. L. R. 516.

The public importance of the question prompts me to voice my dissent in writing.

SISSON v. STATE.

Opinion delivered May 4, 1925.

1. WITNESSES — IMPEACHMENT — TESTIMONY BEFORE GRAND JURY.— Testimony of a witness before the grand jury is admissible on the trial of a criminal case only to contradict his testimony at the trial.
2. CRIMINAL LAW—HARMLESS ERROR.—Any prejudice by reading to the jury the statements of a witness before the grand jury was removed by an instruction that such statements were not substantive evidence and could not be considered by the jury.

3. WITNESSES—IMPEACHMENT AS TO CHARACTER.—A witness may not be impeached by testimony as to his character, based on what the impeaching witness knew and what everybody said about him, as the test is what is his general reputation in the community where he lives, under Crawford & Moses' Dig. § 4187.

4. CRIMINAL LAW—CHANGE OF VENUE.—Where, on application for a change of venue in a liquor prosecution, a supporting affiant testified that he based his opinion that defendant could not obtain an impartial trial in the county upon the fact that defendant's case had been widely discussed all over the county by the candidate for sheriff, who was thereafter elected and who stated that he was "going to send defendant to hell or to the penitentiary," such statement being prejudicial and justifying affiant in believing that the minds of the inhabitants had been prejudiced, *held* that the court abused its discretion in denying a change of venue.

Appeal from Randolph Circuit Court; *John C. Ashley,* Judge; reversed.

Schoonover & Jackson and *Smith & Blackford,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

WOOD, J. B. F. Sisson was convicted in the Randolph Circuit Court of the crime of selling intoxicating liquor, and sentenced by judgment of the court to imprisonment in the State Penitentiary for a period of one year, from which judgment he appeals.

When the case was called for trial the appellant moved for a change of venue, setting up in his motion that the minds of the inhabitants of Randolph County were so prejudiced against him that he could not obtain a fair and impartial trial therein. The motion was supported by the affidavits of two persons. The prosecuting attorney resisted the motion, and had one of its supporting affiants called to testify. The witness was asked:

"Q. Do you know of any person in Richardson Township, the township in which Maynard is situated, who is so prejudiced against Mr. Sisson that he would not give him a fair and impartial trial? A. No sir. I will

say that I have not talked to all the people all over Randolph County, and I do not mean to say that he cannot get a fair and impartial trial in Randolph County, but I do mean to say that this matter has been discussed largely, and much of the discussion in regard to this case has been detrimental to the rights of Mr. Sisson. One of the things that prompted me to sign that affidavit was that I have been informed that the present sheriff, Mr. Perrin, and at that time chief deputy under Mr. Gullett, stated at various times, on the stump, when he was making his canvass for the office of sheriff, that he was going to send B. F. Sisson to hell or the penitentiary one, if he was elected sheriff. I was told by a number of different persons that Mr. Perrin stated repeatedly, and publicly, that he was going to send Mr. Sisson to hell or the penitentiary one. I knew that the sheriff's office had a vast influence, and, if it were I going to trial, I would not want to be tried in a county where such statements as that had gone out from the sheriff's office. And I have heard since then that Mr. Perrin threatened to do Mr. Sisson violence. Mr. Perrin approached me this morning about this, and I do not know whether he wanted to provoke a difficulty or not, but he stated something about this party not being able to get a fair and impartial trial in this county, and I told him that I had heard that he stated he would send him to hell or the penitentiary one. Q. Do you now say that he cannot get a fair and impartial trial in Randolph County? A. I would say this, that I would not want the present sheriff to summon the jury to try me, if it were I being tried under the same circumstances. If the present sheriff should summon the jury to try him, I do not believe then that he could. * * * Q. You are not acquainted with the sentiment of the people over the county generally regarding this case? A. I will not say that I am acquainted with the sentiment of the people in all parts of the county, but I will say it is my information that this case has been widely discussed in all townships in the

county. Q. You base your opinion that he could not obtain a fair and impartial trial in Randolph County upon the fact that the sheriff has taken an interest in this case? A. Yes sir, and partly what I have heard the sheriff state himself, and his speeches he made over the county in his campaign. Q. You did not hear those statements? A. No sir. * * * Q. And you have heard this discussed generally by people from all points in the county? A. I will say that it has been widely discussed. Q. Do you believe that, in view of the statements of Mr. Perrin publicly, on the stump, and because of his being sheriff of the county at this time, it would have a tendency to prejudice the people of the county against Mr. Sisson? A. I would feel that it was hazardous for me, and I would not want to be tried in the county, if he selected the jury."

Witness was then asked about the various townships in the county specifically, and named two townships in which he said he thought he had heard it talked, but could not name the parties that he had heard talking. He stated, "I know that this matter has been widely talked, but I could not name the parties that I have heard discuss it." The defendant thereupon offered the testimony of the other affiant to the effect that he was one of the defendant's lawyers; that he had heard the present sheriff, while he was a candidate for sheriff, make a public speech in every township in the county except two, and that on every stump in the county Mr. Perrin, who is now sheriff, told about Mr. Sisson having been indicted twice as an accessory to (witness) having been shot, and that he was then having Sisson indicted by the grand jury of Randolph County, then in session, seven or eight times for peddling whiskey, and that he was going to send Sisson to the penitentiary before he quit, and that the people of the entire county of the class from which juries are made attended these public speakings and heard these statements.

The trial court refused to hear the offered testimony, and stated that the other affiant had shown that he did not know the condition of the minds of the people of the county with regard to the case, and that, inasmuch as the law required the motion for change of venue to be supported by two witnesses, the offered testimony would only show that the motion was supported by the testimony of one affiant. The appellant excepted to the ruling of the court in excluding the offered testimony. The court thereupon overruled the motion for a change of venue.

One witness, Bob Lynch, testified to the effect that he and one William Junkersfield went to the house of Sisson to get some liquor. It was dark when they got there. Junkersfield was talking to some one that witness took to be Sisson. When Junkersfield came back to the car, they drove up the road about half a mile and stopped, and Junkersfield asked the witness if he wanted a drink. He had what they call "white mule" whiskey. Witness did not see Junkersfield get any whiskey from the appellant.

Junkersfield testified that he and Bob Lynch went to Ben Sisson's house, and stopped; that a fellow out in the yard asked witness what he wanted, and witness replied that he wanted a half gallon of whiskey, and the man said "All right," and witness gave him $6. Witness didn't know whether the man was Ben Sisson or not—could not say. The record shows that the following then occurred:

"Q. You swore before the grand jury? A. I said I bought it at Mr. Sisson's house. The witness was shown his statement before the grand jury and was asked: Is that your signature? and answered, Yes sir. Q. I will ask you, if you did not state— By the court: You need not answer that question. Let the witness look at his statement. The statement was then delivered to witness. By the prosecuting attorney: Look at those last few lines. Defendant objects. The court

then remarked: Let the witness read his whole statement, if he wishes to. The prosecuting attorney then asked the witness: Did you not testify before the grand jury that this was the man that you bought that liquor from? By the court: Don't answer that question. Q. Was it not a man that you have become acquainted with since that time, as Ben Sisson, that you bought the liquor from? A. I could not say. It was dark, and the man that I bought the whiskey from was bareheaded, in the yard, carrying in wood. I do not know who he was. Q. You are unwilling to say at this time that this is the man? (The defendant objected to the question, which was by the court overruled, to which exceptions were saved). A. I could not say. Q. You are unwilling at this time to say that the man that you have since become acquainted with as Ben Sisson was the man you bought the liquor from? A. I could not say."

The prosecuting attorney then asked the witness several times if he did not make the statement before the grand jury that he was not acquainted with the appellant at the time he bought the liquor, but had met him a number of times since, and was sure that it was Sisson that he bought the liquor from. The witness, over the objection of appellant, was permitted to answer that he told the grand jury that it must have been Sisson, as it was at his house. The witness was handed his testimony before the grand jury, and was asked if he signed that statement, and he answered that he did. Witness was finally asked by the court the following question:

"Q. Did you make that statement before the grand jury? A. Yes sir. Q. Is that true? A. Yes sir."

Counsel for appellant moved to exclude all the testimony of the witness before the grand jury and his signed statement as incompetent. The court ruled that whatever statement the witness made before the grand jury was not evidence before the jury; that his statement made before the grand jury should not be considered by them;

that the jury must take his evidence from his statements on the witness stand at that time.

A witness by the name of Clarence Ragan testified for the State that he purchased whiskey from the appellant in the fall of 1923, in Randolph County, Arkansas, and paid him $10 for same. Several witnesses were called for appellant, who testified to the effect that the reputation of Ragan was bad. One of these witnesses, John Clark, after testifying that he was acquainted with the general reputation of Ragan for truth and morality and that such reputation was bad, was asked this question: "Based upon what you know yourself and what all the people say about him, would you believe him on oath?" The State objected to the question, and the objection was sustained. The defendant did not except to the ruling of the court.

The appellant contends that the judgment should be reversed (1), because the court erred in refusing to grant his motion for a change of venue; (2), that the court allowed incompetent and prejudicial evidence to be forced from the prosecuting witness in the presence and hearing of the jury; (3), that the witness John Clark should have been permitted to answer the question asked him.

1. One of the supporting affiants to appellant's motion for a change of venue testified that his statement to the effect that the minds of the inhabitants of Randolph County were so prejudiced against the appellant that a fair and impartial trial could not be had therein was grounded upon his belief from what he had heard that one Perrin had said at various times on the stump when he was canvassing the county of Randolph as a candidate for the office of sheriff. The affiant had heard that Perrin stated repeatedly and publicly that he "was going to send Mr. Sisson to hell or the penitentiary one." The affiant concluded from this that the minds of the inhabitants of Randolph County would be prejudiced against the appellant, and that appellant could not obtain

a fair and impartial trial in that county if Perrin summoned the jury. But it was shown that, after Perrin was elected sheriff, he was, on application of the appellant, disqualified, and did not summon the jury by which appellant was tried. The testimony of this supporting affiant was to the effect that he was not acquainted with the sentiment of the people in all parts of Randolph County, but his information was that appellant's case had been widely discussed, and that much of the discussion had been detrimental to the rights of the appellant. Witness did not mean to say that appellant could not get a fair and impartial trial in Randolph County, but he knew that the sheriff's office had a vast influence, and he would not want to be tried in the county where such statements as that had gone out from the sheriff's office. The witness didn't testify that he heard any one from any part of the county say that he had been prejudiced against the appellant by reason of what Perrin had said in his speeches while canvassing the county. The testimony of the affiant, taken as a whole, therefore, was to the effect that, in his opinion, from what he had been informed by others that Perrin had said in his campaign speeches concerning the appellant, appellant could not obtain an impartial trial in Randolph County. The testimony of the affiant does not show that he had any personal and direct knowledge of the sentiment of the people of Randolph County towards the appellant from having heard any one express a sentiment that was prejudicial or derogatory to appellant. The affiant himself did not testify that he had heard Perrin or any one else express a sentiment that was prejudicial or derogatory to the appellant. The court therefore did not abuse its discretion in overruling the motion for a change of venue.

In *Dewine* v. *State,* 120 Ark. 302-309, we said: "Upon the whole we cannot say, from a perusal of the testimony, that the court erred in finding that the supporting witnesses to the petition for a change of venue were lacking in sufficient knowledge, and rested their

conclusions upon erroneous premises to the extent that they would not be deemed credible persons within the meaning of the statute. In passing upon a question of this kind, much is left to the fair discretion and judgment of the trial court, and each case must be determined by its own particular facts." See also *Spear* v. *State,* 130 Ark. 457.

2. We have often ruled "that it is not proper to admit as substantive testimony at the trial evidence heard before the grand jury. In other words, one cannot be convicted upon evidence heard only by the grand jury, such evidence being admissible for the purpose only of contradicting the conflicting testimony given by the witnesses at the trial." *Minor* v. *State,* 162 Ark. 136-139, and authorities there cited. See also *Lind* v. *State,* 137 Ark. 92-106. But the instruction of the court to the jury in the case at bar to the effect that, whatever statement the witness made before the grand jury was not evidence before them, and could not be considered by them, was sufficient to remove any prejudice that might have otherwise been created in the minds of the jury by the statements read in their presence from the testimony of the witness taken before the grand jury.

3. The court did not err in refusing to allow the witness Clark to testify concerning the character of the witness Ragan, based upon what Clark knew himself and upon what all the people said about him. Such is not the proper method for impeaching the testimony of a witness. The standard is the general reputation of the witness sought to be impeached in the community where he lives. Section 4187, C. & M. Digest; *Dean* v. *State,* 130 Ark. 322-325; *Cole* v. *State,* 59 Ark. 50.

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

WOOD, J., (on rehearing): We have concluded upon reconsideration of the testimony that the trial court erred in holding that the affiant, whose testimony is set

forth in the original opinion, is not a credible person. The testimony of this supporting witness showed that he based his opinion that the appellant could not obtain a fair and impartial trial in Randolph County upon the fact that he had been informed that the appellant's case —the charge of selling intoxicating liquors—had been widely discussed all over the county by one Perrin, who was then a candidate for sheriff, to the effect that he was "going to send Mr. Sisson to hell or the penitentiary one."

The testimony is undisputed that Perrin had made the above announcement generally and all over the county. Perrin was elected sheriff. The statement was certainly extremely prejudicial to the appellant, and was calculated to arouse in the minds of the inhabitants of Randolph County who heard the same a prejudice against Sisson. Even though the affiant did not himself hear Perrin make such a statement and did not hear any one else express a sentiment that was prejudicial or derogatory to the appellant, nevertheless the fact remains that such a derogatory statement to appellant's cause by one who was aspiring to the sheriff's office in the county and who was thereafter elected to that office was calculated, as we have stated, to create a prejudice in the minds of the voters against the appellant; and it furnished a foundation which fully justified the affiant in his belief that the minds of the inhabitants of the county had been prejudiced against the appellant.

The trial court erred and abused its discretion in holding that the affiant, Judge Meeks, was not a credible person in the meaning of the change of venue law. While much is left to the fair discretion and judgment of the trial court in determining the credibility of supporting witnesses to a petition for a change of venue, nevertheless the court may abuse its discretion in passing upon particular facts and we are convinced that such is the case here. See *Mills* v. *State*, 1005. The motion for rehearing is therefore granted, and the judgment,

for the error in holding that one of the affiants to the affidavit supporting the petition for a change of venue was not a credible person, is reversed, and the cause is remanded for a new trial.

McCULLOCH, C. J., dissents.

LOGI v. STATE.

Opinion delivered May 4, 1925.

CRIMINAL LAW—IMPROPER ARGUMENT.—In a prosecution for manufacturing liquor, a statement of the prosecuting attorney that accused was a foreigner and had lived in the county 22 years without becoming naturalized was prejudicial error and was not cured by an instruction that it was not to be considered as evidence of guilt, but was permitted in reply to defendant's attorney's reference to his being a foreigner, where it does not appear that defendant's attorney made any such reference.

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

Cravens & Cravens, for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

WOOD, J. Tony Logi was convicted in the circuit court of the Greenwood District of Sebastian County of the crime of manufacturing intoxicating liquor and sentenced by judgment of the court to imprisonment in the State Penitentiary for a period of one year, from which is this appeal.

One of the grounds of the motion for a new trial is that the court erred in permitting the prosecuting attorney, over the objections of the defendant, to argue that the defendant was a foreigner, and had lived in this country twenty-two years and had never seen fit to become a citizen of this country. The bill of exceptions recites as follows: "The prosecuting attorney, in his argument to the jury, stated that the defendant had lived here twenty-two years and had never been naturalized."

The defendant objected to this, and the court stated: "That cannot be considered as showing his guilt, but the fact that the attorney for the defendant asked about his being a foreigner brought the question out in his argument, the State's attorney will be permitted to make the argument in reply to the argument of the defendant's attorney. That cannot be considered as showing the guilt or innocence of the defendant, and we instruct the jury not to consider it."

The statement of the prosecuting attorney in argument was obviously for the purpose of prejudicing the minds of the jury against the appellant because of the fact that he had not been naturalized. There is nothing in the record to justify the district attorney in his argument in alluding to the fact that the appellant was not an American citizen. The only purpose of such argument could have been to take into consideration that fact in determining whether or not the appellant was guilty of the crime charged. There is nothing in the bill of exceptions to show that the attorney for the appellant, in his examination of the appellant on the witness stand, had asked the appellant "about his being a foreigner." Therefore there is nothing in the record to have justified the court in the statement that the prosecuting attorney was allowed to make the statement in his argument to the jury because of the fact that the attorney for the defendant had asked appellant about his being a foreigner. Nor is there anything in the record to show that the defendant's attorney in his argument before the jury had referred to the fact that appellant was a foreigner.

The court should have removed the prejudicial argument of the prosecuting attorney that the appellant had lived in this country twenty-two years and had never been naturalized by excluding such argument, at the request of appellant's counsel, by a clear and emphatic statement to the jury to the effect that the argument was improper, that it was excluded, and that they should not consider it for any purpose. Instead of doing this, the

charge of the court to the jury concerning the improper argument of the district attorney was tantamount to saying the argument of the State's attorney is proper, and he will be permitted to make it, but then you cannot consider it in determining the guilt or innocence of the defendant. This halting and ambiguous endeavor of the trial court to remove an argument that is wholly improper and highly prejudicial to the rights of the accused cannot be sanctioned. The improper argument was not so flagrant, perhaps, that it could not have been removed by an unmistakable announcement by the trial court that the argument was excluded from the jury and an emphatic direction to them not to consider it. But such was not the case here.

We find no other reversible error in the record, but, for the error above indicated, the judgment is reversed and the cause remanded for a new trial.

AMERICAN INSURANCE COMPANY v. MORDIC.

Opinion delivered May 4, 1925.

1. INSURANCE—FORFEITURE—WAIVER.—Where an insurance agent knew of a mortgage on the insured property at the time he issued a policy thereon, a provision of the policy avoiding it if the insured property was incumbered was waived.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A finding of the jury upon conflicting evidence is conclusive on appeal.
3. TRIAL—ARGUMENT OF COUNSEL.—While an argument of plaintiff's counsel, in an action on a fire policy, that defendant's agent who testified by deposition was in another State trying to defeat some other insurance policy was improper, the prejudice was removed where the court told the jury that it was improper.

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

STATEMENT OF FACTS.

J. A. Mordic sued the American Insurance Co. to recover the sum of $1,000 alleged to be due him upon a fire insurance policy.

J. A. Mordic was a witness for himself. According to his testimony, he made a written application for a policy of fire insurance with the defendant. The application shows that he applied for a fire insurance policy on his dwelling-house situated on his farm about eight miles from Brinkley, in Monroe County, Arkansas. One of the questions propounded to him was whether or not there was any incumbrance on the real estate, and the application shows his answer to be "No." Mordic told the agent that there was a mortgage on the farm for $7,250 in favor of Bondi Bros. The insurance agent filled in the answers to the questions in the application, and Mordic supposed that he had written the answers as he had given them. The application was turned over to the insurance agent after it was signed by Mordic, and he did not know the falsity of the answer as written down by the agent. The policy was duly issued on the property on the 23rd day of July, 1922, in the sum of $1,000. Subsequently, while the policy was in force, his house was destroyed by fire, and Mordic made proper proof of loss to the company as provided in the policy.

J. V. McDonald, the agent of the American Insurance Company, who took the application for the policy sued on, gave his deposition for the defendant. According to his testimony, the application was read over to J. A. Mordic carefully, and was signed by him. Every question was read to him, and his answer was made and written on the application in his presence after he fully understood the question. The witness stated further that, if he had known that there was a mortgage on the house, he would not have written the policy without making provision for the payment of the face of the policy to the holder of the mortgage in the event of fire.

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

J. A. Watkins, for appellant.

Bogle & Sharp, for appellee.

HART, J., (after stating the facts). It is sought to reverse the judgment on the ground that J. A. Mordic made a false answer to the question as to whether or not there was a mortgage on the property which was insured. The application shows and the agent of the company testified that Mordic answered this question "No." On the other hand, Mordic testified that he told the agent that there was a mortgage on the property for $7,250, and that he did not know that the agent had written down a false answer to the question.

In the case of *Fidelity Phenix Fire Ins. Co.* v. *Roth,* 164 Ark. 608, it was held that, where an insurance company's agent knew of mortgages on rice at the time of the issuance of a fire insurance policy thereon, a provision in the policy avoiding it if the insured property was incumbered was waived.

The issue as to the truth or falsity of the answer of the insured to the question as to whether or not there was a mortgage on the property at the time he made the application for insurance was submitted to the jury under the principles of law announced in the case cited above. The jury having found this issue in favor of the plaintiff, its finding is conclusive on appeal.

The next assignment of error is that the court erred in allowing one of the attorneys for the plaintiff, in the course of his argument, to use the following language: "This man McDonald, they say he isn't here and couldn't get here. I expect he is down in Alabama trying to defeat some other insurance policy." The deposition of J. V. McDonald had been read to the jury. Objection was made to the argument of the attorney for the plaintiff, and the court stated to the jury that the argument was not competent. The statement of the attorney for the plaintiff was of a matter of fact which was not in the record, and, as the court told the jury, was an improper argument. We think, however, that any

prejudice that might have resulted to the defendant was cured by the admonition of the court. The jury must be credited with common-sense, and it cannot be thought, when the attending circumstances and the nature and amount involved in the case are considered, that any prejudice resulted from the statement of the attorney which was not cured by the court telling the jury that it was incompetent. *Central Coal & Coke Co.* v. *Orwig,* 150 Ark. 635, and *Arkansas Short Leaf Lbr. Co.* v. *Wilkerson,* 154 Ark. 455.

No other assignment of error is argued for a reversal of the judgment, and it will therefore be affirmed.

FT. SMITH RIM & BOW COMPANY *v.* BAKER.

Opinion delivered May 4, 1925.

1. MASTER AND SERVANT—NEGLIGENCE—Where the testimony of an employee, suing for personal injuries received while operating a ripsaw, showed that he had been properly instructed how to run a ripsaw, and according to his own testimony was not injured by reason of his inexperience, it was error to submit the question of the employer's negligence in permitting an inexperienced employee to operate the ripsaw.
2. MASTER AND SERVANT—PROXIMATE CAUSE OF INJURY.—Where an employee, working at a ripsaw, had stopped the feed chain preparatory to fixing it, and, in going back to shut off the ripsaw, slipped on a piece of tailing and in falling cut his hand on the saw, the employer's alleged negligence in allowing the feed chain to become worn was too remote to be proximate cause of the employee's injury, and submission of such was error.
3. MASTER AND SERVANT—PERSONAL INJURY OF SERVANT—IMPROPER ISSUE.—In an action for injuries to a ripsaw operator, where the only negligence the evidence tended to prove was that of the offbearer in leaving tailings where plaintiff slipped, causing his hand to come in contact with the saw as he fell, it was error to submit the employer's negligence in furnishing an inexperienced assistant.
4. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—SUBMISSION OF ISSUE.—In an action for injuries to a ripsaw operator, alleged to have been caused by slipping on tailing which caused his hand to come in contact with a saw, evidence *held* to require sub-

mission of the question whether he was injured while voluntarily placing his hand near the saw to adjust the machinery.

Appeal from Sebastain Circuit Court, Ft. Smith District; *John E. Tatum,* Judge; reversed.

STATEMENT OF FACTS.

John Baker, for himself and as next friend of his son, Ed Baker, a minor, instituted this action against the Fort Smith Rim & Bow Co., a corporation, to recover damages for personal injuries sustained by Ed Baker while running a ripsaw for the defendant.

Ed Baker was a witness for himself, and became nineteen years of age in February prior to his injury on the 11th day of September, 1922. Ed Baker had been operating the ripsaw about an hour and a half at the time he was injured. He noticed that the feed-chain needed some adjustment, and he shut it off. The saw was still running, and he started to go back to a lever about six or eight feet away for the purpose of stopping the saw from running. As he started to walk around to the lever to shut down the saw, he stumbled on some tailings lying on the floor, and this caused him to fall over backwards. In falling one of his hands came in contact with the revolving saw, and cut off two of his fingers and injured two others.

It was the duty of the off-bearer to carry away the swingletree material that Baker was sawing, and also to pile the tailings at a certain place, so that they would not interfere with the person operating the saw. When the tailings would accumulate to a certain amount, the person running the saw would stop it and assist the off-bearer in loading the tailings on a truck so that they could be carried away. The feed-chain attached to the saw was worn, and would hang once in a while. This made it necessary for the plaintiff to stop the machinery and fix the feed-chain. The feed-chain could be stopped without interfering with the running of the saw. It was then necessary to go back six or eight feet to a lever so that he could stop the saw. He did not notice that some

of the tailings had been negligently thrown aside so that they were in the path leading to the lever. The plaintiff, while walking back to the lever to stop the saw, accidentally tripped or stumbled on a piece of the tailings negligently left in his path, and this caused him to fall backwards, and, in trying to catch, his hand came in contact with the running saw. The plaintiff had worked at the saw in question as off-bearer for two months prior to the time he sustained his injury, and had been instructed about running the ripsaw.

The defendant introduced evidence tending to show that the plaintiff was injured by putting his hand in the machinery for some purpose, and, by his own negligence, allowed it to come in contact with the running saw. Other evidence will be stated or referred to in the opinion.

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

T. D. Wynne and *Pryor & Miles,* for appellant.

Roy Gean and *J. A. Gallaher,* for appellee.

HART, J., (after stating the facts). It is first insisted that the court erred in submitting to the jury the question of the negligence of the defendant in permitting Ed Baker, a youth without experience, to operate the ripsaw. In this contention we think counsel are correct. According to the testimony of Ed Baker himself, he was about nineteen and a half years of age at the time he was injured. His own testimony shows him to be a young man of average intelligence, and physically fit to operate a ripsaw. He had been working as off-bearer for the person operating the ripsaw in question for about two months before he was injured. He asked the operator to teach him how to run the saw. The operator reported that the "boss" had consented for him to teach Baker how to run the saw. The sawyer then showed Baker how to operate the saw, and had allowed him to operate it a few minutes each day for about ten days prior to the time he was hurt. The plaintiff was injured by stepping on the tailings, which had been cut off from

the material which he was sawing and negligently left in a place where he would walk in the performance of his duties. We therefore reach the conclusion that there was no evidence to support the allegation that the plaintiff was injured by reason of his inexperience, and that this question should not have been submitted to the jury.

Baker denied that his hand was injured because he thrust it into a place on the table near the revolving ripsaw and thereby injured himself. His testimony shows that he knew and appreciated fully the danger from allowing his finger to come in contact with the revolving saw. He worked as off-bearer at the saw in question for about two months before he was injured, and, during the last ten days of his service, he was instructed about how to operate the ripsaw. With Baker's knowledge and experience in the use of machinery and the instruction given him, he must be regarded as having acquired a knowledge of the ordinary dangers accompanying its use, and, as we have already seen, his youth and inexperience had nothing whatever to do with causing the injury.

The next assignment of error is that the court erred in submitting to the jury the negligence of the defendant in permitting the chain attached to the saw to become old, loose, and worn. It is well settled that the negligence complained of in cases of this sort must be the proximate cause of the injury. It is true that Baker testified that the feed-chain or belt had become loose and worn and the chain would stick once in a while, and that he would have to stop the machine and fix it. On the occasion in question he had already stopped the feed-chain, preparing to fix it, and this left the saw only running. He slipped on a piece of the tailings as he went back to shut off the saw. The alleged negligence in allowing the feed-chain or belt to become worn and defective was too remote to be treated as the proximate cause of Baker's injury. Therefore the court erred in submitting that question to the jury.

It is next insisted that the court erred in submitting to the jury the negligence of the defendant in furnishing to Baker an inexperienced employee to assist him in the operation of the saw. This contention is well taken. There is no evidence in the record to show that the off-bearer was inexperienced or that the defendant was negligent in employing him. The only cause of action against the defendant was the alleged negligence of the off-bearer in leaving the tailings at a place where Baker would have to walk in shutting off the saw and where he would not anticipate that any of the tailings or a piece of plank would be thrown. According to Baker's own testimony, he was injured by stepping on a piece of the tailings and slipping backwards so that his hand came in contact with the saw as he fell. Therefore the court should not have submitted any question of negligence to the jury except the negligence of the off-bearer in allowing the tailings to fall at a place where Baker would walk in shutting off the saw and where he would not anticipate that they would be placed.

Counsel for the defendant also insists that the court erred in not submitting to the jury the question of whether or not Baker was injured while voluntarily placing his hand near the saw for the purpose of adjusting some part of the machinery.

It seems that this instruction was refused on the ground that there was no evidence upon which to base it. We think the court erred in not submitting this question to the jury. J. R. Boydston, another employee of the defendant, was about three steps from where Baker was when he got injured. We quote from the testimony of this witness the following:

"A. He never shut it down as I noticed. The first I noticed he came around the side and stepped up, and there was a few pieces that come off the machine, the best I remember, and was fixing something like he was going to put his hand in this feed belt on top, and I looked down, and when I looked back I saw him sling his hand like that. Q. Do you know how they throw

these offals or culls off? A. Yes sir. Q. You saw him go around the end of his table? A. Come around from the front here of his machine around to the side. Q. When you saw him sling his hand, what did he do next? A. There was another party just a little ways off from him, and he started towards him, and then turned around, and I don't know what he said, and he come back, and this other boy that was feeding the machine I was at ran to him and caught hold of him and took him to the office."

Another witness for the defendant testified that he was running a planer five or six feet from the ripsaw at the time Baker was injured. According to his testimony, Baker was standing where they ordinarily threw the scraps or tailings down on the floor. He was standing upon the scraps or tailings that came from the saw. The witness looked over and saw Baker sling his hand. Baker was standing by the side of the table, and turned and slung his hand.

Another witness, who was about ten feet away, testified that he heard the whanging of the saw, and looked around, and Baker was up at the machine with a cut hand. Baker was right opposite the machine on the side of the saw; that tailings or scraps were at the side of the saw-table, and Baker was standing on them at the time he saw him.

From this evidence the jury might have inferred that Baker had thrust his hand in a place near the revolving saw for the purpose of adjusting some part of the machinery, and allowed it to come in contact with the revolving saw. Therefore the court erred in not submitting this question to the jury.

Other assignments of error are urged for a reversal of the judgment, but they will not likely occur upon a retrial of the case.

For the errors in instructing the jury as indicated in the opinion the judgment will be reversed, and the cause remanded for a new trial.

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

Opinion delivered May 4, 1925.

1. CARRIERS—FAILURE TO FURNISH CAR—STRIKE.—Where plaintiff made a requisition for a car on September 30 to be furnished October 6, for the shipment of hogs, which was not furnished until November 11, due to a shortage of cars caused by a strike which lasted from July 1 to November 15, an instruction that the carrier would not be relieved of liability for failure to furnish the car on account of the strike, unless it notified plaintiff of its inability to furnish the car at the time he made requisition, was erroneous.
2. CARRIERS—LIMITATION OF LIABILITY.—A carrier may by express contract relieve itself from its common-law liability, except as to the consequences of its own negligence.
3. CARRIERS—DUTY TO SHIPPERS.—It is the duty of a carrier to treat all shippers alike, and the fact that a conductor, after being paid therefor, procured a car for another shipper without the carrier's knowledge or approval is not proof that the carrier was able to furnish a car to the plaintiff on the date requested by him.
4. CARRIERS—LIMITATION OF LIABILITY—CONSTRUCTION OF CLAUSE.—A clause in a shipping contract exempting a carrier from liability on account of strikes refers to existing as well as future strikes.
5. CARRIERS—LIMITATION OF LIABILITY.—While a carrier may contract against liability for loss or damage to live stock on account of strikes, it cannot contract against its own negligence, and, though a strike may be in progress, it is not relieved of liability by merely showing a strike and the consequent delay due in part to it, if by the exercise of ordinary care it might have moved the car under schedule in force during the strike.

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

STATEMENT OF FACTS.

Manuel Watts sued the St. Louis-San Francisco Railway Company to recover damages for the negligent delay in failing to furnish him a car in which to ship 106 head of hogs from Durham, Arkansas, to the National Stock Yards at St. Louis, Missouri, and also for the negligent delay in transporting said hogs.

Manuel Watts was a witness for himself. According to his testimony, he lives at Durham, Washington County, Arkansas, on a branch line of the St. Louis-San

Francisco Railway Company. On September 30, 1922, he filed a written application with the station agent at Durham for a car to be furnished him on October 6, 1922, in which to ship 106 head of hogs to the National Stock Yards at St. Louis, Missouri. The car was not furnished until the 11th day of November, 1922. The hogs were loaded in the car at about three o'clock P. M., and the car was moved out of the station some time during the same afternoon. Watts went on the train with the car, and it arrived at the National Stock Yards at St. Louis at four o'clock P. M., on November 14, 1922. The market was closed on that day, and the hogs were held over until the next morning to be sold. The train was delayed at Springfield, Missouri, about twenty-six hours, and the hogs were unloaded in a pen. Seven of the hogs were dead at the time the car of hogs was unloaded at Springfield. Evidence was also introduced by Watts tending to show the loss sustained by him on account of the fall in the market price and the shrinkage in the weight of the hogs during the delay in transit.

According to the evidence for the defendant, in July, 1922, the Railroad Labor Board issued an order for the purpose of settling a dispute between the railroad and the employees' shop crafts. This caused a strike on all the railroads of the United States, and 480,000 men left the service of the railroad companies. Sixty or seventy per cent. of the strikers were skilled mechanics. They had had long years of training in rebuilding and overhauling locomotives and passenger and freight cars. The Interstate Commerce Commission had promulgated certain rules and regulations with regard to the condition of freight cars, passenger coaches and engines before they could be placed in service. These rules and regulations were not suspended during the strike. The strike continued in force until a period of time much later than that involved in this lawsuit. On account of the strike the defendant was not able to furnish cars to shippers as it had done before the strike commenced. On account

of the strike it was not able to get its cars repaired, and, on this account, was not able to furnish the plaintiff a car when first demanded of it; but did furnish it as soon as it could, which was on the 11th day of November, 1922.

The defendant also introduced evidence tending to show that the delay in transit after it received the hogs for shipment was due to the strike. On account of the strike the defendant inserted a clause in all its shipping contracts as follows:

"Section 1. Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of any or all of the live stock herein described shall be liable for any loss thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness or natural propensity of the animal, or the act or default of the shipper or owner or the agent of either, or by riots, strikes, stoppage of labor, or threatened violence."

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

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

Walker & Walker and *H. L. Pearson,* for appellee.

HART, J., (after stating the facts). The court in effect instructed the jury that the defendant would not be relieved of liability for failing to furnish the plaintiff a car for the shipment of his hogs on account of the strike, unless it notified the plaintiff of its inability to furnish the car on this account at the time he made the requisition for the car.

The undisputed evidence shows that the strike commenced on July 1, 1922, and continued in force on all the railroads of the United States until after the 15th day of November, 1922, which was the day the car of hogs in question was delivered to the consignee. The plaintiff made a requisition for the car on September 30, 1922, to be furnished on October 6, 1922. The car was not

furnished until November 11, 1922. The failure was due to the shortage of cars caused by the strike. Under these facts the instruction of the court was erroneous.

This court has held that, in an action against an initial carrier for a loss to an interstate shipment of hogs, it was error to limit the defendant's contract right to exemption from liability by reason of strikes to a finding that the delay was occasioned solely by a strike of the employees of a terminal carrier, as a strike on any of the connecting carriers would, under the contract, release the initial carrier from liability, except in cases of negligence with regard to averting the loss on its part or on the part of any of its connecting carriers. *Jonesboro, L. S. & E. R. Co.* v. *Maddy,* 157 Ark. 484.

In a later case it was held that, where a carrier is prevented from handling freight in a prompt and expeditious manner by unforeseen conditions, such as a strike, over which it has no control and over which, in the nature of things, it could have no control, it will be excused from receiving freight for shipment until such freight can, in the regular and usual course of business, be moved. *Gage* v. *Arkansas Central Rd. Co.,* 160 Ark. 402.

It results from the principles of law decided in these two cases that the carrier may, by express contract, relieve itself from its common-law liability except as to the consequences of its own negligence. In other words, the plaintiff shipped his hogs under an express contract which relieved the defendant from liability in consequence of delays in transportation caused by strikes, and, under the undisputed facts in this case, the delay in furnishing the car was due to the strike and was occasioned without any fault or negligence on the part of the defendant. But it is insisted that the undisputed evidence does not show that the failure to furnish the car at the time requested was not the result of the defendant's fault or want of care. In this respect counsel for the plaintiff rely upon the testimony of a witness to the effect that he had paid a conductor $5 to get him a car for the

shipment of live stock, and that the conductor had done so. It was the duty of the railroad company to treat all shippers alike, and the fact that one of its employees, without its knowledge or approval, had violated this duty, would not be proof that the carrier was able to furnish a car to the plaintiff on the date requested by him.

In this connection it may be stated that the clause in the contract of shipment exempting the carrier from liability on account of strikes, stoppage of labor, or threatened violence carries on its face notice to the shipper that it would not be liable for delays in furnishing cars caused by the strike. It will be remembered that the requisition for the car was made on the 30th day of September, 1922, and that a general strike had been in progress since the first day of the previous July. Under these circumstances it cannot be said, as suggested by counsel for the plaintiff, that the carrier was contracting against loss on account of delays in furnishing cars which might be suffered on account of strikes which should occur in the future. It is manifest that the exemption clause was inserted in the contract of shipment on account of the general strike which was then in force and which had been in effect for the previous three months. Hence, for the error in instructing the jury as indicated above, the judgment must be reversed.

It is also insisted by counsel for the defendant that the undisputed evidence shows that the delay in the transportation of the hogs after they have been received by the defendant and loaded in the car was occasioned by the strike without any fault or negligence on its part.

While the railroad company may contract against liability for loss or damage to live stock while in transit on account of strikes, it cannot contract against its own negligence, and, although a strike may be in progress, the railroad company is not relieved of liability by merely showing a strike and the consequent delay due, in part, to it, if the facts are sufficient to show that the railroad company, by the exercise of ordinary care,

might have moved the car of hogs from the place of shipment to the place of destination under the schedule which it had in force during the period of the strike.

For the error in instructing the jury as indicated the judgment will be reversed, and the cause will be remanded for a new trial.

BIGGS v. STOUT.

Opinion delivered May 4, 1925.

1. LEVEES—MODE OF SELECTING DIRECTORS.—The office of levee district directors is within the control of the Legislature, which may appoint the directors, as was done by Acts 1893, p. 24, or prescribe any other method for their selection.
2. LEVEES—ELECTION OF DIRECTORS.—By the express terms of Sp. Acts 1919 p. 200, §2, an election of a director of the St. Francis Levee District is null and void where notice of the election was not published by the election commissioners.

Appeal from St. Francis Circuit Court; *E. D. Robertson,* Judge; affirmed.

Norfleet & Norfleet, for appellant.

C. W. Norton and *Mann & McCulloch,* for appellee.

SMITH, J. Appellant filed a petition in the circuit court of St. Francis County against appellees, who are the election commissioners for that county, praying that a writ of mandamus be awarded directing appellees to certify appellant's election as a member of the board of directors of the St. Francis Levee District.

Appellant alleged the following facts: That he is a citizen of St. Francis County, and possesses the qualifications required by law to be a director of the St. Francis Levee District. That in that part of said county lying wihin St. Francis Levee District, hereinafter referred to as the district, there are as many as a hundred persons who possess the qualifications required by law to vote at an election for levee director, and within that part of St. Francis County lying within said district there are seven

polling places, which were named, where it is customary to hold elections for State and county officers, but it had been the custom, in electing levee directors, to hold an election at not more than two of such places, and frequently in only one. That only a small part of the qualified electors have ever voted at the election of a levee director, and Joseph Mewbern, whose term of office had expired and to whose place the petitioner was elected, was elected at an election held at only one of such usual voting places, and at such election received only eleven votes, which were all the votes cast at the election at which the said Mewbern was elected.

It was further alleged that November 13, 1923, was the day fixed by law for electing a levee director for St. Francis County, but the election commissioners failed to issue and publish the notice of such election required by law, and did not appoint judges and clerks to hold such election, but wholly ignored and disregarded their duty to call such election and to fix the places for holding same. That, notwithstanding this failure, certain citizens of St. Francis County, who were qualified as electors to vote for a levee director for that county, assembled at Heth, one of the usual voting places in said district, and elected three of their number as judges and two as clerks, and said judges held an election, at which eleven qualified votes were polled, all of which were cast for appellant, and no votes were cast for any other person, and no election was held at any other voting place in said district in St. Francis County. The votes cast for appellant at such election were duly certified by the election officers as required by the statute authorizing such election, but appellees, constituting the board of election commissioners, have refused to certify the result thereof or to issue to appellant a certificate showing his election.

There was a prayer that appellees be required to certify the returns of the election and to issue to appellant a proper certificate showing his election as a director of the said district.

A demurrer to this petition was filed and sustained and the cause dismissed, and this appeal questions the sufficiency of the complaint to state a cause of action entitling appellant to the relief prayed.

The St. Francis Levee District was created by a special act passed at the 1893 session of the General Assembly. Act 19, Acts 1893, p. 24. The act creating the district named three directors for each county lying wholly or in part in said district, whose terms of office were fixed at one, two and three years, respectively, and it was provided that, upon the expiration of these respective terms of office, successors to the directors whose terms had expired should be appointed by the Governor, and such director thereafter served for three years, so that the terms of office of one-third of the directors expired each year, and vacancies were filled on the expiration of the terms of office by the Governor's appointment.

The directors of the district were thus appointed from the time of the creation of the district in 1893 until provision was made by act 117 of the Acts of 1917 for the election of the directors. Acts 1917, vol. 1, p. 623.

This act of 1917 prescribed the qualifications of directors and of electors to vote for directors, and the time for holding the election, and imposed on the board of election commissioners for each of the counties lying wholly or in part in said district the duty of appointing judges to hold the election and that of canvassing and certifying the returns. The various provisions of the act need not be set out, and it will suffice to say that the act provided a method whereby the directors should thereafter be elected.

This act was construed in the case of *McDaniel* v. *Ashworth,* 137 Ark. 280, where it was held that the act had deprived the Governor of the power to make appointments, and that the existing directors held office until their successors should be elected and qualified, and that, by the terms of the act, three directors were to be elected

in each county in 1918 who should hold office, for one, two and three years, respectively, and that the next election should be held in 1920, when two directors were to be elected, one to fill out the unexpired term beginning in 1919 and the other for a full term of three years, and that thereafter one director should be elected each year for a full term of three years.

The act of 1917, *supra,* was amended by act 116 of the Acts of 1919. Special Acts 1919, page 200. By this amendatory act the time for holding the election of directors was fixed on the second Tuesday of November of each year. By § 2 of the amendatory act of 1919 it was made the duty of the election commissioners to publish notice of the election in some newspaper in each of the counties for not more than twenty nor less than ten days before the date of the election, but, after so providing, it was further provided: "That should any board of election commissioners of any county within said levee district fail, refuse or neglect to give notice of said election as herein provided for, each member of said board of election commissioners for said county shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than twenty-five dollars nor more than two hundred and fifty dollars. Provided, that any election held or attempted to be held in any county within said district for the purpose of electing said directors shall be null and void unless the notice of said election has been given as provided for in this act."

It will be observed that the petition alleges that the election commissioners of St. Francis County failed to give the notice required by this amendatory statute. But appellant insists that this failure could not, and did not, operate to deprive the electors of the right to elect a director at the time appointed by law for holding the election.

In support of this contention counsel for appellant cite cases holding that, where the Constitution or a valid

statute prescribes the time, place and manner for the election of a particular officer, or for the determination of a specific question by the qualified voters, and a statute requires certain officers to give notice of the election, such statutory requirement is merely directory, and neither irregularity in the notice nor an absolute failure to give the notice will invalidate the election. This rule has been given recognition and has been approved and adopted by this court; but it has no application here. *Wheat* v. *Smith,* 50 Ark. 266; *Hildreth* v. *Taylor,* 117 Ark. 465, 470; *Hogins* v. *Bullock,* 92 Ark. 67, 70.

The office in question is that of director of the St. Francis Levee District—an office completely within legislative control. It was within the power of the Legislature to appoint the directors itself, as was done when the district was created, or to prescribe any method it saw fit for their selection.

It was the duty of the election commissioners to call and to arrange for the holding of the election, and they might, by mandamus or other appropriate remedy, have been required to perform this duty, and their failure to perform this duty was a misdemeanor. But, unless this duty is performed, there is no authority for holding the election, and the director in office would continue in office until an authorized election was held. The statute so expressly provides, and therefore the rule stated, which applies to the election of ordinary public officers, has no application to the election of levee directors. This is true because the matter of selecting directors for the levee district is entirely within the control of the Legislature, and it is expressly provided that any election held without prescribed notice having been given is "null and void." There was therefore no authority for holding the election at which appellant claims to have been elected. That election was "null and void," according to the statute quoted from, and the demurrer to the complaint was therefore properly sustained.

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

Opinion delivered May 4, 1925.

1. CARRIERS—PERSONS RIDING WITHOUT PAYING.—One boarding a train with the conductor's permission, to ride to the nearest station where he intended to buy a ticket, without paying for such ride, is not a passenger but a licensee.
2. CARRIERS—RIGHT OF LICENSEE.—A licensee cannot recover for injuries caused by mere acts of negligence, but must show wilfulness or wantonness in the operation of the train.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. W. Bandy,* Judge; reversed.

W. F. Evans and *W. J. Orr,* for appellant.

G. W. Barham, Harrison & Smith and *Sam Costen,* for appellee.

SMITH, J. The appellant railroad company operates a local passenger train, consisting of three cars, from Kennett, Missouri, to Leachville, Arkansas, at which last-named place the train turns around to make the return trip, so that the engine may remain in front of the train. There is no turntable at Leachville, so that the train turns around by means of a wye, the two sides of which are connected by the main-line track of the J., L. C. & E. Railroad Company, and this track, with the two sides of the wye, form practically a equilateral triangle, the sides of which are about 400 yards long. When the train arrives from Kennett it runs into the east leg of the wye, after which it runs beyond a switch which admits the train to the main line of the J., L. C. & E. R. R., over which it runs until it passes another switch, which admits it to the west leg of the wye, and it then runs over the west leg of the wye to a switch which admits it to the main line of appellant's railroad, and as it runs upon the main line the train would be headed north, thus having been turned completely around. It then backs into the station at Leachville over the main line, where the passengers are discharged and passengers for the return trip received.

On the 8th day of February, 1922, one of appellant's trains arrived at Leachville from Kennett and, in the manner indicated, turned around to return to Kennett. Appellee, who is engaged in the tie and timber business, was standing at the south end of the west leg of the wye as the train ran over the west leg and came to a stop, as it was required to do before entering upon the tracks of the J., L. C. & E. Railroad. Appellee saw the conductor of the train standing on the platform of one of the cars, and inquired how much time he would have in Senath, Missouri, a station on appellant's railroad intermediate between Leachville and Kennett, between the time of the arrival of that train in Senath and the departure of the next train from Senath to Leachville, and, this question being answered by the conductor, he stated to the conductor that he would go to Senath, and, with the conductor's permission, he boarded the train for the purpose of riding around the wye to the station, where he intended to purchase a ticket and become a passenger to Senath. He rode over the tracks of the J., L. C. & E. Railroad, and was riding up the west leg of the wye, when his foot caught between two of the cars and was severely injured.

Appellee entered one of the coaches, but returned to the platform, where he was standing at the time of his injury. In making this trip around, and in backing into the station at Leachville after doing so, the train was required to stop and start four times, and it was alleged that the negligence causing appellee's injury was that of the starting the train with undue violence and without warning.

It is insisted by appellant that appellee is not entitled, under the undisputed evidence, to recover on either of these grounds, and it is also insisted that appellee was not a passenger, and that therefore the railroad company owed him no duty as such.

The cause was submitted to the jury upon the theory that appellee was a passenger and that the railroad com-

pany owed him the duty to exercise the highest degree of care, and it is conceded that the right to recover is dependent upon the existence of the relation of carrier and passenger.

As has been said, appellee was alone at the time of his injury, and no member of the train crew knew where he was at that time, so that there can be no contention—and there is none—that appellee was injured through any wanton or wilful act on the part of any member of the train crew.

In our opinion appellee was not a passenger at the time of the injury. He was not a trespasser, but, at most he was a mere licensee,and the duty of the railroad company to him is to be measured accordingly.

In the case of *Cruse* v. *St. L. I. M. & S. R. Co.,* 97 Ark. 137, it was said: "We deem it to be equally sound in justice to say that, when a person enters a train without any intention to pay fare, but under a collusive agreement with the conductor to ride free in violation of the rules of the company, and does not pay any fare, he does not legally become a passenger, and the railway company is not responsible for his safety as a passenger. Quoting from the language of Judge RIDDICK in the Reed case, *supra,* if, under those circumstances, he 'is carried safely to his destination, he gains that much at the expense of the company. On the other hand, if an accident happens, and he is injured, there is no reason or justice in requiring the company to pay for his injuries, unless they have been wantonly or wilfully inflicted.' The authorities which sustain the proposition are numerous, and among them are found the following, which include cases where persons ride under collusive agreements with the conductor not to pay fare, or to pay less than full fare, and also where persons ride on a pass or ticket procured from the company by fraud." (Citing numerous cases and texts).

The act of appellee in boarding the train at the time and place he did was not an act of bad faith, and there

was no intention on his part to defraud the company by not paying fare. But he entered the train for his own convenience and with the permission of the conductor, and his own testimony shows that he was thoroughly familiar with the surroundings and the customary movements of the train. The train had not discharged the passengers whose destination was Leachville. This was not done until the circuit of the wye had been completed and the train had backed down appellant's main line to the station. Appellee knew this fact, and he knew the location of the station and its purpose, and that passengers were received and discharged at the station, and at no other place. This station was south of the J., L. C. & E. Railroad tracks. The main line track of appellant bisected the wye, and the station was, of course, on this track. Appellee could easily have walked from the place where he boarded the train to the station, but it was to save this walk that he boarded the train. He knew that no fare would be exacted for this ride to the station, and that the train would stop at the station, and he testified that it was his intention, after the train had arrived and had stopped at the station, to debark from the train and buy a ticket to Senath. The journey upon which he proposed to embark and for which he intended to pay fare would not have begun until after he had reached the station and had purchased a ticket.

Appellee intended to become a passenger, but had not done so. The railroad company had provided a station for passengers to embark and debark, yet appellee entered the train at a point where it was not contemplated that passengers would be received, and for his own convenience, and to save himself a walk to the station, he rode the train around the wye without expectation of being charged or of paying fare. It was on this trip, and before he had reached the station, that he received his injury.

There was some testimony that, in starting and in stopping the train as the various switches were passed,

the stops were made suddenly and the starts were made violently, and this testimony may have been sufficient to support a finding of negligence in the operation of the train. But there was no testimony whatever that there was any element of wilfulness or wantonness in the operation of the train, and, if appellee was a mere licensee and not a passenger, he is in no position to complain of the mere acts of negligence—if such there were—in switching the train around the wye.

The judgment of the court below must therefore be reversed, and, as the case appears to have been fully developed, it will be dismissed.

CLARK v. PICKLER.

Opinion delivered May 4, 1925.

1. APPEAL AND ERROR—CONFLICTING INSTRUCTIONS.—Where appellant requested an instruction which was too favorable to himself, he cannot complain that correct instructions given at appellee's instance were in conflict therewith.
2. SALES—LOSS OF WEIGHT OF COTTON AFTER DELIVERY—The seller of cotton which was marked "weight guaranteed" was not liable for loss of weight accruing after delivery and acceptance due to exposure to the weather.
3. SALES—JURY QUESTION.—In an action to recover for deficiency in weights of cotton at compress under guaranty of the weights in a contract sale, whether the loss in weight accrued before or after the sale was properly submitted to the jury.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict of the jury is conclusive on a question of fact as to which the evidence is conflicting.

Appeal from Columbia Circuit Court; *L. S. Britt*, Judge; affirmed.

T. J. Gaughan, J. E. Gaughan, J. T. Sifford and *E. E. Godwin*, for appellant.

McKay & Smith, for appellee.

SMITH, J. Appellant purchased from appellee 213 bales of cotton at 36¼ cents per pound, f. o. b. cars at

Taylor, Arkansas, on October 9, 1919. The cotton, at the time of the sale, was located in the gin yard where it had been ginned, 200 yards from the railroad station platform, from which most of the cotton was loaded in the cars. The cotton had been weighed at the gin or in the gin yard prior to the sale, and the invoice executed by appellee to appellant at the time of the sale showed the weight of the cotton to be 108,335 pounds. The cotton had been purchased by appellee on September 20 and dates subsequent thereto.

As soon as the sale was made appellee employed J. W. Blackman to deliver the cotton at the railroad cotton platform at Taylor, Arkansas. Blackman begun hauling the cotton on the day of its purchase and finished hauling it on the 11th of October. Four of the bills of lading for 113 bales of cotton were issued by the railroad company on October 14, and four other bills of lading for the remaining 110 bales of cotton were issued October 17, which was eight days after the sale of the cotton.

The invoice of the cotton, showing the number of bales and the weights thereof, was executed by appellee and delivered by him to L. A. King, the agent of appellant, who purchased the cotton for appellant, and at the same time King gave his personal check to appellee in payment of the cotton at the price which had been agreed upon. King then drew a draft upon appellant for the same amount. There was stamped on the invoice the words "Weights guaranteed," and the invoice was signed by appellee.

The record is silent as to the date the cotton was transported by the railroad company from Taylor, Arkansas, to the compress at Hope, Arkansas. However, before the cotton was shipped from Taylor two bales were stolen, and only 211 bales were delivered at the Hope compress.

This is a suit for loss in weight in the cotton, but appellant gave appellee credit for the two bales stolen, and accepts the gin weights thereof as being correct.

When the cotton reached the Hope compress it was muddy and very wet. The cotton was weighed at the compress at the time of its arrival, and weighed 111,723 pounds. Later the cotton was "reconditioned," that is, the damaged cotton was removed from the bales and it was again weighed, and its weight then was 106,962 pounds. Appellant, by this action, seeks to recover from appellee the difference in the amount of cotton as weighed at Taylor and its weight after it was reconditioned, at the price paid.

Appellant offered testimony to the effect that the meaning of the words "weights guaranteed" meant that the weight of the cotton at the compress should govern, and that any shortage which might then exist would be refunded.

Appellee does not question the meaning of the words "weights guaranteed," and concedes that the compress weights govern, but he contends that he is not responsible for the loss of weights sustained, for the reason that the cotton was damaged by being exposed to the weather, and that it was this exposure which made it necessary to recondition the cotton with the resulting loss in weight.

At the request of appellant the court gave an instruction numbered 1, reading as follows: "The jury are instructed that if you believe from the evidence that plaintiff, Charles Clark, bought from the defendant, Geo. T. Pickler, 211 bales of cotton under a contract between said Clark and Pickler that Pickler would guarantee the weights, and that the words, 'weights guaranteed' meant the weights according to the 'turnout' of the compress to which said cotton should be shipped, and that such cotton was shipped to the compress at Hope, Arkansas, and that the 'turnout' of said compress of such cotton was less than the weights of the cotton on which Clark had made payment, then your verdict will be for the plaintiff for the amount of such difference

at 36¼c per pound, with six per cent. interest per annum from the date of payment for the cotton."

It is insisted that the instructions given on behalf of appellee are in conflict with this instruction, and that the judgment in appellee's favor should therefore be reversed.

The instructions are in conflict, and this was, of course, error, but it is an error of which appellant cannot complain, for the reason that instruction numbered 1 is more favorable to appellant than it should have been, and those given on behalf of appellee correctly declare the law.

It will be observed that, under the testimony set out above, the instruction in effect directed the jury to return a verdict for appellant for the amount of the loss in weight of the cotton, as this loss of weight is undisputed, and the meaning of the words "weights guaranteed" is unquestioned. But the instruction leaves out of account the question of the cause of this loss in weight, and this was the question submitted to the jury in the instructions given at the request of appellee.

These instructions were to the effect that, if the cotton was paid for and delivered at the railroad platform and bills of lading therefor obtained by appellee from the railroad company, there was a delivery and acceptance of the cotton, and on the question of the subsequent damage thereto the court charged the jury as follows:

"You are instructed that if you find from the evidence that the cotton was delivered to the plaintiff at Taylor, Arkansas, in good condition, and that afterwards it was damaged and by reason thereof it lost in weight, as shown by the outturn of the Hope compress, you should find for the defendant.

"You are instructed that the defendant is not liable to the plaintiff for loss in weight which resulted from damages sustained by the cotton after it was delivered to and accepted by the plaintiff. And if you find from the evidence that, after such delivery and acceptance, the

cotton was damaged by reason of exposure to the weather, and for that reason the damaged cotton was removed by the Hope compress, thereby resulting in a loss of weight, then it will be your duty to find for the defendant."

We think these instructions correctly declare the law, and that there was no error in giving them, even though they conflict with instruction numbered 1 given at the request of appellant, because appellee was not responsible for the damage to the cotton after the delivery thereof at the railroad platform, there being nothing in the contract of sale making him liable for such damage.

The instructions submitted the question of fact when the damage to the cotton accrued, and this was a proper question to submit to the jury.

The testimony on this issue of fact was conflicting. On this question the testimony on behalf of appellant was to the effect that, in the fall of 1919, the rainfall was very heavy, and the cotton had been damaged before it was sold. The testimony on behalf of appellee was to the effect that, while the fall of 1919 was unusually wet, the heavy rains which fell during that season did not begin until after the sale of the cotton, and that prior thereto there had been only showers, and that no rain of any consequence had fallen prior to October 9, the day of the sale.

The jury's verdict is conclusive on the question of fact involved, and, as no prejudicial error was committed in the instructions, the judgment of the court below is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. ALMA CASH STORE.

Opinion delivered May 4, 1925.

1. CARRIERS—MEASURES OF VALUE OF PROPERTY DAMAGED.—A provision in a bill of lading limiting the carrier's liability to the value of the property at the time and place of shipment is in conflict with the Cummins Amendment to the Interstate Commerce Act (U. S. Comp. St. § § 8592, 8604a).
2. CARRIERS—MEASURE OF DAMAGES TO PERISHABLE FREIGHT.—The measure of damages to interstate shipments of perishable commodities is the difference between their market value at the point to which they were shipped at the time and in the condition in which they should have arrived, and their market value at the time and in the condition in which they actually arrived, whether the damage resulted from delay in furnishing or transporting the car or from failure to refrigerate it.

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

Thomas B. Pryor and *Vincent M. Miles*, for appellant.

Starbird & Starbird, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $723.70 rendered in favor of appellees against appellant on three separate verdicts in three separate suits which were consolidated and tried together in the circuit court of Crawford County. The suits were for damages to peaches on three interstate shipments from Alma, Arkansas, to different points in Iowa.

A reversal of the judgment is sought upon the sole ground that the trial court instructed the jury that appellee's damage, if any, should be based upon the value of the fruit at the point of origin. The alleged erroneous instruction given by the court on the measure of damages is as follows:

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

The instruction requested by appellant and refused by the court relating to the amount of damages, applicable to the facts in the case, is as follows:

"You are instructed that the measure of damages on this shipment is the difference in the market value of the car of peaches at the point to which it was shipped at the time and in the condition it should have arrived there and at the time and in the condition it actually arrived at the point of destination."

As we understand the evidence in the case, the first car of peaches was sold on the track at Alma to W. M. Hansen & Son, of Dubuque, Iowa, for $1.85 per bushel, and were shipped to that concern by appellee at appellee's risk, but were damaged so badly in transit, because appellant failed to refrigerate and transport the car, that W. M. Hansen & Son refused to account to appellee on the basis of the contract price, but accounted therefor on the basis of the amount realized for the peaches, less freight and other charges. The second car of peaches was sold on the track at Alma to Hubbard-Lanning Company of Ames, Iowa, for $1.25 per bushel, which was also damaged so badly in transit, because appellant failed to properly refrigerate and transport the car, that Hubbard-Lanning Company refused to account to appellee on the basis of the contract price, but accounted therefor on the basis of the amount realized from the sale of the peaches, less the freight and other charges. The third car was sold on order for $1.25 per bushel on the track at Alma, and shipped in the same way to the purchaser in Cedar Rapids, Iowa, but were so badly damaged, on account of appellant's delay in furnishing a car at Alma in which to ship them, that said purchaser refused to account to appellee on the basis of the contract price, but accounted therefor on the basis of the amount realized from the sale of the peaches, less the freight and other charges.

The bills of lading under which the several cars were shipped contained the following condition:

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

The court based its instruction as to the measure of damages applicable to the facts in the case upon the condition aforesaid contained in the several bills of lading. This provision in the bills of lading is an attempted limitation upon the liability of common carriers, and is contrary to the Cummins Amendment to the Interstate Commerce Act of March 4. 1915, 4 Fed. Stat. Ann., 2nd ed. 506. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97.

The correct rule as to the measure of damages in interstate shipments of perishable commodities caused through the negligence of the common carrier is the difference in the market value of the commodity at the point to which it was shipped at the time and in the condition it should arrive there and at the time and in the condition it actually arrived at the point of destination. This rule was announced in the recent case of *C. R. I. & Pac. R. Co.* v. *Walker,* 147 Ark. 109. Any other rule would enable common carriers to make more favorable shipment contracts with some shippers than others, and thereby establish a system of rebates, and would enable vendors and vendees to secretly contract for a higher price than the market value of their commodities at points of designation, for the purpose of establishing the amount of damages to be recovered from the carrier in case of loss or injury caused through its negligence. It does not follow, however, that testimony as to the contract price at the place of origin would not be admissible as evidence tending to show the market value of the commodity at the point of destination, for perishable commodities, when sold at the point from which they are shipped, are usually contracted on the basis of the market value of such commodities where they are to be consumed. The

evidence of the contract price, however, would not necessarily be conclusive of the market value of such commodities at the point of destination.

We think the rule thus announced is applicable to the facts in the instant cases, whether the damage resulted from a delay in furnishing cars or in transit or whether it was due to the failure to properly refrigerate the cars.

On account of the error indicated the judgments are reversed, and the cause is remanded for a new trial.

McFADDIN v. BELL.

Opinion delivered May 4, 1925.

1. MORTGAGES—RECITAL OF PRIOR INCUMBRANCE.—A general recital in a mortgage or conveyance that it is made subject to incumbrances against the property does not estop the mortgagee or grantee from attacking the validity of the incumbrances.
2. MORTGAGES—RECITAL OF INCUMBRANCES.—Before a mortgagee or grantee will be estopped to deny the validity of a prior incumbrance by recitals in his conveyance, they must amount to a recognition on his part that the outstanding incumbrances are valid, and nothing short of a certain and definite reference to the particular incumbrance will evidence an intention to recognize it.
3. MORTGAGES—RECITAL OF INCUMBRANCES.—Recitals in a mortgage that it is taken subject to all mortgages against it on record amount to a recognition by the mortgagee that such mortgages as were on record where prior valid liens on the land, and preclude the mortgagee from pleading the statute of limitation.

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

E. F. McFaddin, for appellant.

W. C. Rodgers, for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Sevier County by appellee against C. W. Wright to foreclose a mortgage upon a certain 160-acre tract of land in said county, executed by Wright and his

wife to her on January 12, 1916, to secure a note for $1,200, payable January 12, 1917. The mortgage was recorded in April, 1916.

Appellant, who was made a party defendant in the suit because he claimed the land free of the mortgage under purchase from M. E. Sanderson, trustee in bankruptcy of the estate of C. W. Wright, filed an answer denying the material allegations in the bill, and a cross-bill alleging that appellee was barred from foreclosing the lien under §§ 7382 and 7408 of Crawford & Moses' Digest.

The cause was submitted to the court upon the pleadings and an agreed statement of facts, which resulted in a finding that appellee's mortgage constituted a valid and subsisting lien paramount to the claim of appellant, and a decree foreclosing same, from which is this appeal.

The facts necessary to a determination of the only question raised on the appeal are as follows: On January 12, 1916, C. W. Wright and his wife executed a mortgage on said tract of land to secure a note in the sum of $1,200, due one year after date. Thereafter he made two $45 payments upon the note, one on July 1, 1918, and the other on March 4, 1920, but these payments were not indorsed on the margin of the record where the mortgage was recorded. C. W. Wright was adjudged a bankrupt, and, under the order of the court, he executed a quitclaim deed conveying this and all other lands owned by him to M. E. Sanderson, who had been appointed trustee in bankruptcy for his estate. The lands, including the 160-acre tract, were sold, and appellant became the purchaser of them at the sale. The deed was executed to him on August 18, 1922, by the trustee in bankruptcy, which contained two recitals that are determinative of the issue involved on this appeal.

The first recital appears in the preamble of the deed, and is as follows: "Said E. F. McFaddin, trustee, buying the real estate subject to all mortgages against it, on record."

The second recital appears in the *habendum* clause of the deed, and is as follows: "The said E. F. McFaddin, trustee, taking the property subject to the mortgages against it, but not personally assuming any of such indebtedness."

Appellant contends for a reversal of the decree upon the ground that the deed secured by the mortgage was barred as to third parties, because the payments made by the mortgagor were not indorsed on the margin of the record as required by §§ 7382 and 7408 of Crawford & Moses' Digest.

Appellee admits that appellant is a third party to the mortgage, and that, prior to the institution of the suit, sufficient time had elapsed under the statute of limitations to prevent the foreclosure of the mortgage against a purchaser of the land, who had not estopped himself by the assumption or recognition of the mortgage. Appellee insists, however, that appellant recognized this mortgage by the recitals in the deed which he accepted, and that, by such recognition, he estopped himself from pleading the statute of limitations.

The rule of law is that a general recital in a mortgage or conveyance to the effect that the instrument is made subject to the incumbrances against the property does not estop a mortgagee or grantee from attacking the validity of such incumbrances. The doctrine is that, before the mortgagee or grantee will be estopped to deny the validity of prior incumbrances upon land by recitals in the conveyance, they must amount to a recognition on his part that the outstanding incumbrances are valid, and that nothing short of a certain and definite reference in some way to particular incumbrances thereon will evidence an intention on his part to recognize such incumbrances. *Clapp Brothers* v. *Halliday Brothers,* 48 Ark. 258; *Arkansas National Bank* v. *Boles,* 97 Ark. 43; *Kay* v. *Castleberry,* 99 Ark. 118; *Reidmiller* v. *Comes,* 158 Ark. 21. The recitals in the deed to appellant from the trustee in bankruptcy should be read together so that

both may stand, if possible. The first clause specifically referred to mortgages on record, meaning mortgages on record which were valid, subsisting obligations between the original parties to the mortgage. The second clause, standing alone, made no reference to any particular mortgage so as to identify it, but, when read in connection with the first clause, meant mortgages of record good between the original parties. There is no conflict between the two clauses, the latter relates to the first and was intended as a mere repetition of the first. When the two clauses are read together and given their proper meaning, they amount to a recognition on the part of appellant of the mortgage in question as a valid lien upon the land.

No error appearing, the decree is affirmed.

McCULLOCH, C. J., (dissenting). My conclusion is that the recital in the deed under which appellant holds, with respect to prior mortgages, was general, not specific, and did not constitute a recognition of the continued existence and efficacy of the mortgage to appellee. The acceptance of the deed by appellant with that recital in it did not therefore remove the statute bar nor constitute a new point from which the statute began to run.

WOOD, J., joins in this dissent.

MAYS v. PHILLIPS COUNTY.

Opinion delivered May 11, 1925.

1. STATUTES—REPEAL.—When there are two acts on the same subject, the rule is to give effect to both if possible; but if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first, and, even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

2. STATUTES—IMPLIED REPEAL.—The special act of February 17, 1919, fixing the fee of the sheriff of Phillips County for feeding county prisoners at 50 cents per day was impliedly repealed by the act of February 27, 1919, fixing the fees of sheriffs for feeding and keeping county prisoners at one dollar per day, and exempting certain counties not including Phillips County.

Appeal from Phillips Circuit Court; *E. D. Robertson,* Judge; affirmed.

P. R. Andrews and *W. G. Dinning,* for appellant.

Brewer & Cracraft and *Mann & Mann,* for appellee.

McCULLOCH, C. J. Appellant was the sheriff of Phillips County, and this appeal involves the question as to the amount of compensation to which he is entitled for feeding prisoners confined in jail.

The General Assembly of 1919 enacted a special statute fixing the fees and emoluments of all the county officers in Phillips County. This act contained an emergency clause, and was approved by the Governor on February 17, 1919. Special Acts 1919, p. 132. The provision of that statute with reference to the sheriff's office fixed the salary of the sheriff and ex-officio collector at the sum of $5,000 per annum and allowing him a certain additional amount for expenses of deputies and clerical assistance, and also contained a provision with reference to feeding prisoners, which reads as follows: "The county court shall provide and pay out of the county treasury the expenses of lighting and heating the county jail, and for bedding of the prisoners, and shall allow the sheriff the actual cost of feeding the prisoners confined in the jail, not to exceed, however, the sum of fifty cents per day for each prisoner; provided, the salary of the jailer shall be included in the cost of feeding the prisoners in this section provided." At the same session a statute was enacted, approved February 27, 1919, fixing the fees of sheriff for feeding and keeping prisoners at the sum of one dollar per day. Acts 1919, p. 127. That statute, omitting the caption, and the second section declaring an emergency and putting the statute

into effect, reads as follows: "Section 1. Hereafter sheriff shall be allowed as fees for feeding and keeping a prisoner confined in the county jail, per day, the sum of one ($1) dollar; provided, the provisions of this act shall not apply to Crawford, Madison, Sebastian, Newton, Greene, Lafayette and St. Francis."

The point of this case is whether or not the last statute repealed the first one. Appellant claims that there was a repeal by implication of the first statute, and that he is entitled to the amount of fees prescribed in the last one. Appellee contends to the contrary. Counsel on both sides present with much care all of the authorities bearing on the subject, and particularly the decisions of this court, which are so numerous and harmonious that it is scarcely worth while to cite them. The principles of law with respect to the interpretation of statutes in determining whether or not there is an implied repeal are elemental. Reference may only be made to a comparatively recent case where the rules of law on this subject are aptly stated. *Sanderson* v. *Williams,* 142 Ark. 91. In that case it was stated that "where there is a plain repugnancy between two acts upon the same subject, the later act repeals the former, or, if the two acts are not in express terms repugnant and the later act covers the whole subject of the first and embraces new provisions, showing that it was intended as a substitute for the first, the last act will stand as the law upon the subject, and the first will be set aside." It has often been announced that repeals by implication are not to be favored, and, in another recent case on this subject, we said: "Repeals by implication are not favored, and, when two statutes covering the whole or any part of the same subject-matter are not absolutely irreconcilable, effect should be given, if possible, to both. It is only where two statutes relating to the same subject are so repugnant to each other that both cannot be enforced that the last one enacted will supersede the former and repeal it by implication." *Martels* v. *Wyss,* 123 Ark. 184.

Now, applying these principles, we do not find that these two statutes cover the same identical subject nor that they are in irreconcilable conflict with each other. Nor can it be said that the last statute takes up the whole subject and covers the subject-matter of the first one. The first statute relates to salaries of all of the county officers of a particular county, and it covers all of the details with reference to the salaries, emoluments and expenses of the office of sheriff. The last statute does not take up the whole subject anew, but it relates to the single subject of compensation for feeding prisoners. The first statute not only fixes the compensation in money of the sheriff for feeding prisoners, but it also requires the county to pay the expense of lighting and heating the jail and for the bedding of the prisoners. If the latter statute can be given any effect at all in its application to the emoluments of the sheriff of Phillips County, it is only to the extent of raising the compensation to one dollar per day instead of the maximum of fifty cents per day, and still leaves the provision requiring the county to furnish the light, heat and bedding. All the fees seem to have been adjusted with care by the first statute, and there is no reason to presume that the Legislature intended to raise the compensation for feeding prisoners above that enjoyed by the same officers in other counties. On the other hand, if we place them on an equality, we would have to indulge the presumption that the Legislature intended to take away by repeal the other requirements placed upon the county with respect to furnishing heat, light and bedding. In this state of the matter we must presume that the Legislature, having taken up the whole subject of salaries in Phillips County, did not intend to impliedly repeal those provisions merely by fixing generally the fees for feeding prisoners. We attach no importance to the fact that the last statute expressly exempts certain other counties. This affords no grounds for interpreting the statute as an express inclusion of all counties not thus exempted in

express terms. If we are indulging in theories and presumptions, it is fair to assume that the Legislature, in passing this statute without expressly repealing the Phillips County special statute, assumed that it was unnecessary to exempt Phillips County, which was within the operation of the special statute and would not be controlled by the last one. The case is, we think, governed by the principles announced in *Bank of Blytheville* v. *State,* 148 Ark. 504. The relation of the two statutes involved in the present case removes the case from control of the recent case of *Massey* v. *State use Prairie County, ante,* p. 174, where the later statute was held to have covered the whole subject embraced in the older statute.

Upon the whole, we are convinced that, under settled principles of interpretation, the last statute should not be held to have repealed the first one, and that the circuit court was correct in its judgment limiting the amount of the sheriff's compensation to the specifications of the special act governing that county.

Affirmed.

WOOD and HART, JJ., dissent on the ground that *Massey* v. *State use Prairie County* governs.

HART, J., (on rehearing). After considering the briefs of counsel on the motion for a rehearing, a majority of the court is of the opinion that a rehearing should be granted. We recognize the general rule that appeals by implication are not favored, but think the case falls within the principles of law decided in *Massey* v. *State, ante p.* 174.

The familiar general rule with regard to implied appeals is clearly stated by Mr. Justice Field in *United States* v. *Tynen,* 11 Wall. (U. S.) p. 88, as follows: "When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and, even where two

acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

The effect of this rule is that the prior statute is impliedly repealed so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute is plainly intended as a substitute for it. Now, in the light of these principles, it may be well to set out the object and purposes of the two statutes and their provisions so far as they bear on the case before us.

The Legislature of 1919 passed a special act for the purpose of fixing the fees and salaries of the officers of Phillips County, Ark. The act was approved February 17, 1919. Special Acts of 1919, p. 132.

Section one, which fixes the salary of the various county officers of Phillips County also contains the following: "The county court shall provide and pay out of the county treasury the expenses of lighting and heating the county jail, and for bedding of the prisoners, and shall allow the sheriff the actual cost of feeding the prisoners confined in the jail, not to exceed however, the sum of fifty cents (50 cents) per day for each prisoner; provided, the salary of the jailer shall be included in the cost of feeding the prisoners in this section provided."

At the same session, the Legislature passed an act to better regulate the fees allowed sheriffs for furnishing prisoners, and it was approved February 27, 1919. Gen. Acts of 1919, p. 127. Section one of the act reads as follows: "Hereafter sheriffs shall be allowed as fees for feeding and keeping a prisoner confined in the county jail, per day, the sum of one ($1.00) dollar; provided, the provisions of this act shall not apply to Crawford, Madison, Sebastian, Newton, Greene, Lafayette and St. Francis. "Sec. 2, provides that all laws and parts of laws in conflict with the act are repealed and contains the emergency clause." It will be observed that this act was

passed only ten days later than the first act. The presumption is that the Legislature had in mind the first act, and its provisions with regard to the fees to be allowed the sheriff for feeding and keeping prisoners confined in the county jail.

Under the first act the county court must provide the expense of lighting and heating the county jail and for bedding of the prisoners. It also provides that the sheriff shall be allowed the actual cost of feeding the prisoners not to exceed the sum of fifty cents per day for each prisoner. The second act allows the sheriff for feeding and keeping the prisoners the sum of one dollar per day. It also contains a proviso that the act shall not apply to certain counties which are named. Thus it will be seen that it was the intention of the Legislature that the act should apply to all counties which were not excepted by the proviso. Phillips County was not one of the counties mentioned in the proviso, and we think this indicates an intention on the part of the Legislature that it should come within the provisions of the act. On the subject of keeping the prisoners the acts are repugnant, and in application of the general rule anounced above we think the first act is to this extent repealed by the latter act.

The result of our views is that the circuit court erred in not allowing the sheriff fees under the provisions of the latter act, which is now incorporated in Crawford & Moses' Digest as § 6211.

The judgment will therefore be reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

McCULLOCH, C. J., and SMITH, J, dissent.

JOHNSON v. NEWMAN.

Opinion delivered May 11, 1925.

1. HIGHWAYS—HUSBAND'S LIABILITY FOR WIFE'S NEGLIGENCE IN DRIVING CAR.—Evidence *held* to make it a question for the jury whether a defendant was negligent in failing to exercise control over his wife who, in driving his automobile, attempted to pass another car at high speed, as the latter was moving toward the center of the road to pass a bus in front of it.
2. MASTER AND SERVANT—HUSBAND'S RESPONSIBILITY FOR WIFE'S NEGLIGENCE.—Evidence *held* sufficient to go to the jury on the issue of the husband's responsibility for his wife's negligence in attempting to drive an automobile occupied by him past a car in front on the theory that she was acting as his agent.
3. MASTER AND SERVANT—RESPONDEAT SUPERIOR DOCTRINE.—While the "family purpose" and imputed negligence doctrines and the husband's common-law liability for his wife's torts are not recognized in Arkansas, the doctrine of *respondeat superior* still obtains, so that one permitting his wife or another to drive his car while occupied by him is responsible for negligence of such driver as his agent.

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

Gray, Burrow & McDonnell, for appellants.

A. J. Newman and *W. R. Donham,* for appellee.

McCULLOCH, C. J. The three appellants instituted separate actions against appellee to recover damages on account of a collision of automobiles, alleged to have been caused by negligence on the part of appellee. Appellee denied the charge of negligence, and the three cases were consolidated by consent and tried before a jury, but the court directed a verdict in favor of appellee. The question presented on this appeal is whether or not the evidence was legally sufficient to call for a submission of the issues to the jury.

The collision occurred during the afternoon of a certain Sunday in the month of July, 1923. It occurred a few miles east of the city of Little Rock, on an asphaltum road, eighteen feet wide, with dirt shoulders on each side about three feet in width. Both automo-

biles were going in the same direction—towards the east. The car in which appellants were riding was in front, and, at the time of the collision, appellee's car was attempting to pass the other one.

The three appellants, Mrs. J. C. Johnson and her daughter, Mrs. Holton, and O. Anderson, a friend or acquaintance, were riding in the same car, a Ford coupe, owned by Anderson. Mrs. Holton was on the left side of the car, driving, and Anderson was sitting next to her, in the center, and Mrs. Johnson was sitting on the right-hand side, holding in her lap the three-year-old child of Mrs. Holton. The car was constructed to seat two passengers, but there is a conflict in the testimony as to whether or not three persons could ride without crowding the driver and interfering with the operation of the brakes and gear-shift.

Appellee Newman and his wife were riding in a Ford coupe, owned by appellee, and Mrs. Newman was doing the driving. The testimony of each of the appellants is to the effect that they were going along at a speed of about twelve to fifteen miles an hour, and, as they approached a motor bus standing on the right-hand side of the road, they turned the car to the left and into the center of the road in order to pass the bus, and that, as they did so, appellee's car dashed by at a high rate of speed and struck the front hub-cap and the fender of the car of appellants with the rear wheel of appellee's car with such violence that the driver of the car of appellants lost control of the steering-wheel, and the car turned to the right at an angle and ran into a ditch, without fault on the part of the driver. The car turned over in the ditch, and each of the appellants received, in consequence, very serious personal injuries. Mrs. Johnson and Anderson both sustained bone fractures, and there was evidence to show that their injuries were not only very severe and painful, but permanent. Mrs. Holton's injuries, according to the testimony, were not permanent, but were substantial and painful.

The bus was, according to the undisputed evidence, stopped on the side of the road for tire repairs, and each of the appellants testified that, when their car got within about twenty feet of the rear of the bus, the driver, Mrs. Holton, turned out to the left, and got about the center of the road, perhaps the left wheel being slightly over the center, and that the front end of the car was within five or ten feet of the rear end of the bus when the collision occurred. They testified that they heard no signal from appellee's car as it approached from the rear, and that they did not see the car until it came alongside of their car and struck the front wheel. They stated that the car struck with a terrific impact and made a great noise, and that the force was sufficient to break open the right-hand door of the car in which they were riding. The evidence of another witness tends to show that the impact was very severe, from the fact that the hub-cap on the car was mashed in against the end of the axle. The narratives of appellee and his wife coincide with each other, but they are in direct conflict with the testimony given by appellants. They testified that they were in a line of cars, going at a very moderate rate of speed, and that many of the cars were passing each other, and that, as they approached the motor bus standing on the side of the road, which they observed ahead of them, they speeded up slightly for the purpose of passing the car in which appellants were riding and two others, and that, just as they went to pass appellants' car, the driver thereof suddenly veered the car to the left and ran into appellee's car, striking the rear wheel with the front wheel of appellants' car. They testified that the collision occurred forty to fifty feet behind the motor bus, and that the impact was so slight that it was hardly noticeable, and that they did not discover that any injury had resulted until they had traveled a distance of about half a block in front of the bus. They testified that, when they started to pass the cars in front, appellee began sounding the horn, and continued to do so until

after they had passed. Appellee stated in a very emphatic way that he was "playing a tune" on the horn, meaning that he was honking it constantly. He testified that, when he noticed appellant's car turning out into the road, he cried out to his wife, "Look out for this car," and that she cut her car around to the left, which was on the extreme left-hand side of the road; that, when the two cars struck, Mrs. Newman asked, "Did I do any harm?" and that he (appellee) replied, "No, everything is all right." He testified that no signals were given from appellants' car, and appellants themselves admitted that they gave no signal. Appellee testified that, after the collision, he looked back and saw that apparently there was nothing wrong with the car with which they had collided, but that, when they got about half a block in front of the bus, he looked back again and saw the car of appellants turning around the bus and saw it run into the ditch.

Now, it is apparent from this recital of the testimony in the case that there was a sharp conflict on material points, and that it showed negligence on the part of one side or the other of this controversy. The jury might have found in favor of either party on this issue, but it was a question for the jury, as the evidence was legally sufficient to support a verdict either way. The issue should not have been taken away from the jury by a peremptory instruction.

In the first place, the evidence was sufficient to show that appellee was guilty of negligence himself in failing to exercise control over the driver in order to prevent the collision. *Minor* v. *Mapes,* 102 Ark. 351; *Carter* v. *Brown,* 136 Ark. 23; *Pine Bluff Co.* v. *Whitlaw,* 147 Ark. 152; *Wisconsin & Arkansas Lbr. Co.* v. *Brady,* 157 Ark. 449. Appellant was not only sitting in the car beside the driver, where he could observe everything that occurred, but, according to his own statement, he was actually participating in the operation of the car by giving directions to his wife and by giving signals. He appears to

have been, for all practical purposes, as much in control of the car as was his wife, who was doing the driving. He admits that he saw the bus standing on the side of the road, and if, as testified by appellants, they were moving out into the center of the road for the purpose of passing the bus, the jury would have been justified in finding that appellee and his wife were negligent in attempting to pass at that moment. The evidence adduced by appellants, if accepted by the jury, was sufficient to show that they were out in the middle of the road, perhaps a little to the left of the middle of the road, in the very act of passing the bus, when appellee undertook to pass at a rapid rate of speed.

Appellants were entitled to a submission of the issues as to liability on the theory that appellee himself participated in the act of negligence which caused the collision.

In the next place, we are of the opinion that there was sufficient evidence to justify a submission of the issue of appellee's responsibility on the theory that his wife, while driving the car, was acting as his agent. This court has refused to accept the so-called "family purpose" doctrine as a basis of liability on account of automobile collisions. *Norton* v. *Hall,* 149 Ark. 428; *Volentine* v. *Wyatt,* 164 Ark. 172. We have also discarded the doctrine of imputed negligence (*Carter* v. *Brown, supra; Miller* v. *Fort Smith Light & Traction Co.,* 136 Ark. 272; *Pine Bluff Co.* v. *Whitlaw, supra; Itzkowitz* v. *P. H. Ruebel & Co.,* 158 Ark. 454), and the common-law liability of the husband for torts of the wife has been eliminated by statute (*Bourland* v. *Baker,* 141 Ark. 280), but we have not departed from the elemental principles of the law of agency in determining the question of liability for automobile accidents. The doctrine of *respondeat superior* still obtains. In *Norton* v. *Hall, supra,* we said: "In other words, we reject the so-called 'family purpose' doctrine as stated by some of the courts in its broadest sense, though we do not mean

to hold that there may not be circumstances under which it would be a question of fact for the jury to determine whether the person so operating the car was the agent of the head of the family or was agent of the particular member or members of the family for whose pleasure and benefit the car was then used." In *Wisconsin & Arkansas Lumber Co.* v. *Brady, supra,* we held that the husband, who was riding in his own car which his wife was driving, was responsible for the negligence of his wife on the theory that she was, under those circumstances, acting as his agent in the operation of the car. Why shouldn't the doctrine of *respondeat superior* apply under such circumstances? If the owner of a car in which he is riding permits some other person to operate it—no matter whether it is his wife or child or friend—there is no reason why the relation of principal and agent should not be held to be subsisting between them so as to make the owner, as the principal, responsible for the negligent act of the driver as his agent. The question merely involves the application of elemental principles of law on this subject, and we are of the opinion that the testimony in the case is sufficient to call for a submission of the issue as to liability of appellee on account of the negligence of his wife as his agent, as well as his own negligence in controlling or failing to control the operation of the car. Of course, we express no opinion on the weight of the evidence further than to say that it is legally sufficient to justify a submission of the issues in regard to negligence.

For the error in taking the case away from the jury the judgment is reversed, and the cause remanded for a new trial.

WOOD and HART, JJ., dissent.

ADCOX v. JAMES.

Opinion delivered May 11, 1925.

1. REFORMATION OF INSTRUMENTS—BURDEN OF PROOF.—To warrant reformation of an instrument for a mutual mistake, the proof must be clear, convincing, unequivocal and decisive, and must establish the mistake beyond a reasonable doubt.
2. REFORMATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.—Evidence of a mutual mistake *held* sufficient to justify reformation of a conveyance of an interest in an oil and gas royalty.
3. REFORMATION OF INSTRUMENTS—NEGLIGENCE.—Alleged negligence of the grantee of a conveyance in failing to read it *held* not to bar reformation for a mutual mistake, where he was misled into believing that the deed conveyed the interest which he had purchased, and was lulled into security by that belief.
4. REFORMATION OF INSTRUMENT—WIFE'S DOWER INTEREST.—Conceding without deciding that a husband's deed conveying an interest in oil and gas royalties is such a conveyance of an interest in the land as requires the wife's relinquishment of her dower, a misdescription of such royalty in the deed will not be reformed as to her, since her dower can be relinquished only in the manner provided by statute.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; reversed in part.

Betts & Betts, for appellent.

Powell, Smead & Knox, for appellee.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of Union County against appellants (husband and wife), seeking the reformation of a deed executed by the latter to the former, conveying part of a royalty reserved in an oil and gas lease covering a certain tract of land in that county, containing forty acres, to which appellant J. B. Adcox had title in fee simple. Said appellant had previously executed an oil and gas lease to one Jones, reserving a royalty of one-eighth of the production of oil and gas. Subsequent to that conveyance, appellants joined in a conveyance to appellee, reciting a consideration of $2,000, cash in hand paid, and conveying an interest described in the following language: "An undivided one-sixteenth (1/16) portion of

their interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described lands situated in Union County, Arkansas, to-wit" (the forty acres of land is then accurately described). The effect of this language in the deed was to convey one-sixteenth of the one-eighth royalty under the lease to Jones, whereas appellee contends that his contract with appellant Adcox for the purchase of an interest in the royalty was that one-half of the royalty, or one-sixteenth of the total production, was to be conveyed. Appellant, Ella Adcox, the wife of J. B. Adcox, joined in the conveyance for the purpose of relinquishing dower, and acknowledged the same, and she was joined in the action as one of the defendants.

Appellants answered denying that the agreement was that one-half of the one-eighth royalty was to be conveyed, and alleging that the description in the deed was in accordance with the intention of the parties in making the sale and purchase.

The chancery court granted the relief prayed for by appellee, and rendered a decree accordingly, reforming the deed both as to the owner, J. B. Adcox, and also against his wife so far as it affected the relinquishment of dower. The correctness of the decree is attacked by counsel for appellants on the ground that the evidence is not clear and convincing in establishing the fact that there was an error in the deed. There is no controversy between the parties as to the law with reference to the degree of proof essential for the reformation of a deed or other written instrument. The evidence must be "clear, convincing, unequivocal and decisive," and must establish the right beyond a reasonable doubt. *McGuigan* v. *Gaines,* 71 Ark. 614. This rule does not require that the fact be established entirely beyond dispute. The only requirement is that there be more than a mere preponderance, and the evidence must be of sufficient weight to establish the issue beyond reasonable controversy or

doubt. We are of the opinion that the evidence in this case fully meets that requirement.

The sale and purchase between appellee and appellants was negotiated by James L. Martin, who testified in the case and stated that he was employed by J. B. Adcox to sell an interest in the royalty, and was authorized by him to make sale of one-half of the royalty for $2,000, and that, pursuant to that authority, he negotiated the sale to appellee. He testified that he was the agent of appellant Adcox, and that the latter, after the sale was reported to him, caused the deed to be made, and that he (witness) took the deed and delivered it to appellee and received a check for the purchase price, out of which he was paid a commission by appellant. He testified that, at the time of the delivery of the deed to him and the delivery of it by him to appellee, he did not know that the deed failed to describe the interest to be conveyed in accordance with the trade made—that is to say, one-half of the royalty. This witness appears to be entirely disinterested, and there is no reason for rejecting any portion of his testimony. He is contradicted, however, by appellant Adcox, who testified that he did not constitute Martin as his agent, but merely consented for the latter, as a broker, to make sale of the royalty, and he stated that the deed properly described the interest to be conveyed.

Appellee testified that, in the negotiations with Martin, the proposition was made to him to sell him one-half of the royalty for $2,000, and he accepted this offer, and that, when the deed was delivered to him, he did not read the description, for the reason that he assumed that it was written in accordance with his agreement with Martin.

Other witnesses testified that appellant Adcox admitted afterwards that he had agreed to sell one-half of the royalty.

The testimony is overwhelming that the price of $2,000 for a conveyance of one-sixteenth of one-eighth

royalty would be grossly excessive. The proof shows that this property was five or six miles from actual oil production and that $2,000 was the full price for one-half of the royalty, which, at that rate, would make $32,000 the value of the total production, whereas the price of $2,000 for one-sixteenth of the royalty would make a one-eighth royalty worth $32,000, which, according to the overwhelming testimony, is grossly excessive.

We are of the opinion that the evidence is thoroughly satisfactory and convincing that a mistake was made in the conveyance. It was a mistake easily made by the scrivener and one little likely to be discovered in casual reading. The description, instead of saying an undivided one-sixteenth portion of the interest of the grantors, should either have said one-sixteenth of the total production or one-half of the interest of the grantors.

It is further contended that there should be no reformation for the reason that the mistake was not mutual. We are of the opinion that, if the evidence shows any mistake at all, it was mutual, because all the testimony adduced in the case which tends at all to show that there was a mistake is to the effect that both appellee and appellant Adcox understood that one-half of the royalty was to be conveyed.

Again, it is contended that appellee is barred from relief on account of his own negligence in failing to read the deed. The answer to this contention is that he was led to believe that the deed conveyed the interest which he had purchased, and was lulled into security by that belief, hence he is not barred by his failure to read the deed. *St. L. I. M. & S. Ry. Co.* v. *McConnell,* 110 Ark. 306.

Our conclusion therefore is that the decree reforming the deed is correct so far as concerns the rights of the owner, J. B. Adcox. But it is further contended by appellants that the court erred in attempting to reform the relinquishment of dower by the wife, appellant Ella Adcox. It will be observed that the conveyance in ques-

tion was not an original sale or lease of mineral rights, but was a conveyance of royalty reserved in the lease to Jones. Whether or not this was such an interest that would give the wife of the grantor dower in the event of the death of her husband we need not now decide; but conceding, without deciding, that the conveyance was of such a character as there should be a relinquishment of the wife's dower rights, it does not follow that the deed should be reformed as to her. On the contrary, we have held that a misdescription in a deed of conveyance of land could not be reformed so far as to affect the wife's dower rights. *Morris* v. *Covey,* 104 Ark. 226. The reason given in that decision why there can be no reformation was that a wife can relinquish her dower only in the method provided by statute, and there can be no reformation, for the reason that she was entirely without power to relinquish dower except in the manner pointed out by the statute. Counsel for appellee insist that that decision fails to take into account a statute enacted by the General Assembly of 1893 (Crawford & Moses' Digest, § 5578), authorizing chancery courts to reform "all deeds or other instruments of conveyance of married women." It is a mistake to assume that the statute was overlooked, for we cited the case of *Mills* v. *Driver,* 72 Ark. 534, where the statute was mentioned. It may be added now, however, that the statute has no application to a relinquishment of dower, for it applies in terms only to deeds or other instruments of conveyance and not to a relinquishment of dower. We adhere therefore to the decision that the wife's relinquishment of dower cannot be reformed. But that does not affect the validity of the conveyance so far as concerns the rights of the husband.

There is a question raised by appellee in this case as to the evidence being properly brought into the record, but we have reached the conclusion on the merits of the case in favor of appellee, assuming the evidence to be

properly brought up, and it is unnecessary to discuss that question.

The decree against appellant J. B. Adcox reforming the conveyance as to him is in all things affirmed, but the decree as against appellant Ella Adcox is reversed, and the cause as to her dismissed.

HOLT v. TEXARKANA.

Opinion delivered May 11, 1925.

1. MUNICIPAL CORPORATIONS—DUTY TO REPAIR STREETS OR BRIDGES.—Municipal corporations at common law are not required to repair highways, streets or bridges.
2. BRIDGES—LIABILITY OF CITY FOR NEGLIGENCE IN REPAIRING.—A city is not liable to an individual for injuries resulting from its negligence in maintaining a bridge within its limits, as required by Crawford & Moses' Digest, § 7607.

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

STATEMENT OF FACTS.

Delia Holt, a minor, by her next friend and mother, Mrs. Delia Holt, in this action seeks to recover damages against the city of Texarkana, Arkansas, for injuries alleged to have been sustained by said minor in consequence of the want of proper repairs to a bridge or viaduct of the city.

It appears from the complaint that Texarkana is a city of the first class, and the railroad of the St. Louis, Iron Mountain and Southern Railroad Company extends through the corporate limits of the city. The Legislature of 1907 passed an act to require said railroad company to build a bridge or viaduct where its right-of-way is crossed by College Street, in the city of Texarkana, Arkansas. The act provides that the railroad company shall pay one-half of the cost of said bridge or viaduct, and the other half shall be paid by the city. It further provides that, after the bridge or viaduct is completed, the rail-

road company shall be under no obligation to maintain it, but that it shall thereafter be maintained by the city of Texarkana, Arkansas. Acts of 1907, p. 606.

The city of Texarkana allowed the floor of said overhead bridge or viaduct to become out of repair, and a plank in the floor of the bridge to be moved and displaced. On the 2nd day of December, 1921, Delia Holt, a little girl eight years of age, while on her way to school, attempted to walk across said bridge on the part of it usually traveled by pedestrians, and fell through said open place in the bridge floor and thereby received severe and permanent personal injuries.

The court sustained a demurrer to the complaint, and the plaintiff refused to plead further. Thereupon judgment was rendered for the defendant, and the plaintiff has duly prosecuted an appeal to this court.

J. M. Carter and *B. E. Carter,* for appellant.

James D. Head, for appellee.

HART, J., (after stating the facts). The plaintiff in this action seeks to recover damages against the city of Texarkana for injuries alleged to have been sustained in consequence of the want of proper repairs to a viaduct of the city. The complaint alleges that it was the duty of the city to keep the viaduct in proper repair, and that the plaintiff's injuries were caused because the viaduct was out of repair and dangerous for travel.

In this State it is the settled law that there is no common-law liability resting upon *quasi* corporations, such as counties and municipalities, to repair highways, streets or bridges within their limits, and they are not obliged to do so unless by force of statute. It is true that the special act for the construction of the viaduct in question provides for its maintenance by the city of Texarkana after it has been constructed by the railroad company. Our general statute, however, provides that the city council shall have the care, supervision and control of all the public highways, bridges and streets within the city, and shall cause the same to be kept open and in

repair and free from nuisance. Crawford & Moses' Digest, § 7607.

This section is a part of the act of March 9, 1875. The negligence of the defendant in the performance of this public duty is the basis of the right of action in cases of this sort. It has been settled by a long train of decisions in this State that such an action is not maintainable. The decisions of this court have classified the management and control of streets and highways by municipal corporations as the exercise of its functions as a governmental agency, and, for this reason, no civil action may arise for an injury resulting from the neglect to keep them in repair. *Arkadelphia* v. *Windham,* 49 Ark. 139; *Fort Smith* v. *York,* 52 Ark. 84; *Collier* v. *Fort Smith,* 73 Ark. 447, and *Gray* v. *Batesville,* 74 Ark. 519.

As sustaining the same principle, see *Fordyce* v. *Woman's Christian Nat'l Lib. Assn.,* 79 Ark. 550; *Franks* v. *Holly Grove,* 93 Ark. 250; *Gregg* v. *Hatcher,* 94 Ark. 54; *Dickerson* v. *Okolona,* 98 Ark. 206; and *Birchfield* v. *Diehl,* 126 Ark. 115.

The same rule has also been applied to improvement districts. *Wood* v. *Drainage District No. 2, Conway County,* 110 Ark. 416; *Board of Improvement of Sewer District No. 2* v. *Moreland,* 94 Ark. 380; and *Jones* v. *Sewer Imp. Dist. No. 3 of Rogers,* 119 Ark. 166.

It is true that there is great conflict in the authorities on this question, but the question has been very fully and carefully considered by different sets of judges of this court. The opinions have been deliberately formed and expressed after recognizing the conflict in the authorities. No useful purpose could be served by again taking up and reviewing the decisions upon the question. For many years the law has been considered definitely settled in this State. Therefore it will require legislative action to create any liability against a town or municipal corporation to a private indi-

vidual for negligence in maintaining its streets, highways or bridges. Whether such liability should be created has been well said to be a legislative question of importance and some nicety.

It follows that the judgment of the court was correct, and it will be affirmed.

WYCOFF v. FARMERS' & MERCHANTS' BANK.

Opinion delivered May 11, 1925.

1. ATTACHMENT—EFFECT OF AGREEMENT THAT OWNER SELL PROPERTY.—An agreement between the owner of personal property and an attaching creditor that the owner should sell the property and turn over the proceeds to the sheriff was in effect a release of the attachment on these specific articles, and a relevy upon the proceeds of the sale.
2. EXEMPTIONS—RIGHT TO EXEMPTION IN PROCEEDS OF SALE.—An agreement of the owner of property, which he was about to sell with an attaching creditor that he continue the sale and turn over the proceeds to the sheriff, thereby allowing the sheriff to levy a writ of attachment on the money, did not amount to a waiver of his claim of exemptions in such proceeds.

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

STATEMENT OF FACTS.

This was an action by the Farmers' & Merchants' Bank in the circuit court against George R. Wycoff, Jr., to recover the sum of $422.20, alleged to be due upon a promissory note.

The plaintiff also sued out a writ of attachment against the defendant on the ground that he was about to dispose of his property with the fraudulent intent to cheat, hinder and delay his creditors in the collection of their debts.

The sheriff levied the attachment on certain personal property which the defendant had advertised for sale on a certain day, and took the property into his

custody. The defendant wished to regain possession of the property so as to proceed with the sale of it. The defendant had given a delivery bond to obtain possession of the property, and some question arose as to its sufficiency. It was agreed between the attorneys for the plaintiff and the defendant that the sale should proceed under the direction of the sheriff, and that the proceeds of sale should be turned over to the sheriff and by him held subject to the order of the court. The sale was made by the defendant under the direction of the sheriff, as agreed upon, and the proceeds of sale in the sum of $163.30 were turned over to the sheriff.

The defendant filed his schedule of exemptions of personal property, and, among the personal property claimed as exempt from the process of the court, was said sum of $163.30. He is a married man, and a resident of Boone County, Arkansas. The court denied the defendant's claim of exemption as to said sum of $163.30, and from an adverse judgment the defendant has duly prosecuted an appeal to this court.

Karl Greenhaw, for appellant.

S. W. Woods, for appellee.

HART, J., (after stating the facts). In denying the plaintiff's claim of exemption as to the $163.30, the court based its decision upon the case of *Surratt* v. *Young*, 55 Ark. 447. In that case certain personal property of the defendant had been levied upon under a writ of attachment. The plaintiff in the attachment suit presented a petition before the circuit judge in vacation, praying for a sale of the attached property. The defendant in the attachment suit indorsed on the petition his consent to the sale of the property as prayed for. An order of sale was made, and the property was duly sold by the sheriff. Afterwards the defendant claimed his exemptions out of the proceeds of the sale of his property by the sheriff, as above set forth. His claim of exemptions was denied. The court said that the Constitution conferred upon the debtor the privilege of claiming specific articles of per-

sonal property as exempt from execution, and the statute points out particularly the manner in which this must be done. The court said further that the statute did not confer upon the debtor the right to claim his exemptions out of the proceeds of property after it is sold under the process of the court, or under an order of the court, when he has had an opportunity to claim his exemption in specific articles as provided by the statute. In short, the court held that, by consenting to the order of sale by the sheriff, he waived his right to claim his exemption out of the proceeds of sale.

Here the facts are essentially different. The defendant did not consent to the sale of his property under the writ of attachment. It was agreed between the plaintiff and the defendant that the defendant himself should sell the property under the direction of the sheriff and turn over the proceeds of sale to him. It was true, this was done after the property had been attached; but the practical effect of the agreement between the plaintiff and the defendant was that the sheriff released the attachment upon the specific articles of property and re-levied it upon the proceeds of sale. The sale was not made under an order of court, but was made by the defendant himself. He turned the proceeds of sale over to the sheriff under the agreement, and this amounted to a levy of the attachment by the sheriff upon the money.

This court has uniformly held that the exemption clause of the Constitution is highly remedial, and should be liberally construed. We do not think, under the circumstances of this case, that it can be said that the defendant waived his exemptions by turning over the proceeds of sale to the sheriff and thereby allowing the sheriff to levy the writ of attachment upon the money. Certainly the agreement that he himself should sell the property did not amount to a waiver of his exemptions. The vital distinction between the facts in this case and the one cited above is that, in the case cited, he consented that his property be sold under the order of the court

before he made his claim of exemptions, while in the present case the sale was made by himself.

It follows that the court erred in denying the defendant his claim of exemptions, and for that error the judgment will be reversed, and the cause remanded for further proceedings according to law.

WARD v. SPADRA COAL COMPANY.

Opinion delivered May 11, 1925.

1. MINES AND MINERALS—LIABILITY OF LESSOR FOR CONVERSION BY LESSEE.—To render a lessor of a coal mine liable in trespass for conversion by his lessee of coal on adjacent land, it must appear that the lessor acted in concert in committing the trespass or otherwise aided and assisted the lessee to commit the trespass.
2. MINES AND MINERALS—CONVERSION OF COAL—EVIDENCE.—In an action for conversion of coal on adjacent land by a lessee of a coal mine, evidence *held* to sustain a finding that the lessor told the lessee to mine the coal in question.
3. MINES AND MINERAL—UNLAWFUL CONVERSION OF COAL—MEASURE OF DAMAGES.—Where coal is unlawfully extracted from another's premises through honest mistake, the measure of damages is the value of the ore in place in the ground; but where the taking is done wilfully and intentionally, the measure is the value of the ore at the mouth of the mine.
4. MINES AND MINERALS—PRESUMPTION AS TO TAKING OF ORE.—The wrongful taking of ore is presumed to be intentional and wilful, but the presumption may be overcome.
5. MINES AND MINERALS—UNINTENTIONAL TRESPASS.—Where a lessor instructed a lessee to mine all the coal in a vein which in fact ran into an adjacent proprietor's land, and it was fairly inferable that they thought the vein would run out before reaching the boundary of his claim, the lessor and lessee were inadvertent trespassers, and liable only for the value of the coal as it lay in the ground.
6. MINES AND MINERALS—DAMAGES.—In an action for conversion of coal by a lessor through his lessee, damages assessed on the basis of the lessor's royalty *held* improper.
7. MINES AND MINERALS—INTEREST ON VALUE OF CONVERTED COAL.—In an action for conversion of coal, interest on its value in place in the ground from the time of conversion *held* proper.

Appeal from Johnson Chancery Court; *W. E. Atkinson,* Chancellor; modified.

STATEMENT OF FACTS.

The Spadra Coal Company instituted this suit in the circuit court against A. F. Ward, M. M. McWilliams, N. R. Clark, James Dalton and James Hardin, to recover damages in the sum of $18,800, on account of the wilful and intentional trespass of the defendants in mining coal on their lands. On motion of the defendants, and without objection, the case was transferred to the chancery court.

The record shows that A. F. Ward, M. M. McWilliams and N. R. Clark had a lease to mine coal on eighty acres of land in Johnson County, Arkansas. The land is described in their lease, and one forty-acre tract lies north of the other forty-acre tract. Their mine was known as the Possum Trot mine, and, after they had mined coal on it for about thirteen years, they leased their mine to James Hardin and James Dalton. They had about $35,000 worth of coal mining machinery and equipment at the time they leased the mine to Hardin and Dalton. They had also spent several hundred dollars in getting their coal tracks repaired before they leased the mine. The Spadra Coal Company operated a mine called the Sunshine mine, which was on the forty acres of land immediately west of one of the forty acres of land mined by the defendants.

Dalton and Hardin, while operating the mine under their lease from the defendants, Ward, McWilliams and Clark, took 4,005 tons of coal from the land on which the Spadra Coal Company operated a mine, and paid to their lessors a royalty of 75 cents per ton, which was the contract price provided in their lease. The plaintiff introduced evidence tending to show that this coal was wilfully and intentionally mined by the defendants. On the other hand, the evidence for the defendants, McWilliams, Ward and Clark, tends to show that the coal in question was not wilfully and intentionally taken from

the land of the plaintiff, and that they had no knowledge that their codefendants, Dalton and Hardin, had mined any coal from the land on which the plaintiff had a lease.

The testimony on this phase of the case and as to the value of the coal in question will be more particularly stated and referred to in the opinion.

The chancellor found the issues in favor of the defendants James Dalton and James Harding, and against the defendants A. F. Ward, M. M. McWilliams and N. R. Clark. It was therefore decreed that the plaintiff recover from the defendants A. F. Ward, M. M. McWilliams and N. R. Clark the sum of $3,003.74, which is found to be the value of 4,005 tons of coal at 75 cents per ton, which said defendants wrongfully mined from the land of the plaintiff. It is also decreed that the plaintiff should recover from the defendants $550.75 interest.

The defendants Ward, McWilliams and Clark have duly prosecuted an appeal to this court.

Jesse Reynolds, for appellants.

G. O. Patterson, for appellee.

HART, J., (after stating the facts). The defendants Dalton and Hardin had leased a coal mine, together with its mining machinery and equipment, from the defendants Ward, McWilliams and Clark, and agreed to pay them a royalty at the rate of 75 cents per ton for all coal taken from the mine by them. They wrongfully mined 4,005 tons of coal on an adjoining tract belonging to the plaintiff, and paid the royalty on this coal to their lessors.

Under these circumstances the defendants Dalton and Hardin were trespassers, and, the tort having been waived by the plaintiff, it had a right to sue Dalton and Hardin for the value of the coal taken by them. To entitle the plaintiff to a judgment against Ward, McWilliams and Clark, the lessors of Dalton and Hardin, it must not only appear that they were landlords of Dalton and Hardin, who took the coal, but also that they participated in some way in the act of going into the plaintiff's land to get it. In other words, it must appear that the

defendants acted in concert in committing the trespass complained of, or that the lessors in some way aided and assisted their lessees to actually commit the trespass. This is in application of the well-known rule that, to render one man liable in trespass for the acts of others, it must appear either that they acted in concert or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others. *Offerman* v. *Starr,* 2 Pa. St. 394; *Bard and Wenrich* v. *Yohn,* 26 Pa. St. 482; and *Dundas* v. *Muhlenberg's Executors,* 35 Pa. St. 351.

On the part of the plaintiff it was shown that McWilliams, acting for himself and Ward and Clark, told Hardin, one of the lessees, to go ahead and mine the coal which is the subject of the controversy in this case. This fact was testified to by James Hardin. Hardin said that McWilliams told him to go ahead and take the coal out between their mine and the Sunshine mine. McWilliams said that the Sunshine mine could not get to the coal in question, and, for that reason, told him to take the whole thing out. On the other hand, McWilliams denied having told Hardin to take out the coal in question, and said that he did not know anything about it until the plaintiff demanded payment for the coal taken, which was some time after the royalty had been paid them for the coal taken.

The chancellor found the issues on this point in favor of the plaintiff, and it cannot be said that his finding is against the weight of the evidence. Hence it may be said to be established that McWilliams and his associates acted in concert with Dalton and Hardin in taking out the coal in question, or at least advised them to mine. Therefore, under the principles of law above announced, they became jointly liable to the plaintiff for the value of the coal taken.

The measure of damages in an action for unlawfully extracting ore from the premises of another depends upon whether the invasion of the premises was through

inadvertence or honest mistake, or was willful. If the trespass is the result of an honest mistake, the defendant is compelled to pay only the value of the ore as it was when originally in place in the ground. If, on the other hand, the defendant takes out the ore wilfully and intentionally, he must pay the value of the ore as found at the mouth of the mine. *Lindley on Mines,* 3 ed., vol. 3, par. 868; *Hall* v. *Abraham* 44 Ore. 75 Pac. 882; *Central Coal & Coke Co.* v. *Penny* 173 Fed. 340; *Resurrection Gold Min. Co.* v. *Fortune Gold Min. Co.* 129 Fed. 668; *Lyons* v. *Central Coal & Coke Co.* 239 Mo. 626, 144 S. W. 503; and *Ege* v. *Kille,* 84 Pa. 333.

The measure of damages for wrongfully taking ore from the land of another, through mistake or in good faith, is the value of the ore in place in the mine. The wrongful taking of the ore raises a presumption of fact that the trespasser took it intentionally and wilfully, but this presumption may be overcome by the evidence in the case.

As we have already seen, the chancellor accepted the evidence for the plaintiff on the question of McWilliams and his associates advising their lessees to mine the ore in controversy. James Hardin, one of the lessees, was the witness who testified for the plaintiff on this point. His evidence establishes the fact that his lessors and the plaintiff both operated mines on adjoining forty-acre tracts of land. His lessors had been mining the ore themselves, and, in consequence, knew the direction of the vein they were mining. They knew that they were near the boundary line of their own mine, and it is fairly inferable from the testimony of Hardin, taken as a whole, that they thought the vein would run out by the time their boundary line was reached, or, in any event, soon afterwards; that they did not believe that it would be practicable for the plaintiff to mine the coal in question.

Under these circumstances, we think that, while the defendants were trespassers, they were innocent trespassers within the meaning of the rule relative to the

measure of damages, and that they took the coal inadvertently, or in the honest belief that they had a right to do so. Hence they were only liable for the value of the coal as it lay in the ground.

It results from the authorities cited above that such value depends upon the position and circumstances of each particular mine, on the quality of the ore, the cost of mining and preparing it for market, its proximity to the places where it is to be used or sold, and on the facilities for transportation.

On these points there is a lack of evidence in the record. The chancellor allowed 75 cents per ton on the ore taken as its value. There is nothing in the record to show where he got this value, unless it is the royalty provided for in the lease between McWilliams and his associates and Dalton and Hardin. The royalty in this lease cannot be considered under the circumstances of this case as a proper method in arriving at the value of the ore in the ground. The work of mining is one of magnitude, and requires a considerable outlay of money. In this case the lessors had mining machinery and equipment of the value of $35,000. They had also expended several hundred dollars in track-laying. These outlays were proper matters to be considered in fixing the royalty they were to receive in leasing their mine. Hence the royalty provided for in the lease could not be considered as a proper method of ascertaining the value of the coal as it originally lay in the ground.

On the other hand, there was evidence in the record which tended to fix the value of the coal in the ground. The plaintiff and the defendants were coal operators. The evidence in the record tends to show that the royalty usually paid in that locality for mining coal, where the machinery and equipment was not considered, was ten cents for slack coal and fifteen cents for hard coal. This evidence is not disputed, and should have been taken by the chancellor in fixing the value of the coal taken. The coal taken amounted to 4,005 tons. It is fairly inferable

that it was hard coal. The value of the coal taken amounted, in round numbers, to $600.

Interest on the value of the coal in place at the time of the conversion was properly directed to be allowed. It is as necessary a part of complete indemnity as the value itself. It has always been the law of this State that interest from the time of conversion, in addition to the value of the property converted, is allowed as damages. The coal in question was taken in November and December, 1920. The trial was had on the 19th day of December, 1923. Interest on $600 for three years at six per cent. would amount to $108.

The result of our views is that the measure of damages is the value of the coal in place at the time of the conversion, which we have found to be $600, with interest up to the time of the trial, amounting to $108. Therefore the decree of the chancery court must be reversed, and a decree will be entered here for $708, with interest at six per cent. from the 19th day of December, 1923.

It is so ordered.

BANK OF WEINER v. JONESBORO TRUST COMPANY.

Opinion delivered May 11, 1925.

1. MORTGAGES—FILING OF UNACKNOWLEDGED MORTGAGE.—A chattel mortgage, the acknowledgment of which was not signed by the notary public who took the acknowledgment, was not entitled to be filed under Crawford & Moses' Digest, § 7384; and such mortgage constituted no lien as to third parties, even though they had actual notice of it.
2. MORTGAGES—EFFECT OF SUIT TO FORECLOSE AND APPOINTMENT OF RECEIVER.—Where a mortgagee of land brings suit to foreclosure his mortgage and procures the appointment of a receiver to take charge of the land, this has the effect of impounding the unsevered crop then growing on the land.
3. APPEAL AND ERROR—ISSUE NOT RAISED BELOW.—In a foreclosure suit the issue that the court erred in decreeing a sale of a growing crop of cotton, instead of entering a decree for the rental value of the land, not being raised by the pleadings below, could not be raised on appeal.

Appeal from Poinsett Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

Hawthorne, Hawthorne & Wheatley, for appellant.

Horace Sloan, for appellee.

SMITH, J. On January 12, 1923, the Jonesboro Trust Company took a real estate mortgage on certain lands belonging to Otto Ruegger. On January 18, 1923, the Bank of Weiner took a chattel mortgage on a rice crop to be grown by Ruegger on said lands during the year 1923. The chattel mortgage was signed by Ruegger, and the notary public attached his seal thereto, but failed to sign his name to the certificate of acknowledgment. This chattel mortgage was forwarded to the circuit clerk of Poinsett County, in which the property was situated, "to be filed but not recorded," as authorized by § 7384, C. & M. Digest, and was so marked filed by the clerk on the 19th day of January, 1923. This chattel mortgage was given to secure an indebtedness then due the bank and to secure future advances to be made by it.

After the rice crop had matured and cutting had begun, the Jonesboro Trust Company filed suit to foreclose its mortgage, and had a receiver appointed by the chancellor in vacation. The holder of a prior mortgage and the Bank of Weiner were made parties to this proceeding, and, at the final hearing, the court held that, as the notary public did not put his signature to the certificate of acknowledgment, the mortgage was void as against third parties, and the trust company, by reason of having a receiver appointed, was entitled to all of Ruegger's crop not cut at the time of the receiver's appointment, and the Bank of Weiner, hereinafter referred to as the bank, has appealed.

The bank contends that the mortgage was good as between it and Ruegger, that the receiver took no greater interest in Ruegger's crop than Ruegger had, that its mortgage was an equitable one, and that, in any event, the trust company would be entitled only to the rents

and profits of the land, and not the entire ungathered crop.

It was alleged in the bill to foreclose that Ruegger was insolvent, and that the land was not of sufficient value to pay the indebtedness secured by appellee's mortgage and the prior mortgage, and that the crop would be required for that purpose. The truth of this allegation was shown by the fact that the proceeds of the sale of the land, including the crop, under the decree of foreclosure, were insufficient to pay the debt due appellee.

The failure of the notary public to sign the certificate of acknowledgment to the chattel mortgage executed to the bank rendered the certificate void, and that mortgage was in effect an unacknowledged instrument. *Davis* v. *Hale,* 114 Ark. 426. This being true, the chattel mortgage was not entitled to be recorded, and the fact that it was filed with the clerk is unavailing, and, while it was good between the parties thereto, it constituted no lien on the property therein described as to third parties, and was not binding on them, even though they had had actual notice of it. *Cross* v. *Fombey,* 54 Ark. 179.

In regard to the contention that the mortgage to the bank is an equitable one and should be given priority as such, it may be said that this is a legal mortgage. It was in fact good between the parties thereto, and might have been foreclosed as between the parties, without the intervention of a court of equity. But, so far as third parties were concerned, this chattel mortgage was not a mortgage at all, because it had not been properly acknowledged, and was not therefore entitled to be placed of record. Sections 7380, 7381, C. & M. Digest; *Merchants' & Planters' Bank* v. *Citizens' Bank,* 125 Ark. 131, 135, and the numerous other cases cited in appellee's brief. *

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*Cases cited in appellee's brief: *Challis* v. *German Nat. Bank,* 56 Ark. 88; *Main* v. *Alexander,* 9 Ark. 112; *Hannah* v. *Carrington,* 18 Ark. 90; *Jarratt* v. *McDaniel,* 32 Ark. 598; *Haskill* v. *Sevier,* 25, Ark. 153. (Rep.)

The mortgage to appellee contained a clause accelerating the maturity of the debt there secured in the event Ruegger made default in the payment of the taxes due on the land mortgaged, and it was alleged and shown that Ruegger had made default in this respect.

Upon filing this suit to foreclose, appellee asked that a receiver be appointed, and this was done, and the receiver gathered the portion of the crop which, at that time, was unsevered from the soil, and this unsevered crop was sold under the decree of the court.

Appellee was entitled, under the allegations of the complaint, to have a receiver appointed to take charge of the land (§ 8612, C. & M. Digest), and, when he did so, this action resulted in impounding the unsevered crop then growing on the land.

In the case of *Osburn* v. *Lindley,* 163 Ark. 260, the court said: "The bringing of this action (a suit to foreclose a vendor's lien) and the petition asking for the appointment of a receiver to take charge of the rents and profits of the lands on which the vendor's lien existed, had the effect of impounding the proceeds of those rents and profits in the hands of the receiver for the benefit of the vendor, to be appropriated in satisfaction of the decree in his favor for the purchase money. The rents and profits on the lands, after their sequestration by the institution of this suit and the appointment of a receiver, stand in the same category as the land itself. A vendor's lien in equity is of the same nature as a mortgage, and is treated and enforced as such. (Citing cases)." See also *Lee* v. *Bandimere,* 140 Ark. 277; *Gailey* v. *Ricketts,* 123 Ark. 18; *Oliver* v. *Deffenbaugh,* 166 Ark. 118.

It is finally insisted that the court below erred in decreeing a sale of the crop, and should have given appellee a decree for the rental value of the land only. In reply to this contention, it may be said that no such issue was raised by the pleadings in the court below; and it may be further said that Ruegger has not appealed, and,

as the bank has no lien on the crop, it is in no position to raise the question.

Moreover, the lien of appellee's mortgage on the land attached to the growing crop when the land was impounded for the purpose of foreclosure, and the crop was therefore subject to sale along with the land, as it had not been severed by the execution of a valid mortgage thereon, or otherwise.

It is true appellee's mortgage did not specifically describe the crop, but the mortgage to the bank on the crop would have been a lien thereon only from the date of its filing, and, as it was not entitled to be filed, it must be treated as not having been filed, and the lien of the mortgage on the land attached to the crop growing thereon at the time possession was taken of the land for the purpose of foreclosure. The court did not therefore err in directing the sale of the unsevered crop, instead of rendering a decree for the rental value of the land only.

The decree is correct, and is affirmed.

REED OIL COMPANY v. SHNABLE.

Opinion delivered May 11, 1925.

FIXTURES—RIGHT OF TENANT TO REMOVE IMPROVEMENTS.—Where a lease provided that improvements could be placed on the land at the lessee's option, but could not be removed unless the rent is paid in full, the lessee was entitled to remove such improvements on vacating the premises before expiration of the term of the lease, without paying the rent for the unexpired term; the requirement of payment before removal referring to rent due on vacating.

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; reversed.

R. W. Wilson and *W. N. Ivie,* for appellant.

Ruth Shnable and *Mike Danaher* and *Palmer Danaher,* for appellee.

SMITH, J. This case was heard in the court below on the complaint and answer, the material portions of

which pleadings are as follows: It was alleged in the complaint that appellant leased a certain lot in the city of Pine Bluff from appellee. This lease contract was in writing, and contained the following provisions:

"The lessee agrees to pay to the lessor as rent for the period of this lease the sum of thirty-five dollars ($35) per month, the first monthly installment of rent to be due and payable May 17, 1922, and one to be due and payable on the 17th of each and every month thereafter during the term of this lease—said rent being payable in advance for each month, until all of said installments shall have been paid; said rent being evidenced by the 48 promissory notes of the lessee in favor of the lessor, dated May 17, 1922, in the sums above mentioned, and payable as above set forth, bearing interest from maturity at the rate of 10 per cent. per annum until paid.

"All improvements placed on said premises shall be made at the lessee's expense, and lessor shall not be required to make any improvements or repairs on said place whatever, and, at the termination of this lease, lessee may remove any buildings or other improvements placed on the land by them, provided the rent is paid in full. Lessee hereby agrees to pay all increase in taxes caused by erection of buildings or other improvements on said leased premises, if any increase is made."

Pursuant to this lease, appellant placed on the land certain tanks, a sheet-iron house, and a gasoline engine and gasoline pump, which, the complaint alleged, appellant was proceeding to take apart for removal from the land and to ship out of the State, and will take apart and remove unless enjoined from so doing.

It was further alleged that, "under said lease, there is due the plaintiff the sum of $910 as rent to May 16, 1926, before the defendant, the Reed Oil Company, is entitled, under the provisions of said lease, to remove any buildings or improvements that it has placed on said premises."

The answer in effect put in issue the respective rights of the parties under the lease. It was not alleged in the complaint that the defendant was insolvent, but the answer denied that defendant was insolvent, and alleged ownership of property in this State subject to execution of the market value of $25,000. The answer denied that appellant was in arrears in the rent or intended to defeat appellee in the collection of any rent due her under the contract.

The court found for the plaintiff on the pleadings, and entered a decree enjoining appellant from removing any of the fixtures which had been placed on the land, unless appellant would first pay all the rent which would accrue up to the expiration of the lease, and this appeal is from that decree.

In addition to the facts stated, there are certain other provisions of the lease, which are not material to the decision of the question presented. The lease imposed the affirmative obligation on appellant to pay $35 per month rent on the 17th of each month for forty-eight consecutive months.

By its express provisions the lease contract exempted appellant from the duty of making any improvements or repairs on the lot, but gave it the option of doing so, and the character of such improvements as might be placed on the lot as trade fixtures was expressly recognized, for the right of removal was given. But it is insisted —and the court below found—that the lease did not give this right of removal until the rent for the entire term had been paid.

After granting the right of removal, the lease does recite that this right may be exercised "provided the rent is paid in full." The parties no doubt contemplated that the lot would be occupied by the appellant for the entire term of the lease and that improvements would be placed on the lot, and we think the meaning of this proviso is that, after so occupying the land for the time

limited, improvements could not be removed unless all rents then due should be paid.

There was no obligation on the part of appellant to place improvements on the land. This was a right to be exercised at its election, but, if improvements were placed on the land, they could not be removed if appellant was in arrears in the payment of rent at a time when the right of removal was sought to be exercised. Now there is no allegation that appellant is in default in the payment of accrued rent. It is only alleged that there is rent which will mature and be payable during the remainder of the lease.

The instant case is very similar to the case of *Buffalo Zinc & Copper Co.* v. *Hale*, 136 Ark. 10, and is controlled by the principles there announced.

In that case certain buildings in question which the lessee sought to remove from the land leased were erected under a contract by the express terms of which the right of removal was reserved, as in the instant case, and we there said that the buildings did not therefore become a part of the realty, but remained the lessee's personal property. In that case, as in this, the contract of lease did not require the lessee to erect the fixtures, and the lessee had the right to erect the fixtures or not, as it pleased, and the rent to be paid was not dependent on the lessee's action in this respect. A fixed rental was provided for in any event.

It was there contended that the right of removal would not have existed but for the contract, and that the provisions of the contract which gave the right of removal conferred the right in the event only that all of the rent be paid for the full period of the lease. We answered that contention by saying that it appeared from the lease contract itself that the buildings were erected on the leased premises solely for the purpose of enabling the lessee to carry on a business or trade, and were intended for its own use and convenience, and not for the purpose of making or increasing the value of the

lots or the value of their use, and that the right to take possession of the property was given only after forfeiture had been declared, and that the lessor could not take possession of the buildings so as to permit the exercise of ownership and control of them by the lessee, when no right to declare a forfeiture existed.

In that case, as in this, no right was given the lessor to collect rent except as it became due, nor was there a showing that the lessee would not continue the performance of the contract with reference to the payment of rent. There is here no allegation of insolvency; on the contrary, the allegation of the answer is that appellant owns unincumbered property in this State subject to execution of the value of $25,000.

Under these facts, the removal of the trade fixtures should not have been enjoined, and the decree so ordering will be reversed, and the injunction will be dissolved.

MACK v. PARAGOULD & HOPKINS BRIDGE ROAD IMP. DIST.

Opinion delivered May 11, 1925.

1. BRIDGES—CONSTRUCTION AS PART OF HIHGWAY.—A bridge 19,000 feet long to be constructed at an expenditure of $57,000, as part of a road improvement to cost $190,000 *held* not so excessive in cost as to require that it be constructed as a separate improvement.
2. HIGHWAYS—CONSTRUCTION OF PLANS.—Plans for construction of a highway, described in landowner's petition and the county court orders, *held* not to call for improvements of any city streets.
3. HIGHWAYS—VALIDITY OF IMPROVEMENT DISTRICT.—The fact that a proposed road improvement under the control of a single set of commissioners extended to the middle of a river which constituted the State boundary did not invalidate the district, where it there connected with a similar improvement by the adjoining State, so as to form a completed bridge across the river.

Appeal from Greene Chancery Court; *J. M. Futrell*, Chancellor; affirmed.

Jeff Bratton, for appellant.

D. G. Beauchamp, for appellee.

SMITH, J. Appellants are the owners of real estate lying within the Paragould and Hopkins Bridge Road Improvement District No. One of Greene County, Arkansas, and have by this suit attacked the validity of that district.

It was alleged in the complaint which appellants filed that the district is void for the reason that, in the plans and specifications prepared by the State Highway Department and filed in the county court of Greene County, upon which the final petition signed by the landowners was predicated, as required by law, a bridge or viaduct is provided for extending from the west line of the lowlands adjacent to the St. Francis River to the center of the channel of said stream. This bridge or viaduct is 1,900 feet in length, and the cost of its construction is estimated at $57,000, and it is alleged that the district has no authority or power to build this bridge or viaduct.

It was also alleged that the map of the district describing the proposed improvement, which was attached to the final petition of the landowners, shows a road to be improved which extends beyond the boundary of the proposed district, and that this fact renders the district void.

The district in question was organized upon the petition of the landowners, under the provisions of what is known as the Alexander road law (§ 5399 *et seq.,* C. & M. Digest).

It appears from the record in the case that the purpose of the proposed improvement is to connect the city of Paragould with an improved highway which has been built in the State of Missouri to the State line, the improved road in that State extending to the center of the St. Francis River, which forms the boundary between the two States at that point.

St. Francis River, at the point where it is proposed to cross it by connecting up with a bridge built in Missouri to the State line, is a very small, narrow stream, but there is an annual overflow which spreads over its banks. Adjacent to the river is a sandy alluvial soil, which was not regarded as adapted to forming the base of an improved road, and the plans prepared by the State Highway Department called for the building of a viaduct or bridge over this area and across a drainage ditch and levee and over that part of the river proper lying in this State, and connecting with the portion of the bridge in the State of Missouri.

As has been said, the total length of the bridge or viaduct is 1,900 feet, of which the portion extending into the river proper is about 150 or 200 feet, and the portion spanning the ditch is between 100 and 150 feet. The remainder extends over the lowlands adjacent to the river.

It is insisted that the bridge or viaduct is of such magnitude that it can only be constructed as a separate improvement, and the case of *Van Dyke* v. *Mack,* 139 Ark. 524, is cited as sustaining that contention.

The case just cited involved the construction of a special act of the General Assembly creating the Arkansas & Missouri Highway Improvement District, by the terms of which improvement districts were created in each of the counties through which the proposed road ran, to construct the portion of the road lying within the respective counties. One of these districts was in Jackson County, through which the White River flows, and it was insisted that the statute creating the district authorized the commissioners of the district in Jackson County to build a bridge over White River.

Section 4 of the special act creating that district authorized the commissioners "to construct bridges, subways, culverts, and all necessary appurtenances of said roads," and we held that the language of the statute quoted did not authorize the commissioners to construct a

bridge across White River as a part of the road to be improved, for the reason that it was manifestly intended by the statute to authorize only such bridges, subways and culverts as would constitute necessary appurtenances to the road to be constructed, and not bridges of such size and magnitude as would constitute separate improvements.

Section 7 of the Alexander law (which is § 5409, C. & M. Digest) provides that the plans for a proposed road shall show the grading to be done, the bridges and culverts to be constructed, and the other work necessary to construct the proposed improvement, and confers power to build such bridges and culverts as are a necessary part of the road, and are not of such magnitude as to constitute a separate improvement.

The facts here are very different from those in the case of *Van Dyke* v. *Mack, supra,* and are very nearly like those in the case of *Bullock* v. *Dermott-Collins Road Imp. Dist.,* 155 Ark. 176, where the proposed road crossed a large creek and Bayou Bartholomew, and bridges costing from ten to twelve thousand dollars over each stream were required. Bayou Bartholomew is a stream of approximately the size of the St. Francis River where the road in the instant case crosses it.

Here the bridge or viaduct extends to the center of the St. Francis River, a distance of less than 200 feet; it crosses a drainage ditch and levee, which requires nearly the same amount of bridge work, and the remainder of the 1,900 feet, comprising the total length of the bridge or viaduct, is over land which might be crossed by building an embankment, if a bridge or viaduct were not regarded by the engineers who formulated and prepared the plans as being more desirable, and this bridge or viaduct is for the larger part of the distance merely an elevated highway. The estimated cost of the bridge or viaduct is $30 per running foot.

The total estimated cost of the whole improvement is $190,400, and we do not think the proportionate cost

of the bridge or viaduct is so large that it could only be constructed as a separate improvement, but we think that, like the bridges in the case of *Bullock* v. *Dermott-Collins Road Imp. Dist., supra,* it is a component part of one improvement.

Of the second ground of attack but little need be said. The west end of the road is at the east end of Junction Street, in the city of Paragould, which street extends to the boundary of the city. In other words, the proposed road extends to the east boundary of the city of Paragould, and runs for several miles on section lines before reaching the city, and the line of this road, as marked by the engineer on the plat, extends into the city for a short distance, as if it were proposed to improve a portion of Junction Street in that city, and which runs beyond the boundary of the district. This line does extend beyond the boundary of the district, but the portion of the road to be improved is colored and the portion of the line extending into the city is not colored. Moreover, the petition circulated among and signed by the landowners described the road as beginning at the east end of Junction Street in the city of Paragould, and the orders of the county court so described the road to be improved, and we do not think it can be fairly contended that the plans called for the improvement of a portion of the street in the city of Paragould which is not in the district.

It does not appear from the record before us that the proposed improvement is open to the objections which proved fatal to the proposed improvement in the cases of *Mullins* v. *Little Rock,* 113 Ark. 590, and *Mullins* v. *Commissioners' Bridge Imp. Dist. No. 2,* 114 Ark. 324. Each of those cases involved the construction of a bridge across the Arkansas River at the city of Little Rock. In the first of those cases the proposed improvement was defeated because, as was held by this court, there was no provision in the law for a local improvement district to aid a county in the construction of a

bridge connecting two cities, as was proposed in that case. In the second of those appeals, which involved the same improvement, it was held that there could not be two separate sets of commissioners to build a single improvement.

In the instant case it appears from the record before us that the commissioners will have sole control of the proposed improvement, which lies entirely in the district, and although it extends to the center of the St. Francis River, that fact will not defeat the construction of the improvement because it there connects with a similar improvement, and, when so connected, a completed bridge will exist and will afford a facility for crossing the river.

We think the court below was correct in dismissing the complaint as being without equity, and that decree is affirmed.

BAILY v. EAKES.

Opinion delivered May 11, 1925.

MORTGAGES—EFFECTS OF MERGER IN FEE—INTERVENING LEASE.—Upon a mortgagee accepting a deed to the mortgaged property, his rights under the mortgage were merged in the fee, subject to any intervening incumbrances, including a lease of which he had no knowledge, so that he could not collect from the tenant rents previously paid to the mortgagor.

Appeal from Pope Chancery Court; *W. E. Atkinson*, Chancellor; affirmed.

Hays, Priddy & Hays and *Robert Bailey*, for appellee.

HUMPHREYS, J. W. J. Martin, one of the appellees, owned two farms in Pope County. He executed a mortgage upon one of the farms for $1,800 and upon the other for $1,500. Subsequently he executed a second mortgage upon both farms to Mrs. Electra Powell to secure an indebtedness of $1,462.39. Mrs. Electra Powell transferred this note and mortgage to appellant,

without recourse, before maturity, for a valuable consideration. W. J. Martin resided upon the place known as the Martin homestead until the latter part of the year 1923. He sold the other place to D. F. Ward, who assumed the $1,500 mortgage thereon and a proportionate part of the mortgage to appellant. In the latter part of 1923 W. J. Martin leased the home place to Dow Eakes for the year 1924 for $350, which amount was paid in advance in cash. The mortgages were all past due at the time said lease was executed. This suit was then filed by appellant to foreclose his mortgage, subject to the first mortgages upon the property. W. J. Martin, Rosa B. Martin, his wife; D. F. Ward, M. M. Ward, his wife, and Dow Eakes and his wife were made parties defendant. After the institution of the suit, W. J. Martin and his wife conveyed the home place to appellant, and appellant accepted the deed with knowledge that, before the institution of the foreclosure proceedings, Dow Eakes had leased the home place for the year 1924 and had paid therefor in advance $350 in cash. D. F. Ward and his wife conveyed the other place to appellant. After the deeds were obtained the court dismissed the foreclosure suit against the Martins and Wards, at the request of appellant, and permitted him to amend his bill against Dow Eakes and his wife by alleging that they were occupying the home place without a verbal or written agreement with appellant, and by praying for a receiver to take charge of the lands for the year 1924, and for judgment against them for rent upon the property for the year 1924.

Dow Eakes and his wife filed a demurrer to the amended bill upon the ground that the facts stated therein did not constitute a cause of action against them.

The demurrer was sustained, and appellant refused to plead further, whereupon the court dismissed his bill for the want of equity, from which is this appeal.

Appellant contends for a reversal of the decree upon the theory that, after the execution and record of the

mortgage, the mortgagor had no right to execute a lease or create a tenancy which would prevent the mortgagee from foreclosing his mortgage. This contention is made upon the erroneous assumption that appellant was a mortgagee after he accepted deeds to the lands from the Martins and Wards. After the execution and acceptance of the deeds, appellee's rights as a mortgagee merged into his estate as owner in fee of the lands, subject, of course, to other intervening incumbrances of which he had knowledge. One of the intervening incumbrances was the lease executed by Martin to Dow Eakes for the year 1924 for $350 cash in advance. Appellant's amended bill contains the following admission:

"It is admitted that, before the proceedings to foreclose said mortgage were instituted, the defendant, Dow Eakes, leased said premises from W. J. Martin for the year 1924, and paid him $350 cash, all of which was known to appellant at the time he accepted the deed in the settlement of his demand."

In accepting the deed with knowledge of the tenancy, appellant ceased to be a mortgagee and assumed the relationship of landlord to Dow Eakes and wife. He voluntarily stepped into the shoes of Martin, and his right is no greater than Martin's right. Martin would have no right to collect the rents a second time, neither would his grantee, the appellant herein.

No error appearing, the decree is affirmed.

REISINGER v. DULANEY.

Opinion delivered May 11, 1925.

1. LANDLORD AND TENANT—GROSS MISTAKE IN ACREAGE.—In an action by landlords on a rental note and contract for lease of a farm at specified price per acre, which contract stated that 762 acres of land were in cultivation, where there was testimony tending to prove a mistake in acreage of cultivated land of over 200 acres, and that plaintiffs subsequently agreed to correct the acreage, the case was properly submitted to the jury, as against a request for peremptory instruction to find for the plaintiffs.
2. APPEAL AND ERROR—INSTRUCTION—HARMLESS ERROR.—In an action on a rental note and contract for lease of a farm, error, if any, in the admission of testimony tending to show that the contract which stated the amount of acreage in cultivation was not binding on the parties *held* cured by an instruction that the recital of such stated amount was binding unless the jury should find that it was the result of a gross mistake or unless the contract was subsequently changed by mutual agreement of the parties.
3. LANDLORD AND TENANT — NEW AGREEMENT — CONSIDERATION.—Where a dispute arose between the parties to a rental contract as to the amount of acreage in cultivation, the settlement of such dispute furnishes sufficient consideration for a new agreement reducing the amount of acreage and granting a refund of rent paid.

Appeal from Crittenden Circuit Court; *G. E. Keck,* Judge; affirmed.

R. V. Wheeler and *Wils Davis,* for appellant.

Caraway & Isom, for appellee.

HUMPHREYS, J. This is a suit upon a rental note and contract for the year 1923, and an attachment proceeding in aid thereof, brought by appellants against appellees in the circuit court of Crittenden County. Appellants leased to appellees 762 acres of land, more or less, open for cultivation, in sections 7, 18, 19, and 30, township 9 north, range 7 east, in Crittenden County, at an annual rental of $10 per acre for the years 1922, 1923, 1924, 1925, and 1926. The contract contains a clause and paragraph pertinent to the issues involved. The clause is in the paragraph describing the several farms specified in the lease, and is as follows:

"* * * of which land (referring to the various farms) there are 762 acres of land in cultivation, more or less, according to the survey made by Cushman, March, 1920 * * *."

The paragraph is as follows: "It is agreed by both parties that this acreage shall stand for the years 1922 and 1923, but for the year 1924 first parties can, if they so elect, have a new survey made, and that survey shall govern the acreage in cultivation for the years 1924, 1925 and 1926."

Appellee, J. B. Dulaney, filed a separate answer and cross-complaint, alleging that he was the sole party in interest, having succeeded to the rights of the other appellees, and admitting the execution of the note and contract, and alleging a gross mistake in the Cushman survey as to the acreage of lands in cultivation and a contemporaneous agreement to correct same, as well as a subsequent agreement, when he paid the rent in 1922, to ascertain the correct acreage by another survey and to rectify it. The cross-complaint contained an allegation that, according to the last survey, there were only 560 acres of land on the various farms in cultivation, and that, under the subsequent agreement modifying the first contract, he was entitled to a refund on the 1922 rent paid by him of $2,020 with interest thereon, and was also entitled to a credit of $600 for ditches which he had dug.

Appellants filed an answer denying each and every material allegation in the cross-complaint.

The right to attach the crops was not questioned.

The cause was submitted upon the pleadings, testimony and instructions of the court, which resulted in a verdict and consequent judgment in favor of appellee for $3,196.25, from which is this appeal.

In the course of the trial said appellee was permitted, over the objection and exception of appellants, to introduce two letters in support of his allegation that there was a contemporaneous agreement to correct the

Cushman survey as to acreage in cultivation, if said survey was incorrect. The letters tended to show such an agreement. The record is made up largely of testimony introduced responsive to the issues of whether there was any shortage in the acreage of cultivated lands, and, if so, how much, and whether there was a modification of the original contract to ascertain the correct acreage in cultivation by another survey to be used as a criterion for a refund of the 1922 rent and in settlement of the rents in the future. Another survey was made by Cy Bond, which showed that only 550.4 acres were in cultivation on the several farms described in the lease. The Cushman survey showed that 762 acres were in cultivation on the various farms. Both surveys were introduced, and each engineer testified in support of his own survey. Both surveyors were civil engineers. Each survey was supported by other witnesses who were familiar with the lands. The testimony was in sharp conflict upon the other issue. On the one hand, J. B. Dulaney and Louis Barton testified that a dispute had arisen between the parties as to the number of acres in cultivation in the several farms, and that Dulaney paid the 1922 rent under an agreement that the land should be resurveyed, and, if there was less land than shown by the Cushman survey, Dulaney should receive a credit in the next settlement for the shortage, at the rate of $10 per acre. On the other hand, F. W. Reisinger testified that, when Dulaney settled with him, he told Dulaney that, if he could prove to Cushman that his survey of 1920 included wild lands as lands in cultivation, he would deduct for the shortage in the next settlement, and denied that he told Reisinger, in the presence of Louis Barton, that, if Dulaney would pay appellee rent for 1922, witness would have the Cushman survey corrected and account to him for the shortage. It was admitted that appellee was entitled to a credit of $191.25 for ditching.

Appellants contend for a reversal of the judgment upon the theory that the contract as written was bind-

ing upon the parties under the disputed facts in the case, and that the court erred in not instructing a verdict for them. It is true that the contract is unambiguous, and means that the Cushman survey should govern as to acreage for the years 1922 and 1923. It is also true that the testimony does not show that the contract was induced through fraudulent misrepresentations of appellants. It is also true that the words "more or less," after the description of the lands, would not justify the admission of testimony showing a material variation in the acreage, as such words are construed to apply to slight variations in quantity when used in deeds or leases; but, notwithstanding these things, there is a rule of law exempting parties from the performance of a contract which contains such a gross mistake that it would amount to a fraud in law to enforce it. This rule is applicable in the instant case; for there is testimony tending to show a mistake in acreage of over 200 acres, which was not known at the time by the parties to the contract. There is also a rule of law that parties by mutual agreement may, subsequent to the execution of a contract, change or modify it. This rule is also applicable in the instant case, for there was testimony tending to show that, if Dulaney would pay the rent in full for 1922, appellants would correct any error in the Cushman survey as to acreage and allow Dulaney a credit therefor.

The court correctly submitted this case to the jury on both these theories, and did not err in refusing to peremptorily instruct a verdict for appellants.

If it be conceded that it was error to introduce the two letters as tending to show that the contract as drawn was not binding upon the parties, the error was cured by instruction No. 2 to the effect that the Cushman survey was binding upon the parties as to acreage unless the jury should find the specified acreage was the result of a gross mistake, or unless the contract was subsequently changed by mutual agreement of the parties.

The contention of appellant that there was no consideration to support the new agreement, if made, is not sound, for a dispute had arisen between the parties as to the acreage, the settlement of which furnished sufficient consideration to support the new agreement.

Appellants make the further contention that, under the undisputed facts, they are entitled to a judgment for $3,458.80. We think not, for there is a dispute in the evidence as to the amount of acreage in cultivation on the several tracts.

No error appearing, the judgment is affirmed.

Mr. Justice SMITH not participating.

HOGUE v. BUNDY.

Opinion delivered May 18, 1925.

1. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—Testimony *held* to sustain a finding of negligence on defendant's part in failing to instruct plaintiff, an inexperienced employee, how to operate a cut-off saw and in failing to keep a trestle near the saw was in a defective condition.
2. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.—A verdict for $200 for loss of a finger, accompanied with considerable pain, *held* not excessive.

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

Boyce & Mack, for appellant.

Gustave Jones, for appellee.

McCULLOCH, C. J. Appellant owns and operates a sawmill in Jackson County, and appellee was employed at the mill as a laborer. While working at a saw, one of appellee's fingers was cut off, and he has sued appellant to recover damages, alleging that the latter was guilty of negligence, the charge being that appellee was inexperienced in operating a saw of that kind, and was sent to work thereat without instructions or warning of danger, and also that a trestle, or "horse," as termed

by some of the witnesses, placed at the saw-table to lay slabs on, was illy constructed, or was not properly fastened to the floor so as to prevent its being pulled over. There was another charge of negligence in the complaint with respect to failure to place a guard on the saw, but it appears that that charge has been abandoned.

It was a cut-off saw at which appellee was working when injured. The saw was suspended above a table, and worked on the end of a rod, so that it could be pulled forward by the operator and brought in contact with the slab of timber which was being sawed. The saw swung across the table, and was about the middle of the table, something like four feet from the end. An ordinary carpenter's trestle, or "horse," was placed three feet from the table, and an end of the slab of timber being sawed was placed on the trestle, the other end extending over the table, in front of the saw. While in this position the operator would swing the saw forward and bring it in contact with the slab at the place where it was being sawed off, and, when the process of sawing the slab was completed, the saw was released, and it swung back to the other side of the table.

Appellee had been working at the mill for some time, but was engaged only in rough labor, such as carrying off stuff from the saws. He had never worked in the operation of the saw before the day in question, and there was a shortage of labor, and he claims that appellant directed him to go to work at the cut-off saw. There is a conflict on this point, as well as all other material points, as appellant himself and other witnesses testified that appellee was not directed to work at the cut-off saw, but was merely sent over to assist in carrying the slabs to the saw and in carrying away the pieces when sawed off. Appellee testified that, when he went to work at the saw, he laid a long slab across the table, with one end resting on the trestle, and that, as he pulled the slab forward and drew the saw across the table to bring it into contact, the trestle either collapsed and fell

down or was pulled over, causing the end of the slab next to the saw to suddenly rise, and that it carried his hand with which he was holding the slab against the saw, and cut his finger off. He testified that the trestle was not fastened to the floor, and that he was not aware of that fact at the time he was sent to work at the saw, and was given no instructions concerning the method of doing the work or of the danger attending the work at that place. Appellee was corroborated by the testimony of other witnesses, but appellant and witnesses introduced by him testified to a wholly different state of facts. The testimony adduced by appellant tended to show that appellee was not sent to work at the saw, and that he voluntarily attempted to operate the saw without directions, that the trestle, or "horse," was not defective in any way, and that, if it turned over at all, it was caused by appellee's own negligence. The verdict of the jury was in favor of appellee for the recovery of damages in the sum of $200, and it is contended here—the only grounds assigned for reversal—that the evidence is not sufficient to sustain the verdict.

We do not undertake to say where the weight of the testimony lies, but it is apparent that the evidence was legally sufficient to sustain the verdict. The testimony introduced by appellee tends to show that he was inexperienced in working at the cut-off saw, that he was given no instructions as to the proper method of work, nor any warning of the danger, and that, as he pulled the slab forward in an effort to bring it in contact with the saw, the trestle either fell down on account of being improperly constructed or that it was pulled over on account of its not being fastened to the floor, and that this was the cause of appellee's hand being brought into contact with the saw. The testimony was sufficient to sustain the charge of negligence in failing to give appellee proper instructions and also in failing to properly construct the trestle and fasten it to the floor and keep it in a reasonably safe condition.

There is no contention that the damages awarded are excessive. Appellee lost a finger and suffered considerable pain, and the sum allowed by the jury is not excessive.

Judgment affirmed.

ARKANSAS-MISSOURI POWER COMPANY *v.* LIGHT & POWER IMPROVEMENT DISTRICT NO. 1.

Opinion delivered May 18, 1925.

1. MUNICIPAL CORPORATION—DEPARTURE FROM PLANS OF IMPROVEMENT.—Where the engineer of a light and power improvement district concluded that an engine of less capacity in power would be sufficient for use in operating the plant, a change of the plans after the assessment of benefits was made by reducing the capacity of the engine did not constitute a departure from the general plans formed by the commissioners of the district in the first instance.
2. MUNICIPAL CORPORATIONS — INJUNCTION AGAINST CONSTRUCTION OF IMPROVEMENT.—The owners of property in an improvement district may restrain the commissioners from entering on the construction of an improvement district when the funds will be insufficient to complete or pay for it.

Appeal from Clay Chancery Court, Eastern District; *J. M. Futrell,* Chancellor; affirmed.

Little, Buck & Lasley, for appellant.

W. E. Spence, for appellee.

McCULLOCH, C. J. An improvement designated as Light & Power Improvement District No. 1 of Piggott, Arkansas, was formed in the city of Piggott for the purpose of constructing and putting into operation an electric light plant. The district was properly formed by ordinance of the city council, enacted on petition of owners of property in the district. A second petition asking for the construction of the improvement was signed by a majority in value of the owners of property, and, after the appointment of the commissioners by the

city council, plans were formed and benefits were assessed.

It is conceded in the present litigation that the sum of $32,800 is the maximum amount which can be legally spent for the construction of the improvement, and in the original plans and estimates the sum of $32,384 was fixed as the estimated cost.

Appellant is the owner of real property in the district, and instituted this action against the commissioners of the district to restrain them from proceeding with the construction of the improvement, alleging that the cost would exceed the amount which could be spent and collected in taxes on the benefits. The case was heard by the chancery court on oral and documentary evidence, and the court refused to grant relief. There was, in other words, a finding in favor of the appellees on the issue as to the cost of the construction of the improvement. There were numerous witnesses, and the testimony was conflicting, but we are unable to discover that the preponderance of the evidence is against the finding of the chancery court. The evidence adduced on the part of appellees tends to establish the probable cost of the improvement at not exceeding $31,552, and that it may cost less than that. The testimony introduced by appellant tends to show that the cost would be about $35,000. We conclude, as before stated, that the finding of the chancellor is not against the preponderance of the evidence, and it will therefore not be disturbed.

It is also contended that the commissioners of the district exceeded their authority in changing the plans after the assessments of benefits were made. The only change made, as we understand the evidence, was in the reduction of the capacity of the engine. The evidence shows that the engineer of the district concluded that an engine of less capacity in power would be sufficient for use in operating the plant, and this change lessened, to some extent, the cost of the improvement. We do not think that this change in the plans was sufficient to con-

stitute a departure from the general plans formed by the commissioners in the first instance, and an engine of any size sufficient to operate the plant was within the scope of the plans. The owners of property in the district have the right to restrain commissioners from entering upon the construction of an improvement when it is shown that the funds will be insufficient to complete it or to pay for it, but the proof in the present case is not sufficient to warrant relief.

Decree affirmed.

FORD v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered May 18, 1925.

1. WATERS AND WATERCOURSES—NEGLIGENCE—CONCURRING CAUSES.—Where a railroad's defense to an action for causing an overflow by the construction of a ditch was that the overflow was caused by the act of God, to excuse the railroad, such act of God must be the proximate and sole cause; and where the act of the railroad so mingled with the act of God as to be an efficient and co-operating cause, the railroad would still be liable.
2. WATERS AND WATERCOURSES — ABSTRACT INSTRUCTIONS.—In an action against a railroad company for damages to plaintiff's land caused by the negligent construction of a ditch, in the absence of any evidence that plaintiff had control over the creek into which the ditch emptied, or that it was his duty to dislodge drifts and logs in such creek, *held*, an instruction submitting the issue as to whether plaintiff was negligent in failing to keep drifts and logs out of such creek was erroneous as abstract and as ignoring plaintiff's contention that the railroad's negligence was the proximate cause of the overflow of plaintiff's land.
3. EVIDENCE—PHOTOGRAPHS.—In an action against a railroad for damages from an overflow caused by defendant's negligent construction of a ditch, the admission and photographs of the alleged locality was improper, in the absence of a showing that they were correct representations or reproductions of the locality at the time of the alleged injured.

Appeal from White Circuit Court; *E. D. Robertson*, Judge; reversed.

Brundidge & Neely, for appellant.

Thomas B. Pryor and *H. L. Ponder,* for appellee.

WOOD, J. This is an action by G. W. Ford against the Missouri Pacific Railroad Company, in the circuit court of White County, Arkansas. Ford sought to recover damages by reason of the digging of a ditch by the railroad company along its right-of-way and parallel thereto, in the town of Bald Knob. Ford alleged that the railroad company negligently and carelessly dug the ditch, so that it diverted the water from Tupelo Creek, a natural watercourse, to run down said ditch over and upon his land, by which he was damaged in the destruction of his crops in the sum of $2,950, for which he asked judgment.

The railroad company answered, setting up that Ford was not entitled to recover for permanent damages to his lands; that the ditch was cut by the company in order to build an embankment to take care of necessary and additional sidetracks and to take care of the surface water which surrounded its property; that the ditches and openings under the company's tracks and road-bed were sufficient to take care of all surface waters and ordinary rainfall, but that, at the time of which Ford complained, there was an unusual and unprecedented rainfall at Bald Knob, which was an act of God, and that the company was not responsible for the damage caused thereby.

Witnesses on behalf of Ford testified to the effect that the railroad company dug a ditch along the east side of its right-of-way north of Bald Knob, which ditch leads off into Tupelo Gum Creek, a well defined natural stream. After the company dug the ditch, the water would get up in the creek, and that would shove the water back up the ditch and scatter it out over the lowlands. The land was not subject to overflow until after this water was allowed to come down in this ditch. There was a divide that kept the water off of Ford's land until the company cut the ditch through it. There are about fifty-six acres of land that are overflowed by reason of

the digging of the ditch. Previous to the cutting of the ditch there had been an old ditch there for several years that ran into Gum Creek, but it was not a deep ditch, and not dug by the railroad company. The company filled up the old ditch in building an extra dump for a track. The ditch is something like six feet wide. When the water got as high as 2½ feet in the creek, it began to flow up the ditch. It overflowed from an ordinary rainfall. There was testimony on behalf of Ford to the effect that his crop was damaged in March and afterwards on the 2d of May, 1923.

There was testimony for the railroad company to the effect that it dug the new ditch to build a dump for the railroad track, and the dirt taken out of this ditch was off the right-of-way of the railroad company. They filled up the old ditch, what little there was of it. Witnesses testified for the company to the effect that the creek would always overflow on both sides before the ditch was dug there, and during the exceedingly heavy rains in May and in June there was an overflow, and the tracks of the company would be covered by the drift. The rainfall was heavy enough to pick up big cross-ties and wash them down on the track. The water was about knee-deep at the station. When this water poured over there by the depot, it was bound to go in over Ford's land.

Ford himself testified that he had two overflows in May and two in June.

The company, over the objection of appellant, introduced photographs that were taken in July, 1923, showing the conditions that existed at that time in the locality of the ditch and the creek. These photographs were taken without notice to Ford, after this action was instituted, and indicated the appearance of the *locus in quo*. The witnesses who were in company with the photographer at the time the pictures were taken could only tell what the condition of the creek, ditch and drifts were in March, April and May by the water-marks. The pictures only represented conditions as they were at the time they were taken.

The plaintiff Ford, in his prayers for instructions numbered one and six, prayed the court to instruct the jury in effect that, if the damage of which he complained was caused by an act of God concurring with the negligence of the railroad company, they should return a verdict in his favor. The court instructed the jury, at the request of Ford, to the effect that, if the railroad company so carelessly and negligently constructed the ditch as to divert Tupelo Creek, the natural watercourse, upon the lands of Ford, to his injury and damage, they should return a verdict in his favor.

At the request of the railroad company, the court gave instruction No. 10, to the effect that the company would not be liable to Ford for loss occasioned by an act of God if its own negligence did not contribute to the damage alleged; that, if the damage to Ford was caused by an extraordinary freshet which could not have been reasonably foreseen or provided against—in other words, an act of God, the proof of such fact would be a perfect shield, and Ford could not recover. The court also granted, over Ford's objection, instructions Nos. 5 and 7, as follows:

"No. 5. The jury are instructed that, if you find from the evidence that the waters of Tupelo Gum Creek were retarded in their flow by reason of drifts and logs caught under the bridges along the public highway and on fences, and on account of brush, trees and standing timber in said creek, over which the defendant company had no control and for which it was not liable, and this caused the waters to back up in said creek and to cause additional overflow and damage to this plaintiff, then the plaintiff would not be entitled to recover."

"No. 7. The jury are instructed that, if you find from the evidence that the plaintiff failed to keep the drift and logs out of Tupelo Gum Creek upon his land, and this caused the water to be held back, and contributed in any way to the damages of which the plaintiff complains, then the plaintiff would not be entitled to recover, and your verdict should be for the defendant."

The jury returned a verdict in favor of the railroad company, and judgment was entered in its favor, from which is this appeal.

1. The court erred in not granting appellant's prayers for instructions 1 and 6. These prayers were predicated upon the doctrine announced by this court in *St. L. S. W. Ry. Co.* v. *Mackey,* 95 Ark. 297, 300, and cases there cited, as follows: "The act of God which excuses must be not only the proximate cause but the sole cause. And where the act of God is the cause of the injury, but the act of the party so mingles with it as to be also an efficient and cooperating cause, the party will be still responsible." See also the later cases of *St. Louis, etc., Ry. Co.* v. *Steel,* 129 Ark. 520-527; *Arkansas Land & Lbr. Co.* v. *Cook,* 157 Ark. 245-253. These prayers for instructions were not covered by instruction No. 10 given at the instance of the appellee. Moreover, instruction No. 10 as framed did not correctly declare the law applicable to the facts, and was in conflict with appellant's prayers numbered one and six.

Prayers for instructions numbered 5 and 7 for the appellee were not properly framed, and the court erred in granting the same. There was no testimony, as we view the record, to justify the court in submitting to the jury the issue as to whether or not the appellant was negligent in failing to keep the drift and logs out of Tupelo Gum Creek where the same flowed through his land. The appellant had no control over the public highway, and it was not his duty to dislodge any drift or logs that might have been caught under the bridge upon such highway. Therefore these instructions were abstract; and, furthermore, they ignored the appellant's contention, bottomed upon the testimony in his behalf, tending to prove that the negligence of the appellee in the manner of the digging of the ditch contributed to, and was a concurring and cooperating proximate and efficient cause with, the unprecedented floods in causing the obstructions in and overflow of Tupelo Gum Creek upon the appellant's lands.

2. The court erred in allowing the introduction of photographs without first requiring the appellee to lay the foundation for the introduction of such photographs by showing that they were correct representations or reproductions of the conditions of the *locus in quo* at the time of the alleged injury and damage to the appellant. Photographs, to be competent testimony, must be shown by extrinsic evidence to be true and faithful representations of the place or subject as it existed at the time involved in the controversy. *K. C. S. R. Co.* v. *Morris,* 80 Ark. 528; *Sellers* v. *State,* 93 Ark. 313; *Zinn and Chaney* v. *State,* 135 Ark. 342; 22 C. J. 919; 10 R. C. L. 943; *Harris* v. *Quincy,* 171 Mass. 472, 50 N. E. 1042.

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

JOHNSON *v.* TUCKER LAKE LEVEE AND DRAINAGE DISTRICT.

Opinion delivered May 18, 1925.

DRAINS—PUBLICATION OF NOTICE OF ASSESSMENT IN WEEKLY NEWSPAPER.—Crawford & Moses' Digest, § 3615, requiring publication of a notice of hearing of the assessment in a drainage district for two weeks in some weekly newspaper, is complied with by publishing such notice once a week for two weeks in a daily newspaper.

Appeal from Jefferson Chancery Court; *H. R. Lucas,* Chancellor; affirmed.

F. G. Bridges, for appellant.

Palmer Danaher and *M. Danaher,* for appellee.

WOOD, J. The Tucker Lake Levee & Drainage District is an improvement district organized under subdivision 2 of chapter 51 of Crawford & Moses' Digest and amendatory acts. The district lies wholly within Jefferson County, Arkansas. The commissioners of the district assessed the benefits and deposited the same with the county clerk of Jefferson County. The county clerk gave notice of that fact by publication two weeks in the

Graphic, a newspaper published in Jefferson County and having a *bona fide* circulation therein. The paper was published every day in the week, except Monday. It is what is termed a daily newspaper. It was not published as a weekly newspaper. The notice of the filing of the assessment by the commissioners was published in the *Graphic* on July 17 and again on July 24, 1924. It called on all owners of property in the district to appear before the county court on the 12th of August, 1924, to show cause, if any, against the assessment of any of the lands in the district. The county court, in pursuance of the notice, confirmed the assessment.

This action was brought by Cyrus Johnson and Pinckney Johnson against the district and its commissioners. The issue raised by the pleadings is whether or not the assessment was void because of insufficient publication. The trial court held that the publication of the notice in the *Graphic* by two consecutive weekly insertions therein, as above set forth, was sufficient compliance with the statute, and entered a decree dismissing the complaint for want of equity, from which is this appeal.

Section 3615 of Crawford & Moses' Digest, pursuant to which the notice was given, provides as follows: "When their assessment is completed, the commissioners shall subscribe said assessment and deposit it with the county clerk, where it shall be kept and preserved as a public record. Upon the filing of said assessment the county clerk shall give notice of the fact by publication two weeks in some weekly newspaper issued in each of the counties in which the lands of the district may lie." The term "weekly" means once a week. 40 Cyc. 877; Webster's International Dictionary. In the nomenclature of newspaperdom the term "weekly newspaper" conveys the idea that the paper is published once a week (*Iowa State Savings Bank* v. *Jacobson,* 8 So. Dakota, 292, 300), and a bi-weekly newspaper is one published every two weeks. *Byrne* v. *Less,* 92 Ark. 211.

The Tucker Lake Levee and Drainage District was formed under a general law. C. 51, C. & M. Digest,

supra, subdiv. 2. The lawmakers had in view conditions that might obtain in any county or in any number of counties where it might become necessary to form drainage districts, and the term "weekly newspaper" in the statute was not used in any narrow or technical sense, but was intended to cover the conditions that would likely prevail generally throughout the State, and did not have reference to the situation in any particular locality. The framers of the law doubtless knew that weekly newspapers were published in most of the counties in the State, and they were framing the law to meet the general situation. The purpose was to provide a method for publication that would most effectually bring home to the landowners the notice of the assessment, and it was determined that the weekly newspaper would afford the best medium, hence it was designated. But, if a paper is published two weeks in succession consecutively on Thursday of each week, it is a weekly publication of such paper, and it is none the less a weekly publication because it is also published, not only on Thursday, but on every other day in the week except Monday. There would certainly be as great probability of the landowners in the territory affected receiving notice of the assessment where the publication was made in a daily paper which has a general circulation as there would be if the same were published in a newspaper published once every week, or, in a weekly newspaper. It occurs to us that it would be "sticking in the bark" to hold that the publication under review did not meet the requirements of the law for the publication of the notice of the assessment. We therefore conclude that the publication of the notice of the filing of the assessment with the county clerk of Jefferson County by an insertion in the *Graphic* for two weeks in succession on July 17 and 24, 1924, was in compliance with the statute in such cases made and provided.

The decree of the chancery court is correct, and it is therefore affirmed.

SOUTHERN IMPROVEMENT COMPANY v. ROAD IMPROVEMENT DISTRICT NO. 5.

Opinion delivered May 18, 1925.

1. EXCEPTIONS, BILL OF—STATUTORY METHODS OF PRESERVING EXCEPTIONS.—Where a party in a chancery cause undertakes to preserve exceptions to rulings of the trial court not appearing of record by bill of exceptions, the statutory methods must be pursued.
2. EXCEPTIONS, BILL OF—BYSTANDER'S BILL—TIME OF FILING.—A bystanders' bill of exceptions, not filed within the time provided by Crawford & Moses' Digest, § 1318, cannot be considered as part of the record.

Appeal from Arkansas Chancery Court, Southern District; *John M. Elliott*, Chancellor; modified.

Sam W. Trimble, R. W. Wilson and *W. G. Riddick*, for appellant.

J. M. Brice and *John W. Moncrief*, for appellee.

WOOD, J. Road Improvement District No. 5 of Arkansas County, hereafter called district, was created by act No. 169 of the Acts of the General Assembly of Arkansas in the year 1919. The district contained 84.5 miles of road radiating in four main branches from the town of DeWitt. The main branches or roads out of DeWitt were divided into sections, and these sections were subdivided into two or more lines. The contract for building the road was awarded to the Southern Improvement Company, hereafter called appellant. The district entered into a contract with the appellant for the construction of the improvement, and the appellant sublet a small portion or line of the road to one McNulty, who assigned his contract to one A. M. Perdue. Perdue, claiming that he had completed the work according to his contract, demanded of the district inspection and acceptance of the same, upon the refusal of which he instituted this action in the chancery court of Arkansas County on the 5th of August, 1922, against the appellant and the Southern Surety Company, the surety on appellant's bond, for the performance of its contract. Perdue alleged that the appellant was due him the sum of $12,000; that

the district was indebted to appellant in a greater sum than appellant owed him, and he asked that garnishment issue against the district, which was done. On the 27th of September, 1922, the court entered an order allowing the district thirty days to answer, and enjoining the parties from taking depositions until the expiration of that time. On October 27, 1922, the district answered denying liability to any one for the work done by Perdue, and, in answer to the writ of garnishment, alleged that it had retained $12,000 out of the first estimates of the engineers after the service of the writ.

On January 22, 1923, the appellant and the surety company answered denying the allegations of Perdue's complaint. On February 3, 1923, one Spratlin, for himself and other taxpayers in the district, filed what he designated an intervention and cross-complaint, alleging that the action by Perdue against the appellant and the district involved the construction of the contract between the appellant and the district, and that Perdue and the district and its commissioners and the appellant and its subcontractors and engineers had entered into a collusion to defraud the taxpayers of the district. He alleged that the district and its officers had paid to the appellant approximately $1,500,000. He denied that the district was indebted to the appellant and Perdue in any sum, and prayed that the district and its officers be enjoined from paying to appellant, and that the appellant be enjoined from receiving, any further sums upon the contract for the construction of the improvement, and that the writ of garnishment be dismissed.

Upon the filing of this intervention, summons was issued and served on February 3, 1923, and on that day temporary injunction was issued, restraining the district from paying over any funds to the appellant or the subcontractors. On the 5th of February, 1923, an order was entered making the district a party defendant to the action, and on the next day an order was entered by the chancery court allowing the commissioners of the district

twenty days in which to complete their proof, and allowing appellant and Perdue ten days for taking proof in rebuttal, and allowing the interveners an additional thirty days after the expiration of the ten days allowed appellant and Perdue in which to take their proof, and directing that the cause should be submitted for consideration and judgment of the court without further delay. Later, on the 20th of February, 1923, Spratlin filed an amendment to his intervention and cross-complaint, seeking further judgment against the appellant and certain subcontractors and their sureties, upon which summons was issued March 12, 1923. On the 21st of March, 1923, Spratlin filed a second amendment to his intervention and cross-complaint, alleging collusion between the commissioners of the district and the appellant, and seeking to recover additional sums, amounting to several hundred thousand dollars, and also asked a mandatory injunction to compel the commissioners to proceed with the work and to restrain them from accepting any portion of the road as completed.

On the 27th of March, 1923, the record shows permission to file, and the filing of, an amendment to their pleadings by the interveners and an answer thereto by the district, and also there was noted of record the filing of depositions. On the same day an order was made directing that the cause be submitted on the 30th of April, 1923, and directing that all parties take proof by deposition, and granting the right to all parties to take oral testimony on submission of the cause.

On April 27, 1923, the interveners filed a petition for temporary injunction to restrain the appellant from disposing of its property. In the absence of the circuit judge and chancellor from Arkansas County, the county judge granted the petition and entered an order on April 28, 1923, restraining the appellant from disposing of its property. On the 30th of April, 1923, depositions of certain witnesses taken in vacation were noted as having been filed on the part of the district and the interveners

and made a part of the record. These depositions were noted as having been taken at various dates from March 1, 1923, to and including April 25, 1923. According to the recitals in the record, the following proceedings were had on April 30, 1923:

"On the call of this case comes A. M. Perdue, by counsel, A. F. Triplett, and announces ready for trial, and none of the parties object thereto, whereupon the court required the pleasure of all parties as to the submission of this cause; and come interveners, Spratlin *et al.*, by counsel, J. M. Brice; board of commissioners by their chairman, J. H. Boone; Southern Improvement Company (a corporation organized under the laws of Delaware) and Southern Surety Company (a corporation organized under the laws of Iowa), by their attorney, Sam W. Trimble; and Arkansas County Road Improvement District No. 5 (organized under act 169 of the Acts of 1919), by counsel, Jno. W. Moncrief, and all parties announced ready for trial, and consent to the submission of this cause upon the complaint of Spratlin *et al.*, answer of Southern Improvement Company, answer of Southern Surety Company, answer of Road Improvement District No. 5, additional or supplemental answer of said district, answer of board of commissioners, and thereupon this cause is submitted to the court on said pleadings with exhibits, all depositions taken with exhibits, and all other files in the case, and, by consent of all parties, this cause is taken under advisement by the court, and, by their consent, the judgment and decree of the chancellor and court is to be rendered in vacation, and it is so ordered."

On May 7, 1923, the court entered a decree in favor of Perdue against the appellant and the surety company in the sum of $11,844.37, and in favor of the district against the appellant and the surety company in the sum of $190,000, and restraining the commissioners of the district from paying the appellant any money and the appellant from accepting or receiving any money from

the commissioners of the district. The record shows that on May 31, 1923, the court entered an order approving a settlement and a decree between the surety company and the district by which the surety company paid the sum of $55,000, and was released from all liability on the decree against it, $12,500 of which was to be paid to Perdue. The appellant announces in its brief that it is not interested in the appeal in the original suit between Perdue and the appellant; that it only prosecutes the appeal from the decree in favor of the district in the sum of $190,000.

1. The appellant contends that the cause was not submitted by consent; that the recitals of the record of the submission of the cause, as above set forth, to the effect that the appellant, together with the other parties, announced ready for trial and consented to the submission of the cause upon the pleadings, exhibits and depositions, and that the cause, by consent of all parties, was submitted and taken under advisement, that they consented that the decree should be rendered in vacation, were all erroneous recitals. Counsel for appellant contends that the record itself shows that, some days prior to the 30th of April, 1923, counsel for appellant objected to the taking of testimony by the interveners, and gave notice that it would offer to file pleadings, and stated that, if the pleadings were overruled, appellant reserved the right to introduce testimony in defense of matters that had been brought out in the depositions taken for the interveners, and notified counsel for the interveners that appellant would take no depositions until the court had passed upon the motions which counsel for appellant proposed to offer to file. This all occurred prior to the recitals of the order showing the submission of the cause by consent of all parties, and in no manner tended to contradict the recitals of the record showing that the cause was submitted by the consent of all parties.

Furthermore, to sustain the contention that the cause was not submitted by consent, appellant relies upon

what is designated as a "supplemental transcript, or bystanders' bill of exceptions." This document was filed in this court November 6, 1923, three days after the filing of the original transcript. It does not contain a certificate of the clerk of the chancery court of Arkansas County identifying it as a part of the original transcript of the record in the cause. It was not filed in the office of the clerk of the chancery court of Arkansas County. The document contains what purports to be the affidavits of W. F. Coleman, E. B. Reynolds, and J. P. McGaughey. These affidavits were to the effect that the affiants were in the courtroom of the chancery court of Arkansas County on the 30th of April, 1923, when said court was in session and being presided over by the Hon. John M. Elliott; that the affiants saw and heard Sam W. Trimble, attorney for the appellant, on a call for motions, offer to file a supplemental answer, a motion to strike intervention, and motion to suppress testimony in the case of Perdue against appellant, and saw and heard the judge refuse to allow the papers to be filed; that Mr. Trimble and Mr. R. W. Wilson, attorneys for the appellant, stood with these papers in hand, and requested permission to file the same; that the presiding judge stated that he was not going to let any papers whatsoever be filed by the attorneys; that Mr. Wilson, attorney for the appellant, then asked the court to let the record show that these papers were offered for filing and to note their exceptions to the court's refusal to allow the same to be filed; that the judge thereupon refused to let the papers be filed, and said that the record should not show anything whatever as to the offer to file the papers, or any refusal of the court in not allowing them to be filed, or to note any exceptions on the record of the court's ruling. These affiants stated that they were not interested in the cause, and were merely bystanders in the courtroom. The affidavits, on their face, show they were made before a notary on the 5th of November, 1923. This document also contains the affidavit of Sam W. Trimble, attorney for the

appellant, to the effect that on Monday, November 5, 1923, at 10 o'clock A. M., he presented to the Hon. J. M. Elliott, chancellor and chancery judge of Arkansas County, Southern District, at the chancellor's office, in Pine Bluff, the "supplemental transcript or bystanders' bill of exceptions," and requested him to sign the certificate, either certifying or refusing to certify the same as contained therein; that he refused to sign the same.

It thus appears from the affidavit of Sam W. Trimble, one of the attorneys for the appellant, that the so-called "bystanders' bill of exceptions" was not presented to the judge of the chancery court of Arkansas County for his approval or rejection until November 5, 1923. The recitals of the record of the chancery court show that the cause was submitted for trial and taken under advisement on April 30, 1923. The recitals in the record do not show that the appellant asked and was granted time beyond the March term of the Arkansas County Chancery Court for preparing and presenting a bystanders' bill of exceptions. The record shows that the decree was rendered on May 7, 1923, the same being a day of the March term, 1923, of the Arkansas Chancery Court, Southern District. A regular term of the court had intervened the day when the decree was entered and the day when the appellant, through its attorney, presented to the chancellor in chambers its so-called bystanders' bill of exceptions for his approval or rejection.

Where a party in a chancery cause undertakes to preserve exceptions to the rulings of the trial court, not appearing of record, by bill of exceptions, the statutory method must be pursued.

Now, the statute provides that the party objecting to a decision of the trial court must except at the time the decision is made, and time may be given to reduce such exception to writing, but not beyond the succeeding term. The statute provides that, if the party excepting is not satisfied with the rulings of the trial court upon his exception, he may procure the signature of two

bystanders attesting the truth of his exceptions, and file the same as a part of the record; that these exceptions may be maintained and controverted by affidavits, not exceeding five in number on each side, to be filed with the clerk within ten days after the filing of the exceptions, which affidavits shall be a part of the record. See §§ 1318 and 1322, Crawford & Moses' Digest. It does not appear therefore that the appellant observed any of the statutory methods for bringing into the record by "bystanders' bill of exceptions" its exceptions to the rulings of the trial court, as shown by the recitals of the record of which it here complains. See *Boone* v. *Goodlett,* 71 Ark. 577; *Ayer-Lord Tie Co.* v. *Greer,* 87 Ark. 543; *Cox* v. *Cooley,* 88 Ark. 530; *Pearson* v. *State,* 119 Ark. 152; *Sneed* v. *State,* 159 Ark. 65-84; *So. Improvement Co.* v. *Elliott,* 160 Ark. 633.

The last case cited was a petition to this court by the appellant herein to compel the chancellor by mandamus to file the same papers which appellant here seeks to bring into the record by a bystanders' bill of exceptions. The appellant sets up in its petition that, on the day of the submission of this cause, it tendered and asked permission of the court to file these pleadings, and that the court refused its request. The chancellor filed a response to the petition for mandamus in this court, in which he states that the papers were offered after all the parties, through their attorneys, had voluntarily consented to a submission of the cause on the record then made, and that he refused to allow the pleadings filed after submission. In passing upon the issue thus joined in that proceeding, we said: "Each side has filed *ex parte* affidavits here on the issue of fact as to whether or not the additional pleas were tendered by petitioner before or after the actual submission of the cause. Permission of the court to a litigant to file pleas or other motions out of time is, or may be, according to the circumstances, a matter of discretion with the trial court, and the rule has quite frequently been announced by this court that a writ of mandamus cannot be used as a sub-

stitute for appeal, nor will the discretion of the trial court be controlled by mandamus. Where the trial judge refuses to act at all in the matter, this court may compel him by mandamus to do so, but, as before stated, it will not attempt to control the discretion of the trial court or to determine what the discretion of the court shall be. The court may or may not have erred in refusing to allow additional pleas to be filed, but any error committed in that respect must be corrected by appeal. Errors of the trial court in the progress of a case must be shown either by a bill of exceptions or by recitals made by the court on its record. If those methods of completing the record be denied by the trial court, a statutory remedy is afforded by bill of exceptions certified by bystanders. The fact that petitioner let the term of court elapse without effort to obtain a bill of exceptions in either of the modes specified by statute, affords no ground for allowing the extraordinary writ of mandamus."

Since the appellant has failed to observe the method provided by statute for bringing into this record, by bystanders' bill of exceptions, its exceptions to the rulings of the trial court as contained in the recitals of the judgment roll, we are bound by those recitals. Such being the case, this disposes not only of the contention of the appellant that the cause was not submitted by consent, also of its further contentions that the cause was prematurely decided and that the intervention was improper.

2. The only remaining question presented by this appeal is whether or not the court erred in rendering its decree in favor of the interveners and the district. This decree is bottomed upon findings of fact by the trial court to the effect that the appellant had wholly failed to comply with its contract; that, by reason of such failure, the district had sustained damages largely in excess of its indebtedness to the appellant and largely in excess of the retained percentage. The court, after giving the appellant credit for all the work it had done

under the contract, and after crediting it with the amount of the retained percentage, found that there was still a balance due the district in the sum of $190,000. It was purely a question of fact as to whether or not the appellant had breached its contract by failing to perform the work according to the plans and specifications. The testimony bearing on this issue is set out at length in the purported abstract of the appellant. As abstracted, it embraces more than 300 pages.

It would unduly extend this opinion to set out and discuss in detail the testimony bearing upon this issue of fact. It is impracticable to do so. Suffice it to say we have read and carefully considered it all, and have reached the conclusion that the findings of fact by the trial court are not clearly against a preponderance of the evidence. Indeed, the preponderance of the evidence clearly supports the findings of the chancellor to the effect that the appellant failed to comply with its contract.

The testimony of H. R. Carter, the engineer of the district, and the local engineers under Carter, having immediate supervision of the work as same was being done, is all to the effect that the appellants did not perform the work in accordance with the plans and specifications which were a part of the contract. The testimony of these supervising engineers and also of many witnesses who were connected with, and who had opportunities to observe, the work as it was being done, all tended to show that the work was not done according to the plans and specifications. Also W. J. Parke and C. H. Miller, both civil engineers and experts of large experience, testified that they examined portions of the road embraced in the district, and that the work had not been done according to plans and specifications, and they went into detail showing the defects and imperfections in the work examined by them.

So we are thoroughly convinced, from a careful consideration of all the evidence, that the appellant violated its contract, and that the court was correct in so finding.

The court based the amount of its judgment on the testimony and a detailed statement by H. R. Carter, the engineer of the district, as follows:

Work to be done:

Line A, 6 miles of base to rebuild at $1,000 per mile		$ 6,000.00
Line B, 6 miles of base to rebuild and repair at $500		3,000.00
Line D, 5 miles base to be rebuilt, now covered by asphalt, at $2,000		10,000.00
Line D, 8 miles base damaged because of neglect in finishing, at $400		3,200.00
Line E, H, I, J, 14 miles gravel repair at $300 per mile		4,200.00
72 miles shoulder repairs, at $250 per mile		18,000.00
60,000 yards emb. Line B, G. Tichnor Levy settlement		25,000.00
152,217.68 tons on which rebate of 30c per ton is due board acct. letter attached by S. Imp.		45,665.30
91,228 sq. asphalt of cheaper brand than called for by proposal, at 20c per yard		18,245.60
Amount due board for rock		260,000.00
Overtime, 350 days at $75		26,250.00
		$419,560.90
Credits retained per cent	$186,498.80	
Credits on rock acct.	42,232.74	228,731.54
		$190,829.36
Credits, $12,000 Perdue		12,000.00
		$178,829.36

The trial court found, among other things, that "in the construction and work by the contractor and defendant, Southern Improvement Company, it did not attempt in good faith to comply with the contract," and * * * that "the defects in the road and construction work were and are of a substantial and fundamental nature and character, and were in violation of the plans and specifications, agreements, and contract, and resulted from the gross negligence and bad faith of the contractor defendant, Southern Improvement Co., and all of these things were and are to the serious and substantial detriment and damage of said road improvement district." There was testimony tending to support the above findings of the court to the effect that the appellant "did not attempt in good faith to comply with its contract," and that its failure to comply with its contract "resulted from gross negligence and bad faith." In view of these findings by the trial court, we are unable to say that the decree of the court is excessive. It appears however from the record that, since the decree was rendered, the surety company has satisfied the judgment in favor of Perdue against the appellant, and the appellant should therefore be credited with that sum. The decree of the court below will therefore be modified by reducing the same to the sum of $178,829.36, and, as thus modified, it will be affirmed.

POLK v. AFFLICK.

Opinion delivered May 18, 1925.

1. JUDICIAL SALES—OPENING SALE FOR INCREASED BID.—Judicial sales will not be opened because bids for a greater amount are offered for the property when the report of sale is presented for confirmation.

2. JUDICIAL SALES—RESERVATION OF RIGHT TO REJECT BIDS.—Reservation, in a degree ordering a sale by a receiver of property, of the right to reject all bids offered at most authorizes the receiver to reject the bids at the time of sale, but does not authorize the

court to reject the highest bid reported by the receiver and to accept a subsequent higher bid of another.

3. RECEIVERS—ARM OF COURT.—A receiver in selling property ordered to be sold is the arm of the court.

4. RECEIVERS—EFFECT OF ACCEPTANCE OF BID.—On receivers acceptance of the highest bid at a judicial sale, the person so bidding becomes the purchaser, acquiring vested rights as such.

5. JUDICIAL SALES—OPENING SALE FOR INCREASED BID.—Where a receiver reported a sale to the highest bidder for confirmation, the court had no authority to set it aside and let in a subsequent higher bidder, in the absence of a showing of the inadequacy of the first bid, coupled with fraud or other element rendering it inequitable to confirm the sale to him.

Appeal from Phillips Chancery Court; *A. L. Hutchins,* Chancellor; reversed.

STATEMENT OF FACTS.

E. M. Polk prosecutes this appeal to reverse an order of the chancery court rejecting and setting aside his bid for certain real estate sold at a receiver's sale.

It appears from the record that the stockholders and creditors of the West Helena Consolidated Company, a corporation, brought a suit in the chancery court against it for the purpose of winding up its affairs as an insolvent corporation. A receiver was duly appointed by the chancery court to take charge of the assets of said corporation and to wind up its affairs. The corporation was duly adjudged to be insolvent, and the receiver was ordered to sell the property in his hands at public sale, upon the express condition that the property as a whole could be sold for an amount sufficient to discharge all of the indebtedness of said corporation.

The first sale was set aside and held for naught. A supplemental decree was then made, in which the property of the corporation was again ordered to be sold by the receiver. It was decreed that the property should be sold in the following order:

"First: The waterworks, all appliances, equipment, pipe, franchises, and real estate upon which said waterworks is situated.

"Second: The street railway, including all rolling stock, right-of-way, franchises, poles, wires, buildings, machinery, appliances, and equipment used in the operation of said railway.

"Third: All the unplatted real estate belonging to the West Helena Consolidated Company, consisting of approximately 1,800 acres of land.

"Fourth: All lots and blocks situated in the city of West Helena, Arkansas.

"Fifth: All notes, book accounts, choses in action, including equity of redemption and all collateral of every kind, character and nature possessed, held and owned by the said corporation.

"It is further provided that, after the said properties had been offered in unit as above provided, the receiver shall be required to offer all of said property for sale as a whole."

The sale was ordered to be made partly for cash and partly on a credit, with security to be approved by the receiver. The decree also contained the following provision: "The court reserves the right to reject any and all bids offered at said sale." The receiver was further directed to make a report of his sale at an adjourned day of the chancery court.

On November 26, 1923, the receiver filed his report of sale. The report shows that Edwin Bevens became the purchaser of the West Helena Consolidated Waterworks; that the Home Mutual Building & Loan Association became the purchaser of the interurban railway system; that Fannie M. Hornor became the purchaser of the property that had been mortgaged to her; that J. T. Hornor, trustee, became the purchaser of certain property mortgaged to him; that E. M. Polk became the purchaser of the equity in a certain town lot for the sum of $525; that E. M. Polk became the purchaser of the lots and blocks in the city of West Helena, Arkansas, for the sum of $3,250; that John I. Moore became the purchaser of the notes and book accounts; and that 1,800 acres of unplatted real

estate belonging to said corporation remained unsold on account of no one having bid for it.

Before the consideration of the receiver's report by the court, C. W. Afflick filed his bid in the sum of $5,000 for all of said property except the street railway property, the waterworks, accounts and notes, and the cash in the possession of the receiver. Upon the consideration of the report of the receiver, the bids of E. M. Polk, Fannie M. Hornor, and J. T. Hornor, for property as above set forth, were rejected, and the bid of C. W. Afflick therefor was received and accepted by the court. The report of sale as thus amended was confirmed by the court, and C. W. Afflick was declared to be the purchaser of the property which had been struck off, respectively, to E. M. Polk, Fannie M. Hornor and J. T. Hornor, as the highest bidders therefor at the receiver's sale.

From the decree confirming the sale upon the offer of C. W. Afflick, E. M. Polk has duly prosecuted an appeal to this court.

P. R. Andrews, for appellant.

W. R. Satterfield and *J. G. Burke,* for appellee.

HART, J., (after stating the facts). The sole question raised by this appeal is whether or not the chancery court erred in setting aside the sale by the receiver to E. M. Polk for certain property belonging to the insolvent corporation and accepting the increased offer by C. W. Afflick for said property.

The record shows that E. M. Polk bid $3,250 for certain vacant lots in West Helena and $525 for the equity in a certain house and lot in West Helena. This property was struck off to him by the receiver, and E. M. Polk complied with the terms of sale by depositing a certified check for $500 with the receiver and securing the deferred payments on said property. The 1,800 acres of rural land was offered for sale, and no one bid therefor. When the report of sale was presented to the court for confirmation, C. W. Afflick offered $5,000 for the property purchased by

Polk and for the rural land. His bid was accepted by the court, and the sale to Polk was set aside.

Under these facts the court erred in setting aside the sale to E. M. Polk. The value of the farm land, which was not sold at the receiver's sale, is not shown; and there is nothing in the record from which to infer that the sum bid by Polk for the property struck off to him by the receiver was inadequate. Even if this be true, the mere fact that Afflick made an advance bid for the property would not be sufficient.

The English practice treats the bidder at chancery sales in the light of one who has made an offer to be reported to the court, and, if a larger offer is made by another, the sale to the former is not confirmed. The practice of the English court of chancery in opening sales whenever an offer of a larger sum for the property is made has never been adopted in this State. *Penn's Adm'r* v. *Tolleson,* 20 Ark. 652.

There is a uniform current of decisions in this State settling that judicial sales will not be opened because bids for a greater amount are offered for the property when the report of sale is presented for confirmation. *George* v. *Norwood,* 77 Ark. 216; *Brasch* v. *Mumey,* 99 Ark. 324; *Miller* v. *Henry,* 105 Ark. 261; *Wells* v. *Lenox,* 108 Ark. 366; and *Stevenson* v. *Gault,* 131 Ark. 397.

This principle is necessary to maintain the stability of judicial sales. In order to preserve the public confidence in the entire fairness of such sales, it has always been declared to be within the judicial discretion of chancery courts in this State to set aside such sales, where there is inadequacy of price coupled with fraud, or any other element which would amount to unfairness and render it inequitable to confirm the sale. As we have already seen, none of these reasons for setting aside the sale made by the receiver exists in the present case.

But it is claimed that the right existed because the order of sale contains the following: "The court reserves the right to reject any and all bids offered at said sale."

In the first place, if this clause be given the broad signification claimed by counsel for appellee, it would not have given the court the right, under the authorities cited, to have set aside the sale to Polk and accepted the bid at the time made by Afflick. At most, it could have only given the court the right to have rejected the bid of Polk.

Under the principles of law above cited, this language could not have any greater signification than to authorize the receiver to have rejected bids made at the time of sale. The receiver was the arm of the court, and, after he accepted the highest bid made at the sale, such bidder became the purchaser, and, as such purchaser, acquired vested rights. He could be required to specifically perform his contract, and he acquired the corresponding right to appear and claim at the hands of the court his rights as a purchaser at the sale.

It follows that the chancellor erred in setting aside the sale to E. M. Polk, and, for that error, the decree must be reversed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

MAYS v. MISSOURI & NORTH ARKANSAS RAILROAD COMPANY.

Opinion delivered May 18, 1925.

1. CARRIERS—LIEN FOR FREIGHT CHARGES.—A carrier has a lien on goods transported for its freight charges, so long as it retains dominion and control over the goods.
2. CARRIERS—EXCLUSION OF EVIDENCE.—In an action against a carrier for loss of cotton stored in a warehouse, exclusion of evidence offered by plaintiffs to show that delivery of the cotton to the warehouse by the carrier was for the purpose of preserving the carrier's lien for freight is proper, where such evidence would contradict plaintiff's testimony that the cotton was delivered to the warehouse in pursuance of a direction in the bill of lading.
3. CARRIERS—ACT OF GOD.—A carrier is not liable for the loss of freight caused by lightning.

Appeal from Lee Circuit Court; *E. D. Robertson,* Judge; affirmed.

STATEMENT OF FACTS.

Buck Mays instituted an action in the circuit court to recover the value of cotton alleged to have been destroyed by fire after being transported by the Missouri & North Arkansas Railway Company, and stored in a warehouse by it for its own benefit.

Similar suits were instituted in the same court against the defendant by Ben Mays, and by Ben Mays and J. T. Myatt, under their firm name of Mays & Myatt. These three separate causes of action were consolidated and tried together.

The record shows that each of the plaintiffs shipped certain bales of cotton over defendant's line of railroad from Marshall, Arkansas, to Searcy, Arkansas. The cotton in each case was consigned to "shipper's order," Searcy, Arkansas, with the direction, "Notify Searcy Compress Company, at Searcy, Arkansas." In each case, when the cotton arrived at destination, it was delivered to the Searcy Compress Company, and held by it until it was destroyed by fire, which was caused by lightning striking the warehouse of the compress company in which the cotton was stored.

The cotton was shipped by the plaintiffs to be sold by the Searcy Compress Company for them. The plaintiffs held the bills of lading, and had received the weight sheets from the compress company showing the weights of the cotton after it had been delivered to the compress company. The plaintiffs knew that the cotton was held by the compress company to be sold for them when directed. They knew that they could get the cotton by paying the freight and delivering the bills of lading.

The cases were tried before the court without a jury, and, from a judgment in favor of the defendant in each case, the plaintiffs have duly prosecuted an appeal to this court.

George J. Crump and *Daggett & Daggett,* for appellant.

Shouse & Rowland and *R. E. Wiley,* for appellee.

HART, J., (after stating the facts). Counsel for the plaintiff insist that the judgment should be reversed because the evidence adduced by them made a *prima facie* case in their favor, and because the circuit court erred in refusing to allow plaintiffs to offer additional testimony tending to show that the delivery of the cotton by the railroad company to the compress company was not made for the purpose of completing the contract of carriage, but was made for the sole use and benefit of the defendant in order to preserve its lien for freight charges. It is the contention of counsel for the plaintiffs that the evidence adduced, together with the offered testimony, brings the case within the principles of law decided in *Southern Grocery Co.* v. *Bush,* 131 Ark. 153. Ark. 153.

In that case the general rule was recognized to be that the carrier has a lien upon the goods transported, for its freight charges, while it retains dominion and control of the same. Under the facts of the case it was held to be a question for the jury whether the compress company acted as agent of the shipper or the railway company before the latter had given the cotton shipped a clearance. In that case the cotton was destroyed by fire; but it does not appear what caused the fire. Therefore if the compress company was the agent of the shipper, the carrier would not be liable.

Under the evidence adduced at the trial the cotton was delivered by the railroad company to the Searcy Compress Company without any reservation whatever. There is nothing in the record to show that the cotton was delivered to the compress company to be held by it for the railroad company until its freight charges were paid.

But it is insisted that the action of the court in refusing the offered testimony amounted to a denial to the plaintiffs of the right of proving that the cotton was delivered by the railroad company to the compress com-

pany to be stored by it in its warehouse for the benefit of the railroad company.

In the first place, the excluded testimony would have been contradictory of the evidence already introduced by the plaintiffs. Under their own testimony the cotton was delivered by the railroad company to the Searcy Compress Company in pursuance of the direction of the bill of lading, and there is nothing to show that it was stored with the compress company for the benefit of the carrier, or for the carrier for the purpose of preserving its lien.

Even if it be conceded that such testimony was not inconsistent with the evidence already introduced at the trial, it cannot be said that it would have helped the case of the plaintiffs any. If it had been shown that the railroad company stored the cotton with the warehouse company for its own benefit, thereby preserving its lien, still the plaintiffs would not be entitled to recover under the undisputed facts.

The railroad company in its answer alleged that the warehouse in which the cotton was stored had been struck by lightning, which caused the warehouse and the cotton stored in it to be destroyed by fire. This was an act of God, and relieved the railroad company from any liability. *St. L. I. M. & S. Ry. Co.* v. *Wood,* 99 Ark. 363; *St. L. I. M. & S. Ry Co.* v. *Pape,* 100 Ark. 269; and *Jonesboro, Lake City & Eastern Rd. Co.* v. *Dunavant,* 117 Ark. 451.

In this case the defendant alleged that the cotton was lost by lightning striking the warehouse in which it was stored, and burning both the warehouse and the cotton. The evidence for the plaintiffs recognizes that the fire was caused by lightning striking the warehouse in which the cotton was stored. So it may be said that the plaintiffs' own evidence shows that the loss of the cotton was due to an act of God, which was one of the causes excepted at common law from the carrier's liability as the insurer of goods lost while in its possession.

It follows that the judgment of the circuit court was correct, and it will be affirmed.

KILLGORE v. DUDNEY.

Opinion delivered May 18, 1925.

VENDOR AND PURCHASER—CONTRACT CONSTRUED.—A contract whereby plaintiff agreed to sell land to defendant for a specified sum, part of which was paid down, does not create the relationship of landlord and tenant, nor is such contract an option to purchaser, but is a contract of sale.

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

McKay & Smith, for appellant.

Joe Joiner, for appellee.

SMITH, J. Appellant brought an action of unlawful detainer to recover from appellee the possession of a house and lot. When the answer was filed, the cause was transferred to equity, where there was a decree sustaining appellee's contentions, from which is this appeal.

It is the insistence of appellant that the possession of the property was taken under an option to purchase which contained no express limitation of time within which the option had to be exercised, and which therefore had to be exercised within a reasonable time, and that, the terms of the option not having been complied with, appellee became a tenant at will. It was upon this theory that appellant prayed judgment for possession and for rents.

It appears however that appellant contracted to sell the property to appellee for the consideration of $825, of which $50 was paid in cash when possession was delivered, and the remainder was to be paid when all liens against the property had been discharged.

This balance was not paid, nor was the outstanding indebtedness, which was secured by a mortgage, discharged, and a settlement of the matter was proposed between the parties by which appellee agreed to surrender possession of the property, and arbitrators were to be appointed, who should determine the amount of rent appellee should pay in view of the improvements he

had put on the place, and the other circumstances of the case. But, before the arbitrators were appointed appellee decided to stand on the original contract.

There was a difference between appellant and the holder of the mortgage over the balance due on the mortgage, but appellant testified that this difference was adjusted and appellee was offered an unincumbered title on payment of the balance of the purchase money. Appellee testified that there was no offer to convey an unincumbered title until the suit was brought, at which time he offered to pay the balance due. Appellee also testified that he never at any time had possession as a tenant, and never at any time agreed to pay rent, although he admitted that, at one time, there was a proposition to compromise the matter in the manner hereinbefore stated, but the negotiations for a settlement were never consummated.

The court found that appellee entered into the possession of the lot under a contract of purchase, and that appellant should be required to specifically perform the contract by making and delivering to appellee a title free from any incumbrance, and that appellee should be required to pay $775, the balance of purchase money, and interest thereon from the date he took possession, together with the taxes and insurance which appellant had paid, all of which totaled $1,138.26. Appellee was allowed ten days from the date of the decree within which to pay the sum found due, and it was decreed that, if the said sum was not so paid, a writ of possession should be awarded appellant.

The decree of the court below was correct. The relation of landlord and tenant did not exist between the parties, nor was the contract an option to purchase which was converted into a tenancy at will. The contract was not an option to purchase. The terms of the sale had been fully agreed upon, and there had been a final acceptance of these terms by both parties, pursuant to which

possession of the property was surrendered and delivered.

The testimony is conflicting as to which of the parties made default, but the relief awarded was proper in any event. Appellant has a decree for the unpaid purchase money and interest, including taxes and insurance, and is entitled to nothing more. The decree of the court below is therefore affirmed.

HINES v. CONSUMERS' ICE & LIGHT COMPANY.

Opinion delivered May 18, 1925.

1. ELECTRICITY—FAILURE TO INSULATE WIRES—LIABILITY.—Although an electric light company is not required to insulate all of its wires, a telephone lineman having a joint right to use its poles may recover for injuries sustained through failure of the light company to have the wires with which he might reasonably come in contact properly insulated.
2. ELECTRICITY — JOINT USE OF POLES — COMPLAINT.—A complaint which alleges that a joint right to use a pole for transmitting electricity existed between an electric light company and a telephone company, and that by reason of the negligence of the former in failing to insulate its wires properly a servant of the latter company was injured, states a cause of action.

Appeal from Columbia Circuit Court; *L. S. Britt*, Judge; reversed.

E. A. Upton and *Henry Stevens*, for appellant.

Chas. L. Neely and *McKay & Smith*, for appellee.

SMITH, J. This appeal is from a judgment sustaining a demurrer to a complaint which contained allegations to the following effect: Defendant is a corporation engaged in furnishing electricity to its patrons in the city of Magnolia, and, in doing so, maintains poles upon which wires are fastened in the various streets of the city.

Plaintiff further alleged that on August 30, 1921, he was employed as a lineman, and was engaged in

stringing a telephone wire upon one of defendant's poles upon which one of defendant's primary wires was also strung, and "that, in stringing said wire to tie same into the said pole up which plaintiff had climbed, the same came in contact with defendant's said primary wire while same was being used to supply current to defendant's patrons; that, by reason of defective and improper insulation of defendant's said primary wire, the said telephone wire, upon contact therewith, became heavily charged with electricity, as a result of which plaintiff was severely shocked and burned."

It was further alleged "that, at the time of the injury complained of, he was employed in stringing the said telephone wire and the same was being strung over and tied to defendant company's poles with its knowledge, consent and permission, and in its interest. * * * That the injury complained of was wholly the result of defendant's negligence and wantonness in failing to properly insulate its said primary wire, and to maintain same in a safe condition for those whose duty brought them in proximity thereto; that defendant owed plaintiff the legal duty to maintain said primary wire in a safe condition by proper insulation, but negligently failed to do so, and, by reason of such negligence, plaintiff sustained a serious injury."

A motion was filed to require the plaintiff to make the complaint more specific by alleging in what manner the stringing of the telephone wire on defendant's poles was in the interest of defendant, which motion was overruled. Thereupon defendant filed a demurrer to the complaint, which was sustained, and, as plaintiff stood on his complaint, the cause was dismissed.

The complaint does not allege in what manner the stringing of the telephone wire was in defendant's interest, and this allegation may be treated as a mere conclusion of law; but the complaint does allege that, at the time of plaintiff's injury, he was on defendant's pole with defendant's knowledge, consent and permission, and that he was injured through the negligent failure of

defendant to have its light wire properly insulated. Do these allegations state a cause of action?

It will be observed that the complaint alleges that plaintiff was injured in the discharge of his employment at a place where he then was with the knowledge, consent and permission of defendant.

These allegations, by fair intendment, necessarily mean that defendant knew the service in which plaintiff would be and was engaged at the time of his injury, and, as the case is being considered on the sole question of the sufficiency of the allegations of the complaint to state a cause of action, we need not consider what defenses may be available to the defendant.

We quote from the chapter on Electricity in 20 C. J. the following declarations of law which are applicable to the facts alleged in plaintiff's complaint:

"(Section 39). *Location of Wires and Appliances.* The duty of exercising care extends to every place where persons have a right to be, whether for business, convenience, or pleasure, and extends to those upon the premises of consumers, and it makes no difference that the injury occurred on private property and not in a public highway, if the person or animal injured had a right to be on such private property" (Pages 345, 346).

"(Section 40). * * * *Persons Invited.* Where the person injured was present at the place in question by the express or implied invitation of the owner or occupant, he is neither a trespasser nor a bare licensee, and as to him the general law of negligence imposes the duty of exercising due care to prevent injury. Employees of independent or subcontractors engaged to do work about the premises are there by invitation within this rule" (Pages 348, 353, 354).

"(Section 50). *Joint Use of Poles or Appliances and Joint Negligence.* Where the negligence of one party results in injury, that party is liable, although the negligence of another contributed to the injury. If the same poles are used by several employers to sustain their respective wires, each owes to the employees of the

others the duty to exercise due care not to injure them while lawfully employed about such wires" (Pages 366, 367).

In the chapter on Electricity in 9 R. C. L., at § 19, page 1210, it is said:

"19. *Employees of Other Companies Making Joint Use of Same Structures.* Where two companies are making a joint use of a structure to which the wires of each are attached, each should be under the same obligation to the other as persons having common rights in a place or passageway are to one another, not negligently to place a dangerous substance on the common territory where it may be reasonably anticipated that others having common rights may be injured. Of course the purpose for which the structures are used renders some danger from electrical currents inevitable; but the danger ought to be made as small as practicable by the exercise of reasonable care." See also *Gentzkow* v. *Portland Ry. Co.*, 54 Ore. 114, 135 Am. St. Rep. 821; *Braun* v. *Buffalo General Electric Co.*, 200 N. Y. 484; 34 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370; *Knowlton* v. *Des Moines Edison Light Co.*, 117 Iowa 451, 90 N. W. 818.

One of the leading cases dealing with the obligation of joint users of poles upon which the wires of more than one company are strung is that of *Illingsworth* v. *Boston Electric Light Co.*, 161 Mass. 585, 37 N. E. 778, 25 L. R. A. 552. This case has been frequently cited, as is shown by the extra annotation to this report.

The question at issue was there stated by the Supreme Judicial Court of Massachusetts in the following language: "The question, then, is, when two business corporations or two persons, under some agreement between themselves, use the same structures, owned by one of them, as supports for separate lines of wire used by each for the transmission of dangerous currents of electricity, what is the duty, at common law, which each owes to the other in regard to the care each must take to have its wires in a reasonably safe condition at or near

the structures where the servants of the other have occasion to go in the usual course of business, and where they must come near to, or in contact with, the wires?"

After thus stating the question under consideration, the court proceeded to say:

"Such servants, when so employed, are more than mere licensees, taking advantage, for their own benefit, or that of their employer, of the passive acquiescence of the licensor. If they are licensees at all, the license, until it is revoked, is coupled with an interest. The two corporations or persons have, in a sense, a common interest in the maintenance and use of the structures to which the wires of each are attached, and each, we think, should be under the same obligation to the other as persons having common rights in a place or passageway are under to one another, not negligently to place a dangerous substance on the common territory, where it reasonably may be anticipated that others, having common rights, may be injured by it. The purpose for which the structures are used renders some danger from electrical currents inevitable, but the danger ought to be made as small as is practicable by the exercise of reasonable care. In the absence of any agreement on the subject, other than what is involved in the permission of the owner of the structures to the other to use them in common for the support of electric wires, on paying some compensation, we are of opinion that the duty of the owner of the structures is to exercise reasonable care in seeing that his wires are kept, so far as is practicable, in a safe condition at such places as the servants of the other are expressly or impliedly licensed to go in performing their duties with reference to the wires attached to such structures."

After thus declaring the law, it was said that there was in that case evidence for the jury that the defendant was negligent in leaving two joints of its wire without insulation, within twelve or fifteen inches of the frame, up which the plaintiff, in the course of his duty, as a person employed in the fire-alarm service of Boston, was required or expected to go.

Another case which we find, in our investigation of the authorities, has been frequently cited, and which is extensively annotated in 45 L. R. A. (N. S.) 303, is that of *Denison Light & Power Co.* v. *Patton,* 105 Tex. 621. There an electric light company knew that an employee of a telephone company had made use of one of the light company's poles to repair the telephone line which overhung the light company's wires at that point, and had not completed the work, and there was reason to believe the workman would return on the following day to complete the repair. The servant of the telephone company was burned while making these repairs, and a judgment in his favor was reversed by the Supreme Court of Texas, but this was done because the injured servant was a mere licensee under the facts of that case.

The court announced principles, however, which are applicable here, and it was there said: "In all such cases the relationship between the parties determines the measure of the duty, and this question must be resolved by ascertaining the relation that existed between Patton and the light company at the time of the injury. Patton was the employee of the telephone company, and, at the time, engaged in a work that was solely for its benefit. To perform that work, he made use of the light company's property in going upon its pole, placing the telephone cable upon a cross-arm attached to it, and suspending his platform beneath the cable in this situation, so as to bring himself in contact with the light company's wires. The dangerous situation was produced by himself, and resulted from the use he made of the light company's property. If Patton had the right to make such use of the property, a relationship was created that imposed upon the light company the duty of exercising care to protect him from injury that might result from turning an electric current on its wires. But, under the settled law of this State, the owner of premises is under no general duty to exercise care to make them safe for the use of others coming thereon without authority, invitation, or allurement" (citing cases).

It was there also said: "A reasonable belief on Sammon's part (the manager of the light company) that he (the servant) would probably return to this place on the morning in question to resume his work for the telephone company was therefore not sufficient to charge the light company with the duty of exercising care to make its property safe for his prosecution of that work. The owner of a structure of this character is not required to make its legitimate use subservient to that of others who go upon it without authority or invitation, for purposes of their own, as would be the case if he is bound to anticipate the presence of such persons upon his property, and, on that account, is under a duty to use it, not in its ordinary way, but only in such manner as not to injure them. In the use of his property the owner is under a duty to exercise due care for the safety of those rightfully upon the premises; that is, those who are there by authority or invitation, or because of allurement. In our view, the charge (of the trial court to the jury) was erroneous in applying this rule to the light company, regardless of whether the plaintiff, at the time of his injury, was rightfully upon its property, or was making an authorized use of it."

In the notes to the text quoted, the annotator says that "the following cases announce the rule that a company maintaining wires over which a dangerous current of electricity passes upon a pole used jointly by others is bound to know that linemen of the other companies may come in contact with its wires, and must use reasonable care in insulating such wires for their protection. (Citing numerous cases)."

There is involved here no question about the duty of the electric light company to insulate all its wires. The authorities appear to be unanimous in holding that there is no such duty, but the cases do hold, as we understand them, that this duty must be performed, or other sufficient safety methods employed to prevent contact

with wires conveying the current at such places as danger of contact may reasonably be anticipated.

The law is stated in 9 R. C. L. at § 21 of the chapter on Electricity, on page 1213, as follows:

"21. *Insulation at Particular Points or Places.*—It is only reasonable that the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, and the law does not compel electric companies to insulate their wires everywhere, but only at places where people may go for work, business, or pleasure, that is, where they may reasonably be expected to go."

In other words, there is no duty to insulate or to take other precautions to prevent contact except at such places as persons have a right to go and whose presence at these points of contact should reasonably be anticipated.

The defendant company was under no more duty than any other property owner to make its premises safe for a trespasser or a mere licensee. The duty to such persons is to inflict no wanton injury after discovering their presence.

Here we interpret the allegations of the complaint to be that a joint right to the use of the pole in question had been conferred, and, if this is true, plaintiff was neither a trespasser nor a licensee. If a right to the joint use of the pole had been conferred, defendant should have anticipated that this right would be exercised, and that its exercise might bring some employee of the telephone company in contact with the wires carrying the electric light current.

We cannot anticipate what facts may be developed by the testimony upon the trial of the cause on its merits, but, under the allegations of the complaint, we think there is a *prima facie* charge that plaintiff was negligently exposed to a danger from which he should have been protected.

The court was in error therefore in sustaining the demurrer to the complaint, and the cause will be remanded with directions to overrule the demurrer.

McCULLOCH, C. J., (dissenting). The law is well settled that one who goes upon the premises of another, not as an employee or as invitee, but merely as a licensee, takes his license with its concomitant perils, and that the owner owes him no affirmative duty of protestation; the measure of the owner's duty being merely the negative one to do no act to cause injury after the presence of the licensee is discovered. *St. L. I. M. & S. Ry. Co.* v. *Tomlinson,* 69 Ark. 489; *Arkansas & Louisiana Ry. Co.* v. *Sain,* 90 Ark. 278; *St. L. M. & S. Ry. Co.* v. *Pyles,* 114 Ark. 218; *C. R. I. & P. Ry. Co.* v. *Russell,* 136 Ark. 365; *Mitchell* v. *Ozan-Graysonia Lbr. Co.,* 151 Ark. 6; *Knight* v. *Farmers' & Merchants' Gin Co.,* 159 Ark. 423. This rule of law applies to the use of electricity the same as to other dangers—there are no exceptions as to the character of danger.

It devolved on the plaintiff in this case to set forth in his complaint a state of facts which imposed on the defendant the duty to exercise care to protect him from danger, and he has failed to allege any such state of facts. The statement that at the time of plaintiff's injury the wire "was being strung over and tied to defendant company's poles with its knowledge, consent and permission," was not sufficient to show that plaintiff was an employee of defendant. The complaint specifically alleged that plaintiff was an employee of the telephone company when he climbed the poles of defendant to string the wires of his employer. He was therefore not an employee of defendant, and the "consent and permission" by defendant for plaintiff to string the wire over the poles and tie it to the poles did not constitute an invitation to so use the poles. Mere permission amounted to no more than a license. In order for plaintiff to make himself out to be an invitee, he should have stated the facts upon which the relation between him and defendant rested. If there existed a

contract between plaintiff's employer, the telephone company, and defendant whereby the latter, for a consideration, permitted the former to use the poles in stringing telephone wires, then plaintiff was more than a mere licensee. But no such state of facts is set forth in the complaint.

My conclusion is that the demurrer was properly sustained.

Mr. Justice WOOD joins in this dissent.

STANDARD SHINGLE COMPANY v. BERRY.

Opinion delivered May 18, 1925.

LOGS AND LOGGING—AGREEMENT TO PAY TAXES—EFFECT.—A provision in the habendum clause of a deed conveying cypress timber that, in case the grantee shall require a longer period than five years to cut and remove the timber, he "undertakes and agrees that he will pay all taxes assessed against the lands upon which the cypress is situated" *held* to be a covenant to pay the taxes, and not a condition upon which the timber might be cut and removed.

Appeal from Woodruff Chancery Court, Southern District; *A. L. Hutchins,* Chancellor; reversed.

Coleman & Gantt and *Roy D. Campbell,* for appellant.

Ross Mathis and *J. F. Summers,* for appellee.

HUMPHREYS, J. These cases were consolidated in the chancery court of Woodruff County, where brought, for the purposes of trial. Gross & Shields' case against W. C. Berry *et al.* was to enforce a vendor's lien for the balance of the purchase money alleged to be due them for timber on a 4,300-acre tract of land in Woodruff County, known as the Gross & Shields lands, and to question Berry's claim to the timber standing or fallen upon said land.

The suit of Berry *et al.* against the Standard Shingle Company *et al.* was to enjoin the Standard Shingle Com-

pany from cutting cypress timber upon said lands and from removing cypress timber therefrom which had been cut and not removed, and for an accounting of that which had been cut and removed. Berry claimed title to the timber under two timber deeds of date March 6, 1923, one from H. T. Witwer and wife, and the other from H. E. Kimmel and wife, conveying to him all their right, title, and interest in and to the timber of all kinds, standing or fallen, on the Gross & Shields lands in said county, particularly describing them. It was alleged that H. T. Witwer had acquired said lands from the Cotton Plant Timber and Logging Company on January 26, 1918, who, in turn, had acquired them by conveyance from Cecil Gross and W. D. Shields, and that H. E. Kimmel was interested with H. T. Witwer in the purchase of a part of the land. It was also alleged that Gross & Shields had released their vendor's lien on the standing timber on said lands, and that, while the Cotton Plant Timber and Logging Company had conveyed the cypress timber on said lands to R. J. Carter, the Standard Shingle Company's predecessor in title, yet Carter and his predecessors in title had forfeited all right to the cypress timber by failure to pay taxes on the lands in accordance with the terms of their timber deed.

The Standard Shingle Company, a partnership composed of E. H. Elsberry and R. Carnahan, filed an answer denying that it forfeited the right to remove the timber by failure to pay the taxes upon the lands, and a cross-bill alleging that it owned the cypress timber on said lands under a timber deed from W. W. Carter, in his own right and as administrator of A. J. Carter, deceased, to E. H. Elsberry and R. Carnahan, of date April 10, 1918, R. J. Carter having purchased same from the Cotton Plant Timber and Logging Company on May 15, 1916; and praying for judgment against W. C. Berry in the sum of $1,250, the alleged value of the cypress timber which he had cut and removed from said lands.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a finding that J. W. Berry was the owner of the cypress timber on said lands, and entitled to the value of the timber cut and removed therefrom on and after September 21, 1923, the day he recorded his timber deed from H. E. Kimmel and H. T. Witwer, and to an order restraining the Standard Shingle Company from removing or molesting the standing or fallen timber; also a finding that the bill of Cecil Gross and W. D. Shields should be dismissed for the want of equity. The decree was rendered in accordance with the finding, from which an appeal has been duly prosecuted to this court.

Aside from the pleadings, the record consists chiefly of the deeds in the chain of title of the respective parties back to the common source of title, and the testimony introduced responsive to the issue as to the amount and value of timber cut and removed by the respective parties from said lands.

The question presented for determination by the appeal is whether the Standard Shingle Company forfeited its right to remove the cypress timber from said lands on account of the alleged failure of itself and its predecessors in title to pay taxes on the lands. This must depend upon the effect to be given the following provision contained in the timber deed from the Cotton Plant Timber and Logging Company to R. J. Carter, of date May 15, 1916:

"It is agreed that, in the event the party of the second part shall require a longer period than five years to cut and remove the timber herein conveyed, the said party of the second part undertakes and agrees that he will pay all taxes assessed against the lands upon which the cypress is situated as the timber herein conveyed, it being understood that, in no event, shall any payment or payments of taxes on the lands aforesaid in any wise convey any title to the lands in question to the party of the second part herein." The provision appears in the

habendum clause of the deed, and is clearly a covenant to pay the taxes on the land, and not a condition upon which the timber might be cut and removed. There is nothing in the language of the provision to indicate that the nonpayment of taxes on the lands should work a forfeiture of the right to remove the timber. It is a promise, nothing more, on the part of the grantee to pay the taxes at the expiration of five years from the date of the deed on all lands from which the cypress timber had not been cut and removed. Had it been intended that the title to the timber should revert to the grantor upon a failure to pay the taxes on the lands, after five years, upon which the timber was still standing, it would have been an easy matter to express it in the deed. *Bain* v. *Parker,* 77 Ark. 168; *Earl* v. *Harris,* 99 Ark. 116; *St. L. S. W. Ry. Co.* v. *Curtis,* 113 Ark. 92; *Terry* v. *Taylor,* 143 Ark., 208 *School Dist. of Newport* v. *Holden Land & Lumber Co.,* 149 Ark. 213. This deed was prior in time to the deed from the Cotton Plant Timber and Logging Company to H. T. Witwer, the predecessor in Berry's title, and the court erred in construing the provision therein with reference to the payment of taxes as a condition upon which the timber might be removed.

We are unable to determine from the record the amount and value of the timber removed from the land by Berry. This feature of the case was not fully developed.

The Standard Shingle Company was entitled to the dismissal of Berry's bill and to a judgment against him for $917.50, the value of the timber which he cut on the premises, and an order restraining Berry from cutting or removing any timber from the lands.

The decree is therefore reversed, and the cause remanded with directions to determine the amount and value of the cypress timber removed from the land by Berry and to render a decree in accordance with this opinion.

STEPHENSON v. GRANT.

Opinion delivered May 18, 1925.

1. SUBROGATION—ADVANCE OF MONEY TO DISCHARGE VENDOR'S LIEN.—One who advances money to pay off an incumbrance on land, such as a vendor's lien, at the owner's instance is not a volunteer.
2. SUBROGATION—PRIOR LIEN—CULPABLE NEGLIGENCE.—The agent of a person advancing money to the owner of land to discharge a vendor's lien, who inquired of the owner whether any other liens existed against the lands and received a negative reply was not chargeable with culpable negligence in not discovering the existence of a mortgage lien against such property which an examination of the records would have disclosed.
3. SUBROGATION—ADVANCING MONEY TO DISCHARGE LIEN.—One who advances money to pay off prior incumbrance on realty, at the instance either of the owner of the property or the holder of the incumbrance, either on the express understanding, or under circumstances from which an understanding, will be implied, that the advance made is to be secured by a first lien on the property is not a mere volunteer; and in the event the new security is for any reason not a first lien on the property, the holder of such security, if not chargeable with palpable and inexcusable neglect, will be subrogated to the rights of the prior incumbrancer under the security held by him.

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

Streett & Burnside, for appellant.

Cook & Trice and *W. W. Grubbs,* for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Chicot County wherein Mrs. E. P. Gaddis was subrogated to Friedlander & Oliven Company's lien for the balance of the purchase money, amounting to $452.46, on a sale of a certain forty-acre tract of land by it to Turner Grant, and for taxes she had paid on the land in the sum of $85.31. The correctness of the decree allowing Mrs. Gaddis to be subrogated to the rights of Friedlander & Oliven Company to the extent of its vendor's lien is challenged, but not for taxes paid by her on the land.

Friedlander & Oliven Company sold and conveyed the land to Turner Grant on March 2, 1918, reserving

a lien in the deed to secure the balance of the purchase money, evidenced by four promissory notes in the sum of $137.50, bearing interest at the rate of 6 per cent. per annum from date until paid, due respectively on the first day of December in the years 1918, 1919, 1920, and 1921. On the first day of April, 1919, Turner Grant and his wife executed a mortgage on the land to W. H. Stephenson to secure an indebtedness to him of $400, evidenced by a promissory note in said sum, due and payable on November 1, 1919, and to secure future advances to them, subject to Friedlander & Oliven Company's lien for the balance of the purchase money. Turner Grant paid one of the lien notes, and afterwards applied to B. L. Ross, cashier of the Merchants' & Planters' Bank of Eudora, Arkansas, for a loan of $1,000 with which to pay the others, and to build a house upon the land. The bank did not want to make a long-time loan, so the cashier agreed to take the loan for Mrs. Gaddis, whom he represented, with the understanding that the lien notes should be paid out of the loan and the lien released, having been informed by Turner Grant and believing that the notes for the purchase money constituted the only lien against the land. Turner Grant then inquired of Mr. Connerly, Friedlander & Oliven Company's local agent, whether the bank would have the first lien if he borrowed the money from it to pay the vendor's lien notes, and was informed that it would, as the notes would be assigned to the party who loaned him the money to pay off the lien. Thereafter he requested Connerly to procure the lien notes and a release of the lien from Friedlander & Oliven Company. Turner Grant and his wife then executed four notes for $250 each to Mrs. Gaddis, and secured same by a mortgage on the land. When the notes and a release were procured, the release deed and mortgage to Mrs. Gaddis were simultaneously filed of record, and the following notation was made on the face of the three Friedlander & Oliven Company's notes, viz:

"Paid 10-16-1919, by Mrs. E. P. Gaddis."

The duplicate deposit slip given to Turner Grant from Mrs. Gaddis is as follows:

"Loan	$1000.00
Less F. Oliven note	452.46
	$547.54
Less interest (should be insurance)	81.78
Recording fee, revenue stamps and mtg. fees	7.75
	$458.01."

There is a dispute in the testimony as to what disposition was made of the Friedlander & Oliven notes after Mr. Ross made the notation quoted above on the face of the notes. Mr. Ross testified that, according to his recollection, he filed them away with the notes and mortgage to Mrs. Gaddis. Turner Grant testified that the three notes were turned over to him by Mr. Ross. However, the following question and answer appear in his testimony:

"Q. Now, when did you recall that Mr. Ross gave you these three notes? A. Now, Mr. Grubbs, if I make no great mistake, it really seems to me that these notes were turned over to me when this loan was closed."

Mr. Ross testified that it was his understanding that Mrs. Gaddis was getting the first lien on the forty-acre tract of land when the loan was made, and, while Turner Grant testified that there was no contract or understanding about it before or at the time the loan was made, the following question and answer appear in the testimony:

"Q. You said in your cross-examination that you intended Mr. Ross to have the same rights that Friedlander & Oliven Co. had. Did you intend Mr. Ross to have any greater rights than Mr. Stephenson? Which was first, the one to Mr. Ross or the one to Mr. Stephenson? A. The one to Mr. Ross. The Friedlander &

Oliven Company was ahead of Mr. Stephenson. Mr. Stephenson would have second mortgage."

The mortgage to W. H. Stephenson was on record when Turner Grant and wife executed the mortgage for $1,000 to Mrs. Gaddis, but neither she nor her agent actually knew of the existence of the Stephenson mortgage. At the time Turner Grant applied to Mr. Ross for the loan, he asked him whether the Friedlander & Oliven Company's loan was the only lien on the land, and Grant informed him that it was.

Appellant insists that, because there was no express agreement that Mrs. Gaddis should be subrogated to the rights of Friedlander & Oliven Company when she advanced the money to pay the lien, and because the lien of Friedlander & Oliven Company was released instead of being assigned to her, she is not entitled in equity to be subrogated to the company's rights. Mrs. Gaddis was not a volunteer. *Rodman* v. *Sanders,* 44 Ark. 504. She was requested by the debtor to pay the vendor's lien, and it is fairly inferable from all the facts that she, through her agent, and Turner Grant intended at the time that she should have the first lien upon the land to the extent of the vendor's lien she was to pay. Her agent was not censurably negligent, for he asked Turner Grant whether Friedlander & Oliven Company's lien was the only lien against the land, and received information from him that it was. It is true that he could have discovered Stephenson's mortgage, had he gone to the record, but, in view of the fact that he made inquiry as to whether there were other liens, culpable negligence cannot be charged to him. Words & Phrases, Second Series, p. 1174. Stephenson's rights were not prejudiced by the decree allowing Mrs. Gaddis to be subrogated to the rights of Friedlander & Oliven Company. Stephenson only had a mortgage subject to its lien for the purchase money, and there is no showing in the evidence that he furnished more to Turner under the "future advance" clause contained in the mortgage than

he otherwise might have done had the vendor's lien not been released of record. In effect, his condition was improved by the loan made by Mrs. Gaddis to Turner Grant, as almost one-half the money was used to make valuable improvements upon the land for which she was not given a first lien in the decree. These improvements enhanced the value of Stephenson's security.

The rule of law applicable to cases of this kind is well stated in a foot-note on page 473 of 37 Cyc. It is as follows: "One who advances money to pay off an incumbrance on realty, at the instance either of the owner of the property or the holder of the incumbrance, either on the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and, in the event the new security is, for any reason, not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior incumbrancer under the security held by him, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit."

In discussing the equitable doctrine of subrogation, it is said in 37 Cyc. p. 365, that "its basis is a doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice;" and, at page 371, that "generally, where it is equitable that a person, not a mere stranger, intermeddler, or volunteer, furnishing money to pay a debt should be substituted for or in the place of the creditor, such person will be so substituted."

We think the facts in the instant case are sufficiently similar to the facts in the case of *Southern Cotton Oil Company* v. *Napoleon Hill Cotton Company,* 108 Ark. 555, for it to be ruled by that case. We also cite the case of *Blevins* v. *Rogers,* 32 Ark. 258, in support of the conclusion reached by us.

No error appearing, the decree is affirmed.

FRANKS v. STATE.

Opinion delivered May 25, 1925.

1. RAPE—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to sustain a verdict of guilty of assault with intent to rape.
2. CRIMINAL LAW—EXCLUSION OF EVIDENCE—HARMLESS ERROR.—In a prosecution for rape, there was no reversible error in refusing to permit accused to interrogate State's witness, for the purpose of affecting his credibility, as to his having had intercourse with the prosecutrix on the morning after the alleged offense, where such fact was proved by the prosecutrix, especially where the witness had thoroughly discredited himself.
3. CRIMINAL LAW—INSTRUCTION NOT PREJUDICIAL WHEN.—In a prosecution for rape, even though the testimony of the prosecutrix was that sexual intercourse was fully consummated, a charge of the court on assault with intent to rape was not prejudicial, as it operated to accused's benefit.
4. RAPE—INSTRUCTION—WEIGHT OF EVIDENCE.—In a prosecution for rape, an instruction that, while the prosecutrix should have offered such resistance as she might to prevent the defendant from effecting his purpose, the extent of such resistance is to be determined by the situation of the parties, the age of the prosecutrix, and whether she was acting under the influence of fear, *held* not on the weight of the evidence.

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

June R. Morrell, J. S. Steel and *George R. Steel,* for appellant.

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appellee.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Sevier County for the crime of rape, alleged to have been committed on the person of Lenora Gill, a girl about thirteen years of age. On the trial of the cause the jury found the defendant guilty of assault with intent to rape, and fixed his punishment at twenty-one years in the penitentiary.

It is earnestly contended in the first place that the evidence is not sufficient to sustain the verdict.

The girl, Lenora Gill, and the appellant were related by marriage—her sister being the wife of a brother of

appellant's wife. The girl lived with her mother in the same neighborhood with appellant and his wife, and was accustomed to visit at their home.

The crime was said to have been committed on or about July 1, 1924. This was during the peach harvest, and the girl, together with another girl related to her, Dixie Jackson by name, was staying at appellant's home to help harvest peaches. The girl testified that, during the evening, about dark, appellant requested her and Dixie Jackson to accompany him out to the edge of a thicket near the house to gather some wood, and that, when they got out in the edge of the thicket, appellant, in the presence of Dixie Jackson, seized her and threw her down, and had sexual intercourse with her, forcibly and against her will. She testified that she cried and fought him and made every effort to get him to desist, but that he consummated the act of sexual intercourse. She testified that she remained at the house of appellant two or three days, and then went back home, and that she did not tell anybody about it until she started to school about a week later, when she told her mother. She testified also that, early the next morning after the crime was committed, appellant and an associate, Charlie Busbee, took her and Dixie Jackson in a car over to appellant's mother's home, ostensibly to peel peaches, but did not remain there, and brought them on back towards his (appellant's) home, and stopped the car in the woods, and that appellant turned her (witness) over to Charlie Busbee, who had intercourse with her forcibly, and that appellant took Dixie Jackson aside for a short distance, the inference being from the statement that he had intercourse with her.

Dixie Jackson testified, in corroboration of the testimony of Lenora Gill, that she was present at appellant's house on the night in question, when she and Lenora accompanied appellant, at the latter's request, into the thicket, and that appellant had intercourse with Lenora, forcibly and against Lenora's will. She testified that she heard Lenora crying and telling appellant to quit.

The State introduced Charlie Busbee, who, it was shown, was confined in jail on the charge of assaulting one of these girls, and he testified that, on the night appellant is said to have committed the rape on Lenora Gill, he was at appellant's house; that appellant and the two girls started out into the woods to gather wood with which to cook supper, and that he started with them; that appellant objected to his going, and that, as they returned, one of the girls was laughing, and said that she knew something on Lon (appellant), and that appellant afterwards told him that he had "had dealings with the girl before." On cross-examination, counsel for appellant asked the witness if he did not have intercourse with Lenora Gill the morning after this occurred, and, on objection of counsel for the State, the court excluded the question, and appellant's counsel then offered to prove by this witness that he had had sexual intercourse with Lenora Gill that morning as well as on other occasions. This testimony was offered, as stated by counsel for appellant, "for the purpose of showing his interest in this case and affecting his credibility as a witness."

Appellant testified in the case, and denied that he assaulted either of the girls or that he had ever had sexual intercourse with them. He stated that, on the night in question, he went out into the thicket, a short distance from his home, about dark, for the purpose of getting wood; that the girls did not accompany him, at least that they did not get out into the thicket where he was, and that he was in full view of the house all of the time, and made no attempt to assault either of the girls.

There was testimony relating to the examination of the girl shortly after the alleged commission of the crime, and her condition at that time. The physician who examined her parts testified that there was an appearance of her having been entered shortly before the time of the examination.

The testimony was sufficient to sustain the verdict.

It is next contended that the court erred in refusing to permit appellants to interrogate witness Busbee,

for the purpose of affecting the latter's credibility as a witness, as to whether or not he had had intercourse with Lenora Gill on the morning after the alleged commission of the crime set forth in the indictment. Witness Busbee had shown himself so untrustworthy by his own statements while on the witness stand that it is difficult to see how he could have been any more thoroughly discredited. He admitted that he had changed his testimony from the statements he had previously made to appellant's counsel, and made a different statement to the prosecuting attorney, for the reason that he had "seen where it would be to my benefit to change my mind." But, even if proof of Busbee having had sexual intercourse with Lenora Gill would have had any tendency to affect his credibility, under the circumstances, there was no prejudice in excluding the witness' own statement of that fact, for the State had already proved by Lenora Gill herself that Busbee had had intercourse with her on the morning after the commission of the alleged crime by appellant. The State having proved that fact by its own witness, it was unnecessary to take up any further time in having the witness to narrate the event. We think therefore that the ruling of the court had no material bearing upon the trial of the issues, and did not constitute reversible error.

The court gave an instruction, over appellant's objection, submitting the issue as to guilt of the crime of assault with intent to rape. It is contended that this was error, as there was no testimony tending to establish a mere assault, the prosecuting witness having testified that the act of sexual intercourse was fully consummated. Even if it be conceded that there was no ground for reducing the degree of the offense, if the testimony of the girl was believed, still there was no prejudicial error in giving the instruction, for it was for appellant's own benefit, and enabled the jury to find him guilty of a lower degree instead of the higher degree. In order to find the defendant guilty, it was necessary, as the court instructed, to find that appellant had

assaulted the girl with intent to rape her, forcibly and against her will, and it must be assumed that the jury found those facts beyond a reasonable doubt in returning a verdict to that effect. If the testimony of the girl and other witnesses introduced by the State failed to convince the jury beyond a reasonable doubt that appellant was guilty, the verdict would not have been returned, and the fact that the jury, under this instruction, found for the lower offense of assault, operated to appellant's benefit, and he cannot complain.

It is insisted that the following instruction, given over appellant's objection, was erroneous:

"14. The court instructs the jury that, while the law requires the prosecuting witness should have offered such resistance as she might to prevent defendant from effecting his purpose, the extent of such resistance is to be determined by the situation of the parties at the time, the mature and immature age of the prosecuting witness at the time, and whether or not she was acting under the influence of fear."

The argument is that this instruction constituted one on the weight of the evidence. We cannot agree that such was the effect of the instruction. The court gave the following instructions on that subject at the request of appellant:

"10. You are instructed that a mere pretense at resistance by the said Lenora Gill is not sufficient, but that resistance upon her part must have been in good faith, and she must have used all the means within her power consistent with her safety, and, unless you find from the evidence that she used all the means within her power consistent with her safety, up to the time when the act of sexual intercourse was actually accomplished, if it was accomplished, it will be your duty to find the defendant not guilty."

"20. In the event that you should find that there was no outcry and that no complaint was made for some time after the alleged occurrence, you may take this into consideration as a circumstance as to whether the

alleged intercourse was had violently and against the will of Lenora Gill."

The instructions as a whole correctly submitted the issues to the jury.

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

GREEN v. GREEN.

Opinion delivered May 25, 1925.

1. DIVORCE—CONTINUING CONTROL OVER ALIMONY.—A continuing order for the payment of alimony remains within the court's control from time to time, to be altered according to changes in the circumstances of the parties.
2. DIVORCE—FINALITY OF DECREE FOR ALIMONY.—A decree for an accrued sum as alimony becomes final with the end of the term, and cannot be set aside at a subsequent term, even though found to be erroneous.

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

R. G. Davies, for appellant.

Murphy & Wood, for appellee.

McCULLOCH, C. J. On August 30, 1923, the chancery court of Garland County rendered a decree in favor of appellant, against appellee, for divorce and alimony. The decree in appellant's favor was for the recovery of a monthly allowance of twenty-five dollars, running back to the commencement of the action on March 10, 1919, and the court decreed the recovery of all of the accrued sums, aggregating $1,325. The court ordered the commissioner to sell certain impounded personal property belonging to appellee for the purpose of satisfying the decree in appellant's favor. At the next term of the chancery court the commissioner reported the sale of the impounded property for the sum of $500, and the court approved the sale and ordered the distribution of the fund. The court ordered that all of the funds except the sum of $158, which was reserved in the hands of the com-

missioner subject to further orders of the court, be paid over to appellant and her attorney, which was done. This order was made on December 17, 1923. Thereafter appellee filed a petition asking that the court set aside the order of allowance of alimony, and appellant filed a response, and, on February 18, 1924, the court rendered a decree directing the clerk to pay over to appellant the balance of $158 in the hands of the commissioner, and that, "upon the receipt of the same, the said cross-complainant discharge all judgments and allowances against the plaintiff, Frank J. Green, in her favor, on account of alimony or allowances and for all future allowances, the payment of the said sum being a full and complete settlement between them." In other words, the court, in the last decree, remitted the unpaid amount adjudged in favor of appellant and against appellee at the former term of court. This appeal has been prosecuted in apt time by appellant from the last decree.

It is insisted by counsel for appellee that appellant waived her right of appeal by obtaining an order from this court dismissing his (appellee's) appeal from the same judgment. The answer to that contention is that the motion of appellee to dismiss related to an appeal from the original decree of the court rendered on August 30, 1923. The records of this court under date of May 19, 1924, show that the present appellant moved to dismiss the appeal of appellee, Frank J. Green, from the decree of the court rendered on August 30, 1923, and, as the transcript had not been filed within six months so as to give the court jurisdiction, there could be no affirmance of the judgment, but that the appeal would be dismissed, and this was done. The present appeal by appellant, Nona Green, is from the last decree of the court, rendered on February 18, 1924. By that decree the court undertook to remit the balance of the amount of alimony decreed to appellant at a former term of the court. A continuing order of court for the payment of alimony remains within the control of the court from time to time,

to be altered according to changes in the circumstances of the parties. A decree rendered for an accrued sum becomes final with the end of the term and cannot be set aside at a subsequent term, even though found to be erroneous. In that respect it is the same as any other judgment or decree of a court of record.

The court having rendered a decree in favor of appellant, she was entitled to have it enforced, and it was beyond the power of the court to set it aside. The court should therefore have ordered the commissioner to pay over to appellant the balance in his hands, and appellant is entitled to process of the court to enforce payment of the remainder of the amount formerly decreed.

The cause is therefore reversed, and remanded for further proceedings not inconsistent with this opinion.

HOLLAN v. AMERICAN BANK OF COMMERCE & TRUST CO.

Opinion delivered May 25, 1925.

1. MORTGAGES—SECURITY FOR OTHER INDEBTEDNESS.—A mortgage executed to secure certain notes which provides that it shall be security for any other indebtedness that may be owing by the mortgagor to the mortgagee "up to the time of foreclosure" is not limited to indebtedness incurred before maturity of the described notes, but includes all indebtedness of any kind incurred up to the time of foreclosure.
2. MORTGAGES—CONSTRUCTION.—A mortgage is a matter of contract between parties, as there is no limitation upon the right to contract with reference to the extent of the debt secured; the province of the court being merely to interpret the language and declare the right of the parties in accordance with the expressed intention of the parties.

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

Snodgress & Snodgress, for appellant.

Moore, Smith, Moore & Trieber, for appellee.

MCCULLOCH, C. J. This is an action to foreclose a mortgage executed by appellants to appellee on certain

real property in the city of Little Rock. The mortgage was executed on April 3, 1920, to secure the payment of two notes of that date, each for $2,000, payable one year after date, with interest. The mortgage also contained the following clause:

"This deed of trust shall be security for any other indebtedness of whatever kind or character that may be owing by grantor to said American Bank of Commerce & Trust Company up to the time of 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."

When the notes became due there was an agreement extending the date of maturity until October 3, 1921.

In April, 1921, appellants became further indebted to appellee as indorsers on two negotiable promissory notes, executed by one Williams to appellants and by them sold and indorsed over to appellee. Liability of appellants on these two notes was established by a judgment at law rendered in favor of appellee prior to the institution of the present action, and the amount of that indebtedness was, at the time of the decree below, $972.21. The only point at issue in the case was whether or not the indebtedness described above, in addition to the two notes specifically mentioned in the mortgages, fell within the terms of the mortgage and were secured thereby. The court decided in favor of appellee on that point, and rendered a decree foreclosing the mortgage both as to the notes and additional indebtedness. There was a junior mortgagee, who was made party and has not appealed. No question is involved as to priority between the junior and senior mortgagees.

It is first contended by counsel for appellants that the language of the mortgage should be interpreted to refer only to indebtedness incurred up to the date of the maturity of the two notes described in the mortgage. Placing that interpretation on the language of the mortgage does not help appellant's cause, for, according to the

undisputed evidence, there was an agreement extending the date of the maturity of the notes to a date beyond the time that the additional indebtedness was incurred. But we are of the opinion that the construction contended for by counsel for appellants is not the correct one. In the case of *Fort* v. *Black,* 50 Ark. 256, there was involved the interpretation of a mortgage to secure a promissory note and to secure "supplies furnished and to be furnished," and this court held that the mortgage covered only advances made up to the date of the maturity of the note. In later cases involving mortgages, using broader language, we have held that the mortgage covered any indebtedness up to the time of the foreclosure. Each instrument, of course, must be interpreted according to its particular language, and, in order to interpret the present mortgage in accordance with the contention of counsel for appellants, it would be necessary to wholly reject the language in the mortgage which has an unmistakable meaning. *Howell* v. *Walker,* 111 Ark. 362; *Word* v. *Cole,* 122 Ark. 457.

We must interpret the language of this mortgage to mean just what it says—that it secures any indebtedness incurred up to the time of the foreclosure. It is a matter of contract between the parties, as there is no limitation upon the right to contract with reference to the extent of the debt secured by a mortgage, and the province of the court is merely to interpret the language and declare the rights of the parties in accordance with their intention as expressed in the language used.

It is next contended that this case falls within the ruling of the court in the recent case of *Page* v. *American Bank of Commerce & Trust Co.,* 167 Ark. 607. In that case a series of chattel mortgages had been executed by the present appellants to the present appellee to secure separate notes, and there was a clause in each of the mortgages providing that it should be security "for all other moneys, advances, goods, wares, merchandise, supplies, services, etc., furnished by the party of the second part

(the bank) to the party of the first part (Hollan Auto Company) up to the foreclosure of this instrument." In disposing of the case here, we said:

"We think the proper interpretation of the clause for advances in the several mortgages was to secure any additional advances which appellee might make on any particular shipment, and not secure independent loans secured by other mortgages on independent shipments. The clause was not intended to cover loans secured by separate mortgages on entirely different property, but to secure advances related and incident to each particular contract and shipment."

It will be observed that the clause of the mortgages involved in that case and the clause involved in this case are couched in entirely different language. In the former case it provided for the security of "all other moneys, advances, goods, wares, merchandise, supplies, services, etc.," whilst in the present case the mortgage secures "any other indebtedness of whatever kind or character that may be owing by grantor to said American Bank of Commerce & Trust Company up to the time of foreclosure of this deed of trust." The former mortgages were restricted by the language to indebtedness incurred for advances, whereas the mortgage now before us embraces any kind of indebtedness. The language of the present mortgage is just about as broad as it is possible to make it. Nor does this case fall within the recent decision of this court in *Lightle* v. *Rotenberry,* 166 Ark. 337, where it was held that a mortgage providing that it should be security "for the payment of any other liability or liabilities of grantor already or hereafter contracted" did not embrace obligations of the mortgagor held by the bank as collateral security for the debt of another person. In interpreting the language of the mortgage in that case, we said that it had reference to liabilities which had directly arisen between the mortgagor and mortgagee. The language in the present case is far broader, for it reads, "other indebtedness of what-

ever kind or character that may be owing." It is difficult to imagine how more appropriate language could have been used by the parties with the intention of accurately describing the particular kind of indebtedness involved in the present case. It is clear that the parties meant to include every kind of indebtedness or liability of appellants to the appellee, whether it arose directly or indirectly. The chancery court was therefore correct in holding that the mortgage of appellants to appellee embraced and secured, as against the appellants as mortgagors, the additional indebtedness heretofore described. We express no opinion as to what the effect would be if the rights of subsequent mortgagees were involved.

Decree affirmed.

DYKE BROTHERS v. STOKES.

Opinion delivered May 25, 1925.

1. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.—In a suit on an oral contract of employment, where the issue was as to whether defendants promised to pay to plaintiff a bonus in addition to his salary, it was not prejudicial error to permit plaintiff to testify that there was no possibility of his being mistaken in his verson of the contract, where such statement was merely a repetition of his prior statement.
2. CONTRACT—EVIDENCE.—In a suit on an alleged oral contract to pay a bonus in addition to a salary, it was not error to permit plaintiff to testify that he would not have given up his business elsewhere and come back to work for defendants but for such promised bonus, and also that he had contracted debts on the strength of such promise.
3. WITNESSES—CROSS-EXAMINATION.—In a suit upon an alleged oral contract to pay a bonus in addition to a salary where plaintiff testified that he had contracted debts in reliance on such promise, refusal to permit defendants to cross-examine plaintiff as to the specific debts which he contracted in reliance thereon was not error.
4. EVIDENCE—SELF-SERVING DECLARATION.—In a suit to recover a bonus alleged to have been promised in addition to salary, testimony of plaintiff concerning debts contracted in reliance upon

the alleged bonus *held* not in the nature of self-serving declarations.

5. APPEAL AND ERROR—FAILURE TO OBJECT TO LANGUAGE OF INSTRUCTIONS.—A party who does not specifically object in the trial court to the phraseology of an instruction cannot object thereto on appeal.

6. TRIAL—INSTRUCTION SINGLING OUT TESTIMONY.—In a suit to recover a bonus, which plaintiff alleged was to be paid in addition to his regular salary, an instruction that if the circumstances surrounding plaintiff's employment, in addition to the evidence of the appellee as to the contract, constituted a preponderance of the evidence, the verdict should be for plaintiff, *held* not objectionable as emphasizing plaintiff's testimony.

7. TRIAL—REPETITION OF INSTURCTIONS.—Refusal to give requested instructions, fully covered by others given, *held* not erroneous.

8. APPEAL AND ERROR—ORAL INSTRUCTION—HARMLESS ERROR.—In a suit on a contract to pay a certain amount as bonus in addition to a fixed salary, an oral instruction to the jury that their verdict need not be for the full amount claimed, *held* not prejudicial.

9. APPEAL AND ERROR—VERDICT—HARMLESS ERROR.—Defendants cannot complain because a verdict against them was for a less sum than the evidence justified.

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

Warner, Hardin & Warner, for appellants.

Cravens & Cravens, for appellee.

WOOD, J. This is an action by the appellee against the appellants. Appellee alleged in substance that the appellants entered into a verbal contract with him for employment whereby they agreed to pay appellee, in addition to a fixed salary of $200 per month, a bonus of ten per cent. of the net earnings of appellants' business; that he had received his salary for the year 1922, but had not received the bonus, and that the net earnings of that year were more than $60,000; that the appellants therefore were due the appellee a bonus in the sum of $6,000, for which he prayed judgment.

The appellants answered denying that they had entered into any contract whatever to pay the appellee a bonus, and therefore denied liability.

The testimony on behalf of the appellee tended to prove that Dyke Bros. was a partnership composed of M. T. Dyke, Nathan Dyke, Jr., Frank W. Dyke, and Martin T. Dyke, Jr. The partnership was engaged in the business of retailing building material and manufacturing mill work in Fort Smith and various other places in Arkansas, and at Poteau, Oklahoma. The appellee first began work for the firm in July, 1907, and quit in January, 1920. He was for thirteen years the bookkeeper and cashier, and the last two or three years he was salesman. Part of the time he received a salary of $175 per month, and later the sum of $200 per month. The appellee, after quitting appellants in 1920, went to DeQueen, where he, with others, established a corporation engaged in the lumber business. While appellee was at DeQueen, M. T. Dyke, Sr., requested him at least four times to come back to Fort Smith, and told him that he (Dyke) had been trying to work out a way whereby the appellee, as employee, would share in the profits of the business of appellants to compensate him for the years of service he had given to appellants in the past. While witness was at DeQueen he received for a time a salary of $200 per month as bookkeeper, and the last six months it was reduced to $175 per month. Witness went back to work for the appellants from January 15, 1922, at a salary of $200 per month, and at the end of the year appellants were to give him as a bonus ten per cent. of the net profits of the business. The net profits of the business for the year 1922 were something like $60,000. During the early part of the year 1923 witness asked the appellants about his bonus, and Dyke stated that there would be no bonus for the year 1922, giving as a reason that appellee did not measure up to the standard—didn't give appellants what they thought he would. Appellee replied that they had been a long time saying anything about his not measuring up to the standard, and that they had let him work all that year expecting the bonus, and he told appellants that he was going to quit at once.

Appellee demanded ten per cent. of the $60,000 profits, and the appellants refused to pay it, and appellee instituted this action.

Appellee testified that he gave up his salary and the profits in his business at DeQueen when he returned to Fort Smith the first of the year 1922 to work for the appellants, and, in July of that year, he sold his stock in the corporation at DeQueen. The attorney for the appellee asked him the following question: "Is there any possibility of your being mistaken about Mr. Dyke offering to pay you, in addition to the $200 per month salary, a ten per cent. interest in the profits of Dyke Bros. business, if you would come back and go to work for them?" Appellee answered, "No sir." The appellants objected to the question, the objection was overruled, and they duly excepted. After the appellants closed their case, the appellee was called in rebuttal, and, during the cross-examination, he was asked by his attorney the following:

"Q. Would you have given up your business at DeQueen but for the promise that you were to have ten per cent. of the profits of the business as a bonus?" The appellants objected, the court overruled their objection, and the appellants duly excepted. Thereupon the appellee answered the above question as follows: "I would not; I never would have sold my business and given up my position in DeQueen if he had not promised me that bonus." The appellee was further asked: "Q. Did you contract debts on the strength of the promise of Mr. Dyke that he would pay you this bonus if you came back to work for him?" The appellants objected, the court overruled their objections, and the appellants duly excepted. The appellee then answered the question as follows: "Yes sir." The counsel for appellee then asked appellee when he contracted these debts and what debts he contracted in DeQueen in December. Thereupon the court ruled that it would not allow the witness to go into detail in explaining the debts. Counsel for appellants then stated that they had a right to go into detail as to the debts on

cross-examination. The court ruled that that was not material, and refused to allow appellants' counsel to examine the appellee as to the specific debts contracted in December, stating that it was sufficient that he said he had contracted debts. Appellants objected to the ruling of the court, and excepted thereto.

Appellants categorically denied that there was any contract with the appellee to pay him a bonus, and denied that they had requested him to return to Fort Smith. They admitted that he was employed by them after he returned to Fort Smith. The testimony on behalf of the appellants was to the effect that they never promised a bonus to any one as a part of compensation or salary for services. They had paid some bonuses for twelve or fourteen years, but never promised one to anybody. When given, they were given purely as a reward for good service and not as a contractual obligation. Their testimony was to the effect that they never asked appellee to return from DeQueen, and that appellee asked employment of the appellants on his own initiative, stating that he could not make any money in DeQueen, whereupon the senior member of the firm of appellants told appellee that he (appellee) knew he could always have a job with them at any time. Appellee finally telephoned the senior Mr. Dyke that he wanted to see him, and he came up on a Sunday morning in December. Appellants told him that he could come back, and his salary would be $200 per month. During the former years that appellee had worked for appellants they had always paid him a liberal salary, and he was always satisfied with it. They positively denied that there was anything said about a bonus or interest in the business as a part of appellee's compensation. They did not tell appellee that they would give him the same per cent. of the profits as was received by the sons of the senior members of the firm.

Appellee quit the employ of the appellants in March, 1923. Mr. M. T. Dyke, Sr., described in detail the conversation that he had with the appellee at that time as

follows: "He came into my room and sat down and said, 'Mr. Dyke, I have always come to you when I was in trouble, and you have always helped me out,' and I said, 'What's the trouble, Walter?' and he said he was owing debts which were making him trouble, and showed me a list of debts he owed, and I looked them over and said, 'I have helped you three or four times before, but how in the world have you come to owe so much money?' and he said, 'On account of the sickness of my wife.' We talked for quite a while, and I told him I did not see how I could help him out that much, and he left. Nothing more was said until the following Monday, about 4 o'clock in the afternoon, and he asked me again to help him. He said he had to have money and I said, 'Walter, there is nothing doing,' and he said, 'Well, I have quit,' and I said, 'Do you mean to say you quit on thirty minutes' notice,' and he said, 'I have quit—I have to have money to pay these debts.' "

The witness further testified that he never made a contract with the appellee for a year. He had never in his life made a contract with any person to work for any term whatever. Appellee was to work for $200 per month. Witness further testified that, in the conversation between him and the appellee about appellee's quitting the employment of the appellants, appellee did not then or afterwards say that he had contracted any debts on the strength of the alleged promise to pay him a bonus of ten per cent. of the profits in the business, and the witness denied that any such conversation ever took place.

At the request of the appellee the court gave, among other prayers, instructions Nos. 1 and 2, which in effect told the jury that the plaintiff alleged in his complaint that, on or about the 15th of January, 1922, he entered into a contract with the defendants whereby they agreed to pay him for his services for the year 1922 a salary of $200 per month and in addition thereto ten per cent. of the net profits earned by the defendants in their business; that the burden was on the plaintiff to

establish these allegations by a preponderance of the evidence; that, if the jury believed from the evidence that the contract as set out in plaintiff's complaint was entered into with the defendants, and that his evidence on these material allegations constituted a preponderance of the evidence, their verdict should be in favor of the plaintiff in such sum as the jury should find from the evidence in excess of the sum of $200 per month.

The court also gave appellee's prayer for instruction No. 3, which in effect told the jury that, in determining the greater weight of the evidence, they would take into consideration all the circumstances in connection with the employment, and, if the circumstances surrounding appellee's employment, in addition to the evidence of the appellee as to the contract, constituted a preponderance of the evidence, their verdict should be for the appellee in such sum as the jury might find from the evidence the appellants agreed to pay him for his services in addition to the sum of $200 per month.

The appellants requested the court to instruct the jury, in their prayer for instruction No. 1, to return a verdict in their favor. And in their prayer for instruction No. 2 they requested the court to define to the jury the issues they were to determine. In their prayers for instructions Nos. 3, 4 and 6 they asked the court to instruct the jury that the burden was upon the appellee to establish the alleged contract by a preponderance of the evidence. And in their prayer for instruction No. 5 they asked the court to tell the jury that, if the appellee made an oral agreement with the appellants to employ him for a longer period than one year at a salary of $200 per month and ten per cent. of the net profits earned by the appellants during each year, such agreement, if made, would be within the statute of frauds, and the appellee could not recover.

The court refused the above prayers for instructions, to which rulings the appellants duly excepted.

The court gave appellant's prayer for instruction No. 7, which told the jury that, "if the defendant, M. T. Dyke, did not agree to pay the plaintiff ten per cent. of the net profits earned by the defendants each year, in addition to the salary of $200 per month, then the plaintiff could not recover, and their verdict should be in favor of the defendants."

After the jury retired to consider of its verdict they returned for special instructions, and the following occurred: "The foreman asked the court: 'Do we understand that we have to find for the full amount, if anything?' The Court: 'No, the instructions do not read that way.' Foreman: 'That is the question we want to ask.' The Court: 'We instructed you that if you find for the plaintiff, you will write your verdict, "We, the jury, find for the plaintiff" in any sum you think that the evidence warrants, not exceeding the amount claimed.' Foreman: 'The jury did not understand that.' The Court: 'That is the instruction I gave you. You are not bound to consider the arguments. The evidence and the instructions of the court govern you. They just give their interpretation of the evidence. They are officers of the court, and you have a right to give proper weight to their arguments.'" Thereupon the court re-read the instructions that had been given to the jury. Counsel for defendants at the time excepted to the rulings of the court. The jury returned a verdict in favor of the appellee in the sum of $3,600. Judgment was entered in appellee's favor for that sum, from which is this appeal.

1. The court did not err in permitting the appellee to state that there was no possibility of his being mistaken in his version of the contract. While the questions and answers were in the nature of an argument, which the court might very properly have refused to allow the appellee to make, nevertheless the statement was a mere reiteration of what the appellee had already testified, and the restatement of his testimony by way of emphasis

and argument could not possibly have prejudiced appellants' rights in the minds of the jury. It is hardly possible that a sensible jury would conclude that a fact once truthfully stated would gain any force by reasseveration. It occurs to us that the repetition of the question and answer might tend to weaken rather than to strengthen the testimony of the appellee.

Nor was there any prejudicial error in permitting the appellee to state, in answer to questions of his counsel, that he would not have given up his business at DeQueen and come back to Fort Smith to work for the appellants but for the promise of the appellants to give him a ten per cent. bonus of the profits of the business in addition to his regular salary, nor in permitting the appellee to state that he had contracted debts on the strength of the promise of the ten per cent. bonus. These questions and answers thereto were during the examination of the appellee in rebuttal to certain conversations which, according to the testimony of M. T. Dyke, Sr., had taken place between himself and the appellee concerning the appellee's last employment by appellants. Dyke testified that the appellee had solicited this employment with the appellants; that, in one of the last conversations before his employment, appellee said that he owed personal bills at DeQueen and could not get out of DeQueen unless the witness would pay the bills, and he told witness he wanted to get some money from witness, and witness let him have $850, and took his stock in the DeQueen corporation as security; that, after that, appellee wrote for $400 more, and witness let him have that; that, in March, 1923, just before the appellee quit the employment of the appellants, he had another conversation with witness in which he said that he was owing a lot of debts that were giving him trouble, and showed witness a list of the debts he owed. Witness looked them over and asked him the situation, and appellee told witness about them. Witness said, "Now, I have always helped you out three or four times before, but how in the

world came you to owe so much money?" Appellee replied that it was on account of the illness of his wife. Witness finally told him that he didn't see how he could help him out that much. Appellee insisted that he had to have money, and asked witness to help him out. Witness refused, and appellee quit, saying, "I have quit—I have to have money to pay these debts," and he left, and witness had not talked to him since.

In rebuttal of the above testimony of Dyke, Sr., the plaintiff was recalled and testified, without objections, as follows:

"Q. Mr. Dyke stated that you went to him and stated to him that you were in debt and that you had to have money, and asked him to advance you money. If you had a conversation with him about it, tell the jury what you told him? A. He knew my financial condition, and has known it all the time, and I at different times have owed him and borrowed money from him, with as much sickness as I have had in my family for the last ten years or twelve years; and before Christmas we had made some local bills around town, made some purchases that we would not have made under any other circumstances if it had not been that he promised me that percentage. Q. Did you tell Dyke that? A. Yes sir; I asked him at the time that he refused to give me that percentage, I said to him, 'You see now what you have done to me.' Q. What did you tell him that he had done to you? A. How is that? Q. What did you tell him that he had done to you? A. I told him that he had just ruined me, that is all. Q. I will ask you this question. I cannot get you to tell it any other way. Did you tell him that you had made a lot of debts on his promise to give you this profit of the business, ten per cent? A. Yes sir, I did. Q. And that now, as he had refused to pay it, did you tell him what a fix that had gotten you into? Did you tell him that? A. Yes sir."

When the entire record is considered, it is manifest that the court did not err in admitting the testimony of

the appellee, as above set forth, to which appellants here object. The testimony was proper in rebuttal.

There was no error in the ruling of the court in refusing to permit the appellants to cross-examine the appellee as to the specific debts which he had contracted. The appellants themselves had elicited the fact that the appellee was indebted. It would have been drifting too far afield and would have introduced collateral issues to have permitted a cross-examination as to any specific debts contracted by the appellee. It would have been competent and relevant for appellants to show that the appellee had not contracted any debts in contradiction of appellee's statement to that effect, but such is not the purport of the cross-examination. The court only refused to permit appellants to "go into the details of the debts."

We are convinced that the testimony of the appellee concerning the debts, in the manner and form in which same was elicited, was not in the nature of self-serving declarations, as the appellants contend, and the authorities cited by them bottomed upon that assumption have no application to the testimony of the appellee as above set forth.

2. The court did not err in granting appellee's prayer for instruction No. 1. This instruction was predicated upon the issue raised by the appellee's amended complaint and the answer thereto. The appellee alleged in this amended complaint that the contract as set forth in the original complaint was entered into for the year 1922, and this was denied by the appellants. There was no specific objection by the appellants to the phraseology of this instruction in the trial court, and such objection here therefore cannot avail the appellants. The instruction was not inherently erroneous. The same may be said of instruction No. 3. This instruction does not, as appellants contend, single out and give undue prominence to the testimony of the appellee and emphasize the particular features of the case presented by his testimony. On the contrary, the instruction tells the jury to take into

consideration not only the evidence offered by the plaintiff and the circumstances surrounding his employment, but all the evidence and all the circumstances in the case, and to determine from these where the greater weight of the evidence lies. This instruction, when read in connection with instructions 1 and 2 given on the court's own motion, could not have confused or misled the jury. Instructions 1 and 2 on the court's own motion told the jury in substance that the burden of proof is on the appellee to establish his case by a preponderance of the evidence, and that a preponderance of the evidence means a greater weight of the evidence. There was no error in the rulings of the court in refusing appellants' prayer for instructions numbered from 1 to 6 inclusive. Such of these as were correct were fully covered by instructions which the court gave.

We find no prejudicial error in the ruling of the court in giving the oral instruction or explanation in response to the inquiry of the jury, through their foreman, as to whether the verdict, if in favor of the appellee, would have to be for the full amount claimed by him. This oral instruction was but tantamount to telling the jury that, if they found for the appellee, they should return a verdict in such sum as the evidence warranted, but not exceeding the sum claimed. Since the jury found in favor of the appellee, the appellants cannot complain that the amount of the verdict was less than the jury might have found from the evidence of the appellee. There was evidence to support the verdict. The issues of fact were in sharp conflict, and they were submitted under instructions which, upon the whole, correctly declared the law.

There are no reversible errors in this record. The judgment is therefore affirmed.

HUMPHREYS, J., dissents.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. WEBB (1)

AND

CHERRY v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY (2).

Opinion delivered May 25, 1925.

MASTER AND SERVANT—PENALTY FOR NONPAYMENT OF WAGES.—In an action to recover from a railroad company the penalty for nonpayment of wages of discharged employees, evidence *held* to sustain a finding that the plaintiffs had complied with Crawford & Moses' Digest, § 7125, and that the company had failed to pay their wages at the time and place required.

Appeals from Hot Spring Court; *Thomas E. Toler*, Judge; No. 1 affirmed; No. 2 reversed.

Thos. S. Buzbee and *Geo. B. Pugh*, for Railroad Co.

A. I. Roland and *D. D. Glover*, for plaintiffs.

WOOD, J. W. O. Webb and J. C. Cherry were employed by the Chicago, Rock Island & Pacific Railway Company, hereafter called company, to watch and coal its engines at night while in its yards at the town of Malvern. They instituted independent actions against the company, under § 7125 of Crawford & Moses' Digest, to recover the penalty for nonpayment of wages, alleging that they had been discharged; that they had complied with the statute, and that the appellant had refused to pay their wages. The appellant answered and denied liability. The causes were consolidated for trial.

Webb testified that he was nineteen years old. He went to work for the company August 27, 1923. His duty was to watch and coal engines at night so as to have them ready for the next day. He was to receive $3 per night. He worked five nights. His foreman was named Ledford. Ledford employed him and discharged him. He was discharged September 1, 1923. When witness was discharged by Ledford, witness asked him when he could get his money, saying that he would like to have it right then. Ledford replied, "You will get it in a day or two. Just send a card in for your time." Ledford said he didn't have anything to write witness' time on;

that they attended to that in Little Rock, and would send it to the office at Malvern. Witness requested Ledford to have it sent to Malvern. Witness made out a card every morning for the night before, and made out such a card on the morning of September 1. He put it in the baggage coach and sent it to Butterfield and then to Little Rock. Witness put the card where Ledford told him to put it. For sixteen days thereafter, witness went to the office at Malvern and asked the agent if the check had come for his money, and the agent told him that it hadn't come. Witness then went to the passenger depot and wired for his pay, and still it didn't come. It was finally sent to Mr. Glover, witness' attorney. Witness worked some overtime, and that was the reason why the check was sent for $17 instead of $15. Witness had turned in his time for $15 when he brought the suit. Witness signed the card "Owen Webb," and they made out the check to "Wiff" instead of "Webb."

Cherry testified that he was employed by the company in the same capacity as Webb. He was discharged on September 3 by Ledford. When he was discharged he demanded his time of Mr. McColpin, the foreman on the job, and was told that he would have to go to the time office at Little Rock. He was told to report to the freight depot to Mr. Johnson, and he would get his money from him in two or three days. Witness made out his own time card each morning and took it to the foreman, who was the engineer on the passenger train. The foreman O.K.'d it. Witness put these time cards in the baggage coach in the mail department, where witness was instructed to put them. The foreman told witness that witness would collect for his time over at the freight depot, where Johnson was the agent. Witness went to the freight depot every morning to try to collect the amount due him, until the 16th of September. He then went to the passenger depot and wired to the time-keeper in Little Rock for a check. Johnson was the agent of the company at the freight depot, and Jones was the time-keeper and cashier. Witness sent the wire to Little

Rock for his pay addressed "Time-Keeper, Rock Island." He didn't know the name of the time-keeper.

Ledford testified that he was not the time-keeper of Webb and Cherry; that he was looking after the engines and keeping the boilers from being blown up, as these boys were inexperienced. He was telling them how to do their work. He didn't hire either of them. Neither of the boys asked him to get a time-check for them. Webb asked witness about getting his pay, and witness told him to go to McColpin, who was taking care of that. Witness understood that McColpin had O.K.'d their time cards. He signed their cards for them.

McColpin testified that he was in the employ of the company as a locomotive engineer. He had nothing to do with employing Webb, other than to tell Cherry that, if he had an extra engine, he could pick up somebody to help him out. Witness remembered the time that Cherry and Webb quit work. Witness O.K.'d the time cards of Webb and Cherry in order to identify the parties. It was what was called their work cards. Witness told Webb and Cherry to mail these cards to the master mechanic at Little Rock. Webb came around one morning and asked witness what to do to get his time, and witness told him to take it up with the agent and the agent would wire for his time, or something to that effect. Witness didn't undertake to get the time for Webb himself. The engine watching was done under witness' supervision. Time would not be recognized unless witness O.K.'d the cards. There was a place on the train for receiving railroad mail. Witness told the boys where to put their cards. These cards, if made out properly, would go to the master mechanic's office at Little Rock. Then it would be the master mechanic's duty to see that the checks were issued. The parties were furnished envelopes by the company which they used to mail these cards. All of the men working there watching these engines would come to witness to O. K. their cards. Cherry and Webb did just like the others had done.

Johnson testified that he was the agent of the company at Malvern in September, 1923. He remembered

Cherry and Webb asking the cashier, Jones, about their time checks. They never did come to witness. The pay checks usually came to witness' office on the 14th, 30th or 31st of the month—at the middle and end of each month. "Pay checks—we just handed out to the party they are made payable to, and the time checks—we take their signatures on the time checks and pay them the cash right there in the office. In order to get a time check, we have to have an identification to correspond to their check."

Jones testified that he was in the employ of the company in August and September, 1923. He was cashier at Malvern. He knew Webb and Cherry. He denied that they asked him to get any time checks for them, and denied that they made any demand on him for pay for the work they had done. They did ask witness for checks which they were expecting. The checks were not there when they called for them. The regular pay checks usually came a day ahead of the 15th and a day ahead of the last of each month. These parties came to witness four mornings in succession asking about their checks, and witness suggested that they send a telegram. Witness didn't have anything to do with keeping their time down there. Webb seemed to be looking for a time check, and there was no time check for him. After these pay checks came, witness tried to locate the parties, but could not do so. Witness kept the checks until the 18th of October, and did not mail it to Webb. Neither did he write Webb or Cherry that the checks were there for them.

The jury returned a verdict in favor of Webb to cover penalty only in the sum of $180, and in favor of the company against Cherry. Judgments were rendered in accordance with the verdicts, from which are these appeals.

Section 7125 of Crawford & Moses' Digest provides: "Whenever any railroad company or corporation, or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge, with or without cause, or refuse

to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and, if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then, as a penalty for such nonpayment, the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ at the same rate until paid. Provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time. Provided, further, that this act shall apply to all companies and corporations doing business in this State, and to all servants and employees thereof, and any such servants or employees who shall hereafter be discharged or refused further employment may request or demand the payment of any wages due, and, if not paid within seven days from such discharge or refusal to longer employ, then the penalties hereinbefore provided for railway employees shall attach."

The undisputed testimony of Webb and Cherry showed that they were employed by the company, and that they were discharged, and their testimony, as well as the testimony of McColpin, shows that they applied to McColpin, who was their foreman and the keeper of their time. He O.K.'d their time cards for their pay at the time they were discharged, and directed them whom to mail their time cards to at Little Rock, which was done in envelopes furnished by the company, so that they would go to the master mechanic's office in Little Rock, where the record was kept. McColpin further testified that he told Cherry, when he came to witness to get the money for his labor, that he should go to the agent; that Webb might have been present when Cherry was making

the inquiry. The undisputed testimony shows that both Webb and Cherry went to the freight agent at Malvern, where they were told to go and where they were assured their money would be sent in two or three days; that the pay checks were usually sent to the freight office. Webb and Cherry went to the freight depot, as their undisputed testimony shows, each day for sixteen days after they had been discharged, and demanded their pay, and they were not paid even the wages that were due them until after the institution of their actions against the company. Webb was discharged on the first of September and Cherry on the third. The actions were instituted on the 21st of December, 1923, more than sixty days after their discharge.

The court, in its instructions, correctly declared the law as set forth in the above statute, and, at the request of the company, told the jury that, before the plaintiffs could recover, the burden was upon them to show by a preponderance of the testimony that they had complied with the provisions of the statute, first, by showing that they had been discharged or refused further employment; second, that they had requested their foreman or keeper of their time to have the money due them, or a valid check therefor, sent to the station at Malvern; and third, that the checks failed to arrive at Malvern within seven days from the time they requested same to be sent.

The court also instructed the jury that, under the undisputed testimony, no penalty could accrue for more than sixty days, as the suits had not been brought until after sixty days of the date of their discharge. The issue was thus submitted to the jury as to whether or not Webb and Cherry were entitled to recover any penalty under the statute. This was more favorable to the company than it was entitled to, for, as before stated, the undisputed testimony showed that Webb and Cherry had complied with the statute and the company had failed to pay them their wages at the time and place required by the statute, and thereby subjected itself to the penalty prescribed therein.

It could serve no useful purpose to set out in detail the instructions. Suffice it to say we have examined same and find that they correctly declare the law applicable to the facts.

The appellant company relies upon the cases of *Bush* v. *Coleman,* 131 Ark. 379; *Hall* v. *C. R. I. & P. Ry. Co.,* 96 Ark. 634; *St. L. I. M. & S. Ry. Co.* v. *McClerkin,* 88 Ark. 277; and *St. L. I. M. & So. Ry. Co.* v. *Bailey,* 87 Ark. 132. These cases are all differentiated from the case at bar by the facts. Applying the law as therein announced to the undisputed facts of this record, it is clear that both Webb and Cherry are entitled to recover. The judgment in favor of the appellee Webb is sustained by the testimony, and will therefore be affirmed. The judgment in favor of the company against Cherry is contrary to the undisputed evidence, and it is therefore reversed, and judgment will be entered here in his favor against the company in the sum of $180, with interest at the rate of six per cent. per annum from January 31, 1924.

WESTERN COAL & MINING COMPANY *v.* DANE.

Opinion delivered May 25, 1925.

1. MASTER AND SERVANT—UNSAFE CONDITION OF MINE—EVIDENCE.—In an action by a miner for injuries caused by the harness of a mule catching on overhead timbers, testimony of the mine inspector as to the condition of the roadway on which plaintiff was injured prior to and after the accident was competent as tending to show continuing negligence.
2. MASTER AND SERVANT—ASSUMED RISK JURY QUESTION WHEN.—In an action by a miner for injuries received by reason of the harness of a mule catching and dragging down overhead timbers, conflicting evidence as to plaintiff's knowledge of the danger *held* to make the question of assumption of risk one for the jury.
3. MASTER AND SERVANT—NEGLIGENCE OF MASTER—JURY QUESTION.—In an action by a miner for injuries caused by the harness of a mule catching on overhead timbers, where there was testimony tending to sustain the allegation that defendant negligently permitted a mine entry to become filled with debris, the court did not err in sending such issue to the jury.

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

Thomas B. Pryor and *Vincent M. Miles,* for appellant.

Grover C. Carter and *Dave Partain,* for appellee.

WOOD, J. On the 23rd of October, 1923, George Dane was working in Coal Mine No. 2 of the Western Coal & Mining Company, hereafter called company. He was driving an entry in the mine, and his working place was about three-quarters of a mile from the bottom of the shaft. While riding to his work in one of the cars, as was the custom of the miners, the hames on one of the mules caught the timbers overhead and dragged them down upon Dane, injuring him. He instituted this action against the company, and alleged that the company was negligent in placing the timbers along the roof of the roadway in a position that was too low for a mule to pass with harness on. He further alleged that the company was negligent in allowing the roadway to become and remain filled with dirt, rock, coal and debris, so as to cause the place where the mule traveled to become and remain uneven and elevated in such way as to cause the mule and the harness thereon to catch upon and drag down the timber, which struck and injured Dane.

The company answered, denying the allegations of the complaint as to negligence, and set up the affirmative defense of assumed risk on the part of Dane.

Dane testified that he had no work to perform in the roadway over which he traveled, except that he traveled the same back and forth going to and coming from his work. The testimony of witnesses for Dane was to the effect that, on the morning he was injured, he was riding in the car, when the hames on one of the mules caught a cross-timber overhead and pulled it down. The timber was put there for the purpose of holding up the rock, and trolley wires were strung to it. At the time the car was going at about such speed as a mule would walk. It was the custom in this mine for the miners to ride empty cars to their work. It was a pretty sure thing for the

hames on the mules' collars to catch the cross-bar. At the particular time that Dane was injured the track was dirty. It was easier for a mule to get over the track when it was not dirty. A few days before Dane was hurt they had brought two mules in from the Rafter mine. The Rafter mine had a higher roof than Mine No. 2, in which Dane was working at the time of his injury. Dane was riding behind one of the Rafter mules at the time he was hurt.

The State Mine Inspector testified, over the objection of appellant, that he inspected the mine of the company in the latter part of July, 1923, and also on January 24, 1924; that he didn't remember whether he had visited the mine between July, 1923, and January, 1924, or not. The last inspection he made prior to the day on which Dane was injured he found that the average height of the mine entry leading from the bottom of the shaft was about five feet above the rails. There were one or two places in the main south entry where there were some rock, and there were some timbers placed there to support the work. These timbers were about four feet from the top of the ties. Witness made a report of the conditions he found at that time. He would not undertake to say how far it was from the pump station. It was not far from the pump station, but was between the bottom of the shaft and the pump station. The timbers between the bottom of the shaft and the pump station were low enough for a mule to drag.

Dane testified that he did not know, on the morning that he was injured, that he was riding behind one of the Rafter mules. He had heard his father-in-law say, four or five days before, that riding behind the Rafter mules would be at the men's own risk. At the time he was injured there were seven men in the car besides himself, and the driver in charge of the men and the mules was George Gowing. When Gowing came in and hooked to the car, he didn't tell Dane that he was hooking one of the Rafter mules to the car, and Dane didn't make any investigation to determine whether it was a Rafter mule or not.

Witnesses for the company testified to the effect that, a morning or two before Dane was hurt, Jim Ivy gave instructions to the men, including Dane, to the effect that Gowing was driving a mule from the Rafter mine, and Gowing said it was dangerous to ride behind him, and Ivy said that the men who rode in a car behind the Rafter mule would do so at their own risk. One of the witnesses testified that it was generally known in the mine that it was dangerous to ride behind the Rafter mules.

Ivy testified that he didn't caution Dane about riding behind the Rafter mule; that he had no recollection of ever giving notice that it was dangerous to ride behind the Rafter mules, and that the men would do so at their own risk. One of the witnesses for the company testified that he was with the mine inspector at the time he inspected the roadway, and that the place he inspected was 1,600 feet from where the accident occurred. The old pump station is 1,600 feet from the bottom of the shaft.

The company prayed the court to instruct the jury to return a verdict in its favor. The company also, among other prayers, presented the following:

"No. 6. You are instructed that there is no evidence of negligence to sustain the allegations in plaintiff's complaint that the defendant was negligent in permitting the roadway to become filled with dirt, rock, coal, debris and other material so as to cause the harness on the mule to catch and drag down the timber, and your verdict must be for the defendant on that allegation of negligence."

The court refused these prayers for instructions, to which ruling the company duly excepted.

The jury returned a verdict in favor of the appellee in the sum of $450. Judgment was entered in favor of Dane for that sum, from which is this appeal.

1. The court did not err in admitting the testimony of the State Mine Inspector to the effect that he had inspected the roadway or entry on which the appellee was injured, and that this inspection was made in July

previous to the injury, and that he made another inspection after January 22, 1924, and that the condition was the same at the last inspection as at the former; that he found timbers in the roof of the entry to support the rock, and that, in one or two places, it was not more than four feet high. It was not a great distance from the pump station between the bottom of the shaft and the pump station. These timbers were low enough for a mule to drag. This testimony was competent and relevant as tending to show that the appellant was negligent in maintaining the entry of its mine in such a manner as to make it unsafe to the employees in going to and returning from their work, in that it tended to show that the entry of the mine, because of the conditions that existed at certain places along which the appellee had to travel, was too low for one of the mules which appellant was using to pass without dragging down the timbers in the roof. This was a continuing act of negligence, which, the testimony tended to prove, caused the injury and damage to the appellee. The testimony did not tend to prove separate, independent and different acts of negligence on the part of the company previous to the act of negligence causing the injury to appellee, and therefore the authorities upon which the appellant relies to sustain his contention that the inspection of the mine was incompetent had no application.

2. The appellant contends that the undisputed evidence shows that the appellee assumed the risk, but we are convinced that it was an issue for the jury under the evidence, and this issue was submitted to the jury under instructions which correctly declared the law on that issue. There was testimony on behalf of the appellant tending to prove that the appellee had been notified that it was dangerous to ride in a coal-car when said car was being drawn by a Rafter mule, on account of its height, and that the miners would do so at their own risk. But the appellee in his testimony denied that he had been so advised, and his testimony and the testimony of Ivy made this an issue of fact to be submitted to the jury as

to whether or not appellee knew and appreciated the danger of riding in a car which was being drawn by a Rafter mule, and also as to whether or not he knew, at the time of his injury, that the car was being so drawn.

3. The court did not err in refusing to grant appellant's prayer for instruction No. 6. The appellee alleged in his complaint that the appellant was negligent in permitting its roadway, over which the cars moved and upon which the appellee was being transported at the time of his injury, to become and remain filled with dirt, rock, coal and debris, so as to become uneven and elevated in such manner as to cause the mule and harness to catch upon and drag down the timber upon the appellee. There was testimony on behalf of the appellee tending to sustain these allegations of his complaint. The court therefore did not err in refusing to remove this issue from the jury.

We find no reversible error in the rulings of the trial court, and its judgment must therefore be affirmed. It is so ordered.

MEEKS v. GRAYSONIA, NASHVILLE & ASHDOWN RAILROAD COMPANY.

Opinion delivered May 25, 1925.

1. CARRIERS—INSTRUCTION IGNORING ISSUE.—Where plaintiff who was waiting in defendant's station while the local mixed freight train on which she was traveling was being switched, desiring to use a toilet, and seeing none in the station, returned to the caboose and was injured while standing in the aisle by an alleged violent jerking of the train, an instruction to find for the defendant if plaintiff failed to inquire for the toilet at the station *held* erroneous as ignoring the issue as to the alleged violent jerking of the train, the negligence complained of.

2. CARRIERS—PROXIMATE CAUSE OF INJURY.—Where plantiff, who had been waiting in the station while the local mixed freight train on which she was traveling was being switched, desiring to use a toilet, and seeing none about the station, returned to the caboose, and was injured, while standing in the aisle, by the alleged violent jerking of the train, *held* that her failure to ask the station agent

concerning the station toilet was not the proximate cause of the injury.

3. NEGLIGENCE—PROXIMATE CAUSE OF INJURY.—Unless the negligence of defendant proved was the proximate cause of her injury, there can be no recovery.

4. NEGLIGENCE—PROXIMATE CAUSE.—To warrant a finding that negligence was the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence charged, and that it ought to have been foreseen in the light of the attending circumstances.

5. CARRIERS—MIXED TRAINS.—While local freight trains are allowed to carry passengers, the primary purpose of such trains is the transportation of freight, and passengers electing to ride on such trains are chargeable with notice of such fact.

6. CARRIERS—OPERATION OF MIXED TRAINS.—It is matter of common knowledge that jolting and jarring are incident to the operation of freight trains, and the company is bound to exercise only the highest degree of care that is usually and practically exercised consistent with the operation of trains of that nature.

7. CARRIERS—OPERATION OF MIXED TRAINS.—It is common knowledge that a good deal of switching is necessary when local freight trains stop at a station, and this fact, together with the age and experience in traveling of the passenger, is to be considered in determining whether the passenger was negligent in standing in the aisle of a caboose while the train was being switched.

8. CARRIERS—PRESUMPTION OF NEGLIGENCE.—Under Crawford & Moses' Dig., § 8562, proof of an injury to plaintiff, caused by the operation of a train on which she was a passenger establishes a *prima facie* case of negligence against the carrier.

9. CARRIERS—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.—Where plaintiff, an elderly lady, was injured while standing in the aisle of a freight caboose, the question whether she was guilty of contributory negligence *held*, under the evidence, to be a question for the jury.

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

STATEMENT OF FACTS.

Mary Meeks sued the Graysonia, Nashville & Ashdown Railroad Company to recover damages by reason of being violently thrown to the floor of a car in which she was riding as a passenger, on account of the negligent operation of said train by the defendant. She alleged specifically that the defendant's negligence con-

sisted in the failure of its agents or employees to couple its train in a reasonably safe manner to the coach in which she was rightfully riding as a passenger, and to exercise such care in the operation of the train as required by law.

Mrs. Meeks was a witness for herself. According to her testimony, she lived at Mineral Springs, Arkansas, and is eighty-two years of age. On the 21st day of September, 1923, she boarded one of the defendant's local freight trains at Murfreesboro, Arkansas, to go to her home at Mineral Springs, Arkansas. She had purchased a ticket. After the train reached Nashville some one told her that the train would be there quite a while, and it would be better for her to go to the depot and stay there until the train was through with its switching and ready to depart. The persons who advised her to do this went to the depot with her. After Mrs. Meeks had remained in the waiting-room at the depot for a while, she went back with a colored woman to the caboose in which she had been riding. She was obliged to go, or she would not have gone. She had gone back to the coach to attend to a call of nature, because there was no toilet at the depot. After she had come out of the toilet in the caboose she stood in the aisle, talking to the negro woman, for not longer than five minutes, and was then thrown down by other cars being propelled against the caboose. She was asked what caused her to be thrown down, and answered: "I don't know; the cars came together. I had started to a seat to sit down, and I was lifted clear up off of the floor, and it threw me down." She then described her injuries. She testified that she had enjoyed good health all of her life and was in good physical condition at the time she was injured. On cross-examination she stated that she looked for a toilet before leaving the waiting-room, and could not find any. She went to the window of the room where the agent usually stayed, but did not see anybody. She then went to the caboose with the negro woman, as stated in her examination in chief. One of the trainmen had

carried her baggage from the caboose to the waiting-room. The negro woman told her that the train was nearly ready to start, and carried her baggage back for her when they went to the caboose. Her fall caused a fracture of the long bone of the leg that connects with the hip.

According to the evidence of the train crew, there was no sudden or violent jar or jolt when the train was coupled with the caboose in which she was standing at the time she was injured. One of the train crew had advised her to go to the depot and stay in the waiting-room until the train was ready to depart. The members of the train crew supposed that she was still in the waiting-room when the train was coupled to the caboose.

The station agent testified that toilets were provided by the railroad company for white and colored passengers. He denied that Mrs. Meeks made an application to him on the day in question for information concerning the toilet.

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

Featherston & Featherston and *Tom W. Campbell,* for appellant.

J. G. Sain, for appellee.

HART, J., (after stating the facts). Counsel for the plaintiff ask for a reversal of the judgment because the court erred in giving instruction No. 5 to the jury at the request of the defendant. The instruction reads as follows: "The court instructs the jury that the law requires railroad companies to furnish toilets for its patrons, and that the plaintiff is charged with knowledge of that fact, and that, if plaintiff neglected or failed to ask the agent of the defendant for a key or location of the toilet, and, by reason of her failure or neglect to get this information from the agent of the company, but acted on her own volition and thereby received an injury, then the plaintiff would be guilty of negligence, and you will find for the defendant."

In the first place, this instruction entirely ignores the theory upon which the plaintiff predicated her right of action in this case. In her complaint she alleges that she was injured by the negligence of the defendant in the operation of its train upon which she was riding as a passenger. The particular act of negligence complained of was that the defendant negligently coupled its train to the coach in which she was riding as a passenger, and that she was violently thrown to the floor.

Moreover, the fact whether or not the defendant had a toilet at the station, and whether or not the plaintiff asked the agent for a key to said toilet, was not the proximate cause of her injury. It cannot in any sense be said that the failure of the railroad company to comply with the statutory requirement of maintaining water-closets at its passenger depots was shown to be the natural and immediate cause of the injury to the plaintiff.

The rule is well established in this State that, in an action for personal injuries, although the defendant may be shown to have been negligent in some manner, yet, unless the negligence so shown is the proximate cause of the injury complained of, no recovery can be had on account of said injury. It has been uniformly held that, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence and that it ought to have been foreseen in the light of the attending circumstances. *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576; *St. L. & S. F. R. Co.* v. *Whayne,* 104 Ark. 506; *St. L., Kennett & S. E. Rd. Co.* v. *Fultz,* 91 Ark. 260; *Hays* v. *Williams,* 115 Ark. 406; and *Bona* v. *Thomas Auto Co.,* 137 Ark. 217.

It is manifest that the failure of the defendant to maintain toilets at its station, as required by statute, was not the proximate cause of the injury to the plaintiff, and that it could not have foreseen that its failure in this respect would have caused the injury complained of by the plaintiff.

The allegation of the complaint is that the defendant was guilty of negligence in the operation of its train upon which the plaintiff was a passenger and thereby caused her injury. The particular act of negligence complained of was that the other cars in the train were backed against the caboose in which the plaintiff was riding with such violence as to lift her up and throw her down on the floor. Instruction No. 5 wholly ignored the plaintiff's theory of the case, and made it the duty of the jury to find for the defendant upon facts which were not the proximate cause of the injury. Hence it was necessarily prejudicial to the rights of the plaintiff.

In view of another trial, we deem it necessary to state that the degree of care required in the operation of freight trains which, by law, may carry passengers, was not correctly stated in the instructions given at the request of the plaintiff. While local freight trains are allowed to carry passengers, the primary purpose of such trains is the transportation of freight. Their equipment therefore is adapted to such business, and those of the traveling public electing to ride on mixed trains are charged with knowledge of such facts. It is a matter of common knowledge that jolting and jarring are incident to the operation of freight trains, and therefore the company is bound to exercise only the highest degree of care that is usually and practically exercised consistent with the operation of trains of that nature.

In this connection it may be also stated to be a matter of common knowledge that a good deal of switching is necessary when local freight trains stop at a station, and this fact, together with the age and experience in traveling of the passenger, are to be considered in determining whether she is guilty of contributory negligence in standing in the aisle and talking to a fellow traveler. *St. L. I M. & S. R. Co.* v. *Brabbzon*, 87 Ark. 109, and cases cited; *St. L. I. M. & S. R. Co.* v. *Hartung*, 95 Ark. 220; *Rodgers* v. *Choctaw, Okla. & Gulf Rd. Co.*, 76 Ark. 520; and *Pasley* v. *St. L. I. M. & S. R. Co.*, 83 Ark. 22.

In *Pasley* v. *St. L. I. M. & S. R. Co.*, 83 Ark. 22, it was held that, while it is not practical to operate freight trains without occasional jars and jerks calculated to throw down and injure careless and inexperienced persons standing in the car, jars of great, unusual and unnecessary violence would be evidence of negligence on the part of the trainmen.

The injury to plaintiff was caused by the operation of the train of the defendant, and, under our statute, proof of this fact made a *prima facie* case of negligence against the railroad company. Crawford & Moses' Digest, § 8562, and cases cited in foot-note. The defendant attempted to overcome the *prima facie* case in favor of the plaintiff by introducing witnesses who testified that the coupling of the rest of the train to the caboose in which the plaintiff was standing at the time she was hurt was not accompanied by any unusual jolt or jar, and in fact was a very easy coupling.

On the other hand, the evidence for the plaintiff tends to show that, while she was eighty-two years old, she had been in good health all of her life, and was a sturdy old woman. She had left the closet, and had only been standing in the aisle a few minutes when the accident occurred. She was talking to a negro woman who had conducted her from the station to where the caboose was standing. As the plaintiff expressed it, she had started to her seat when she was "lifted clear up off the floor" and thrown down when the rest of the train was coupled to the caboose.

The jury might have legally inferred from the evidence for the plaintiff that the train was coupled together with a jar of great, unnecessary and unusual violence. If the evidence for the plaintiff was legally sufficient, if believed by the jury, to warrant a verdict in her favor, we are not concerned upon appeal as to where the weight of the evidence was. This was a question for the trial court in determining whether or not a new trial should be granted. *St. L. S. W. Ry. Co.* v. *Ellenwood*, 123 Ark. 428.

It is true that the plaintiff would not likely have been hurt if she had been in her seat, but, under the circumstances as detailed by her, the question of whether she was guilty of negligence was a proper one to have been submitted to the jury.

For the error in giving instruction No. 5 at the request of the defendant the judgment will be reversed, and the cause remanded for a new trial.

SAXON v. BARKSDALE.

Opinion delivered May 25, 1925.

1. MASTER AND SERVANT—SAFE PLACE TO WORK.—An employer furnishing a completed scaffold for employees to work on must see that it is reasonably safe for the purpose intended.
2. MASTER AND SERVANT—DEFECTIVE SCAFFOLD.—Where plaintiff and two other employees were furnished suitable material to build a scaffold for their work, the fact that the others were negligent in constructing it, causing injury to plaintiff, did not render the employer liable.

Appeal from Nevada Circuit Court; *J. H. McCollum*, Judge; reversed.

STATEMENT OF FACTS.

This was an action by E. J. Barksdale against R. L. Saxon and J. R. Lockhart to recover damages for injuries sustained by the plaintiff from the fall of a scaffold upon which he was working upon the premises of the defendant, R. L. Saxon.

E. J. Barksdale was a witness for himself. According to his testimony, he is a carpenter, forty-six years of age, and was employed to work for Dr. R. L. Saxon in June, 1923. J. R. Lockhart was the foreman of Dr. Saxon. Barksdale, together with Stanley Barger and Ed Eaves, went to work for Dr. Saxon on Monday, and were injured on the following Wednesday by the falling of the scaffold on which they were standing at work. Barger and Eaves built the scaffold upon which they

were working. They first made what is called a horse of 2 x 4 lumber. They placed 2 x 8 lumber on these wooden horses, and in this way built a scaffold upon which to work. They first commenced to work in the lobby of the hotel, which was owned by Dr. Saxon. They then removed their scaffold to the dining-room, and it became necessary to cut off the legs of the wooden horses, because the ceiling in the dining-room was six or eight inches lower than the lobby ceiling. After they got through in the dining-room, they carried their scaffold back in the lobby to work there again. It was necessary to build up the scaffold six or eight inches higher in order to work on the ceiling. This was done by nailing pieces on the legs of the wooden horses. The carpenters were engaged in putting beaver boards on the ceiling of the lobby at the time the scaffold fell and injured all three of the workmen. The plaintiff had nothing to do with building the scaffold upon which they worked, but he was working with the other two carpenters at the time it was built. The materials for constructing it were furnished by Dr. Saxon.

A brother of the plaintiff testified that there was a knot in the plank which formed one of the legs of one of the wooden horses, and that this caused the leg to break and thereby let the scaffold fall. This happened unexpectedly, and the fall of the scaffold caused the injury to the plaintiff upon which he based his cause of action.

The case was tried before a jury, which returned a verdict for the plaintiff, and from the judgment rendered the defendants have duly prosecuted an appeal to this court.

H. E. Rouse and *Saxon & Davidson,* for appellant.

William F. Denman, for appellee.

HART, J., (after stating the facts). As a general rule, where a scaffold or staging is furnished by an employer as a completed structure, he is liable to an employee injured through his failing to furnish a reasonably safe structure as a place upon which to work. So in this case, if the defendants undertook to furnish the

scaffold as a completed structure for the plaintiff and his fellow-workmen to work upon, it was their duty to see that it was reasonably safe for the purpose for which it was intended. *Murch Bros. Construction Co.* v. *Hays,* 88 Ark. 292. On the other hand, if the defendants did not undertake to furnish the scaffold as a completed structure, but it was the duty of the plaintiff and the other carpenters employed with him to build the scaffold, then the only duty resting upon the defendants was that of using reasonable care in providing suitable materials for the object in view and employing suitable men to do the work. *Vulcan Construction Co.* v. *Harrison,* 95 Ark. 588. Numerous other decisions from the courts of last resort of the various States sustaining the general rule may be found in the case-notes to *Studebaker* v. *Shelby Steel Tube Co.* (Pa.), 18 Ann. Cas. 611, and *Haakensen* v. *Burgess Sulphite Fibre Co.* (N. H.), Ann. Cas. 1913B, 1122.

But, in this case, the scaffold was not a permanent platform furnished by the defendants on which the plaintiff and his fellow-workmen were invited to stand during their work. It was a temporary platform constructed by the workmen themselves, and to be lowered or raised any height by them as the work progressed and as their needs required.

It is true that the plaintiff did not actually help make the staging or scaffold upon which they worked, but he and the other two carpenters who did construct it were all engaged in carrying on the same general work, and no one of them performed duties which did not in some way relate to or affect the safety or the instrumentality with which, or places in which, the others worked. This was a case in which the three carpenters were working together upon the same part of the building, and it was necessary, as a part of their work, to construct scaffolds to stand upon in doing their work. It does not appear that J. R. Lockhart, as foreman of Dr. R. L. Saxon, interfered in any way or gave any suggestion in the manner

of selecting or fastening the materials together to form the scaffold. This was left to the men engaged in doing the work of repairing the hotel, and the construction of the scaffold was a part of their work. The undisputed evidence shows that the fellow-workmen of the plaintiff were good carpenters and skillful workmen. For aught that appears in the record, there was plenty of good material on hand with which to build the scaffold. Therefore the defendants were not answerable to the plaintiff for the negligence, if any, of his fellow-workmen in constructing the scaffold which fell and thereby caused his injury.

It follows that the judgment must be reversed, and, inasmuch as the case appears to have been fully developed, the cause of action will be dismissed.

WESTERN COAL & MINING COMPANY v. BURNS.

Opinion delivered May 25, 1925.

1. MASTER AND SERVANT—ASSUMED RISKS.—An employee assumes the ordinary risks incident to his employment, and such extraordinary risk as is obvious to an ordinarily observant person, or which are patent to one having experience in the business in which he is engaged.
2. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—Whether an experienced miner assumed the risk of a coal car crushing his foot as the result of catching it between the rail of the track and a wall of rock built by himself by direction of the foreman *held* for the jury.
3. MASTER AND SERVANT—SAFE PLACE TO WORK.—It is the master's duty to exercise ordinary care to provide a safe working place for his employees.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict based upon substantial, though conflicting, evidence will be sustained on appeal.

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

STATEMENT OF FACTS.

McKinley Burns instituted this action against the Western Coal & Mining Company to recover damages for personal injuries sustained by him while in the employment of the defendant.

McKinley Burns was the principal witness for himself. According to his testimony, he was twenty-seven years of age, and was employed by the defendant to dig coal for it in its mine at the time he was injured, in February, 1923. The plaintiff and Arch Hargrove were working in a double room thirty-six feet wide. It had been driven in seventy-five or one hundred feet from the entry. The room had a track on each side. The plaintiff worked on one side and used one of the tracks, and Hargrove worked on the other side of the room and used the track on that side. The tracks were about twenty or twenty-five feet apart. It is the duty of the miner, when he digs a car of coal, to push it out on the track to the entry. When rock falls from the roof or side of the mine, it is thrown to one side until it accumulates to such an extent that it is in the way of the miner in digging coal. Sometimes the coal digger cleans the rock up and sometimes the company does it. Ed Bobbitt was the foreman of the mine. After a quantity of rock had fallen in that part of the room in which the plaintiff worked, the foreman came in the room. A large rock had fallen next to the face of the coal where the plaintiff was working, and the latter told his foreman that he was going to load a car of rock and haul it out through the entry. The foreman told him not to do that, but to gob it. This meant that the rock should be piled up in the form of a wall, and, when this was done, it was called a gob wall. The plaintiff thought that the rock should be hauled out because his working place was too narrow for the rock to be piled up in a wall. The foreman told the plaintiff that it would cost the company too much to have the rock hauled out, and directed him to build a gob wall. The foreman and another employee turned the big rock

into position and started the gob wall with it. The plaintiff then piled the other loose rock up, and finished the gob wall. He built the wall as high as his head. After the wall had been finished, he started to push a load of coal out, and had to make a pretty good hill. After he had pushed the car up the hill a little bit, he got his foot wedged between the gob wall and the track. He could not hold the car, so it rolled back on his foot and crushed it. His foot was caught right at the place where the foreman started the gob wall with the big rock. The plaintiff had never paid any particular attention as to how close the gob wall was to the track at this point, and supposed that the foreman knew what he was doing when he started the wall there.

It was also shown that there was a flange on the coal car which protruded three or four inches from the wheel beyond the rails. A coal miner is controlled by what the mine foreman says about putting the rock away. The gob wall was pretty close to the rails at the place where the plaintiff was injured.

The defendant introduced evidence tending to show that the gob wall was two feet from the rails at the point where the plaintiff claims that he was injured. It also introduced evidence tending to show that the plaintiff knew and appreciated the danger of his work in pushing out the loaded car of coal, and that, under the facts proved, the plaintiff assumed all the risk of injury from getting his foot caught in the space between the rails and the gob wall.

The jury returned a verdict in favor of the plaintiff for the sum of $1,250, and, from the judgment rendered, the defendant has duly prosecuted an appeal to this court.

Thomas B. Pryor and *Vincent M. Miles,* for appellant.

Dave Partain, for appellee.

HART, J., (after stating the facts). The sole ground relied upon for a reversal of the judgment is that the court should have directed a verdict for the defendant

on the ground that the plaintiff knew the distance from the rails to the gob wall, and assumed the risk of injury from getting his foot caught in the space between the rails and the gob wall.

The general rule is that an employee assumes the ordinary risks incident to his employment and such extraordinary risk as is obvious to an ordinarily observant person, or which is patent to one having experience in the business in which he is engaged. *Mama Coal Co.* v. *Dodson,* 141 Ark. 438; *Moline Timber Co.* v. *McClure,* 166 Ark. 364, and *Western Coal & Mining Co.* v. *Nichols, ante,* p. 346.

Under the evidence adduced, it cannot be said as a matter of law that the plaintiff assumed the risk of getting his foot caught between the rails and the gob wall while he was pushing out the car of coal. It is true that he was a miner of experience and that he built the gob wall himself; but these facts do not conclusively show that the danger of getting hurt in the manner described by the plaintiff was appreciated by him when he built the gob wall, or that it was so obvious and patent to one of his experience that he will be deemed in law to have known and appreciated it. In the very nature of things the relation of master and servant makes the servant place reliance upon the judgment of the master or the foreman appointed by him to direct the servant about his work. It is the duty of the master to exercise ordinary care to provide a safe working place for his servants. In the case at bar, it became necessary to move the accumulated rock so that the miner could proceed with his work of digging the coal and loading it on the car. The plaintiff thought it advisable to load the rock on the car and haul it out of the mine. The foreman thought that this would cost too much, and directed the servant to pile the rock up and make what is called a gob wall. The foreman took the large rock and started the wall himself. He thereby indicated to the plaintiff that this was a safe distance from the track for the gob wall to be built. It became the duty of the plaintiff to build

the gob wall on the line shown him by his foreman. It is true that the plaintiff, in building the wall, must have noticed how far the gob wall was from the rails, but we do not think that it should be said as a matter of law that he must have anticipated that he might get hurt in the way the evidence showed he was injured.

It is insisted that, if he had kept his feet between the rails, he would not have got hurt. This may be true; but it was the duty of the plaintiff to push the car of coal through the entry, and, in doing this, he had to push the car up-grade at one place. It may be that the car was in danger of slipping back, and that he placed his foot between the rails and the gob wall in order to better brace himself. Be that as it may, he testified that, in pushing the car of coal up-hill, he placed his foot there, and that it got caught so that he could not extricate it, and that the car of coal finally rolled back and crushed his foot.

It is also true that the evidence for the defendant shows that the gob wall at this place was two feet from the rails, but this evidence is contradicted by the testimony of the plaintiff and of his witnesses. The distance of the gob wall from the track was a question of fact, and the jury was the judge of the credibility of the witnesses, and, by its verdict, evidently believed the plaintiff and his witnesses.

The testimony of the witnesses for the plaintiff as to the distance between the rails and the gob wall, and as to the fact that the plaintiff caught his foot in that space, was as to matters of which the witnesses had personal knowledge. Their evidence was necessarily of a substantial character, and, having been accepted as true by the jury trying the case, we are not at liberty to reverse or set it aside upon appeal.

It follows that the judgment of the circuit court must be affirmed.

WOOTON v. KEATON.

Opinion delivered May 25, 1925.

1. GIFTS—WHEN TITLE PASSES.—The title to a gift *inter vivos* passes at once when the property is delivered to the donee or to some one else for his benefit.

2. DOWER IN PERSONALTY—NOT VESTED RIGHT.—Although Crawford & Moses' Dig., § 3535, provides for dower in personalty, it is not a vested right in such property, and the Legislature may increase or diminish it or wholly take it away.

3. DESCENT AND DISTRIBUTION—RIGHT OF DISPOSITION OF PERSONALTY.—The owner of personal property may dispose of it at will during his life as against the rights of his wife and children under Crawford & Moses' Dig., § 3471, relating to the distribution of such property of which he dies possessed.

4. EVIDENCE—DECLARATIONS OF DONOR.—A donor's declarations, made after transfer of title, in derogation of such title, is inadmissible against the donee, being mere hearsay and not admissible as part of *res gestae* nor as declarations against present interest.

5. EVIDENCE—DECLARATIONS OF DONOR.—To make the declarations of a donor admissible against a donee, they must have been made during the time the interest in the property was vested in such donor.

6. GIFTS—DONEE'S TITLE.—Title to money given to defendant *held* not affected by her assertion that she earned it, and that it belonged to her on that account, although it might affect her credibility as a witness.

7. GIFTS—EVIDENCE.—The fact that deceased collected interest on money which he had given to defendant with whom he was living *held* not to overcome positive evidence of the depositary of the money that deceased gave it to defendant.

8. GIFTS—TITLE.—That the donee of money lived in an apparent state of concubinage with her donor did not affect her title to the money.

9. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of fact will be upheld if not against the preponderance of the evidence.

10. TRUST—SUFFICIENCY OF PROOF.—Parol evidence to establish a resulting trust must be clear, positive and satisfactory.

Appeal from Garland Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellees to have certain real estate and personal property declared to belong to the estate of J. W. Fulton, deceased, and to establish their rights as widow and sole heirs-at-law of said decedent.

The suit was defended on the ground that the property belonged to Ella Keaton, one of the appellees. So far as is necessary to decide the issues raised by the appeal in this case, the facts may be briefly summarized as follows:

In September, 1874, William J. Fulton married Martha Estes, in Clark County, Arkansas. The chief occupation of William J. Fulton was in constructing roadbeds for railroads under contracts with the principal contractors. While engaged in that occupation he lived in various parts of Arkansas, Oklahoma, Texas, Louisiana, and Mississippi. Three children were born as the fruits of his marriage to Martha Estes. William J. Fulton died intestate in Garland County, Arkansas, in the month of December, 1920. At the time of his death he was known as J. W. Fulton. Several years after his marriage, J. W. Fulton sent his wife and three children to stay with some of his relatives in the State of Virginia, and he did not thereafter live with them. He continued, however, to make contributions to their support until all of his children were grown. Some time before he sent his wife and children to Virginia, Fulton formed an attachment for Ella Keaton, who had negro blood in her veins, and lived with her for thirty-six years and until his death. His widow and children, who are the appellants here, were plaintiffs in the chancery court, and Ella Keaton was the principal defendant. Henry Thane and the Desha Bank & Trust Company were also made defendants, on the ground that they had in their possession something over $29,000 of money which belonged to Fulton at the date of his death, and which was claimed by Ella Keaton.

On the part of the bank it was shown that neither Fulton nor Ella Keaton had any money deposited in said bank at the time Fulton died. Henry Thane admitted that he had in his possession something over $29,000, which he said belonged to Ella Keaton. He admitted that he had been paying the interest monthly, and had paid it to Fulton.

According to the testimony of Ella Keaton, she had lived with J. W. Fulton as she knew him for thirty-six years, and he had paid her wages during all of that time. She had dealt in real estate with her earnings, and had made the money which she had deposited with Henry Thane. She admitted that she had deposited it with him because Fulton had advised her to do so. For several years, during the latter part of his life, Fulton was afflicted with sores of a cancerous nature, and she not only cooked and kept house for him, but daily dressed his sores. She further testified that Fulton lost all of his property, and that she used the income from her property to support them both. Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of the appellees, and it was decreed that the bill of appellants should be dismissed for want of equity. The case is here on appeal.

Martin, Wooton & Martin and *St. John & Gore,* for appellant.

C. T. Cotham and *Gibson Witt,* for appellee.

HART, J., (after stating the facts). It is fairly inferable from the facts as they appear in the record that appellants are the widow and children of J. W. Fulton, deceased, who died intestate in Garland County, Arkansas, in December, 1920, and that Fulton had not lived with them for nearly thirty-six years before his death. It also appears from the record that Ella Keaton lived with Fulton for thirty-six years before his death. At the time of Fulton's death, Henry Thane, who was the president of the Desha Bank & Trust Company, had in

his hands over $29,000, which both he and Ella Keaton testified belonged to her. They admitted that the interest was paid monthly to Fulton, but say that this was done because Ella Keaton lived with Fulton, and he had always acted as agent for her.

According to the testimony of Ella Keaton, she first earned some money by cooking for Fulton and the hands employed by him in railroad construction work. She invested the money earned by her in a farm, and sold it for a profit. She continued to invest in farm lands, and made additional money by farming and by selling her farms at a profit.

Evidence was adduced by appellants tending to show that the money in the hands of Henry Thane at the time of Fulton's death had been earned by Fulton, and belonged to him at the time it was deposited with Thane.

In this connection it may be stated that, so far as the record discloses, a part of this money had been earned by Ella Keaton and a part of it by Fulton himself. Be that as it may, however, for the purposes of this decision we have assumed that the money deposited with Henry Thane once belonged to Fulton. Both the testimony of Henry Thane and Ella Keaton, however, show that, when the money was deposited with Thane, it was deposited with him as the money of Ella Keaton. The first question then which presents itself is whether or not this could be done and the marital rights of the widow and children of decedent be thereby divested of them. The money was deposited with Thane in 1908 and 1909, and Fulton died in 1920. Our statute provides that a widow shall be entitled, as part of her dower, absolutely and in her own right, to one-third part of the personal estate whereof the husband died seized or possessed. Crawford & Moses' Digest, § 3535.

Under our statute of descents and distributions, whenever any person shall die having title to any personal or real estate not disposed of, and shall be intestate

as to such estate, it shall descend and be distributed, subject to the payment of his debts and the widow's dower, in the following manner; first to his children or their descendants in equal parts. Crawford & Moses' Digest, § 3471.

In the case of *Hatcher* v. *Buford,* 60 Ark. 169, it was held that, under our dower statute, property conveyed by the husband by gift *causa mortis* is subject to the widow's right of dower. The reason given was that, in the case of a gift *causa mortis,* the donor dies seized and possessed of the property so conveyed, and that, under our statute, the right of the widow to dower attaches before the estate by gift *causa mortis* vests in the donee. In that case, however, it was expressly recognized that the rule was different as to a gift *inter vivos.* The reason is that, in such case, the title passes at once when the property is delivered to the donee or some one else for his benefit. The court expressly said that the owner of personal property has the right to dispose of it during his life as he pleases, and that the title passes when the gift is made. For this reason the donee's rights are superior to those of the widow, because her right to dower does not become vested until the husband's death. The court adopted the view that the question of fraud could not be predicated upon such a gift, and cited in support of its conclusion and reasoning on the question the cases of *Lines* v. *Lines,* 142 Pa. St. 149, and *Pringle* v. *Pringle,* 59 Pa. St., 281. Mr. Justice Sharswood, who delivered the opinion in the case last cited, said that, at common law, a man who is *sui juris* and *compos mentis* may give away all his personal property, so as to become himself and leave his wife and children penniless, and cited in support of the holding Blackstone's Commentaries and Kent's Commentaries.

In this connection it may be stated that the text of both of these learned commentators sustains the proposition. Of course the wife might prevent the disposition of it by asserting her marital rights by way of alimony,

where the husband had deserted or failed to support her. Since the wife's right of dower is not a vested right in property, it is upon the same footing with the expectancy of heirs before the death of the ancestor, and the Legislature may increase, diminish, or wholly take it away. *Randall* v. *Kreiger*, 23 Wall. (U. S.) 138; *Hatcher* v. *Buford*, 60 Ark. 169, and case note to 12 Ann. Cas. at p. 191.

The language of our statute of descents and distributions is that personal property not disposed of shall descend first to the children of the intestate. Hence, with greater reason, if the owner of personal property should make a gift *inter vivos*, the title would pass during his lifetime, and his children could not set aside the gift. If the Legislature can act in the premises at its pleasure, it is manifest that the owner of property can dispose of his personal property at his own will during his life in so far as the rights of his widow and children are concerned.

But it is insisted by counsel for appellants that the evidence shows that the money in the hands of Henry Thane belonged to J. W. Fulton. Both Henry Thane and Ella Keaton testified that the money was given to him as the property of Ella Keaton. Ella Keaton was present when the money at the various times was turned over to Thane. These witnesses were introduced by appellants; but counsel for appellants claim that they were both hostile witnesses, and insist that their evidence was contradicted by the declarations of J. W. Fulton to other parties. The declarations referred to were made by Fulton after the money had been deposited with Henry Thane as the money of Ella Keaton.

This court is committed to the doctrine that the declarations of one from whom a party obtains title to property, made after the transfer of title and in derogation of that title, is inadmissible in evidence against the latter. To make a declaration of one from whom a party obtains title to property admissible in evidence against the latter, it must have been made during the time an

interest in the property was vested in the person making the declaration. *Bispham* v. *Turner,* 83 Ark. 331; *Brown* v. *Brown,* 134 Ark. 380; and *Jefferson* v. *Souter,* 150 Ark. 55.

Statements made by the donor of real or personal property are not receivable in evidence as admissions against the donee. The reason is that the declarations of a donor in disparagement of the title made subsequent to the full execution of a deed or gift are mere hearsay. Thy are neither a part of the *res gestae* nor declarations against the present interest. See case-note to 1 A. L. R. at p. 1240. In the same case-note it is said that statements derogatory of title, made subsequent to a complete gift of personal property, are inadmissible as against the donee, and numerous cases are cited to support the rule. Among those sustaining the rule we cite the following: *Tierney* v. *Fitzpatrick,* 195 N. Y. 433, 88 N. E. 750; *Bennett* v. *Cook,* 28 S. C. 353, 6 S. E. 28; *Brock* v. *Brock,* 92 Va. 173, 23 S. E. 224; *First Nat. Bank* v. *Yoeman,* 17 Okla. 613, 90 Pac. 412; *Hicks* v. *Forrest,* 41 N. C. 528; *Hilton* v. *Rahr,* 161 Wis. 619, 155 N. W. 116: *Dixon* v. *Labry* (Ky.), 29 S. W. 21; *Echols* v. *Barrett,* 6 Ga. 443; *Cornett* v. *Fain,* 33 Ga. 219; *Francoeur* v. *Beatty,* 170 Cal. 740, 151 Pac. 123; and *Walden* v. *Purvis,* 73 Cal. 518, 15 Pac. 91.

In the latter case it was held that declarations made by a donor of personal property, after he had parted with the property, are inadmissible in evidence against the donee, either to prove fraud or any other fact in avoidance of the gift. In some of these cases it may be stated that the courts say that an exception to the general rule may be made in cases where the main evidence of the donee to support his title to the property are the declarations of the donor.

The evidence for appellees in the present case does not in any sense make this exception applicable, even if it could be said to be the law, and upon this point we express no opinion, for the evidence of the donee to sup-

port her title to the money is evidence of facts of which the witnesses had personal knowledge, and are not the declarations of the donor that he had given the money to the donee. In short, both Henry Thane and Ella Keaton testified in positive terms that the money in question was deposited with Henry Thane as her money.

It is insisted, however, that, inasmuch as Ella Keaton claimed that she had earned the money, it would be inconsistent with this theory to allow her to hold it as a gift from Fulton. This fact, however, could not affect her title to the money, but would only go to her credibility as a witness. As we have already seen, under the law she would be as much entitled to the money as a completed gift from Fulton during his lifetime as if she had earned the money herself. Even if her testimony should be wholly discredited, there remains the testimony of Henry Thane to support her title to the money. He is wholly disinterested in the matter, and simply holds the money as a depositary for its owner. He testified in positive language that the money was delivered to him as the property of Ella Keaton. There is nothing to contradict his testimony in this behalf, except the fact that Fulton collected the interest. We do not think this fact is sufficient to overcome his positive testimony that the money was deposited with him as the money of Ella Keaton.

It appears that Fulton became afflicted with sores of a cancerous nature and became entirely dependent upon Ella Keaton to take care of him and to support him for several years before his death. Of course this is no justification or excuse for the long continued state of concubinage between Fulton and Ella Keaton, which is inferable from the record; but this could not affect her legal rights in the premises. Their relationship prompted her to make him her agent for the collection of the interest on her money from Henry Thane. Therefore the finding of the chancellor in her favor on this point is not against the preponderance of the evidence, and, under the settled rules of this court, must be upheld on appeal.

It is next insisted that there is a resulting trust in favor of appellants to a piece of property conveyed to Ella Keaton by Jas. Housley in 1912. According to the testimony of Housley, Fulton made the trade for the property and agreed to pay him $4,000 for it. Fulton directed Housley to make the deed to Ella Keaton, and this was done. The sum of $4,000 was paid to Housley in the presence of Ella Keaton. She testified that the money belonged to her, and told how she obtained it by the sale of other property, which she had paid for by wages which she had received from Fulton before he became afflicted and before he lost his property.

Thus it will be seen that the undisputed evidence shows that the title to the property was placed in Ella Keaton at the time of its purchase by the express direction of Fulton, and there is nothing in the record which tends to show that he intended a resulting trust in his own favor. It is well settled that a resulting trust in land may be established by parol evidence, but the evidence must be clear, positive and satisfactory. *Greer* v. *Greer,* 155 Ark. 235, and cases cited.

The decision of the chancellor was correct, and the decree will therefore be affirmed.

RUSSELL v. CONE.

Opinion delivered May 25, 1925.

1. STATES—APPOINTMENT OF LEGISLATIVE COMMITTEE.—Amendment 8 to the Constitution, fixing the *per diem* of members of the Legislature, does not deprive the Legislature of the power to appoint committees to serve after expiration of the session to complete its records.
2. STATES—VALIDITY OF STAMP ALLOWANCE TO COMMITTEE.—Acts 1925, No. 167, allowing members of a committee appointed to complete the work of the Legislature after adjournment $1 per day in stamps in addition to $6 per day in money, was not invalid; the compensation for services on such committee not being prescribed or limited by the Constitution.

3. CONSTITUTIONAL LAW—LEGISLATIVE QUESTION.—Whether a committee of unnecessary size was appointed by Acts 1925, No. 167, to complete the work of the Legislature after adjournment is a political question to be decided by the Legislature in enacting and by the Governor in approving the bill, not by the court, which cannot review questions involving only legislative discretion.

4. OFFICERS—APPOINTMENT OF LEGISLATORS.—Acts 1925, No. 167, appointing a legislative committee to complete the records after expiration of the session, *held* not in conflict with Const., art. 5, § 10, as creating new offices and appointing members of the Legislature thereto; the act merely imposing additional duties upon the members of the committee.

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

Emerson & Donham, for appellant.

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appellee.

SMITH, J. Appellant filed a complaint in the Pulaski Chancery Court, alleging that he was a citizen and taxpayer of the State, and that the defendants, Cone and Sloan, were respectively the Auditor and the Treasurer of the State. That the General Assembly, at its regular 1925 session, had, by act No. 167, entitled "An act for the completion of the records of the work of the Forty-Fifth General Assembly," provided and required that seventeen members of the Senate of the said Assembly and seventeen members of the House of Representatives of the Assembly should remain on duty as members of such Assembly after adjourning on March 12, 1925, for a period of time expiring not later than April 23, 1925, for the purpose of completing the work of the Assembly, and that, for such services, sixteen of said senators and sixteen of the representatives should receive the sum of $6 each per day, and that the president of the Senate and the Speaker of the House of Representatives, who were made members of said committee, should receive $8 each per day, and all of said senators and representatives should receive, in addition, the sum of $1 per day for stamps during the time of their said service

It was further alleged that vouchers covering such services had been presented to the Auditor, who would issue warrants thereon, which the Treasurer of the State would cash, unless they were enjoined from so doing, and there was a prayer that the Auditor and Treasurer be enjoined from so doing.

By an amendment to the complaint it was alleged that none of said senators and representatives who were named in said act 167 had, in fact, performed any services whatever, and that there was no occasion or necessity for the appointment of said committee, and that the act was a mere subterfuge whereby the said senators and representatives might draw money from the State treasury, in violation of the Constitution of the State.

To this complaint and amendment thereto an answer was filed, denying, in general terms, the allegations thereof, and a demurrer was also filed, alleging that the complaint did not state a cause of action.

The complaint also contained allegations to the effect that the bill was not properly passed, to which an answer was filed denying that allegation, but, at the hearing, it was stipulated that the journals of both the Senate and the House of Representatives disclosed that act 167 was properly passed and had been duly signed and approved by the Governor, and this allegation has therefore been abandoned.

Testimony was offered and was heard by the chancellor at the trial as to the services performed by said committee, and the court found the fact to be that said act was not a subterfuge, and that services were performed by the members of the committee named in said act, and the complaint was dismissed as being without equity, and the plaintiff has appealed.

Without reviewing the testimony heard by the court below, it may be summarized by saying that it was to the effect that only a few of the senators or representatives could or did work at any one time, and that a number of them had done no work at any time, yet all of them had

received vouchers entitling them to warrants from the Auditor of State, which would be paid by the Treasurer of the State out of the appropriation made by the General Assembly for that purpose.

In this connection it may also be said that the act under review provided that, in addition to the senators and representatives who were named in the act, the Secretary of the Senate, with two assistant secretaries, the journal clerk, with two assistants, the bill clerk, the enrolling clerk, and one assistant, and nineteen extra clerical helpers who had been named by the president of the Senate, should likewise be employed, and that a like number of employees on the part of the House were also provided for. A grand total of forty-six persons on the part of the Senate and a like number on the part of the House were thus provided for by the act.

The testimony shows that only fifteen days were required to enroll the bills for presentation to the Governor, and that a comparatively small number of persons could have performed this service within that time. No injunction was prayed in regard to paying these clerks, and the court made no order in regard to them.

It is insisted, for the reversal of the decree of the court below, that the act is unconstitutional and void, for the reason that there is no authority in law for the appointment of members of the General Assembly after the adjournment of the session thereof, and further, that it is apparent, from the very number of members appointed in comparison with the amount of work which they might perform, that the act was a mere subterfuge to increase the compensation of the members named in the act beyond that allowed by the Constitution, and that the act is therefore unconstitutional and void.

We think the controlling question in the case, so far as this appeal is concerned, is the power of the Legislature to appoint the committee at all.

This question was first considered in the case of *Dow* v. *Beidelman*, 49 Ark. 325, where the court had

occasion to construe article 6, § 15, of the Constitution, which reads as follows: "Every bill which shall have passed both houses of the General Assembly shall be presented to the Governor; if he approves it, he shall sign it; but, if he shall not approve it, he shall return it, with his objections, to the house in which it originated, which house shall enter the objections at large upon their journal, and proceed to reconsider it. If, after such reconsideration, a majority of the whole number elected to that house shall agree to pass the bill, it shall be sent, with the objections, to the other house, by which likewise it shall be reconsidered; and, if approved by a majority of the whole number elected to that house, it shall be a law; but, in such cases, the vote of both houses shall be determined by 'yeas' and 'nays,' and the names of the members voting for or against the bill shall be entered on the journals. If any bill shall not be returned by the Governor within five days, Sunday excepted, after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall become a law, unless he shall file the same, with his objections, in the office of the Secretary of State, and give notice thereof by public proclamation within twenty days after such adjournment."

In construing this section of the Constitution the court there said: "Nothing in this language implies that all bills must be transmitted to the Governor before the adjournment of the Assembly. He is prevented by the adjournment from returning the bill, whether the bill is in his hands before it adjourns or reaches his hands afterwards. The term of members does not expire when it adjourns, nor do all the functions and powers of its officers then cease. It may often happen, in the case of bills passed in the closing hours of a session, that there is not sufficient time to enroll them properly and present them to the executive before an adjournment takes place. The effect is not that, under the circumstances, the bill

fails to become a law. Our constitutional provision differs materially in this respect from § 7 of article 1 of the Constitution of the United States."

This question was next considered in the case of *Tipton* v. *Parker,* 71 Ark. 193, in which case the validity of a warrant issued to a member of the Senate for services performed on a committee after the adjournment of the session of the General Assembly was involved. The committee had been appointed under a resolution which directed that the members thereof should receive the same pay as when the Legislature was in session. The warrant was held invalid, but this was done only because the committee was provided for by resolution, and not by a bill regularly passed and which had been approved and had become a law. The court there said: "The committee, being the mere agency of the body which appointed it, dies when the body itself dies, unless it is continued by law; and it is not within the power of either house of the General Assembly to separately enact a law, or pass a resolution having the force and effect of a law. To do this requires a majority of each house voting in its favor. Const. 1874, art. 5, § 23. The only legitimate office, power or duty of a committee of the Senate, in the absence of a law prescribing other functions and duties, is to furnish the Senate which appointed it with information, and to aid it in the discharge of its duties. The Senate alone has no power to appoint a committee to make an investigation after its adjournment and to make a report to another department of the government or to another session of the Senate or General Assembly. Ordronaux, Cons. Leg. p. 375."

In the case of *Monroe* v. *Green,* 71 Ark. 527, § 15 of article 6 of the Constitution was again considered. The case involved the time and manner within which bills must be presented to the Governor for his consideration after the adjournment of the Legislature. The joint rules of the House and Senate relating to the enrollment and presentation of bills to the Governor were set out *in*

extenso in the majority opinion, which was written by Mr. Justice HUGHES. These rules are identical, or substantially so, with the ones in force during the 1925 session of the General Assembly.

The right and duty of the Legislature to have bills enrolled for presentation to the Governor, and to do this with the aid of clerical assistance, was expressly recognized, although the right of the Governor to waive this requirement was also recognized.

There were four opinions in this case, two of which were concurring opinions. The fourth and last was a dissenting opinion by Chief Justice BUNN, but, in all four of the opinions, the right of committees of the General Assembly to serve and to perform the functions for which they were constituted after the adjournment of the Legislature appointing them was expressly recognized.

Chief Justice BUNN took occasion to say that, if the question were open for decision, he would hold otherwise, but he stated that it had been so held in the case of *Dow* v. *Beidelman, supra,* and that this decision had so long been acquiesced in that great confusion and injustice would prevail if that decision were not followed.

As pointed out by Chief Justice BUNN, the case of *Dow* v. *Beidelman* was then sixteen years old, and twenty-two additional years of acquiescence have since elapsed, so that the confusion and injustice to which he referred would, at this date, be much augmented if *Dow* v. *Beidelman* were not followed as correctly declaring the power of the General Assembly in the matter of enrolling bills and of presenting them to the Governor for his action thereon.

It is insisted, however, that, since the adoption of Amendment No. 8 to our Constitution, members of the General Assembly cannot serve on committees of the Legislature after the adjournment thereof, and that, if they do so serve, they can receive no pay for such services. This amendment reads as follows: "Each member of the General Assembly shall receive six dollars per day for

his services during the first sixty days of any regular session of the General Assembly, and, if any regular session shall be extended, such members shall serve without further per diem. Each member of the General Assembly shall also receive ten cents per mile for each mile traveled in going to and returning from the seat of government, over the most direct and practicable route. When convened in extraordinary session by the Governor, they shall each receive three dollars per day for their services during the first fifteen days, and, if such extraordinary session shall extend beyond fifteen days, they shall receive no further per diem. They shall be entitled to the same mileage for any extraordinary session as herein provided for regular sessions. The terms of all members of the General Assembly shall begin on the day of their election, and they shall receive no compensation, perquisite or allowance whatever, except as herein provided."

It is insisted that the necessary effect and the purpose of act 167 was to increase the compensation of the members of the committee, and that the act is void as offending against Amendment No. 8, set out above. It is insisted that this results from the decision of this court in the case of *Ashton* v. *Ferguson,* 164 Ark. 254.

In the case last mentioned each house had passed a resolution directing its chief clerical officer to issue warrants to all the members in the sum of a hundred dollars, covering stamps, telegrams and other incidental expenses incurred while attending the session of the Legislature. We held that those resolutions provided for an allowance or perquisite or additional compensation within the meaning of Amendment No. 8, and that the resolutions were therefore void. But the resolutions so held void related to the compensation of the members during a session of the General Assembly, while act 167 relates to the compensation of members of the Legislature serving as committees of the Legislature after the adjournment thereof.

Amendment No. 8 limits the terms of regular sessions to sixty days, and provides that, if a regular session is extended beyond that time, the members shall serve without further per diem. It likewise provides mileage which shall be paid each member who attends a regular session.

The amendment next deals with extraordinary sessions of the General Assembly, and provides that the members, when so convened, shall receive $3 per day for the first fifteen days of such a session, and that, if the extraordinary session is extended beyond fifteen days, the members shall receive no further per diem. The same mileage is allowed members who attend an extraordinary session as is allowed at a regular session.

Amendment No. 8 did not attempt to deal with any subject whatever except the length of the regular session and the per diem and mileage of the members during such regular session and the mileage and per diem of the members for any extraordinary session which might be called by the Governor.

In the case of *Hodges* v. *Dawdy,* 104 Ark. 583, in construing an amendment which had been adopted to the Constitution, the court said: "The amendment being the last expression of the popular will in shaping the organic laws of the State, all provisions of the Constitution which are necessarily repugnant thereto must, of course, yield, and all others remain in force. It is simply fitted into the existing Constitution, the same as any other amendment, displacing only such provisions as are found to be inconsistent with it. Like any other new enactment, it is a 'fresh drop added to the yielding mass of the prior law, to be mingled by interpretation with it.' *State* v. *Sewell,* 45 Ark. 387. In the construction of its terms, and in the determination of its scope and effect, the courts should follow settled rules of interpretation."

We find nothing in this amendment which deprived the Legislature of the power which the decisions rendered prior to its adoption declared the Legislature possessed,

of appointing committees which might serve after the expiration of a session.

The case of *Ashton* v. *Ferguson, supra,* which is relied upon by counsel for appellant, dealt with compensation of members serving as such during a session of the Legislature, and, as the resolutions under review in that case increased the compensation for such services, they were declared void as conflicting with Amendment No. 8.

The case of *Dickinson* v. *Johnson,* 117 Ark. 582, was decided April 19, 1915, which was, of course, subsequent to the adoption of Amendment No. 8. In that case the Legislature, at its 1915 session, passed a concurrent resolution which provided that certain members of the House and Senate should constitute a committee to audit the several departments and the different institutions of the State. The resolution further provided "that the said committee shall for their work receive the same per diem allowed to members of the General Assembly, and the expenses of the said committee and the expert accountants, auditors, stenographers, employed by them, and printing and postage, shall be paid out of the contingent expenses of the General Assembly. upon vouchers issued by the secretary of Senate directed to the Auditor, who shall draw his warrant on the Treasurer, who shall pay the same."

We there affirmed the decree of the chancery court enjoining the Auditor from issuing and the Treasurer from paying any warrants for expenses incurred under this concurrent resolution, but this was done because the committee was provided for by a resolution, and not by a bill for that purpose, regularly passed and approved by the Governor.

We there said that it was peculiarly appropriate, in the interest of economy and honesty in all the departments of government, that such an investigation should be made as the resolution provided for.

It was there further said: "The committees were the agencies of the General Assembly which created

them, and, so long as the Legislature was in session, it had full control over them. When it became apparent, near the close of the session, that the committees would not have time to make the investigation and procure the information contemplated for the purposes of any present legislation, it was not only within the power of the Legislature, but was a proper exercise of that power, for it to continue the work of the investigation for the information of the Governor and the public generally, and as a guide for any future legislation that might be necessary. But this continuation or reappointment of the committees for the important work outlined for them after the adjournment of the Legislature was not a proper subject-matter for concurrent resolution. It could only be done by a bill enacting a law to that effect. * * *

"In the instant case the Legislature attempted to do by concurrent resolution that which they had no power to do, but which they did have the power to do by an act, as was done *In re Davis,* 49 Pac. 160 (Kan.)."

There was involved in that case not only the power of the General Assembly to appoint committees which might serve after the adjournment of a session of the General Assembly by concurrent resolution, but also the power to pay for such services out of the fund provided to meet the contingent expenses of the Legislature.

In disposing of this last question we said that the decision that such committees could be appointed by a bill, but not by a resolution, made it unnecessary to decide the second question, but, in view of the public importance of the question, we proceeded to do so. In the decision of this question it was said: "When the Legislature of 1915 adjourned *sine die,* there could be no future contingent expenses of that Legislature except those that were necessary to enroll and put in shape for publication the laws that had been already enacted. It would be a contradiction in terms to say that there could be contingent expenses of a Legislature after that Legislature had ceased to exist."

"The act making appropriations for contingent expenses of the Legislature nowhere makes appropriation, as was said *In re Davis, supra,* for the payment of expenses of committees that had been continued for the purpose of making investigations. Article 5, § 29, of the Constitution provides: 'No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill.'

"Even if the Legislature, by concurrent resolution, could have continued its committees after final adjournment, it could not by resolution, under the above provision of the Constitution, appropriate the money necessary for the payment of the expenses of such committees out of the funds appropriated to pay the contingent expenses of the Legislature. To do this would have required a bill making the specific appropriation (citing cases)."

It thus appears that the case of *Dickson* v. *Johnson, supra,* decided that committees might be appointed to serve after the adjournment of the session which appointed them, and that the members of the committee may be compensated for such services, but that this could be done only by a bill, and not by a resolution.

It is pointed out that act 167 allowed the members of the committee a dollar each per day in stamps, and that the testimony taken at the trial shows that they were required to perform no duty which made these stamps necessary, and that, as the act allowed six dollars per day in money, which is the compensation allowed by Amendment No. 8 for members during a regular session, the act is void because of this additional allowance of a dollar per day.

The answer to this contention is, however, that the members were serving, not as members of the Legislature in session, but as a committee of the Legislature after the adjournment of the session, and the compensation for such services not having been prescribed and

limited by the Constitution, might be fixed at such sum as the General Assembly saw proper.

The point has been raised in our consultation that the undisputed testimony shows that a committee of unnecessary size was appointed, and that the right to appoint clerks was grossly abused, and that a reasonable number only could be appointed. Appellant does not raise this question, but, in view of its public importance and the fact that it forms the basis of the dissent of two of the judges, we proceed to discuss it. *Dickson* v. *Johnson, supra.*

We do not consider whether a committee of unnecessary size was appointed, as this court can determine only the power of the Legislature to appoint the committee at all. This is the judicial question which we have a right to decide, and have answered affirmatively. But, once this right is conceded, the size of the committee becomes a political question which we have no right to review. This is a question to be decided by the General Assembly in enacting, and the Governor in approving, the bill which creates the committee.

We recognized this limitation upon our jurisdiction in the case of *Ashton* v. *Ferguson, supra,* where we said that we could only review the power of the Legislature to pass the resolutions there under review, and that, if no more was involved than the exercise of the power, "the determination of the case would be easy," that is, there would be nothing for us to decide, as the courts cannot review questions involving only legislative discretion.

No authorities were there cited to sustain the proposition that courts are without jurisdiction to review the discretion of the Legislature in the exercise of a power it possesses. If authority were necessary, an endless number might be cited, but the case of *Little Rock* v. *North Little Rock,* 72 Ark. 195, will suffice. Mr. Justice RIDDICK, speaking for the court, there said: "It is equally clear that we cannot inquire into the motives of the Legislature in passing the act nor into the means by which they

were induced to enact it. The allegation in the complaint that the passage of the act was obtained in a fraudulent and surreptitious manner cannot be considered, for we have no right to inquire into or consider such matters. If courts should enter upon such inquiries, and annul laws because they seem to be unwise or impolitic, or because improper influence was brought to bear upon the Legislature to secure their passage, no one could rely upon any law until it had been submitted to the courts for their approval. The adoption of such a rule would invest the courts with legislative as well as judicial powers, and would be clearly in violation of the provision of our Constitution which declares that one department of the government shall not exercise the powers conferred upon another and different department." In other cases it has been said that, if courts should usurp the function of reviewing matters of legislative discretion, the laws of the land would become as uncertain as the terms of horse trades.

The decree of the court below is correct, and is therefore affirmed.

HUMPHREYS, J., (dissenting). The majority opinion announces the rule that the Legislature has power by bill to appoint holdover committees to complete the journals and enroll the bills and present them to the Governor for his approval, or disapproval, without limitation as to number, clerical help, or compensation. It is conceded by the majority that obviously a much larger number of committeemen and helpers were provided for in the bill than necessary. If it had not been conceded, it is a demonstrable physical fact that it did not require between ninety and one hundred persons to wind up the business of the Legislature. The history of the State has revealed that the President of Senate, Speaker of the House, clerk of the House and his regular assistants, secretary of the Senate and his regular assistants, the journal clerks and their regular assistants, the regular enrolling committees of the two houses and their clerks

or stenographers have been sufficient in number to prepare the journals for filing and the bills for presentation to the Governor. None of the cases cited in the majority opinion lay down the rule that the Legislature has unlimited authority to create by bill unnecessary hold-over committees, or to provide the committees with unnecessary employees, or to provide unreasonable compensation for them. The majority has laid down this rule in the instant case under the conviction that the Legislature has unlimited power, if it has power at all, to do a thing. It is believed by the majority that a legislative power may be exercised by that body in an unreasonable manner. In other words, that the Legislature has unlimited discretion to exercise any one of its powers in any manner it may please. In the opinion of the minority, this court in the past committed itself to an exactly contrary rule or doctrine. This court said in the case of *Louisiana & Arkansas Railway Company* v. *State,* 82 Ark. 12, "That the Legislature has the general power of supervision of railroads, and the power to require them to establish and maintain stations at points designated by the legislature, cannot be doubted. It is equally true, however, that such power must be exercised reasonably and with due regard to the rights of corporations, for they have rights which the Legislatures as well as courts must respect. But who is to be the judge whether or not the power has been exercised reasonably or unreasonably and arbitrarily? * * * We think the power of the Legislature in this respect, and the decree of conclusiveness to be accorded to its determination of the necessity and propriety of its action, are the same as in other instances where the Legislature is to determine the facts which call for direct legislation. The greatest latitude should be given to the law-making body in determining the necessity for its acting; but the power must not be exercised arbitrarily and without reason." The third syllabus of the case is as follows:

"A legislative determination that a station should be erected and maintained at a certain point is conclusive

unless the courts can declare, as a matter of law, that such determination is arbitrary and unreasonable." The syllabus is taken almost bodily from an opinion of the United States Supreme Court in the case of *Norwood* v. *Baker,* 172 U. S. 269, cited by this court in the case of *Louisiana & Arkansas Railroad Company* v. *State, supra.*

Again, this court said in the case of *Coffman* v. *St. Francis Drainage District,* 83 Ark. 54, that (quoting syllabus No. 1), "While the Legislature, in creating a drainage district, may provide what lands shall be assessed for the improvement, and the extent of such assessment, the courts will interfere where the act of the Legislature is such an arbitrary abuse of the taxing power as would amount to a confiscation of the property without benefit." The same rule applies where a legislative assessment of benefits is on its face discriminatory between the different tracts of land included in the district.

Again, it has been held by this court that the Legislature has the power to determine whether the required notice was given for the passage of a local bill, and that when exercising the authority within the power, it was a legislative question and not a judicial one; but, notwithstanding this ruling, when it became apparent or obvious that the notice could not have been given between the calling and convening of the special session of the Legislature, the court did not hesitate to say that the Legislature exceeded its authority. *Booe* v. *Road Improvement District,* 141 Ark. 140.

Mr. Justice WOOD and the writer are of the opinion that the extent of or limitation upon any power which the Legislature may possess is as much a judicial question as whether it has power to do the thing; and further, whether a power possessed by the Legislature has been exercised in a reasonable manner or in an arbitrary, unreasonable manner, is also a judicial and not a political question. In the instant case we think the power was exercised in an unreasonable manner and that the act, in so far as same is unreasonable, should be declared to

be void. For the reason assigned, we most respectfully dissent from the majority opinion.

SMITH, J., (on rehearing) It is insisted in the petition for rehearing that, inasmuch as we held in the original opinion that the members of the General Assembly were serving, not as members of the Legislature in session, but as a committee of the Legislature after the adjournment of the session, the act of the Legislature is in conflict with § 10 of article 5 of the Constitution, which provides that "No Senator or representative shall, during the time for which he shall have been elected, be appointed or elected to any cival office under this State."

We do not agree with counsel in this contention. The act does not create or confer an office. It was not required that the members of the General Assembly who were named as members of the committees should take an oath of office before entering upon the performance of the duties imposed upon them by the act. Certain duties were imposed upon these committee members which were not incumbent upon members of the General Assembly who were not members of the committee, but these were duties which were to be performed by the committee members as members of the General Assembly. These duties related to the work of the General Assembly of which the committee were members and were incident to their membership in the General Assembly, and there was therefore no creation of new offices.

The petition for rehearing is therefore denied.

MILLS v. STATE.

Opinion delivered May 25, 1925.

1. CRIMINAL LAW—CHANGE OF VENUE.—Where persons who signed affidavits supporting a motion for change of venue testified that there was a general belief in the county that, because deceased was a brother of the sheriff, who was the most influential man in the county and actively interested in the prosecution, accused would not have a fair trial, it was error to refuse a change of

venue, in the absence of a showing that affiants lacked information on which they based their opinion, so as to warrant a finding that the affiants were not credible persons.

2. CRIMINAL LAW—PETITION FOR CHANGE OF VENUE—EXAMINATION OF AFFIANTS.—Persons making affidavits in support of a petition for change of venue may be examined orally before the court, not for the purpose of trying an issue as to the truth of the allegations, but solely for the purpose of determining the credibility of the affiants.

3. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—An instruction that, even if accused fired the first shot in self-defense, still if he fired the second shot when it was not necessary to defend himself, then he would be guilty of murder in the second degree or manslaughter if the second shot contributed to deceased's death, *held* erroneous as making the necessity to depend upon the viewpoint of the jury, instead of that of the accused.

4. CRIMINAL LAW—STATEMENT BY ACCUSED.—Where accused, in testifying in his own behalf, denied having made a statement sworn to by a State's witness, it was error to refuse to permit him to state what he did say to the witness.

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

J. M. Carter, W. H. Arnold and *B. E. Carter,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

SMITH, J. Appellant was indicted for the crime of murder in the second degree, alleged to have been committed by shooting one Will Barber. He was found guilty of manslaughter and given a sentence of three years in the penitentiary, and has appealed.

The deceased Barber and the appellant Mills lived near the Red River levee, and an act had been passed by the General Assembly of the State authorizing the levee directors to shoot hogs found running at large upon the levee. Dr. Barber's hogs ran on the levee, and several of them were killed, and he suspected defendant of having killed them. Deceased became embittered against Mills, and on one occasion, about a month before the killing, announced his intention of whipping Mills, and, after inviting several bystanders to witness the whip-

ping, he assaulted Mills and struck him over the head with a club, and inflicted a serious wound. Mills, who was a deputy sheriff, was armed with a pistol at the time, but made no attempt to shoot Barber. Subsequent to this incident more of Dr. Barber's hogs were killed, and he was shown to have made violent threats against Mills.

On the morning of the killing Mills went to a sawmill on the levee to see about some lumber. He carried his rifle with him, but explained that he was doing so for a lawful and peaceable purpose. After finishing his business he started home, and was walking in the road which ran along the banquette of the levee. As he was proceeding homeward he met Barber, who was walking on the top of the levee. Barber had recently broken his arm and had it in a sling, but, as he saw Mills, he started walking towards him down the levee, and as he walked up to Mills he was seen to be talking to him angrily.

These facts are established by the witnesses for the State, all of whom appeared to realize that a difficulty was about to occur, as they knew the feeling between the parties, and one of the State's witnesses remarked that "Dr. Barber was looking for Jesus."

There is a conflict in the testimony as to just what occurred thereafter. No witness was close enough to hear just what occurred between the parties, but the undisputed testimony shows that Dr. Barber was seen gesticulating with his sound arm.

Mills testified that, when Dr. Barber approached, it was apparent that Dr. Barber was very angry, and he accused Mills of having shot more of his hogs. Mills testified that he denied having done so, when Dr. Barber told him he was a liar, and that he was going to kill him, and that Barber put his hand in his pocket, and he, believing Barber was about to execute his threat, raised his rifle, and, without putting it to his shoulder, commenced firing, and fired two shots in rapid succession. He further testified that Barber was armed, and that he saw his pistol and believed Barber was about to shoot him.

It was shown that Dr. Barber smoked a pipe incessantly, and the testimony on the part of the State was to the effect that Barber was unarmed at the time he was killed, that he was smoking his pipe at the time he met Mills, and that, while talking to Mills, Barber put his pipe in his pocket, and that, as he was doing so, Mills commenced to shoot.

There was testimony on behalf of Mills that Barber was not smoking at the time the shots were fired, and that he did not have his pipe in his hand when he reached for his pocket.

Barber was a brother of the sheriff of the county where the killing occurred, and the sheriff was shown to be a man of predominant influence in the county; he employed special counsel to assist in the prosecution, and the killing appears to have been much discussed throughout the county.

Before the trial, Mills filed a petition for a change of venue, which was in proper form. This petition was supported by the affidavits of ten persons, one of whom proved not to be a qualified elector. The remaining affiants were summoned to appear before the court for examination as to the basis of their opinion that Mills could not obtain a fair and impartial trial. One of these affiants was ill and could not attend court, but the remaining eight appeared and were examined. The first of these affiants testified that he had heard probably a hundred men who lived throughout the county discuss the case, and he had concluded, from what he had heard these men say, that Mills could not obtain a fair trial in the county. He testified that there were two factions in the county, one of which favored the sheriff, and the other opposed him, but the sheriff's faction was overwhelmingly in the majority, and that, if one of the sheriff's friends got on the jury, Mills would not get a fair trial, and, if one of the sheriff's enemies got on the jury, he would not give the State a fair trial.

Other affiants who were examined do not appear to have heard so much about the killing, but they all

testified that the killing had been widely discussed, and the effect of the sheriff's participation was frequently conjectured, and the opinion was common that the sheriff's influence and prestige would militate against Mills securing a fair and impartial trial.

These witnesses testified that they had heard the killing discussed in various townships of the county, which were named, and from which an experienced attorney, who was not shown to be connected with the trial, testified that ninety-five per cent. of the jurors were selected for the various terms of court.

The court denied the petition for a change of venue, and this action is assigned as error.

We think a showing was made upon which the venue of the case should have been changed. The witnesses were shown to have heard discussion of the case by electors residing in various parts of the county, and it was generally known that deceased was a brother of the sheriff, who was the most influential man in the county, and actively interested in the prosecution. Under this testimony a change of venue should have been granted. The affiants were not shown to have sworn with that lack of information upon which to base the opinion they expressed which would warrant the court in finding that the affiants were not credible persons.

The rule by which the trial court should be governed in passing upon an application for a change of venue in a criminal case was restated by this court in the recent case of *Spurgeon* v. *State,* 160 Ark. 112, where we quoted from the case of *Whitehead* v. *State,* 121 Ark. 390, as follows: " 'The trial court exercises a judicial discretion in passing upon the credibility of the affiants, but its discretion is limited to that question. When the petition for change of venue is properly made and supported, the court has no discretion about granting the prayer thereof, whatever the opinion of the court may be as to its truthfulness. The statute provides no method by which the court may determine the credibility of the affiants, but leaves the question to the court. A number

of cases, however, have approved the practice of calling the affiants and examining them as to the source and extent of their information, for the purpose of ascertaining whether or not they have sworn falsely or recklessly without sufficient information as to the state of mind of the inhabitants of the county as to the accused. But the cases also hold that the statute on this subject does not contemplate that the truth or falsity of the affidavits shall be inquired into, and that the only question for the determination of the court is whether or not the affiants are credible persons, and that all inquiry must be confined to that question.' "

The testimony shows that the first shot fired inflicted only a slight flesh wound, while the second shot was almost immediately fatal, and, upon this phase of the case, the court gave, over objection of Mills, an instruction numbered 15, which reads as follows: "Although you may believe that the defendant fired the first shot in necessary self-defense, still, if you believe the second shot was fired at a time when it was not necessary to further defend himself, then the defendant would be guilty of murder in the second degree, or manslaughter, provided you believe the second shot contributed in any manner to the death of the deceased."

This instruction was objected to generally at the time it was given, and the specific objection was made that it permitted the jury, rather than the defendant, acting without fault or carelessness, to determine whether it was necessary for the defendant to fire the second shot. The instruction was erroneous in the particular indicated, and should have been modified as requested.

After Mills had killed Dr. Barber, he went to Walter Oden, who was also a deputy sheriff, and surrendered, and Oden was asked to state what Mills said when he surrendered, and the witness answered: "A. Well, to the best of my recollection, he said he wanted to kill him, he didn't want to cripple him." On his cross-examination the witness admitted that his hearing was

defective, and that he might be mistaken as to what Mills had said. Oden was then asked this question: "Q. Didn't he tell you he was crippled and he didn't want to have any trouble with him, and he had to kill him, and isn't that what he told you?". The witness answered: "A. Well, something to that amount, that is, it was all in line there; he said something else, I disremember what it was, but I think that's the contention—he had to shoot him because he was afraid of him. I asked him the particulars of it. He said he had to kill him to keep from getting killed."

When called as a witness on his own behalf, Mills denied making the statement which the witness Oden had first attributed to him. He was then asked what he did say to Oden, and the court sustained an objection to the question, and refused Mills permission to answer. Had witness been permitted to answer the question he would have testified that what he did say to Oden at the time he surrendered was that he didn't want to kill Barber, as he was crippled already, but he had to do so to save his own life.

We think the exclusion of this testimony was error. It is true the witness Oden did qualify his first statement, but he did not withdraw it, and his apparent candor in admitting that he might be mistaken may have given added weight to his testimony by making it appear that he had no prejudice against Mills and no desire to do his case an injustice. The court should have permitted Mills to relate what he did say, and thus afford the jury the opportunity to consider Mills' version of the conversation.

The rule governing such cases was stated in the case of *King* v. *State*, 117 Ark. 82, where we said: "In the case before us, the record shows that, on the former trial of the case, the defendant had testified as a witness, and admitted the killing, but the admission was accompanied by an explanation of the circumstances attending the killing, and it is an elementary rule of law that, when admissions of a defendant in the nature of a

confession are allowed in evidence against him, all that he said in that connection must also be permitted to go before the jury. That is to say, whatever explanation he may make in regard to the killing or in regard to the circumstances attending it, are to be admitted in evidence just as much as the admission of the killing itself. The jury are the sole judges of the weight of the testimony and the credibility of the witnesses, and it was the duty of the jury to consider not only the testimony of the State to the effect that the defendant, on the former trial, had admitted the killing, but also the explanation he made at the time as to the circumstances attending it. The jury were not required to accept or reject such testimony in its entirety, but it was their duty to accept such portions of the testimony in the whole case as it believed to be true, and to reject that which they believed to be false. *Pickett* v. *State,* 91 Ark. 570; *Allison* v. *State,* 74 Ark. 444."

Other assignments of error are discussed, but they relate either to matters which are not likely to recur upon the retrial of the cause, or are not deemed of sufficient importance to require discussion.

But, for the errors indicated, the judgment must be reversed, and it is so ordered, and the cause will be remanded for a new trial.

STRUM v. STATE.

Opinion delivered May 25, 1925.

1. SODOMY—DISTINCTION BETWEEN SODOMY AND BUGGERY.—The common-law distinction between sodomy and buggery has been practically eliminated by Crawford & Moses' Digest, § 2745, 2746, prescribing the evidence to convict and fixing the punishment.
2. SODOMY—DEFINITION.—The crime of sodomy consists of unnatural relations between persons of the same sex, or with beasts, or between persons of different sex, but in an unnatural manner.
3. INDICTMENT AND INFORMATION—SUFFICIENCY.—An indictment is sufficient if the particular facts necessary to constitute the offense

are specifically and accurately described, although erroneously named.

4. SODOMY—PERSONS GUILTY.—Under Crawford & Moses' Dig. § 2745, the pathic as well as the agent may be convicted of buggery, on proof of actual penetration.

5. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—The corroboration of an accomplice necessary, under Crawford & Moses' Dig., § 3181, to sustain a conviction of felony must be substantial.

6. SODOMY—CORROBORATION OF ACCOMPLICE.—Testimony *held* insufficient to corroborate the testimony of accomplices.

Appeal from Clark Circuit Court; *James H. McCollum*. Judge; reversed.

G. W. Matthews and *J. S. Townsend*, for appellant.

H. W. Applegate, Attorney General, and *John L. Carter*, Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Clark County upon the following indictment:

"The grand jury of Clark County, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant, John Strum, of the crime of buggery, committed as follows, to wit: the said defendant, on the first day of January, 1925, in Clark County, Arkansas, did unlawfully and feloniously have sexual intercourse with Al Jones, both said defendant and Al Jones being male persons, against the peace and dignity of the State of Arkansas." From the judgment of conviction he has duly prosecuted an appeal to this court, insisting upon a reversal thereof on account of the alleged insufficiency of the indictment to charge a crime, and the alleged insufficiency of the evidence to support the verdict. The indictment is assailed because the crime of buggery is based upon alleged sexual intercourse between appellant and Al Jones, both being male persons, whereas, it is claimed that said crime can only be committed by copulation between a person and a beast, and that an unnatural crime between persons is sodomy. The common-law distinction between the crimes of sodomy and buggery has

been practically eliminated in this State by our statutes against such crimes, which are as follows:

"Proof of actual penetration of the body shall be sufficient to sustain an indictment for the crime against nature." Crawford & Moses' Digest, § 2745.

"Every person convicted of sodomy, or buggery, shall be imprisoned in the penitentiary for a period not less than five nor more than twenty-one years." Crawford & Moses' Digest, § 2746.

It will be observed that evidence necessary to convict as well as the punishment is made the same by our statutes. In passing upon the sufficiency of an indictment for sodomy in the case of *Smith* v. *State,* 150 Ark. 265, this court quoted approvingly from Bishop's Criminal Law and Ruling Case Law in the use of the offenses interchangeably, as follows:

"Not alone to protect the public morals, but for other reasons also, sodomy—called sometimes buggery, sometimes the offense against nature, and sometimes the horrible crime not fit to be named among Christians, being a carnal copulation by human beings with each other against nature, or with a beast—is, though committed in secret, highly criminal." 1 Bishop's Criminal Law, 1191.

"The crime of sodomy, broadly and comprehensively speaking, consists of unnatural sexual relations between persons of the same sex, or with beasts, or between persons of different sex, but in an unnatural manner." 8 R. C. L. 364, page 333.

The indictment is not only sufficient under the rule that the offenses are interchangeable, but also under the well-established rule in this State that an indictment is sufficient if the particular facts necessary to constitute the offense are specifically and accurately described, although erroneously named. *Harrington* v. *State,* 90 Ark. 596; *Kelley* v. *State,* 102 Ark. 657; *Speer* v. *State,* 130 Ark. 457; *Harris* v. *State,* 140 Ark. 46. The indictment in the case specifically charges appellant with having had sexual intercourse with Al Jones, both of them

being male persons, and it is immaterial that it is named buggery, since the name will follow the particular facts set forth in the indictment.

The evidence is attacked as being insufficient to support the verdict upon the alleged grounds, first, that there was no penetration by appellant, and second, that there was no substantial corroboration of the testimony of the accomplices in the crime who testified against appellant.

(1). It is true that our statutes provide that actual penetration of the body shall be sufficient to convict, but this does not mean, as contended by appellant, that the pathic cannot be convicted of the crime against nature. It means that both the agent and pathic may be convicted upon proof of actual penetration. The testimony of the accomplices was to the effect that they were the agents and appellant was the pathic in the commission of the crime.

(2). It is provided by § 3181 of Crawford & Moses' Digest that "a conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof." The corroboration must be substantial. *Earnest* v. *State*, 120 Ark. 148. In the instant case the only evidence offered in corroboration of the testimony of the alleged accomplices was that R. C. Tyson, the marshal who arrested appellant. The alleged accomplices were boys sixteen and seventeen years of age, who lived at Prescott. They had been to Graysonia, and, upon their return, they had to stop over in Gurdon about an hour to make connection with their train. While waiting at the depot one of them had to attend to a call of nature, so they went into an alley in search of a water-closet. In returning to the depot by a different route they came upon the house of appellant, a stranger to them. Accord-

ing to their testimony, he invited them in, and, after a few moments, put one of them out and induced the other to join him in the crime. Then he put the first one out, and induced the second boy to do likewise. The boys testified that, after thinking the matter over, they became angry and pulled appellant out of the house for the purpose of flogging him, but that he ran, and they were chasing him down the alley, which attracted the attention of third parties, who interfered and notified the marshal. When the marshal arrived, appellant claimed the boys had attempted to rob him, and that they were chasing him for that purpose. The boys, on being interrogated, told the story related above. While being interrogated, each claimed the old man had spit near the bed upon which each was lying immediately after the commission of each offense. The officer went to the house, and could find no sputum upon the floor, but found a little wooden box containing sawdust under the edge of the bed, in which there was something resembling semen. The marshal did not see appellant spit in the box after the occurrence, and neither did the boys. The boys testified that he spit over in the dark near the bed. No analysis was made of the liquid in the box. It is entirely conjectural as to whether appellant spit in the box immediately after the alleged occurrences, and whether the liquid was phlegm or semen. We do not think this bit of evidence amounts to substantial corroboration tending to connect appellant with the alleged crime. The story told by the boys is unreasonable to begin with, and we think the testimony of Tyson is too weak to be characterized as substantial corroboration thereof. *Smith* v. *State, supra,* is not an authority to the effect that there may be a conviction in cases of this kind on the uncorroborated testimony of accomplices. In the Smith case there was no request of the court to give an instruction relative to whether or not the prosecuting witness was an accomplice of Smith.

The judgment is therefore reversed, and the cause is dismissed.

MUTUAL AID UNION v. WHEDBEE.

Opinion delivered May 25, 1925.

INSURANCE—CONCLUSIVENESS OF SETTLEMENT.—Where defendant company's adjuster had represented that the company was not liable on a benefit certificate and offered a small settlement, but plaintiff did not accept it until he had made a full independent investigation, the settlement was binding, though plaintiff thereby surrendered rights which the law would have sustained.

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

J. V. Walker and *Duty & Duty*, for appellant.

Kincannon & Kincannon, for appellee.

HUMPHREYS, J. Appellee instituted this suit against appellant in the circuit court of Sebastian County, Greenwood District, to recover an alleged balance of $854.91 on an insurance certificate issued by appellant to Mrs. Mary Cotton, in which the appellee was named as the beneficiary.

A number of defenses were interposed to the suit, one of which was an alleged settlement and release of the claim.

Appellee filed an answer denying that he compromised and settled the claim, in which it was stated that, if he executed a release, it was induced by fraud and misrepresentations of appellant's agent.

At the conclusion of the testimony, appellant moved for an instructed verdict, which the court refused to give, over its objection and exception. On the contrary, he submitted the cause to the jury upon the pleadings, testimony, and declarations of law that he regarded applicable to the facts in the case, resulting in a verdict and consequent judgment in favor of appellee, from which is this appeal.

The undisputed facts relative to the issue of a settlement of the claim are, in substance, as follows: After the death of the insured and proof thereof, which was made for appellee by H. L. Holbrook, cashier of the Huntington State Bank, W. A. Mundell, agent and

adjuster of appellant, called on Mr. Holbrook and convinced him that appellee could not recover on the certificate of insurance because he (appellee) was not related to the insured by consanguinity. He had the case of *Home Mutual Benefit Association* v. *Keller*, reported in 148 Ark. at page 361, with him, and interpreted it to mean that, if an insured should take out an insurance policy on the life of his son-in-law, it would be a wagering contract and void, whereas the opinion was to the effect that a son-in-law had no insurable interest in a father-in-law by reason of the relationship. The Huntington State Bank had loaned appellee $200 on the policy with which to bring his mother-in-law back from Tennessee, where she had died, for burial. Mundell said that appellant would pay the premiums with 6 per cent. interest back to appellee if he would accept same in full settlement of the claim. They thereupon went to see appellee, and Mundell stated to him that they were not liable upon the policy under the ruling made by the Supreme Court in the Keller case. He then proposed a settlement with appellee on the basis which he had suggested to Holbrook. Appellee became abusive to Mundell, and angrily declined the offer. Holbrook had no connection whatever with appellant. He was appellee's friend and banker. Appellee and Holbrook discussed the matter on several occasions, and Holbrook, by and with the consent of appellee, sought the advice of the bank's attorneys. The attorneys advised that appellee could not recover, whereupon appellee requested Holbrook to write to Mundell that he would accept a return of the premiums and interest, amounting to $145.09, in full settlement of the claim. This information was conveyed to Mundell about two months after his unpleasant interview with appellee. Appellant paid the amount, and received a written release of the claim.

It will be observed that, according to the undisputed facts thus detailed, appellee refused to rely upon the representations made by Mundell, but made an independ-

ent investigation and was governed by the results thereof in making the settlement. This record reflects that the parties settled the disputed claim, each relying upon his own judgment, after ample opportunity on the part of appellee to acquire a knowledge of every fact bearing upon the question of the claim. Having made an investigation to his entire satisfaction, he will not be heard to say that he was deceived. It is immaterial, under these circumstances, whether he surrendered rights that the law, if applied to, would have sustained. *Mason* v. *Wilson,* 43 Ark. 172; *Gammill* v. *Johnson,* 47 Ark. 335; *Willingham* v. *Jordan,* 75 Ark. 266; *Fender* v. *Helterbrandt,* 101 Ark. 335; *Hennessy* v. *Baker,* 137 U. S. 78.

The trial court should have instructed a verdict for appellant on the undisputed facts, and, on account of his refusal to do so, the judgment is reversed, and the cause is dismissed.

PINE BLUFF COMPANY *v.* BOBBITT.

Opinion delivered May 25, 1925.

1. ELECTRICITY—FAILURE TO DISCOVER CONDITION OF WIRE.—Where a child was injured by coming in contact with an electric company's guy wire, which had become charged because a wire not belonging to the company was fastened to the guy wire and thrown across an uninsulated high-tension wire, the only issues for the jury were as to the length of time the condition had existed, and whether the company was negligent in not discovering and removing the foreign wire.
2. ELECTRICITY—DANGEROUS CONDITION OF WIRE—LIABILITY.—A requested instruction that if the wire which caused injury was placed over defendant's electric wire and connected with its guy wire by some unknown person, so as to charge the guy wire, thereby injuring plaintiff, and if the company did not know of such connection and could not have known of it by the exercise of ordinary care, it would not be liable, *held* correct.
3. ELECTRICITY—RULE AS TO CARE OF WIRES.—The rule that electrical companies must use a high degree of care with reference to wires carrying a dangerous current of electricity to keep them properly insulated not only applies to its own wires, but extends

to prevention of the escape of dangerous current through any wires brought in contact with their own.

4. ELECTRICITY—REASONABLE CARE—BURDEN OF PROOF.—Proof that a child was injured by coming in contact with an electrical company's guy wire made out a *prima facie* case of the company's negligence, and the burden was on it to show that it used ordinary care to discover and remove a foreign wire which caused the guy wire to become charged, and could not excuse itself by simply showing that the current was connected to the guy wire from its tension wire through a foreign wire attached to the two by some third party.

5. ELECTRICITY—FOREIGN WIRE—EVIDENCE.—In an action for injuries from contact with an electrical company's guy wire, where the undisputed evidence exonerated the defendant company from liability for placing a wire which connected its high-tension wire with a guy wire, evidence as to how the foreign wire was placed by a third person, and the motive of placing it was properly excluded as immaterial.

6. EVIDENCE—ACTS OF DEFENDANT'S AGENT.—In an action for injuries from contact with an electrical company's guy wire, evidence that an employee of the company attempted to induce a witness to admit that he had attached a foreign wire to defendant's guy and high-tension wires on promise that the company would pay his fine *held* inadmissible, in absence of a showing that the employee had authority to make such agreement.

7. WITNESSES—IMPEACHMENT AS TO COLLATERAL MATTER.—In an action for injuries from contact with an electrical company's guy wire, evidence that the company's employee attempted to induce witness to admit that he had attached a foreign wire to defendant's guy and high-tension wires, on promise that the company would pay his fine, was not admissible to impeach the company's witness, who, on cross-examination, denied that such offer had been made, and plaintiff was bound by the negative answer of such witness.

8. TRIAL—WAIVER OF OBJECTION TO EVIDENCE.—Appellant did not waive his objection to incompetent testimony objected to by him by subsequently introducing contradictory testimony.

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

F. G. Bridges, for appellant.

Rowell & Alexander, for appellee.

HUMPHREYS, J. L. W. Bobbitt, father of Lawson W. Bobbitt, brought suit on his own account and as guardian

of his child to recover damages for permanent injuries received by his child from coming in contact with a guy wire of appellant company which was carrying a heavy voltage of electricity, through the negligent operation of the plant. The alleged negligence consisted in the failure of appellant's servants to discover and remove a wire, one end of which was securely wrapped around one of its guy wires near the ground and the other hanging across an uninsulated section of its high-tension wire, carrying 2,300 volts of electricity, thereby permitting a heavy current of electricity to pass from said high-tension wire through the lower part of the guy wire where the child, while playing and gathering flowers along the side of the road, came in contact with it.

Appellant filed an answer denying that the wire connecting this high-tension wire with its guy wire was a part of its system, and that its servants negligently failed to discover and remove same.

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

There is no dispute in the evidence that the injury was caused by current of electricity passing through one of appellant's guy wires, with which the child came in contact while playing near the roadside. The purpose of the guy wire was to hold the post in place where the line changed its course, and not for the purpose of conveying a current of electricity. It is also undisputed that the wire connecting the high-tension wire with the guy wire was foreign to and no part of the system. One end of it was securely attached to the guy wire and the other end, which was tied to a rock, was hanging over an uninsulated section of the high-tension wire attached to the top arm of the post.

The testimony is in conflict as to how long this condition in the wire had existed, and as to whether appellant was negligent in not discovering and removing the

foreign wire before the injury. The conflict in the evidence in these particulars presents the only real issues in the case, and the cause should have been sent to the jury upon these issues only. We think instruction No. 14, presented by appellant and refused by the trial court, was a correct, accurate declaration of the law applicable to the disputed issues of fact in the case, and should have been given, for the rule therein announced was not clearly covered in the instructions given by the court to guide the jury. Said instruction is as follows:

"If you find from the evidence that the wire causing the injury was placed by some unknown third party over the defendant's electric wire and connected with the guy wire so as to charge said guy wire, thereby injuring the plaintiff, Lawson Bobbitt, and if you further believe that the defendant company did not know of such connection or danger, and could not have known of same by the exercise of ordinary care, then the defendant would not be liable, and you should so find."

Instruction No. 14 is criticised by appellee because it required the exercise by appellant of only ordinary care to discover the dangerous condition caused by the connecting wire. This requirement was correct, and conformed to the rule announced by Joyce on Electrical Law, quoted approvingly by this court in the case of *Texarkana Company* v. *Pemberton*, 86 Ark. 329, as follows:

"Electrical companies, in the maintenance of their wires, owe to their employees, as well as to others who may of right, either for pleasure or work, be in the vicinity of such wires, the duty of exercising reasonable care, that is, such care as a reasonably prudent man would exercise under the same circumstances. We have already stated that reasonable care or ordinary care is a degree of care varying with the circumstances of each case, and which, in the case of electrical wires carrying a dangerous current of electricity, requires the exercise of a high degree of care to keep them properly insulated and so suspended as not to endanger lives."

The rule not only applies to wires owned and used by an electric company "but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and its transmission thereby to any one using the streets. *Electric Street Ry. Co.* v. *Coney,* 64 Ark. 381; *Southwestern Tel. & Tel. Co.* v. *Myane,* 86 Ark. 588.

Appellant contends that the instructions given by the trial court as a guide to the jury were erroneous because they placed the burden upon appellant to justify or excuse itself from transmitting the current of electricity through its guy wire which burned the child. Under the circumstances of the injury a *prima facie* case of negligence on the part of appellant was made, which entitled appellee to go to the jury, and placed the burden on appellant to justify or excuse its negligence. The undisputed evidence revealed that the child received the injury from coming in contact with appellant's guy wires, while playing near the roadside, which should not have been carrying electricity in the proper operation of the plant. This guy wire was under the control and management of appellant. *Southwestern Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581; *Commonwealth Public Service Co.* v. *Lindsay,* 139 Ark. 283; *Arkansas Light & Power Co.* v. *Jackson,* 166 Ark. 633. It was appellant's current of electricity which burned the child, and it could not excuse itself by simply showing that the current was connected to the guy wire from its tension wire through a foreign wire attached to the two by some third party. It was required to do more than that to exculpate itself from the *prima facie* case of negligence made by proof of the injury and the manner thereof. It must be shown, in addition, that it used ordinary care to discover and remove the foreign wire. 9 R. C. L., pp. 1215, 1217 and 1218. In the case of *City Electric Street Ry. Co.* v. *Conery,* 61 Ark. 381, this court, in comparing that case with the case of *Texarkana Gas & Electric Light Co.* v. *Orr,* 59 Ark. 215, said: "The main difference between

the case last cited and this is, the electricity was communicated to the party injured in the former by the electric company's own wire, and in the latter by the wire of another, but the principle upon which the liability is based is the same in both cases. All persons have the right to use the streets, in or over which the wires were suspended, as public highways. Subjecting the dangerous element of electricity to their control, and using it for their own purposes, by means of wires suspended over the streets, it is their duty to maintain it in such a manner as to protect such persons against injury by it to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets or other public highways, but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to any one using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended."

While the burden in the whole case rested upon appellee after a *prima facie* case was made, the instructions given by the court correctly placed the burden upon appellant to justify or excuse its negligence. The instructions given by the court, in so far as they covered the issues involved, were substantially correct and impervious to attack by general objections.

Appellant next contends that the court erred in excluding testimony relative to experiments which might indicate how the end of the wire with the rock attached might have been thrown over the tension wire, and opinion evidence as to what motive might have inspired the third party to commit the act. We regard this testimony as wholly immaterial, after it was shown by the undisputed testimony that such wire was not a part of the construction of the plant, and could serve no useful purpose, or, in other words, that it was a foreign wire. It

is immaterial how it was placed there or what motive inspired it to be done, if appellant's linemen did not do it. We do not see how the exclusion of these pieces of evidence could have prejudiced appellant's cause.

Appellant's next and last contention for a reversal of the judgment was the admission of the testimony of Max Fry to the effect that Clint Green, who was working for appellant, attempted to induce him to admit that he had attached the foreign wire to the two wires in question upon a promise that appellant would pay his fine. Such an agreement on the part of Clint Green was not within the scope of his apparent authority, and it was not shown that he had actual authority to make such an agreement, hence inadmissible to bind appellant company. The court erred in admitting it.

On account of the errors indicated the judgments are reversed, and the causes are remanded for a new trial.

HART, J. My dissent is based on the ground that the matters embraced in instruction No. 14 asked by the defendant and refused by the court is substantially covered by instruction No. 5, which was given and reads as follows:

"The defendant, Pine Bluff Company, is claiming that the connection between its high tension wire and its guy wire was made by a connecting wire which was placed between the two wires by some third person. The burden is upon the Pine Bluff Company to show by a preponderance of the evidence that the said connecting wire was actually placed there by some third person, and even this would be no defense against its liability in this case unless it has also shown by a preponderance of the evidence that the dangerous condition of its guy wire could not have been detected and corrected by the exercise on its part of ordinary and reasonable care in time to have prevented the injuries sustained by Lawson Bobbitt."

Instruction No. 14 is set out in the majority opinion and need not be repeated here. I believe a comparison

of the two instructions shows that the instruction given fully and fairly covers the matters embraced in the refused instruction, and it is well settled that the trial court need not repeat instructions on the same phase of the case. Neither do I think that any prejudice resulted from the admission of evidence as indicated in the opinion.

HUMPHREYS, J., (on rehearing). On motion for rehearing, learned counsel for appellee strenuously insist that this court erred in admitting the testimony of Max Fry to the effect that Flint Green who was working for appellant, attempted to induce him to admit that he had attached the foreign wire to the two wires in question, upon a promise that appellant would pay his fine. It is urged that this testimony was admissible for the purpose of impeaching P. C. Tucker, one of appellant's witnesses, who testified that Clint Green did not tell Max Fry that if he would admit attaching the foreign wire to the other two wires, the company would pay his fine. Appellant did not ask Tucker anything about this matter on direct examination. Appellee propounded the question to Tucker on cross-examination. Tucker denied that any such conversation occurred. The purported subject-matter of the conversation was incompetent and entirely collateral. Appellee was bound by the negative answer of Tucker and had no right to impeach his statement, same being collateral and incompetent as original testimony. *Furlow* v. *United Oil Mills,* 104 Ark. 489. Appellant objected and excepted to the introduction of Max Fry's testimony in this particular, and did not waive the error committed by the court in admitting it by afterwards introducing the testimony of Basham in contradiction of Fry's statement. It was the privilege of appellant, after saving its exception to the inadmissible and prejudicial testimony of Fry, to remove the damaging effect thereof, if possible, by the introduction of testimony in contradiction of his statement.

As the reversal of the judgment must stand on account of the error of the trial court in admitting Fry's testimony, we deem it unnecessary to decide whether instruction No. 14 requested by appellant and refused by the court was fully covered by instructions Nos. 5 and 6 requested by appellee and given by the court. We think, on a retrial of the cause, instruction No. 14 should be given as an alternative instruction affirmatively presenting appellant's theory of the case.

The motion for rehearing is overruled.

HART, J., I dissent from the additional opinion of Judge HUMPHREYS on rehearing to the effect that the testimony of Max Fry was collateral. Max Fry testified that, after the accident to Lawson Bobbitt, Clint Green in the presence of P. C. Tucker told the witness that if he would admit that he put the foreign wire there which caused the accident and pay a small fine, the appellant would pay the fine for him.

It seems to me that this testimony was admissible as tending to be an admission on the part of appellant that it or one of its servants, had been guilty of negligence and was endeavoring to shift that negligence to another person who was not in its employment and for whose acts it was not responsible. P. C. Tucker was the regular claim agent of appellant, and as such made an investigation of the accident. When he went to examine the boys of the Industrial School, he took Clint Green with him. He testified that the latter was talking and acting for the company on that occasion. This to my mind made the company responsible for what Clint Green did in the premises. It is true that Tucker was asked if he did not hear Clint Green tell Max Fry that, if he would admit that he had put the wire there and pay a small fine for it, the company would pay the fine, and he answered no. If the testimony was admissible, the fact that Tucker answered "No" to the question would not make it collateral.

I do not think it is sound to say that if a party to an action attempts to prove a fact which is competent by a witness, he is concluded from proving that fact because the first witness asked with reference to that fact or alleged fact answered in the negative. It is admitted that Tucker was the regular claim agent of the company, and as such it was made his duty to investigate the accident. According to his testimony Clint Green was his assistant, and on the occasion in question was talking and acting for the company. Then he had as much apparent authority in the premises as Tucker. I do not think it is in any sense a sound proposition of law to say that a claim agent of a corporation can attempt to induce a witness to testify that he was responsible for a certain act of negligence, instead of the company or its servants, and then allow the company to escape the responsibility of such act or conduct.

In this connection it may be stated that the majority opinion virtually concedes that I was correct in my dissenting opinion of the analysis of the instructions and I repeat that a simple comparison of the instructions in question shows this to be true.

MYERS v. MARTIN.

Opinion delivered June 1. 1925.

1. JURY—DRAWN JURY—OBJECTION.—Where the record recites that at the request of both parties for a drawn jury a list of eighteen qualified jurors from the regular panel was prepared in the ordinary manner, and furnished to each of the parties, from which list each party struck three names, and the twelve jurors remaining were impaneled, defendant cannot complain, in the absence of a specific showing, that the names were not drawn from the box.
2. EVIDENCE—PROOF OF OTHER TRANSACTIONS.—Though generally testimony must be confined to the particular transaction under investigation, and evidence of other conduct, statements or transactions is inadmissible, yet where such testimony tends to show motive or design or intention, it is admissible.

3. FRAUD—EVIDENCE.—In an action against a bank president for alleged fraudulent misrepresentations, inducing the purchase of stock by plaintiff, testimony that he made misrepresentations to other prospective purchasers *held* competent as tending to show motive and a general scheme to induce people to buy stock in the bank.

4. FRAUD—MISREPRESENTATIONS.—It is not essential to the liability of a bank president for misrepresentations to plaintiff in regard to the value of bank stock that defendant should have been directly interested in the sale of such stock, as indirect misrepresentations, in the absence of contractual relations with the person to whom the representations are made, create liability.

5. FRAUD—LIABILITY FOR MISREPRESENTATIONS.—Where a bank president, making fraudulent representations in regard to the value of stock to a prospective purchaser, had peculiar knowledge as to the conditions of the bank, the purchaser had a right to rely on such representations; and where he did rely thereon, and they were fraudulent, the president is liable, though the purchaser made no further inquiry.

6. APPEAL AND ERROR—WEIGHT OF EVIDENCE.—The weight of evidence is a matter within the province of the jury and the trial court.

Appeal from Boone Circuit Court; *J. M. Shinn,* Judge; affirmed.

S. W. Woods, E. G. Mitchell, Karl Greenhaw and *Marvin Hathcoat,* for appellant.

Shouse & Rowland, for appellee.

McCULLOCH, C. J. Appellee instituted this action against appellant to recover damages alleged to have been sustained in the purchase of certain bank stock by fraudulent misrepresentations made to him by appellant in regard to the value of the stock. Appellant denied all the allegations of fraud and deceit, and on the trial of the issue the verdict was in favor of appellee.

The controversy relates to the sale and purchase of capital stock of the Farmers' Bank of Harrison, Arkansas. Appellee purchased stock in the bank of the par value of $1,100—the purchase of $1,000 of the stock being made by appellee from John Ross, a stockholder, and another purchase of $100 from Ival Presley, and appellee claims that appellant made false and fraudulent

misrepresentations to him concerning the value of the stock in order to induce him to purchase it.

It is undisputed that the bank was in a crippled condition, and that appellant, at the request of a State Bank Examiner, and certain other bankers in Harrison, was induced to buy stock in the bank, and become its president, in order to rescue the affairs of the bank from disaster. Appellant purchased $1,000 stock and was made president of the bank and operated the bank for a time. To meet the requirements of the State Bank Commissioner, appellant, as president, and the other members of the board of directors issued a call upon all stockholders for payment of thirty per cent. of their stock. Many of the stockholders complained at this call, and some of them refused to respond. At this time appellee purchased the stock of Ross and Presley, and responded to the call by paying into the bank thirty per cent. of the face value of the stock. He claims that before making the purchase he consulted appellant about the purchase, and that the latter assured him that the payment of a thirty per cent. assessment by stockholders would take care of all the bad paper and put the bank in as good shape as any bank in town. Appellee testified that he relied on this statement, and purchased the stock and paid the assessment on the faith of it, the aggregate sum paid being $880, and that he lost it all by the bank's subsequent failure. It is undisputed that the bank went out of existence a few months later, the assets being barely sufficient to pay the depositors.

Appellant denied that he made any misrepresentations to appellee or to any one else concerning the financial condition of the bank. He testified that, after appellee purchased stock in the bank, he merely remarked to appellee that he was glad to have him identified with the bank, and that this was all that ever occurred between him and appellee with reference to the latter being a stockholder. Appellant testified that he had no interest in the bank except the investment of $1,000 in stock, and that he was induced to make this investment and take charge of

the bank at the request of a bank examiner and some of the other bankers in town, in an effort to improve the financial condition of the bank.

Appellee was allowed, over appellant's objection, to prove by other witnesses that appellant made misrepresentations to other prospective purchasers of stock concerning the financial condition and solvency of the bank.

It is first contended that the court erred in refusing appellant's request for a drawn jury, in pursuance of the statute. Crawford & Moses' Digest, § 6383 *et seq.* The request of appellant was in writing, and is shown in the record to be a request for "a full drawn jury, twenty four in the box, eighteen to be drawn, and the first twelve to serve as a jury in this case." It will be observed that the request is not strictly in accordance with the statute, for the request is that the first twelve on the list is to serve on the jury, whereas the statute provides that after eighteen qualified jurors are drawn, a copy of the list shall be furnished to each party, "from which each may strike the names of three jurors, and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and first twelve names remaining on said original list shall constitute the jury." Crawford & Moses' Digest, § 6384. The record recites that the court overruled the request of appellant, but that "at the request of both parties hereto for a drawn jury, a list of eighteen qualified jurors from the regular panel was prepared in the ordinary manner and furnished to each of the parties hereto, from which list so prepared each party struck three names, and the twelve jurors remaining on said list after the parties hereto had struck three names each, were empaneled and accepted by the parties as a jury to try said cause." The record does not recite in so many words that the eighteen names were drawn from the box. The recital is that the eighteen names "were prepared in the ordinary manner," and the inference is that they were drawn in accordance with the requirements of the statute. We think that appellant is not in an attitude to complain without having made

some specific showing that the names were not in fact drawn from the box.

The next assignment of error relates to the ruling of the court in admitting the testimony of witnesses as to alleged misrepresentations made by appellant concerning other sales of stock. The general rule is that testimony must be confined to the particular transaction under investigation, and that evidence of other conduct, statements or transactions is inadmissible. There are, however, exceptions to this rule, and they have been recognized in decisions of this court, both civil and criminal. *White* v. *Beal & Fletcher Grocer Co.* 65 Ark. 278; *Woodward* v. *State,* 84 Ark. 119; *Ross* v. *State,* 92 Ark. 481; *National Novelty Imp. Co.* v. *Ellis,* 143 Ark. 413. Those exceptions relate to proof of motive and design or intention. Decisions of other courts cited in brief of counsel are to the same effect. The testimony was competent, we think, as tending to show that appellant was generally boosting the stock of the bank so as to enhance its value, and restore confidence in the bank. It tended to show a motive and a general scheme to induce people to invest in the stock of the bank.

It is not essential to liability that appellant should have been directly interested in the sale of the stock. On the contrary, the authorities are that an indirect misrepresentation or misrepresentations in the absence of contractual relations with the person to whom the misrepresentations are made, create liability. 12 R. C. L. 402; *Hindman* v. *First National Bank,* 112 Fed. 931; 57 L. R. A. 108; note to *Henry* v. *Dennis,* 85 Am. St. Rep. 365.

Finally, it is insisted that the evidence is not sufficient to support the verdict, but we find that there was a substantial conflict in the testimony, and that the evidence was legally sufficient to support a verdict either way. It is contended that, according to the undisputed evidence, appellee did not use due diligence to ascertain the true condition of the bank, and was not misled by the alleged false misrepresentations. According to the evidence adduced, appellee could have relied, and did

rely, on the misrepresentations of appellant; and if there were fraudulent misrepresentations which were relied on by appellee, appellant is liable for damages sustained, notwithstanding the failure of appellee to make further inquiry. Appellant was in position that he had peculiar knowledge of the condition of the bank, and appellee had the right to rely on the representations; therefore appellant cannot be heard to say that appellee should have made further investigation to ascertain the truth, instead of relying upon his statements. *Hunt* v. *Davis,* 98 Ark. 44. We are not dealing with the weight of the evidence, but merely with its legal sufficiency. The weight of the evidence was a matter within the province of the jury and the trial court.

Affirmed.

FOSTER v. GRAVES.

Opinion delivered June 1, 1925.

1. STATUTES—EXTRAORDINARY SESSION OF LEGISLATURE—SUPPLEMENTAL PROCLAMATION.—Where the Governor, under Const., art. 6, § 19, has issued a proclamation calling for an extraordinary session of the Legislature to convene, he could before the convening of such session, enlarge his original proclamation by a supplemental proclamation, specifying additional subjects for legislation.
2. APPEAL AND ERROR—APPOINTMENT OF STENOGRAPHER—VALIDITY.—Though a special statute providing for the appointment of a stenographer to transcribe the testimony in chancery cases did not go into effect until after the trial of a cause, if it was in effect when the record of the testimony was made up by the stenographer and filed thereunder, the evidence was properly preserved.
3. STATUTES—REMEDIAL ACTS—APPLICATION TO PENDING PROCEEDINGS.—Statutes in regard to remedies in procedure may be construed to apply to pending proceedings, and will be so applied, unless the language of the statute indicates a contrary intention.
4. ACKNOWLEDGMENT—FORGERY—BURDEN OF PROOF.—Where a deed on record purports to have been acknowledged before a notary public, the burden of proving by a preponderance of the evidence that signatures to the deed and the acknowledgment were forged is upon the party attacking the deed.

5. MINES AND MINERALS—FORGERY OF DEED—EVIDENCE.—In a suit to cancel oil and gas royalty deeds for forgery, a finding that the deeds were forged *held* against the weight of the evidence.

6. APPEAL AND ERROR—CONSIDERATION OF AFFIDAVITS.—While the Supreme Court in a chancery case can not on rehearing, consider affidavits filed before it for the purpose of testing the correctness of its decision, or the decision of the trial court, it may consider such affidavits for the purpose of determining whether or not a new trial should be permitted.

7. APPEAL AND ERROR—DISCRETION TO REOPEN CHANCERY CASE.—It is within the discretion of the Supreme Court whether, on reversal of a chancery case, the case should be reopened for a new trial.

Appeal from Union Chancery Court, Second Division; *W. T. Saye,* Special Chancellor; reversed.

Marsh & Marlin, Pat McNalley and *Saxon & Davidson,* for appellants.

George M. Lecroy, appellant, *pro se.*

Powell, Smead & Knox, for appellees.

WOOD, J. Appellee, Buchanan Graves, is the owner of a tract of land in Union County, containing eighty acres, and he and his wife, Jennie, gave an oil and gas lease on forty acres, reserving a royalty of one-eighth of the production of oil or other minerals. This action was instituted by appellees Buchanan Graves and his wife, Jennie, against appellant Foster and his grantees to cancel and set aside two deeds purporting to have been executed by appellees to Foster, conveying one-half of the royalty theretofore reserved by appellees in the aforementioned lease executed by them.

One of the deeds sought to be canceled was dated May 10, 1923, and was filed for record on May 23, 1923, and the other deed was dated May 29, 1923, and filed for record on the same date. The two deeds covered the same property, and the last one was executed, as claimed, to cure a slight defect in the form of the first deed. Foster conveyed certain portions of the royalty to appellees Ratcliff, Wilson, Hawkins, LeCroy and Ellison, all of whom were joined as defendants in this action.

It is alleged in the complaint that the deeds were both forgeries—that neither of the appellees executed

the deeds or appeared before any officer to acknowledge the same. The answer contained appropriate denials of the allegations of the complaint, and the cause was heard by the court on oral and documentary evidence. The trial resulted in a decree in favor of appellees canceling the deeds as forgeries. The appeal calls merely for a review of the facts to determine whether or not the findings of the chancery court were against the preponderance of the evidence, but counsel for appellees raise the question in the outset that the testimony of witnesses adduced *ore tenus* is not preserved in the record so as to properly bring it before us for review, and that we must therefore indulge the presumption that the decree appealed from was supported by the evidence.

It is conceded that the General Practice Statute in regard to preserving oral testimony in chancery cases (Crawford & Moses' Digest, § 1269) was not complied with, in that there was no order of the court entered designating a stenographer to take down the testimony and transcribe and file the same. *Harmon* v. *Harmon,* 152 Ark. 129; *McGraw* v. *Berry,* 152 Ark. 453; *Sercer* v. *Hamilton,* 155 Ark. 639; *Smith* v. *House,* 163 Ark. 423.

The General Assembly at the extraordinary session which convened September 24, 1923, enacted a statute regulating the practice in the Seventh Chancery District and providing for the appointment of a stenographer with authority to take down, transcribe and file the testimony in chancery cases. This statute was approved by the Governor on October 13, 1923. The decree appealed from in this case was rendered on November 15, 1923, and the evidence was transcribed by the court stenographer appointed in accordance with the terms of this statute and was filed with the clerk of the chancery court on January 15, 1924. The terms of this statute were complied with, but it is contended by counsel for appellees that the statute is invalid for the reason that it was not within the specification of the Governor's original proclamation convening the Legislature in extraordinary session, and that, though embraced within the specifica-

tions of a supplemental proclamation issued by the Governor prior to the convening of the Legislature, the Governor had no authority to supplement his original proclamation by additional specifications of subjects to be dealt with by the Legislature. It is also contended that the emergency clause was not voted by two-thirds of the members of each house on separate roll call, as provided in Amendment No. 13 to the Constitution, recently declared adopted in the case of *Brickhouse* v. *Hill,* 167 Ark. 513, and that the statute had no application for the reason that it did not go into effect until January 10, 1924, which was ninety days after the adjournment of the special session, and has no controlling effect in making the record in this case.

It is conceded that the subject-matter of this statute was not embraced within the original proclamation issued by the Governor on September 8, 1923, calling the extraordinary session of the Legislature to convene on September 24, 1923, but that on September 17, the Governor issued a supplemental proclamation specifying additional subjects for legislation, and that one of those subjects embraced the statute now under consideration.

In the case of *Sims* v. *Weldon,* 165 Ark. 15, we decided that the Governor was without power, after the commencement of an extraordinary session of the Legislature, to specify additional subjects of legislation so as to enlarge the scope of the original proclamation, and the question now presented is whether or not the Governor has the power, before the convening of an extraordinary session, to enlarge his original proclamation calling the session by specifying additional subjects of legislation. In the case of *Sims* v. *Weldon,* we expressly pretermitted the question now before us by saying: "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."

Article 6, § 19 of the Constitution provides: "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 the 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 4 § 12, of the Constitution of Pennsylvania provides: "He (the Governor) may, on extraordinary occasions, convene the General Assembly, etc." Article 3, § 25 of the Constitution of Pennsylvania provides: "When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session." These provisions of the Pennsylvania Constitution, on the question now under consideration, are similar in substance and legal effect to article 6, § 19 of our own Constitution, *supra.*

In *Pittsburg's Petition*, 217 Pa. 227, one of the objections to the constitutionality of the act under review in that case, was "that it is not legislation upon a subject designated in the proclamation of the Governor calling the special session." Among other things, the court said: "Whether the General Assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called, and what notice of the call is to be given, are also for him alone. The Constitution is silent as to these matters, and wisely so, for emergencies may arise, such as riots, insurrections, widespread epidemics, or general calamities of any kind, requiring the instant convening

of the Legislature, and, in the power given to the Governor to call it, no time for the notice is too short, if it can reach the members of the General Assembly; and with telephones and telegraphs the uttermost portions of the commonwealth can at any time be reached between the rising and the setting of the sun. * * * But no form of proclamation is to be followed, and if, after one has been issued, it occurs to the executive that other subjects than those designated in it should be passed upon by the Legislature, he can unquestionably issue another, fixing the same time for the meeting of the General Assembly as was fixed in the first, and designate other subjects for its consideration. This is, perhaps, what ought to be done when other subjects than those designated in the proclamation are to be brought to the attention of the Legislature in special session, and, if it had been done in the present case, the objection of the appellants now under consideration would hardly have been raised. This, however, is not for the judiciary, but for the Governor alone. The proclamation of January 9 is in effect a second proclamation. In it the Governor adopts his original call for the purpose of fixing the time of the meeting of the General Assembly, and then proceeds to designate the additional subjects of legislation. With every presumption in favor of compliance by the executive with the constitutional requirements relating to his calling the General Assembly together in extraordinary session, it would be judicial hypercriticism to declare his second notice or proclamation insufficient to authorize the Legislature to pass the act under consideration."

We adopt the reasoning and conclusion of the above case in the construction of article 6, § 19 of our Constitution, *supra*. It follows that the power of the executive over the form of his proclamation and the subjects to be embraced therein, continues and is plenary until the Legislature has actually convened pursuant to the call contained in the proclamation. See *People ex rel. Tenant* v. *Parker*, 3 Neb. 409. The supplemental

proclamation of September 17, which included the act under review for consideration by the Legislature, expressly recites in its title that it is "A proclamation supplemental and in addition to the proclamation calling an extraordinary session of the General Assembly dated September 8, 1923," and in the body of the proclamation it is expressly recited that "the Governor did, on the 8th day of September, 1923, call an extraordinary session of the General Assembly to convene at the capitol building at the seat of government at the hour of 12:00 o'clock, M., on the 24th day of September, 1923," * * * and that, in addition to the purposes therein enumerated, others were added, including the act under review. The subjects for legislative consideration mentioned in the supplemental proclamation must be taken and considered as much a part of the original proclamation as if they had been expressly enumerated therein. We therefore conclude that the statute was properly enacted.

Since we hold that the statute under consideration was properly enacted, being within the supplemental call of the Governor, we reach the further question whether the statute applies to the making up of the record in the present case. The statute, as we have already seen, did not go into effect until January 10, 1924, by reason of the fact that there was no separate roll call as provided in amendment No. 13 to the Constitution. This omission did not render the act invalid, but merely affected the validity of the emergency clause and rendered it inoperative. Notwithstanding the fact that the statute did not go into effect until after the trial of this cause in the chancery court, it was indisputably in effect when the record of the testimony was made up by the stenographer on January 15, 1924, and filed with the clerk. The statute related merely to procedure, and was applicable to procedure pursued after it went into effect, even though the cause was pending and the decree was rendered prior to that time. The rule established by this court is that statutes in regard to remedies in procedure may be construed to apply to pending proceedings, and will be so applied

unless the language of the statute indicates a contrary intention. *Green* v. *Abraham,* 43 Ark. 420; *Sidway* v. *Lawson,* 58 Ark. 117; *Van Hook* v. *McNeil Monument Co.,* 107 Ark. 292. At the time the statute went into effect the proceedings in the trial court had come to an end, but this statute related to procedure on appeal and applied thereafter to the method of procedure in perfecting the appeal. No vested rights are disturbed by giving this effect to the statute, for, as we have already said, the statute only related to the remedy and not to any substantive right.

Our conclusion therefore is that the oral testimony has been properly preserved in the record, and we proceed to a review of the evidence for the purpose of determining whether or not the decree of the chancery court was correct—whether or not it was against the preponderance of the evidence.

The tract of land in controversy is situated in the oil district of Union County, a few miles from the town of Norphlet. Appellee and his wife resided on the lands in controversy until after the commencement of this action on June 14, 1923. Appellant Foster contends that the first deed was executed on the day of its date, May 10, 1923, in the town of Norphlet; that the deed was acknowledged by appellees, Buchanan Graves and wife, before R. E. Black, a notary public living in Camden, who happened to be at Norphlet on that day, and that Foster paid Graves, as consideration for the conveyance, the sum of $2,000 in currency—twenty bills, each of the denomination of $100. Foster testified further that he left town soon after the execution of the deed and went to Shreveport, Louisiana, without having recorded the deed, and that later, when he made a sale to another person of a portion of the royalty, it was discovered by the attorney examining the title that there was a slight defect in the deed from Graves, and that he thereupon caused a new deed to be prepared by an attorney at Camden, and that the last deed was executed by appellees and acknowledged

before the same notary, R. E. Black, at the home of appellees on the land in controversy.

Appellees both testified in the case, and each denied that they had executed either of the deeds or that they were acquainted with Foster. They denied that Foster and Black, or either of them, came to their home at any time to obtain the execution of a deed. In fact, they denied that they had ever had any transaction at all with Foster. This was all the testimony introduced by appellees except the testimony of one of their attorneys in contradiction of a statement made in the testimony of Black, the notary public who took the acknowledgments to the deeds.

Foster testified that he began negotiations with Graves for the purchase of the royalty in the latter part of March, 1923, and that, two or three days before the execution of the deed, he and Graves reached an agreement for the sale and purchase of one-half of the royalty for $2,000, and that Graves told him that he would bring his wife to Norphlet on the day named, for the purpose of executing the deed. He testified that he was at that time dealing in oil leases, and had had a notary named Wells to take acknowledgments for him, and that, after he met Graves and wife in Norphlet on the morning in question for the purpose of consummating the sale by the execution of the deed, he could not locate Wells, and that he got Black, a notary public from Camden, to take the acknowledgments, and that he paid Graves the consideration in cash in one hundred-dollar bills. He testified that, after failing to find Wells, he saw Black enter a restaurant, that he went into the restaurant and got Black and brought him out, and that the deed was acknowledged on the street, near a certain grocery store. He testified that before closing the deal with Graves he did not get an abstract of title, but called to see an abstract company and was shown a memorandum to the effect that Graves was the patentee of the land from the United States Government, and had not conveyed it away, which satisfied him without obtaining a certified abstract. He testified that, after being told later that there was a defect

in the deed, which was unacceptable to the purchaser with whom he had negotiated a sale of some of the royalty, he then procured a new deed, prepared by an attorney, and made an engagement with Black to go back and see Graves and get the new deed signed, which was done by Graves and his wife at their home, on May 29, 1923.

Black's testimony coincided with that of Foster. He testified that he had no interest in the litigation, but was merely called on to take the acknowledgments while he chanced to be in Norphlet on business, and that later, when it became necessary to get a new deed signed for the correction of errors in the old one, he went with Foster, at the latter's request, to the home of the Graves and there took their acknowledgment to the new deed. He testified that he was not very well acquainted with Graves at the time of the execution of the deed but had met him and talked with him a few weeks before this transaction, and that he had never met Graves' wife, Jennie, before that day and was not acquainted with her. He pointed out both Graves and his wife during the trial of the case in the court room as being the two persons who acknowledged the deed. Graves and wife were both illiterate negroes and signed by mark.

Foster and Black both testified that the second deed was executed during the forenoon of the day mentioned, and that it occurred on the front porch of the home of appellees. They both testified that a man by the name of Gamble was present when the first deed was executed, but that Gamble had been accidentally killed in Louisiana since that time; that a man by the name of Sexton was present when the second deed was executed at the home of appellees, but that Sexton was absent from the trial and then lived somewhere in Florida, his exact whereabouts being unknown to them. Foster testified that on the morning he secured the first deed from appellees he paid a man named Carter Bell for a lot he had purchased from the latter, and still had $600 in money left. Bell testified that, on the morning in question, Foster paid

him twelve dollars, balance due on a lot, and that he saw that Foster had a large roll of one-hundred-dollar bills, apparently as much as $2,500. He testified further that at the time this occurred Foster asked him if he had seen Buchanan Graves in town, and he told Foster that he had seen him there that morning. Neither Foster nor Bell claimed that the latter was present when the deed was executed.

Foster was subjected to a very rigid cross-examination as to where he got the money he used in paying for the alleged conveyance, and why he had not given checks on the bank instead of using currency. He undertook to give an account of the source of his accumulations, and there are some discrepancies or inconsistencies in his testimony.

It appears from the testimony of witness Black and other witnesses that about the time this suit was commenced Black was arrested for the alleged forgery and put in jail for a time before giving bond. He was asked whether or not he had, in conversation with Mr. Smead, one of the attorneys for appellees, while witness was confined in jail, stated that he did not know Buchanan Graves or his wife. Black's answer was that he had said to Mr. Smead that he saw them once before, and that he did not tell Mr. Smead that he did not know them. His testimony was, as before stated, that he had met and talked to Graves once before, but had never seen his wife before, and was not acquainted with her.

H. F. Flocker testified that on or about May 29, 1923, he was at work as a contractor in the construction of a pipe line near the home of Buchanan Graves, and that he saw R. E. Black standing close to the gate talking to another man, and that Foster, with whom he was also acquainted, was standing there with a paper in his hand, and that both Graves and his wife were present. He testified that he was not interested in this controversy and knew nothing about the facts except the mere circumstance of seeing Foster and Black at the home of appellees on that morning, that all he knew about it was that

he happened to be digging a pit about one hundred yards of Graves' house that morning and saw the parties there in the yard, as above stated.

Tom Cargile testified that he was acquainted with appellant Foster and also with R. E. Black and appellee, Buchanan Graves, and that he saw Black and Foster at the home of Graves in the latter part of May, about May 30, and noticed that Black had a paper in his hand and was doing some writing. He testified that he and his brother were out there looking for work.

Sam S. Cargile testified to the same effect as his brother Tom. They both stated that this occurred about 9:30 or 10 o'clock in the morning, and that as they passed they hollered "hello" to Black and saw that he had some papers and was doing some writing. It is to be borne in mind at this point that Graves and his wife both testified that they were not acquainted with either Foster or Black and that neither of those parties were at their house on any occasion.

Clyde Carter testified that he was in Norphlet on May 10, 1923, and while standing in front of a certain cafe or restaurant he saw a man, whom he recognized at the time the testimony was given as appellant, go into the restaurant and speak to R. E. Black and request him to do some notary work, and that appellant and Black left the restaurant together.

The law of this case has been fully settled by a recent decision of this court. *Miles* v. *Jerry,* 158 Ark. 314. The purported deeds having been duly recorded, the burden of proof is upon the party challenging their authenticity to prove his case by a preponderance of the evidence. The burden therefore rested on appellees to show by a preponderance of the evidence that the deeds were forged. The only affirmative testimony offered by appellees is that of their own. They are not corroborated by any other witness, while, on the other hand, Foster, who is interested to the same extent as each of the appellees, is corroborated in every detail by Black, who is disinterested except to the extent of his interest in the

assault that is made upon his own integrity in participating in the alleged forgery; and by witnesses Flocker, Tom Cargile and Sam Cargile, who are apparently disinterested, and who each testified that they saw Foster and Black at the home of the Graves talking to them and apparently carrying on a transaction which called for the execution of papers. This is in positive contradiction of the testimony of both of the appellees. If the testimony of these witnesses is true, then the testimony of both of the appellees is false. It is true that there are some inconsistencies in the details of Foster's testimony, especially with reference to the manner of his accumulation of the money and in paying for the conveyance. It may be said also that there are inconsistencies in the testimony of both of the appellees. It is likewise true that witness Black is, to some extent, contradicted by the testimony of Mr. Smead, one of the attorneys for appellees. But it must be remembered that this contradiction related to a conversation while Black was in jail, and the contradiction was so slight that it may be attributed to some misunderstanding as to just what particular words were used. Mr. Smead testified that he went to see Black while the latter was in jail, being then the attorney for appellees, and Black told him that he did not know "Buck" Graves and had not seen him to know him in his life, but that he had taken the acknowledgment of somebody. Black testified that he was not acquainted with Jennie Graves at all and had never seen her before the day the deed was executed, but he identified her when he saw her in the court room at the trial as being the woman who had executed the deed as the wife of Buchanan Graves. He testified that he was only slightly acquainted with Buchanan Graves, and that he talked to him once before the execution of the deed. Under these circumstances it can easily be seen that Mr. Smead may have misunderstood what Black said with reference to his acquaintance with the two persons, Graves and wife.

Making due allowances for the inconsistencies in all the testimony, we are of the opinion that the testimony

adduced by appellees does not preponderate, and that the finding that the deeds were forgeries was clearly against the preponderance of the evidence. In order to sustain that finding, we must absolutely disregard the material testimony of witnesses not shown in the slightest degree to be interested in this litigation.

The decree of the chancery court was therefore erroneous, and the same is reversed, and the cause is remanded with directions to enter a decree dismissing the complaint for want of equity.

McCULLOCH, C. J., dissents.

OPINION ON REHEARING.

WOOD, J. We are asked to reconsider the conclusions reached on the questions involved, both of fact and of law, and, having done so, we adhere to the conclusions expressed in the former opinion. Appellees have filed here since our decision was rendered the affidavit of R. E. Black, one of the material witnesses, repudiating his testimony given at the trial below, and they ask that the judgment of the court be modified so as to allow a retrial of the issues on remand of the cause, instead of directing the entry of a decree. Counter affidavits have been filed by both parties bearing on the question whether the witness did in fact voluntarily repudiate his testmony, or whether he was, as he since claims, coerced or imposed upon. We cannot consider any of those affidavits for the purpose of testing the correctness of our decision or the correctness of the decision of the chancery court, as the record made in the court below must furnish the sole test. We can, however, consider those affidavits for the purpose of determining whether or not a retrial of the issues should be permitted.

The usual practice on appeals in chancery cases is to end the controversy here by final judgment, or by direction to the lower court to enter a final decree, but there are exceptions, and it rests in the discretion of this court to determine, under the circumstances, whether, upon a reversal of a chancery cause, the same should be

opened for a new trial. *Carmack* v. *Lovett,* 44 Ark. 180; *Long* v. *Chas. T. Abeles & Co.,* 77 Ark. 156; *Gaither* v. *Gage,* 82 Ark. 51; *Carlisle* v. *Carrigan,* 83 Ark. 136. Here the circumstances are peculiar and unusual.

The fact that there is evidence of a repudiation by such a material witness as Black of his former testimony presents a situation which makes it appropriate to permit the facts to be re-examined in the trial court. We are not at liberty to determine here whether or not the witness has in fact voluntarily repudiated his former testimony, but we consider it only for the purpose of determining whether or not we should vary the usual practice, by sending the case back for a retrial after having reached the conclusion on the record before us, which was made in the lower court, that the evidence is insufficient to warrant the decree of the chancery court.

The former judgment of this court will therefore be amended so that on remand of the cause to the chancery court for further proceedings the cause will be reopened and the parties on each side may be permitted to introduce further testimony bearing upon all the issues. The cause will be retried by the chancery court. The petition of appellee for a rehearing is in all other respects denied.

McCULLOCH, C. J., (dissenting). My only difference with the majority of the court relates to that part of the opinion which holds that the Governor has the power, after he has called an extraordinary session of the General Assembly, to enlarge the subjects to be considered. In my judgment the executive has no such power. It is true that in the case of *Sims* v. *Weldon,* 165 Ark. 13, holding that the Governor had no right to enlarge the subjects by supplement after the Legislature convenes, we pretermitted the question whether or not he could do so before the extraordinary session begins. But it seems to me that it necessarily follows from that decision that if the Governor has no power to issue a supplemental call or to enlarge the subjects of legislation after the

session begins, he has no power to do so before them. There is no distinction whatever that I can observe. If his power is not exhausted by the first call, there is no reason why he does not under the Constitution possess the power to continue to enlarge the subjects after the session begins.

The executive authority to call a special session of the Legislature is an extraordinary power, and the Constitution itself specifies in detail how that power shall be exercised and what authority shall result therefrom to the General Assembly itself. The Constitution (Art. 6, § 19) specifies a single act for the Governor to perform, and that is that he may "by proclamation on extraordinary occasions convene the General Assembly," and "shall specify in his proclamation the purpose for which they are convened." Certainly there is no express authority to do anything more than that, and it seems to me that, as the Constitution proceeds at that point to a detailed statement of the powers of the Legislature, it excludes any additional power on the part of the executive. In other words, the Constitution authorizes him to issue one proclamation calling that particular session of the Legislature, and he shall specify in that single proclamation the subjects of legislation which are to be considered. It is true that there are no limitations upon the number of special sessions that he may call, but there is a clearly implied limitation upon his acts with respect to any one particular session. I think that the executive's power is exhausted when he issues a proclamation calling a session and specifying the subjects of legislation. By that act he creates the authority for the convening of the Legislature and limits the subject of legislation, and then his power ceases. He has no authority to revoke the call, for the exercise of it has gone beyond his control. Neither has he any authority to enlarge the scope of the legislation, for the Constitution in express terms leaves it to the General Assembly itself to determine when and under what circumstances other matters may be considered.

The purpose of calling a special session of the General Assembly is to meet unforseen emergencies of great import. The Constitution says that such session may be called "on extraordinary occasions," meaning of course, in great emergencies. The thought that was in the minds of the framers of the Constitution was that when those emergencies arose the Governor would know and would be prepared to state the subjects, which were thought to be sufficient to meet the extraordinary situation then impending. It is true that the chief executive himself is the sole judge of the necessity for the call or the subjects upon which there is to be emergency legislation, but in conceding to him authority to amend his call and to add other subjects of legislation we must assume that he has found that a new emergency has arisen which is sufficient to call into exercise his extraordinary powers. I think that if the framers of the Constitution had intended to confer any such continuing power upon the executive, they would have said so in plain language.

SHERWIN-WILLIAMS COMPANY v. LESLIE.

Opinion delivered June 1, 1925.

1. REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE.—Where the uncontroverted proof showed that it was the intention of the parties to a deed that certain lands should have been included, and that it was omitted through the oversight of the scrivener who prepared the deed, as between such parties the deed will be reformed.
2. REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—SUBSEQUENT MORTGAGEE WITH KNOWLEDGE.—Where a mortgage by mistake of the scrivener omitted a tract of land, and a subsequent mortgage of the omitted land contained a clause that it was subject to a first mortgage to the named mortgagee in a stated sum, the subsequent mortgagee was bound by such recital, and the first mortgagee was entitled to reformation of his mortgage so as to include the omitted land as against the second mortgagee.

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

Sleator & Slattery and *W. C. Rodgers,* for appellant.

A. F. Auer, for appellee.

WOOD, J. On the 23rd of September, 1920, J. S. Norman and wife executed a deed of trust in favor of Mrs. Kate A. Fowler to secure her in the sum of $5,000. Sam E. Leslie was named as trustee in the deed. The deed embraced the following lands:

SE¼ of SE¼ section 25, and W½ of NE¼ of NE¼, section 36, township 9 south, range 27 west, except one acre in the northwest corner, in Howard County, Arkansas; and the N½ of SE¼ of section 19, township 9 south, range 26 west in Hempstead County, Arkansas.

On the 26th of December, 1922, the Ozark Nursery & Seed Breeding Farms, a corporation, through its president, J. S. Norman, and M. C. Foster, its secretary, executed a deed of trust to the Sherwin-Williams company, hereafter called company to secure a promissory note in the sum of $2,203.94, which was due April 1, 1923. The deed of trust to the company contained the following land:

"SE¼ of SE¼ and the NE¼ of SE¼, section 25, and the W½ of NE¼ of NE¼ of section 36, all in township 9 south, range 27 west, Howard County, Arkansas, except one acre in the northwest corner of last-named tract."

The deed of trust to the company was duly recorded on December 28, 1922. It contained the following clause: "This deed of trust is subject to a first mortgage to Mrs. Kate C. Fowler in the sum of $6,000."

This action was begun by Sam E. Leslie, trustee, in the chancery court of Howard County against Norman and wife, and one J. S. Butt and the company to foreclose the deed of trust in favor of Mrs. Kate C. Fowler. Leslie alleged that in addition to the land actually conveyed and described in the deed of trust to Mrs. Fowler, it was intended to include the following land situated in Howard County: The NE¼ of SE¼ of section 25, township 9

south, range 27 west. He further alleged that the company claimed an interest in the land above described by virtue of the deed of trust executed to it. Leslie prayed that the deed of trust to him in favor of Mrs. Fowler be reformed, so as to include the lands last above described and that the trust deed as thus reformed be foreclosed.

The company, in its answer, denied that the mortgage to Mrs. Fowler was prior in date to its mortgage, and alleged, by way of cross-complaint, that its mortgage on the NE¼ of SE¼ of section 25, township 9 south, range 27 west, was senior and paramount to Mrs. Fowler's mortgage, and the company prayed that its lien on this tract be declared superior to that of Mrs. Fowler, and that its mortgage be foreclosed on said land.

The undisputed proof was to the effect that the grantors in Mrs. Fowler's mortgage intended to include the tract of land in Howard County in controversy, and that the grantors were living on that tract when the mortgage in favor of Mrs. Fowler was executed, and by oversight the scrivener omitted that tract. It was agreed by the parties that the company had no knowledge or notice of an intention on the part of the grantors in the mortgage to Mrs. Fowler to include therein the NE¼ of SE¼ of section 25, township 9 south, range 27 west, in Howard County, Arkansas, unless the clause, "this deed of trust is subject to a first mortgage to Mrs. Fowler in the sum of $6,000," constituted such notice. It was agreed that, if Mrs. Fowler's mortgage should be construed to include the lands last above mentioned, then judgment should be rendered and foreclosure had of the mortgage on the lands mentioned in her favor; otherwise, the judgment and foreclosure on the tract mentioned should be in favor of the company.

The trial court, upon the facts as above set forth, found that the mortgage to Mrs. Fowler included the tract of land in controversy as above described, and that her mortgage should be reformed so as to include such tract. The court rendered a decree in her favor, fore-

closing the mortgage on such tract, and from that decree the company prosecutes this appeal.

As between Mrs. Fowler, the beneficiary, and the grantors in the deed of trust from Norman and wife to Leslie, the trustee, Mrs. Fowler was entitled to a reformation of the deed of trust so as to include the lands in controversy, under the uncontroverted proof that it was the mutual intention of all parties to that deed of trust that such lands should be included and that it was omitted merely through oversight of the scrivener who prepared the deed of trust. *Craig* v. *Pendleton,* 89 Ark. 259. Therefore, the deed of trust from Norman and wife to Leslie, the trustee, in favor of Mrs. Fowler, executed September 23, 1920, should read as if it originally included, in addition to the lands therein described, the NE¼ of SE¼ of section 25, township 9 south, range 27 west, in Howard County, Arkansas, the same being the tract of land in controversy.

As between the appellant and the appellee, Mrs. Fowler, the only issue is whether or not the latter is entitled to have her deed reformed so as to give her a lien on the land in controversy, which is paramount to the lien of appellant under its deed of trust. We believe the doctrine of the above case is also decisive of this issue, for, in that case, it is held (quoting syllabus): "Where a mortgage by mistake incorrectly describes land intended to be conveyed, the mortgagee is entitled to reformation thereof as against the mortgagor or any subsequent purchaser with notice of the mistake." The notice mentioned in the above excerpt means either actual or constructive notice.

Now, the uncontroverted proof, as we have seen, shows that Mrs. Fowler did have a mortgage on the land in controversy to secure an indebtedness due her from the Normans in the sum of $6,000. The appellant expressly contracted with the grantors in its deed of trust that its mortgage was subject to the prior deed of trust to Mrs. Kate A. Fowler for the sum of $6,000. This provision was embodied by the grantors in appellant's

deed of trust. It shows that the appellant contracted with its grantors in the deed to make the appellant's deed of trust subject to Mrs. Fowler's deed of trust. This provision was for the benefit of Mrs. Fowler as well as for the benefit of the grantors in appellant's deed of trust. J. S. Norman was the president of the Ozark Nursery & Seed Breeding Farms, and he was also the grantor in Mrs. Fowler's deed of trust. The parties to appellant's deed of trust were contracting with reference to any first mortgage that embraced the lands in controversy which had been executed in favor of Mrs. Fowler, regardless of whether such mortgage had been placed of record or not. If the parties to appellant's deed of trust had intended that the clause in controversy should refer only to a mortgage in favor of Mrs. Fowler that had been put of record, it would have been easy and the natural thing to do to refer to such mortgage as of record. But such is not the language of the clause mentioned. By reason of the fact that this clause expressly mentions Mrs. Kate Fowler as having a first mortgage and specifies the amount of same, the appellant must be held to these recitals, and they show that appellant had knowledge of the fact that Mrs. Fowler had a prior mortgage to the land in controversy. If the clause had stopped with the language, "this deed of trust is subject to a first mortgage," then appellant's contention would be more plausible, but since it specifically named the mortgagee in the first mortgage, and specified the amount of that mortgage, and states that the mortgage to Mrs. Fowler is a first mortgage, and that it is subject thereto, it occurs to us that this language is tantamount to saying that the mortgage to the appellant is subject to the first mortgage of Mrs. Fowler for the same property.

Such recitals bring the case at bar clearly within the doctrine announced by us in *Reidmiller* v. *Comes,* 158 Ark. 23, where we said: "This court has also held that, by accepting a mortgage which recites the first mortgage and provides for its payment, the second mortgagee, whose mortgage has been first filed for record, estops

himself to deny the existence of the said mortgage and the validity of its lien. * * * Between conflicting mortgages, the one first filed for record will have precedence, *in the absence of a recital that it is made subject to another mortgage on the same property.*" True, both mortgages in the above case were filed for record, but the doctrine of estoppel, which was controlling in that case, was predicated upon the fact that the second mortgage contained a recital that it was subject to a first mortgage on the same property. We are convinced that it was not in the contemplation of the parties to appellant's mortgage that appellant should have a first mortgage, or a superior lien on the land in controversy to the mortgage of appellee, Mrs. Fowler, but just to the contrary.

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

DISSENTING OPINION.

McCULLOCH, C. J. The writer and Mr. Justice HART have the view that, while full recognition should be given to the doctrine that acceptance of a deed reciting the existence of a prior incumbrance constitutes notice thereof to the grantee, yet under the facts of the present case the recital in appellant's mortgage should be treated as having reference merely to the prior recorded mortgage to appellee. Appellant had no notice that the tract of land in controversy was intended to be included in the mortgage to appellee, and had the right to assume that the recital referred to the prior recorded mortgage and to none other. Appellant was not, by the recital, put on notice as to any other incumbrance.

BABERS v. STATE.

Opinion delivered June 1, 1925.

1. SEDUCTION—CORROBORATION OF PROSECUTRIX.—To sustain a conviction for seduction under a promise of marriage, the prosecuting witness must be corroborated as to the promise of marriage and the fact of sexual intercourse.
2. SEDUCTION—SUFFICIENCY OF EVIDENCE.—In a prosecution for seduction under promise of marriage, evidence corroborating the prosecutrix *held* sufficient to sustain a conviction.
3. CRIMINAL LAW—INSTRUCTIONS SINGLING OUT EVIDENCE.—Requested instructions singling out certain evidence and instructing as to the weight to be given to it *held* properly refused; the weight of the evidence being a jury question.
4. CRIMINAL LAW—ADMISSION OF ACCUSED.—In a prosecution for seduction, a statement of the accused that he was going to marry the prosecutrix *held* competent as an admission corroborating testimony of the prosecutrix that he had promised to marry her.

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

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, for appellee.

HART, J. Willie Babers was indicted and convicted before a jury of seducing Era Zachary under a promise of marriage. The case is here on appeal.

For a reversal of the judgment it is contended that there is not sufficient corroborating evidence of the prosecuting witness. Under our statute the defendant in a seduction case shall not be convicted upon the testimony of the prosecuting witness, unless corroborated by other evidence as to the promise of marriage, and the fact of sexual intercourse. *Lasater* v. *State,* 77 Ark. 468.

According to the testimony of the prosecuting witness, the defendant kept company with her for several months. He promised to marry her, and by virtue of his promise of marriage she had sexual intercourse with him a number of times, and as the result of it a child was born unto her.

Members of her family testified that the defendant had been waiting on her during the time stated in her

testimony. Other witnesses testified that the defendant told them that he and the prosecuting witness were going to get married. Still another witness testified that, after the defendant was arrested, he stated to him that if he had known that the prosecuting witness was pregnant he could have gotten away before he was arrested. This evidence was sufficient to corroborate the testimony of the prosecuting witness in both the respects required by the statute.

The action of the court in instructing the jury is also assigned as error calling for a reversal of the judgment. We have examined the instructions, and find that they fully and fairly cover the respective theories of the State and of the defendant. Moreover, this is the second appeal in the case, and these same instructions were approved on the former appeal. *Babers* v. *State,* 164 Ark. 381.

The next assignment of error is that the court erred in refusing instructions Nos. 7 and 8 requested by the defendant. We do not deem it necessary to set out these instructions. Both of them single out certain evidence and in effect instruct the jury as to the weight to be given to it. Under our Constitution it is for the jury and not the court to decide upon the weight to be given to the evidence. *Bullard* v. *State,* 159 Ark. 435; and *Fields* v. *State,* 154 Ark. 188.

Another assignment of error is that the court erred in allowing a witness to testify that the defendant had told him that he was going to marry the prosecuting witness.

As we have already seen, under our statute the prosecuting witness must be corroborated both as to the promise of marriage and the fact of the sexual intercourse. The admission of the defendant to the witness that he was going to marry the defendant was in the nature of an admission that he had promised to marry her, and was competent testimony to corroborate the prosecuting witness on this point.

No brief has been filed for the defendant, but under our rules we have considered the other assignments of error set out in his motion for a new trial. We do not find any prejudicial error in the record, and the judgment will therefore be affirmed.

THOMPSON v. KINARD.

Opinion delivered June 1, 1925.

1. DEEDS—FORGERY—BURDEN OF PROOF.—The burden of proof is on one who alleges the forgery of a deed to establish it by a preponderance of the evidence.
2. DEEDS—FORGERY—EVIDENCE.—Evidence *held* to sustain a finding that a power of attorney was not forged.
3. PRINCIPAL AND AGENT—POWER OF ATTORNEY TO EXECUTE DEED.—Where one known by several names executed a power of attorney authorizing the execution of deeds to real and personal property in such manner as the principal could do, the attorney was empowered to execute a deed by a name by which the principal was known, though it was not the name that was signed to the power of attorney.
4. PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S ACT.—A party giving a power of attorney will be held to have ratified a deed by the attorney by receiving a cash payment and accepting the notes for the balance of the purchase money.

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

STATEMENT OF FACTS.

Lena Thompson brought this suit in equity against J. T. Kinard, W. J. Kinard and Lula Payne to cancel and set aside a deed purporting to have been executed by J. T. Kinard, as attorney in fact for Lizzie Oliver to Lula Payne to a lot in the city of El Dorado, Union County, Arkansas.

According to the allegations of the complaint, Lena Thompson is the mother of Lizzie Oliver, who died intestate in said county and State in January, 1922, and left surviving her her mother as her sole heir at law. The

suit was defended on the ground that Lula Payne had acquired the legal title to said property.

The deed in question purports to have been executed on the 8th day of August, 1921, and is signed "Lizzie Oliver by J. T. Kinard, attorney in fact." The consideration recited in the deed is $275. $137 of the purchase price was paid in cash and the balance is represented by fourteen promissory notes of $10 each, payable respectively on the 10th day of September, 1921, and each year thereafter for the fourteen years. A vendor's lien was reserved in the deed to secure the payment of said notes. The deed was duly acknowledged before W. J. Kinard, a notary public, and a son of J. T. Kinard.

The power of attorney under which the deed was executed was dated June 14, 1921, and was also duly acknowledged before W. J. Kinard, notary public. The body of the power of attorney reads as follows:

"Know all men by these presents:

"That I, Lizzie Alderson, nee Turner, do by these presents constitute and appoint J. T. Kinard of El Dorado, my true and lawful attorney in fact, in my name, place and stead, to execute deeds, leases, receipts and all matters, chattels and goods of any kind, both real and personal, in as true and lawful manner as I myself could do if present, and I hereby ratify and confirm all acts that my attorney shall perform for me and in my name place and stead."

Lena Thompson was the principal witness for herself. According to her testimony she was the mother of Lizzie Allison, who is also known as Lizzie Oliver, Lizzie Turner and Lizzie Alderson.

Lizzie Allison died intestate in Union County, Arkansas, on January 6, 1922. Lena Thompson had another daughter called Sula Henderson. She had two sons named respectively Monroe and Calvin Thompson. She helped her daughter, Lizzie Allison, buy the town lot in question. During the first part of the year 1921, Lizzie Allison lived at Dierks, Arkansas, and came back to El

Dorado in Union County in November of that year. Lizzie Allison lived at Dierks during the month of June, 1921. Lizzie Allison could neither read nor write and could not sign her own name.

Two other witnesses testified that they knew Lizzie Allison, and that she could neither read nor write. They also stated that she could not even write her own name. Monroe Thompson stated that his sister Lizzie Allison lived at Dierks, Arkansas, during the month of June, 1921, and was not in El Dorado during that month. He stated further that she could not read or write.

W. J. Kinard was a witness for the defendants. According to his testimony he has no interest whatever in the case, and is the notary public who took the acknowledgment of Lizzie Allison to the power of attorney, and of J. T. Kinard to the deed to Lula Payne above referred to. He stated in positive terms that the signature to the power of attorney in question was the signature of Lizzie Allison.

J. T. Kinard was also a witness for the defendants. According to his testimony Lizzie Allison could neither read nor write, but she had learned to sign her name in the latter part of her life. He wrote letters for her often, and he usually signed her name to the letters. Lizzie Allison signed the power of attorney in question. The witness collected two of the notes and turned over the money to Lizzie Allison. He transferred and assigned the rest of the notes to Cliff Barton. He executed the deed in question to Lula Payne pursuant to the power given him by the power of attorney. He did not see Lizzie Allison sign the power of attorney; but he wrote it and gave it to Lizzie Allison to be carried to his son, W. J. Kinard, and executed before him as notary public. Pursuant to directions, Lizzie Allison took the power of attorney and left his office. In a short time she returned with the power of attorney. Her name was signed to it as grantor, and it purported to have been executed before W. J. Kinard as notary public.

Cliff Barton was also a witness for the defendants. According to his testimony, he purchased the twelve notes above referred to from Lizzie Allison and paid her for them.

Lula Payne was a witness for herself. According to her testimony both the deed and power of attorney were delivered to her and she filed them for record in the clerk's office. She admitted that she did not do this until after Lizzie Allison had died. Lula Payne paid $275 for the lot in question. She paid $137.50 cash and gave her notes for the balance of the purchase money. She also built a house on the lot, which together with other improvements, cost about $400.

The chancellor found the issues in favor of the defendants, and it was decreed that the plaintiff's complaint be dismissed for want of equity.

The case is here on appeal.

I. S. Pinkett for appellant.

Wilson & McGough, and *Jones, Ragsdale & Matheney,* for appellees.

HART, J. (after stating the facts). It is first contended that both the deed executed by J. T. Kinard as attorney in fact for Lizzie Oliver to Lula Payne, and the power of attorney executed by Lizzie Oliver to J. T. Kinard were forgeries.

The burden of proof rests upon the person denying that he signed a deed or acknowledged it to show by a preponderance of the evidence that his signature is a forgery. *Polk* v. *Brown,* 117 Ark. 321, and *Miles* v. *Jerry,* 158 Ark. 314.

To sustain the burden of proof in this respect, the plaintiff testified that her daughter, Lizzie Oliver, did not live in El Doardo, Arkansas, in June, 1921, and that her daughter could neither read nor write. The plaintiff and her son both testified to these facts. Two other witnesses also testified that Lizzie Oliver could neither read nor write. The power of attorney which is claimed to be a forgery purports to have been signed on the 14th day of

June, 1921, and to have been acknowledged on the same day in Union County before W. J. Kinard, as notary public.

Opposed to this testimony on the part of the plaintiff is the testimony of W. J. Kinard to the fact that Lizzie Oliver personally appeared before him on the day in question and signed and acknowledged the power of attorney. This testimony is corroborated by that of his father, J. T. Kinard. The latter testified that he wrote the power of attorney and then gave it to Lizzie Oliver to be carried by her to his son's office and there acknowledged. He said that Lizzie Oliver left his office with the power of attorney and in a short time came back with it signed by herself with a certificate of acknowledgment by W. J. Kinard, a notary public. The witness stated further that, while Lizzie Oliver could not read nor write, during the latter years of her life she had learned to sign her own name.

Neither J. T. Kinard nor W. J. Kinard claim any interest in the lot in controversy, nor do they ever claim to have had any interest in it. Their testimony is corroborated by the fact that pursuant to the power given, J. T. Kinard executed a deed to said lot to Lula Payne and paid that part of the purchase money received by him to Lizzie Oliver and delivered to her fourteen notes for $10 each given for the balance of the purchase money. These notes were transferred by Lizzie Oliver to C. D. Barton, and Barton testified that he paid value received to her for them.

Lula Payne testified that she took possession of the lot in question pursuant to her deed, and built a house on it. She lived in her house for a time with the knowledge of Lizzie Oliver and of the plaintiff. Finally she had a row with the plaintiff about hanging some things on the wire fence between their homes, and this, to her mind, caused the lawsuit.

The chancellor found the issues on the question of forgery of the name of Lizzie Oliver to the power of

attorney in favor of the defendants, and it cannot be said that his finding is against the preponderance of the evidence.

On the question of the forging of the name of J. T. Kinard to the deed but little need be said. Both he and his son before whom he acknowledged the deed testified that he signed the deed and acknowledged it before his son. There is no evidence in the record to contradict their testimony in this respect.

It is next contended that the decree should be reversed because the language of the power of attorney is not broad enough to authorize J. T. Kinard to execute the deed in question for Lizzie Oliver. The power of attorney is set out in our statement of facts. It will be noted that Lizzie Alderson appoints J. T. Kinard her attorney in fact to execute deeds to both real and personal property in as lawful manner as she could do. We think this language is broad enough to show that J. T. Kinard was given the authority to execute the deed in question. The undisputed evidence shows that the daughter of the plaintiff who executed the power of attorney was known under various names. She was called Lizzie Oliver, Lizzie Alderson and Lizzie Turner. Moreover, she ratified the deed executed by J. T. Kinard for her by receiving the cash payment and accepting the notes given for the balance of the purchase money.

It follows that the decree of the chancery court was correct, and must be affirmed.

McDANIEL v. BRANDON & BAUGH.

Opinion delivered June 1, 1925.

1. PARENT AND CHILD—DUTY TO FURNISH NECESSITIES.—A father is bound to supply his minor children with the necessities of life, and may be held to pay for such necessities furnished by third persons to a minor child without any control or consent, where he has failed or refused to act, or in case of some special exigency.
2. PARENT AND CHILD—IMPLIED AGREEMENT TO PAY FOR NECESSITIES.—A father's agreement to pay for necessities furnished to his minor child may be implied from the knowledge on his part that the child has on former occasions bought goods for which he has paid.
3. APPEAL AND ERROR—WAIVER OF ERROR.—Error in an instruction is waived where appellant requested a similar instruction.
4. PARENT AND CHILD—LIABILITY FOR NECESSITIES.—Where a parent, sued for necessities alleged to have been furnished to his stepdaughter, introduced evidence tending to establish that he had furnished her with necessities suitable to her condition in life, an instruction to the effect that he was liable for necessities furnished by another unless he notified the other not to supply her was erroneous in ignoring his defense that he had already supplied her necessities, and had not authorized her to buy goods on his credit.

Appeal from St. Francis Circuit Court; *E. D. Robertson*. Judge; reversed.

STATEMENT OF FACTS.

Brandon & Baugh brought this suit before a justice of the peace against Henry McDaniel on an account for goods furnished by said firm and charged on its books to said McDaniel for his stepdaughter.

The plaintiff's recovered judgment against the defendant for the sum of $78.95, and the defendant took an appeal to the circuit court.

According to the evidence for the plaintiffs, the account sued on was correct and consisted of wearing apparel sold and delivered to a stepdaughter of Henry McDaniel. Credit was given exclusively to the defendant, and the goods were necessities and suitable to the condition of the purchaser. Said stepdaughter was at the time of the purchase seventeen and a half years of age

and a member of the defendant's family. She had purchased goods for herself at the store on other occasions, had them charged to her stepfather, and he had paid for the same.

Henry McDaniel was the principal witness for himself. He admitted that his stepdaughter lived with him as a member of his family. He testified further, that he had always provided her with the necessities of life suitable to his condition; that he had never allowed any member of his family except his wife to purchase goods and charge the same to his account; that he did not authorize his stepdaughter to purchase the goods in question; and that she purchased the same after she had run away from home. The defendant also admitted that he had told another firm with whom he traded not to sell his stepdaughter anything after she had run away from home. He did this as a matter of precaution, because he was afraid she would attempt to purchase goods and have the same charged to his account. He did not notify the plaintiffs not to sell his daughter goods because he did not think of it.

The jury returned a verdict for the plaintiffs, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

W. J. Lamier, for appellant.

C. W. Norton, for appellee.

HART, J. (after stating the facts). It is insisted that the court erred in giving instruction No. 2 at the request of the plaintiffs. The instruction reads as follows:

"If you find that the defendant treated his stepdaughter as a member of his family, and undertook to supply her wants the same as for his own children, and if you find that the said stepdaughter bought the goods on the account in this case, and if you find that such goods were reasonably necessary for her comfort and support in the station of life in which the family was accustomed, then your verdict must be for the plaintiffs unless you further find that defendant had notified plaintiffs

before this bill was made not to sell goods to his said stepdaughter on his credit."

The law is that a father is bound to supply his minor children with the necessities of life. He may be held to pay for necessities furnished by a third person to a minor child without any contract or consent where there is an omission of duty on his part to furnish necessities. If the need exists and the father refuses to act, or in case of some special exigency, such as illness away from home, the father would be liable for articles of the necessary class, which a third person may furnish to his minor child. Such agreement may also be implied from a knowledge on the part of the father that his children had bought goods on previous occasions which the father had paid for. *Lufkin* v. *Harvey,* (Minn.) 154 N. W. 1097; Ann. Cas. 1917 D, 583. This general rule has been in effect adopted in this State. *Smith* v. *Gilbert,* 80 Ark. 525, and *Johnson* v. *Mitchell,* 164 Ark. 1.

But counsel for the plaintiffs invoke the well known rule that the alleged error in the instruction given was waived by reason of the defendant having requested and obtained a similar instruction on the same point. *Wisconsin & Arkansas Lbr. Co.* v. *Ashley,* 158 Ark. 379. Counsel for the plaintiffs claim that the alleged error in the instruction given was also contained in instruction No. 2, given to the jury at the request of the defendant. The instruction for the defendant reads as follows:

"The jury is instructed that it must find from a preponderance of the evidence adduced at the trial of this cause that the articles charged in the account of plaintiffs to defendant and purchased by the minor must have been necessities for the minor before you can find for plaintiffs, unless you further find that said articles were purchased from said plaintiffs by said minor by virtue of authority from the defendant."

It is true that this instruction also allows a recovery, if the jury should find that the goods charged in the account were necessities for the minor, regardless of the

fact of whether the father had furnished his stepdaughter with wearing apparel suitable to her condition in life, still the instruction precludes the plaintiffs from recovery, unless it should also find that the articles were purchased from the plaintiff by the minor by virtue of authority from the defendant.

In this latter respect instruction No. 2, given at the request of the plaintiffs is deficient. It authorizes the jury to find for the plaintiffs under certain conditions, unless it should further find that the defendant had notified the plaintiffs not to sell goods to his stepdaughter on his credit, and this without regard to the fact of whether he had authorized her to buy goods on his credit or not. This constituted error which was necessarily prejudicial to the rights of the defendant.

According to the testimony of the defendant he had furnished his stepdaughter with necessities suitable to his condition in life, and he had not authorized her to buy goods on his credit. Thus it will be seen that the theory of the defendant that he had not authorized his stepdaughter to buy goods on his credit was submitted in the instruction given at his request, and was omitted from the instruction given at the request of the plaintiffs. Therefore, instruction No. 2, given at the request of the plaintiffs, calls for a reversal of the judgment.

It follows that for the error indicated, the judgment must be reversed, and the cause will be remanded for a new trial.

LIPSCOMB v. AULENBACHER.

Opinion delivered June 1, 1925.

1. DOWER—IN PARTNERSHIP PROPERTY—INTEREST ON ADVANCEMENT.—In a proceeding in chancery to have dower assigned to the widow of a deceased partner *held* that the widow was entitled to recover a sum advanced by her and invested in a homestead which became part of the partnership assets, but, since the widow shared the occupancy of the homestead during her husband's lifetime, she is entitled to interest on her advancement only from the time she removed from the homestead.

2. DOWER—PARTNERSHIP PROPERTY.—In a proceeding to assign dower to the widow of a deceased partner, where land was purchased with partnership funds for the partnership, but deed was first made to the deceased partner individually, but, before delivery the name of the other partner was inserted in the granting but not the habendum clause as one of the grantees, the land was properly held to be partnership land, and reformation was unnecessary to the purpose of assigning dower.

3. DOWER—IMPROVEMENTS ON PARTNERSHIP LAND.—In a proceeding to assign dower to a widow of a deceased partner, where the latter had purchased land in his own name, but thereafter the other partner paid half of the purchase price, and the land was improved with partnership funds, the land as thus improved will be treated as partnership land, and dower assigned therein.

4. DOWER—PARTNERSHIP LAND—TRUST.—In a proceeding to assign dower to the widow of a deceased partner, where money which was being accumulated by the deceased partner for his grandson was used to build a house on a lot belonging to the partnership, *held* that the partnership did not hold the lot in trust for the grandson, and the widow was entitled to dower in her husband's interest therein, but provision must be made for payment from the partnership assets of such grandson's money.

5. DOWER—ADVANCEMENT TO BUY HOMESTEAD—LIEN.—In a proceeding to assign dower to a widow of a deceased partner, where the widow was entitled to a sum advanced by her to the partnership and used in the purchase of a joint homestead which became part of the partnership property, *held* that the sum so advanced was properly declared a lien on the homestead, with directions that, if it be not discharged, the homestead be sold, rather than have the widow's rights postponed by an allowance from a monthly rental of the homestead.

6. DOWER—PARTNERSHIP PROPERTY—SET-OFF.—In a proceeding to assign dower to a widow of a deceased partner, where the widow prayed and was allowed a money judgment against the surviving partner, it was proper to credit against such liability indebtedness which the widow admittedly owed to such partner.

Appeal from Clark Chancery Court, *C. E. Johnson*, Chancellor; modified.

McMillan & McMillan, for appellant.

John H. Crawford and *Dwight H. Crawford*, for appellees.

SMITH, J. Appellee is the widow of Jacob Aulenbacher, who died intestate. Appellant, Lizzie Lips-

comb, is his daughter and only heir, and her co-appellant, J. C. Lipscomb, is her husband. At the time of Aulenbacher's death, and for a number of years prior thereto, he and Lipscomb had been partners in the mercantile, cattle and land business in Clark County, and at the time of Aulenbacher's death the partnership owned a number of tracts of land and some lots in the town of Gurdon. The partnership prospered and was solvent at the time of Aulenbacher's death, and there was an attempt to wind up the partnership affairs and to effect a division of Aulenbacher's estate between his widow and daughter. There was a satisfactory settlement and division of the personal estate, but there was a disagreement as to their respective rights in certain lands, which led to the institution of this suit.

The suit was brought by Mrs. Aulenbacher against her daughter as the heir of her husband and against Lipscomb as his surviving partner, to have dower assigned her in her husband's estate, and to recover a sum of money belonging to her which the partnership had used, and to have dower assigned in certain rents on the partnership property which Lipscomb had collected after Aulenbacher's death.

The first item in dispute is referred to by the parties as the $2,000 claim. Mrs. Aulenbacher owned a home, in which she and her husband had lived for a number of years, but she desired a better one. Finally, the old home was sold for $2,000, and with the proceeds of this sale, together with the sum of $3,500 in cash which was advanced by the firm of Aulenbacher & Lipscomb, a new home was bought. The title to this land was taken in the partnership name, and after its purchase both families moved into the new home, and both families resided there until Aulenbacher's death. After that event a disagreement arose between Lipscomb and Mrs. Aulenbacher, which increased in acrimony until Mrs. Aulenbacher left Lipscomb and his family in possession of the home, and she has since lived apart from them.

The court below found that Mrs. Aulenbacher had advanced the copartnership $2,000, which should be repaid her, and allowed her interest on that sum from the date she left the house. Appellant insists that the $2,000 was a voluntary contribution by Mrs. Aulenbacher to induce the partnership to buy the home, and that Mrs. Aulenbacher should not be allowed to recover this money. Appellee has cross-appealed from the decree of the court below on this item, and now insists that she should not only be allowed interest on this money, but that the interest should be calculated from the date the money was advanced, and not from the date of her abandonment of the homestead.

Upon a consideration of all the testimony concerning this item, we have concluded that the decree should be affirmed both on the appeal and the cross-appeal. The testimony is undisputed that Mrs. Aulenbacher advanced the sum of $2,000 to the partnership, and it now has the homestead as a part of the partnership assets, and we do not think this was a donation or a contribution by the wife either to her husband or to the partnership to acquire this partnership property. On the other hand, we think that equity will be administered by allowing Mrs. Aulenbacher the $2,000 and interest thereon, as was done by the court below, from the date she surrendered the home to her son-in-law as her husband's surviving partner, instead of allowing interest from the date the advance was made. She had shared in the occupation of this home during her husband's lifetime, and after his death until she abandoned it on account of friction which had arisen between herself and her son-in-law, and the decree as to this item allowing interest only from the date of her departure is affirmed.

The next item in controversy is referred to as the 120-acre tract. The testimony shows that this land was bought with partnership funds for the benefit of the partnership, but the deed as prepared was made to Aulenbacher individually. This deed was typewirtten.

This omission was discovered before the delivery of the deed, and upon the discovery of this omission an attempt was made to correct this error by writing into the deed with a pen the name of Lipscomb as one of the grantees, but his name was not inserted in the habendum clause.

The court found this was partnership property, and we concur in that finding. Appellee insists that the decree involves the reformation of the deed, and that this relief could not be granted because the grantor in the deed was not made a party to this proceeding. We do not concur in this view. The proceeding is one in chancery to assign dower to the widow of a deceased partner in a solvent partnership whose debts have been paid, and the reformation of this deed was not essential to that purpose. The undisputed testimony shows that this land was, in fact, partnership property, and the court was correct in so holding.

The next item involved is referred to as the 30-acre tract. This land was bought by Aulenbacher for $250, and deeded to him alone. After so purchasing the land Aulenbacher proposed to Lipscomb that the partnership take over this land, and Lipscomb paid Aulenbacher $125 to effect that purpose, but no deed was made by Aulenbacher to Lipscomb. After Lipscomb had paid to Aulenbacher one-half of the purchase price, the partnership assumed control of the land and commenced to improve it by clearing, ditching and tiling it, and by building a fence, house and barn on it. The chancellor decreed that the widow should have dower in the thirty acres as the individual lands of the deceased and that her dower right in the improvements thereon was unaffected by the fact that the improvements were made by partnership funds after the trade between the partners, wherein Lipscomb paid the $125 to Aulenbacher.

It is first insisted for Mrs. Aulenbacher that the sum spent by the partnership should not be taken into account, as the testimony shows only the amount spent, and not the enhanced value of the land. But we think

it fairly appears that the value of the land was enhanced to the extent of the sum spent in clearing, fencing, ditching, tiling, and in building the house and barn, so that the value of the thirty-acre tract may be said to equal the $250 paid for it and the $1,500 spent in improving it.

It is insisted, however, on behalf of Lipscomb that the enhanced value of the land, resulting from the improvements, should not be taken into account in assigning dower, and the case of *Welch* v. *McKenzie,* 66 Ark. 251, is cited as sustaining that contention. In that case a widow claimed dower in lands which had been conveyed to a partnership by her deceased husband in a deed in which she did not join. This court held that the widow was entitled to recover one-third of the rents after the death of her husband, but that the value of the improvements made on the land by the partnership should be excluded in estimating her dower and the rents to which she was entitled.

Here, however, the husband of the widow did not convey away the land. He had the apparent title to it during his lifetime, and at the time of his death, and in equity it should be treated as partnership land, because it was so intended, and each partner had paid one-half of the purchase price, and the land had been improved with partnership funds. The $1,500 spent by the partnership went into improvements, which became a part of the land, and the land, as thus improved, should be treated as a part of the partnership assets and dower assigned accordingly, and the decree of the court below will be reversed in this respect.

The next item relates to lot 9, block 18, Crescent Heights Addition to the town of Gurdon. As we have said, Mrs. Lipscomb was the only child of Aulenbacher, and the two families lived together as one until after Aulenbacher's death. Mrs. Lipscomb had an afflicted son, who had been named for her father and who is referred to as "Little Jake." It was shown that Mr. Aulenbacher entertained a feeling of greatest affection for this afflicted grandson, who is now sixteen years old,

and Aulenbacher commenced the accumulation of a fund for Little Jake's benefit in the child's early infancy, which had grown to the sum of $2,000 in 1919, at which time the partnership purchased fifteen lots, of which lot 9 was one. The title to all the lots was taken in the name of the partnership, but lot 9 was always referred to as Little Jake's lot, and Aulenbacher took the $2,000 and built a house on it, and the court held that this lot belonged to the partnership, and that Mrs. Aulenbacher was entitled to have dower assigned in it.

It is insisted that this is error, and that the court should have found that the partnership held the title to the lot in trust for Little Jake.

We are of the opinion that the court was correct in not declaring that the partnership held the title in trust to the lot for Little Jake's benefit. It was, no doubt, the intention of Little Jake's father and grandfather to give him this lot, but this intention had not been effectuated. The purchase money was paid by the partners, who took the title in themselves, and they retained control of the property. But the partnership did use Little Jake's money, and we perceive no reason why it should be allowed to appropriate the $2,000 to its own use and thus deprive him of it.

It is pointed out that Little Jake is not a party to this proceeding and is not, therefore, bound by any decree which may be entered in this cause. This is true, but it is also true that Mrs. Aulenbacher is asking dower in this lot 9, as well as in the other property, and the court decreed it to her, and we do have before us the question as to what dower should be assigned her.

In the case of *Lenow* v. *Fones,* 48 Ark. 557, it was held that, upon the death of a member of a partnership, his widow will take dower in the surplus of the real estate of the partnership which remains after paying the partnership debts, for life as in real estate, and not absolutely as in personal property, unless there was an agreement between the partners for the conversion and

sale of the lands after the partnership affairs were settled, in which case she would take dower as in personalty.

Here there was no such agreement, but all debts have been paid, and the partnership is admittedly solvent, aside from the real estate, and we do not, for that reason, reverse the decree assigning dower with directions that the assignment thereof be postponed until this $2,000 item of indebtedness has been paid. There appears to be no necessity for so doing, but the $2,000 item due Little Jake should be taken into account and provision for its payment made upon the remand of this cause before the rights, of the parties properly before the court are finally adjudged, and the court will enter an appropriate decree in accordance with this opinion.

We are of the opinion, therefore, that dower was properly assigned the widow in this lot 9, but the money belonging to Little Jake which was expended in improvements made on it must first be taken into account, and provision made for its payment out of the partnership assets.

The court found that Lipscomb had collected rents on the property herein referred to, for which he should account, and out of which dower should be assigned.

The court declared that the $2,000 advanced by Mrs. Aulenbacher was a lien on the homestead, and gave Lipscomb twenty days within which to discharge the lien, with directions that if not discharged the homestead should be appraised and sold by commissioners, who were named for that purpose, and to assign dower in the other lands as well as the homestead and that, after said sum had been paid Mrs. Aulenbacher, she should have dower in the balance of the proceeds of the sale of the homestead.

It is insisted, as we have said, that the court was in error in awarding Mrs. Aulenbacher a decree for the $2,000; but we have said that we do not think so. It is further insisted that the court was in error in decreeing a sale of the homestead to assign dower in any event and that the equities of the case would have been better subserved if the court had found the monthly rental value

thereof and ordered that the same be paid by Lipscomb, and that Mrs. Aulenbacher have dower out of the rents to be thus paid. We do not think, however, that Mrs. Aulenbacher should be thus postponed in the assignment of her dower.

Commissioners were appointed to assign dower in the land referred to as the homestead, and in the other lands herein mentioned, and except in the particulars indicated it is not objected that erroneous directions were given the commissoners in the discharge of this duty, and except as we have herein indicated the decree of the court below in the matter of the assignment of dower will be affirmed.

It is finally insisted by Mrs. Aulenbacher on her cross-appeal that the court erred in rendering judgment against her for $197.18 in favor of Lipscomb. This indebtedness of $197.18 to Lipscomb by Mrs. Aulenbacher is not questioned, but it is insisted that it cannot be taken into account in an action of this character.

We think, however, that no error was committed by the court in this respect. Mrs. Aulenbacher prayed and was awarded a money judgment against Lipscomb for rent which he had collected, and it was proper to credit against this liability the indebtedness which Mrs. Aulenbacher admittedly owed Lipscomb, and the decree in this respect is therefore affirmed.

The cause will therefore be remanded, with directions to enter a decree in accordance with this opinion.

HARRISON ELECTRIC COMPANY v. BUMGARDNER.

Opinion delivered June 1, 1925.

1. MASTER AND SERVANT—INJURY IN LINE OF DUTY.—A servant seeking to recover for personal injuries must show that he was injured while in performance of some work in the line of his duty, and, if he were a volunteer undertaking to render a service which the company had no reason to believe he would attempt to perform, the company would not be liable.

2. MASTER AND SERVANT—INJURY IN LINE OF DUTY—JURY QUESTION.—In an action by a lineman's helper for injuries alleged to have been received in the line of his duty, evidence held to make it a jury question whether he was injured in the line of duty.

3. MASTER AND SERVANT—SUFFICIENCY OF WARNING—JURY QUESTION.—In a lineman helper's action for injuries by being burned by an electric wire, whether a warning given that the particular wire was "hot" and dangerous on that account was a sufficient warning *held* for the jury.

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

Marvin Hathcoat, for appellant.

Shouse & Rowland, for appellee.

SMITH, J. Appellee, who is a young man now twenty-one years old, sues for an injury which he sustained while only twenty. He was employed by the appellant company, which generated and furnished electric lights for the city of Harrison. He was employed as a lineman's helper, his immediate superior being Lucian Covington, and he testified that it was his duty to read meters, collect bills, to do cut-out work, and to assist the lineman.

On the day when appellee was injured he and Covington had been engaged in collecting bills for the appellant company, and they reported to the appellant's office about 4 p. m., and were there informed that there was a trouble call. The office girl, who was also the bookkeeper, and whose duty it was to receive these calls and to make a ticket thereof, which was placed on a file, was not sure of the location from which the call had come but thought it was from the Wallace store on the south side of the square. Covington went to see what the trouble was, but soon returned and said that he had found no one reporting trouble. Appellee said he would go to the store of another man, named Wallace, on another side of the square, and see if the trouble was there. Covington testified that he directed appellee to ascertain what the trouble was and to report back to him.

Appellee went to the store of the other Wallace, and found there a man named Keeton, and another man whose name was Bogart, and was told that they had called him. Keeton and Bogart were the linemen of the telephone company, whose wires were stretched on the same poles with the appellant light company's wires. Keeton told appellee there was a "hot" wire which he wished removed from the pole. There were five cross-arms on the pole, and the top cross-arm was used by the light company, the wires of the telephone company being fastened to the lower cross-arms.

Appellee admits that Keeton told him the wire was a live one—indeed, that was the reason Keeton wished it removed—but appellee testified that he thought Keeton was mistaken, and he said he would climb the pole and find out whether the wire was "hot," as the witnesses expressed it, or not. He had with him some pliers, the handles of which were insulated, and appellee testified that he intended to test out the wire in question with the pliers, and he climbed the pole for that purpose, and as he reached out with the pliers, but before touching the wire, he was badly burned. Appellee was standing on the cable of the telephone company when he was burned and was unable to extricate himself until Keeton telephoned the light company to shut off the current, and in the meantime he was badly burned.

Appellee complains that the appellant light company was negligent in the following particulars: (1) Failure to promulgate reasonable rules for the safety of its employees; (2) failure to warn appellee, an inexperienced youth, of the dangers incident to his employment and how best to avoid them; (3) failure to disconnect the high-current wires where a transformer had been removed and to maintain effectual insulation. There was a verdict and judgment for appellee, which is not claimed to be excessive if there is liability, and the company has appealed.

The instructions given cover many phases of the law of master and servant, beginning with the duty to promulgate rules to protect the servant. These we shall not review, as we think they submitted a number of questions which are not properly presented by the testimony, and we shall discuss only the law applicable to those issues which we think should be submitted to the jury.

It may be first said that it is insisted on the part of appellant that appellee was not engaged in the line of his duty at the time of his injury. That no one connected with the appellant company knew what appellee proposed to do, and that it was no part of appellee's duty to work with the wires except as a helper to Covington, who should have been notified by appellee. Covington who was appellee's immediate superior, testified that he directed appellee to ascertain the trouble and report to him.

It is, of course, essential to a recovery by appellee that he show that he was injured while in the performance of some work in the line of his duty, and if he were a mere volunteer, undertaking to render a service which the company had no reason to believe he would attempt to perform, the company would not be liable. But appellee testified that he was injured while engaged in the line of his duty, and this, of course, made a question for the jury.

Appellee was a high school graduate, and while in the navy had graduated from the naval electrical school, but he testified that his training gave him no experience in handling wires, and that he did not know the dangerous character of the wire he attempted to remove, or, rather, was attempting to test for that purpose. He admitted that he knew that the wires conveying the high voltage were on the top cross-arm of the telephone pole, but he had not been given any instructions as to the manner of protecting himself against the current which they carried, and he supposed the insulation on his pliers would protect him from danger when he made the test to determine the character of the wire which the telephone lineman requested him to remove.

Appellee also testified that the light wire was not properly insulated; but we do not think this was the proximate cause of the injury, and we do not understand that the testimony shows any duty on the part of the light company to insulate the wires at the point where appellee was injured.

In the recent case of *Hines* v. *Consumers' Ice & Light Co., ante* p. 914 we had occasion to consider the duty to insulate, and we defined that duty by quoting and approving the following statement of the law from 9 R. C. L., at § 21 of the chapter on Electricity, page 1213, as follows: "Section 21. *Insulation at Particular Points or Places.* It is only reasonable that the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, and the law does not compel electric companies to insulate their wires everywhere, but only at places where people may go for work, business, or pleasure, that is, where they may reasonably be expected to go."

Here the light wires were placed on a cross-arm above the telephone wires, and the testimony does not show that the appellant light company was required to anticipate that any employee would come in contact with the wire where appellee was injured without being prepared to handle this wire with safety to himself. The method employed for this purpose was the use of rubber gloves, and the testimony shows that appellant had gloves for that purpose. Appellee admitted that he knew that gloves would be furnished for the purpose of removing that light wire, and that it was his intention to get the gloves before attempting to remove the wire, but he also testified that he was first endeavoring to determine whether the wire was a live one or not, and that he did not know that the use of a pair of insulated pliers to determine that fact would involve any danger to himself.

It is insisted that the admission of appellee that the telephone lineman had told appellee that the wire was

"hot" and dangerous on that account, and that this was the reason why he wished it removed, was all the warning required or which any one could have given; but we are unwilling to say, as a matter of law, that this is true, because, as we have said, appellee testified that he was not attempting to remove the wire, but was only endeavoring to verify the statement of the telephone lineman before going after the gloves or reporting the trouble to Covington.

It must be said that this case is a close one whether appellee is entitled to have any issue in the case submitted to the jury, in view of his own admissions. But, on account of his age, his own testimony that he had only worked as an assistant lineman for three days in removing and repairing wires, although he had been employed by appellant company for a month in other work, and his testimony that he was ignorant of the dangers of his employment, and had been given no instructions or warning in that respect, we have concluded that the case should go to the jury on these questions, but we think no other theory of liability is presented.

For the errors in submitting other questions of negligence to the jury, the judgment is reversed, and the cause will be remanded for a new trial.

WHITMORE v. HARPER.

Opinion delivered June 1, 1925.

MINES AND MINERALS—LIEN FOR LABOR ON OUTPUT OF OIL WELL.—Where the contract under which defendants assigned an interest in an oil and gas lease was executed and legal and equitable rights were vested before acts 513 and 615 of 1923, giving the contractor drilling an oil well a lien on the output of the well, became operative, plaintiff, who furnished labor and material under contract with the assignee, did not acquire a lien under such acts.

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

J. W. Warren, for appellant.

HUMPHREYS, J. This suit was instituted in the Chancery Court of Ouachita County by appellee against appellant, to have a lien of $5,639.70 declared and foreclosed upon the oil, gas, and mineral leasehold estate and interest of appellants in the E½ of the NW¼ of the NW¼ of the SE¼ of section 28, township 15 south, range 16 west, containing five acres, in Ouachita County, Arkansas, for drilling an oil well upon said property under contract with one Richardson, who had purchased an interest in the lease from Joseph Dansiger, to whom appellants had assigned an interest in their lease in consideration that he would develop same without cost or expense to them.

Appellants filed an answer denying that appellee had any right to have a lien declared on the interest reserved by them in the leasehold estate, which they assigned to Joseph Dansiger.

The cause was submitted to the court upon the pleadings and an agreed statement of facts, which resulted in a decree subjecting the ¼ interest of appellant in the lease to the payment of appellees' claim, from which is this appeal.

The agreed statement of fact is as follows:

"It is agreed by attorneys for the plaintiff, W. H. Harper, and the defendants, T. E. Whitmore, J. N. Moxley, R. L. Bennett, and W. F. Ault, that the facts in the above-styled cause are as follows:

"That on the second day of March, 1923, the above-named defendants were the sole owners of an oil and gas lease in usual standard form, on the lands described in the complaint, which lease reserved to the fee owner a ⅛ royalty and vested in defendants 7/8 of all oil produced from said land, with the usual rights and privileges for drilling, and specifically authorized the assignment of said lease by the lessees; that on said date the defendants entered into contract with Joseph Dansiger whereby they assigned said lease to him in consideration that he would develop said lease by drilling a minimum of two

wells thereon for oil and deliver to defendants, in the pipe line to which he might connect his tanks or wells, free of cost to defendants, a 1/16 each of all oil produced and saved from said lease, a copy of which contract is hereto attached and made part of the state of facts herein agreed upon; that said contract was duly recorded in the record of deeds in the office of the recorder for Ouachita County.

"That thereafter the said Joseph Dansiger assigned an undivided 1/2 interest in and to his rights under said contract to ———— Richardson, who in turn contracted with the plaintiff to drill a well on said lease, and that the plaintiff under said contract with said Richardson did furnish the materials and perform the labor for which he sues herein in drilling a well on said lease.

"The defendants were not parties to the assignment from Dansiger to Richardson nor to the contract between plaintiff and the said Richardson; that they have had no relations or dealings with plaintiff which would subject their rights under their said contract with Dansiger to payment of any part of plaintiff's claim unless the state of facts as above set out had that effect."

The lien was declared upon appellant's ¼ interest in the leasehold estate by virtue of the provisions of act 513 of the Acts of 1923, p. 430, and act 615 of the Acts of 1923, p. 499, which was clearly erroneous for the act did not become effective until appellant's contract with Dansiger had been executed. The legal and equitable rights of appellants growing out of their contract with Dansiger were vested before the passage of the acts, and the Legislature had no power to divest previously vested rights. The acts in question were not retrospective.

On account of the error indicated, the decree is reversed, and the cause is remanded with directions to dismiss appellee's bill for the want of equity.

DANIELS v. STATE.

Opinion delivered June 8, 1925.

1. RECEIVING STOLEN GOODS—EVIDENCE.—Evidence *held* sufficient to sustain a conviction of receiving stolen goods.
2. LARCENY—RECEIVING STOLEN GOODS—UNEXPLAINED POSSESSION.—Unexplained possession of recently stolen goods is legally sufficient to warrant conviction of either larceny or receiving stolen goods.
3. RECEIVING STOLEN GOODS—WEIGHT OF TESTIMONY.—The weight to be given to accused's explanation of his possession of recently stolen goods, and of the inferences to be drawn therefrom are questions for the jury.
4. WITNESSES—CROSS-EXAMINATION.—In a prosecution for receiving stolen goods, the accused may be asked on cross-examination whether he had committed burglaries, for the purpose of affecting his credibility.
5. CRIMINAL LAW—JUDICIAL NOTICE.—It is judicially known that the city of Little Rock is in Pulaski County.
6. CRIMINAL LAW—EVIDENCE OF VENUE.—Evidence that property was stolen from a house of a certain street number in Little Rock establishes the venue as in Pulaski County.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; affirmed.

Sam Robinson, for appellant.

H. W. Applegate, Attorney General and *Darden Moose, Assistant,* for appellee.

McCULLOCH, C. J. This is an appeal from a judgment of conviction of the crime of receiving stolen property, the alleged offense occurring in the city of Little Rock.

Appellant is a negro boy, sixteen or seventeen years old, and is alleged to have received the stolen articles from another boy named Davis. The State proved that a lot of different articles, including wearing apparel, jewelry and other things, were stolen from the home of Mrs. Gardner, and that immediately after the burglary some of the stolen articles were found in possession of appellant at his room in the city. A police officer testified that he found in appellant's room the coat of a blue serge suit, and a "pin-striped suit of clothes," some

jewelry and other articles, which were said to have been stolen from Mrs. Gardner's residence. The proof was sufficient to show that these articles found in appellant's room were the identical articles which were stolen from the house named.

It is contended, in the first place, that the evidence was insufficient to sustain the verdict, in that it does not show that appellant knew that the property had been stolen. He testified that he roomed at the same house with Davis, and that, when the landlady required Davis and the girl with whom he was living to move out of the house, the girl turned the articles over to him (appellant) to keep as Davis' property, and that he did not know that the property was stolen. He testified that all he knew about the property was that the girl turned it over to him to keep.

The rule has long been maintained by this court that unexplained possession of property recently stolen constitutes legally sufficient evidence to warrant a conviction, either of larceny or receiving stolen property. *Sons* v. *State,* 116 Ark. 357; *Mays* v. *State,* 163 Ark. 232. The weight to be given to the testimony and the inference to be drawn therefrom are questions for the jury. It was a matter for the jury to determine the reasonableness and sufficiency of the explanation given by the accused of his possession of the stolen property.

After the appellant had testified in the case and stated that the articles were delivered to him as the property of Davis, the State introduced Davis in rebuttal, and he stated that he did not have anything to do with the property found in appellant's room. He said that he owned a blue serge suit, and that the coat of the suit was at his house, but that it was not at the house of appellant, and that he had nothing to do with the property found at appellant's house. This testimony tended to contradict the testimony of appellant and added to the weight of the evidence. We think that the evidence was sufficient to sustain a conviction.

The next assignment of error relates to the ruling permitting the prosecuting attorney to ask appellant on cross-examination whether or not he had committed other burglaries. This was competent, under well settled rules of evidence, for the purpose of affecting appellant's credibility as a witness.

It is also contended that the proof is not sufficient to establish the venue in Pulaski County. The witnesses testified as to the home of Mrs. Gardner on a certain street in Little Rock from which the property was stolen, and also the location in the city of the house in which appellant roomed and where the stolen goods were found. It is judicially known that the whole of the city of Little Rock is in Pulaski County, and the mention of a street number of a house in the city is sufficient to prove the venue.

Judgment affirmed.

LUCAS v. REYNOLDS.

Opinion delivered June 8, 1925.

1. CONSTITUTIONAL LAW—AMENDMENT 11 SELF-EXECUTING.—Amendment 11 to the Constitution, authorizing counties and cities to issue bonds, is self-executing.
2. COUNTIES—MATURITY OF BONDS—VALIDITY OF CONTRACT.—The act of 1925 "to facilitate the funding of debts of counties," etc., providing that county bonds should not mature before September 1, 1926, was not violated by a contract providing for interest payments prior thereto; the provision relating only to payments on the principal.
3. COUNTIES—ISSUE OF BONDS IN EXCESS OF INDEBTEDNESS.—A contract for the sale of county bonds is not in excess of the county's indebtedness where bonds were issued in contemplation of converting them into bonds bearing a lower interest rate if, when so reduced, the amount of bonds will be equivalent to the indebtedness to be discharged.

Appeal from Conway Chancery Court; *W. E. Atkinson*, Chancellor; affirmed.

Colvin & Sellers, for appellant.

Edward Gordon, for appellee.

McCULLOCH, C. J. The county court of Conway county made an order ascertaining the amount of the county's indebtedness at the time of the adoption of Amendment No. 11 to the Constitution, and entered into a contract with R. C. Helbron for the sale of bonds sufficient to pay off the indebtedness. The amount of indebtedness was ascertained by the court to be $80,380.84.

Appellant is a citizen and taxpayer of the county, and instituted this action in the chancery court to restrain the county judge from carrying out the project.

The General Assembly enacted a statute (unprinted as yet) entitled, "An Act to Facilitate the Funding of the Debts of Counties, Cities and Incorporated Towns." The contention of appellant is, in the first place, that the county had no right to proceed under Amendment No. 11 until the enabling act was passed, and that the act was not in force for the reason that an emergency is not stated in the act so as to put it into immediate force. This point was decided against the contention of appellant in the recent case of *Cumnock* v. *Little Rock, ante* p. 777 where we decided that the portion of amendment No. 11 authorizing the issuance of bonds is self-executing. We found it unnecessary in that case to decide any other question, and the question as to when the act went into effect is still undecided so far as this court is concerned.

It is further contended that, if the enabling act is in effect and controls this proceeding in Conway County, the terms of the statute have been violated, and that the county judge ought to be restrained for that reason.

Section 2 of the enabling act provides that the bonds to be issued under the amendment shall be "negotiable coupon bonds payable serially through a period of not exceeding forty years, and bearing a rate of interest not exceeding six per cent. per annum," and that "none of such bonds shall mature before September

1, 1926." The schedule agreed upon in the contract between the county and the bond purchaser provides for the first interest payment on October 1, 1925, and the first installment of principal is payable on October 1, 1926. It is thus seen that the terms of the statute, which applies only to the payment of principal not earlier than 1926, are not violated by the provision for the payment of interest. There is nothing in the Constitution or statute which forbids interest payments to be made semi-annually, and this was doubtless in contemplation of the framers of the enabling act when they provided that none of the bonds should mature before September 1, 1926. Acts 1925, No. 210.

It is next contended that the contract is for an amount of bonds in excess of the indebtedness as ascertained by the order of the county court, and that the terms of the enabling act were violated in this respect. It will be remembered that the Constitution merely provides that the bonds shall bear interest not exceeding six per cent. per annum, and § 3 of the enabling act contains a similar provision, and also provides that "bonds may be sold at six per cent. with the privilege of conversion into bonds bearing lower rate on such terms that the county, city or town shall receive thereon and pay therefor substantially the same amount of money as on six per cent. bonds at par; and the proceeds thereof shall be used only in payment of indebtedness of such county, city or town existing at the time of the adoption of said Eleventh Amendment to the Constitution." The contract for the sale of bonds was made in contemplation of converting the bonds into those of a lower rate of interest, and the county will not, in fact, become liable on bonds in excess of the actual outstanding indebtedness existing at the time of the adoption of the amendment to the Constitution. In other words, when the amount of premium contracted for on six per cent. bond is reduced to the corresponding value of bonds bearing a lower rate of inter-

est, the amount of bonds will be equivalent to the amount of indebtedness to be discharged. There is, therefore, no conflict between the contract and the terms of the statute. So, in any event, it is unnecessary to determine whether the statute went into immediate effect, for, as before stated, there is no violation either of the Constitution or of the statute.

Decree affirmed.

WEAKLEY v. STATE.

Opinion delivered June 8, 1925.

1. HOMICIDE—INSTRUCTIONS—MANSLAUGHTER.—Where the State's evidence was that defendant shot and killed deceased while in a state of voluntary intoxication and without provocation, and the testimony of defendant tended to prove that defendant did not know what he was doing at the time of the shooting, *held* that there was no room for an instruction on manslaughter.
2. HOMICIDE—MALICE—KILLING WHILE DRUNK.—As the specific intent to kill is unnecessary in murder in the second degree under our statute, if one voluntarily becomes too drunk to know what he is about, and then without provocation by the use of a deadly weapon shoots and kills another, he commits murder in the same degree as if he were sober.
3. HOMICIDE—DISEASED MIND—INSTRUCTION.—Where, in a prosecution for murder in the second degree, the testimony of the defendant's witnesses was to the effect that drinking so affected his mind that he did not know what he was doing during the period of his intoxication and for several days thereafter, but there was no testimony tending to show that he was afflicted with delirium tremens or any form of mental disease, and that the killing was the result of such disease, it was not error to refuse to instruct the jury to find defendant not guilty if at the time of the killing he was laboring under such a defect of reason as not to know the nature of the act he was doing or was ignorant that he was doing what was wrong.
4. WITNESS—CROSS-EXAMINATION.—Where, on direct examination, defendant asked his witness as to defendant's reputation for peace and quietude, it was not error on cross-examination to permit the State to ask the witness whether there had been any complaint about dances, drinking parties and crap games at defendant's

house, and whether defendant's reputation for morality was good or bad.

5. HOMICIDE—DYING DECLARATIONS.—A statement made by deceased after he was shot was inadmissible, in the absence of proof that the statement was made under a sense of impending death.

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

Botts & O'Daniels, for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

WOOD, J. The appellant was indicted by the grand jury of Arkansas County for the crime of murder in the second degree in the killing of one Den Garrison.

Witness Slim Huddleston for the State testified substantially as follows:

On the night of the shooting Den Garrison and others were at the appellant's house. They had met there for a dance. After the dance broke up some of them went upstairs and engaged in a crap game. Garrison borrowed some money from the defendant that night. The game broke up about four o'clock in the morning, and the crowd went down stairs. The defendant came down stairs and through the room where Garrison and others were, but did not at that time say anything. He went into the kitchen and came back with a gun and cursed and said, "Now, what do you want me to do?" He threw the gun on his wife who ran and picked up the baby and said, "Daddy, don't shoot me, I have got the baby." Albert Dallas and witness were the only men in the room at that time. Witness left the room and went about a hundred yards from the house and about that time a shot was fired. Witness went back to the house and found Den Garrison was shot. The defendant told them all to clear out, and some one took the gun away from him. Garrison was lying on the floor with a wound about an inch or two across on the inside of his leg. Garrison asked the defendant why he shot him, and the defendant smiled a little bit and told Garrison that he had insulted his wife, but when

his wife came in she said that Garrison had not insulted her. Garrison and defendant were friendly.

Witness Albert Dallas testified that he was at the dance at defendant's home when the defendant came down stairs and got his gun and told the crowd to leave. Witness left and went down the road about a quarter of a mile when he heard a gun fire. Witness didn't hear the defendant say anything to Garrison that night. They had no differences or words over money. Witness didn't see or hear anything to indicate that the defendant and Garrison were on unfriendly terms. Witness didn't hear the defendant cursing or going on—no more than he told the parties to leave. Defendant didn't point the gun at anybody. He did not make any complaint against any particular person. He came in swinging the gun around and told witness and the others to leave.

Lester Miller testified that he was at defendant's home the night of the shooting. The defendant had been upstairs asleep and came down with a gun. He pointed the gun in at the door and ordered the crowd to leave. There were eight or ten in the room at that time. Garrison went out of the house and came in at the front and told the defendant, "For Christ's sake, put that gun up before you shoot some one!" Defendant said something that witness did not understand, and Garrison turned about that time, and defendant shot, and Garrison fell up against witness. Witness asked him where he was hit, and Garrison replied, "He hit me in the leg." About that time the light went out and witness ran. He returned in about five or ten minutes and some one had taken the gun away from defendant. Witness stated that defendant was in the game and had been winning a little and had loaned Den Garrison some money during the game.

Other testimony for the State was to the effect that Garrison was shot on Saturday night and lingered until the Wednesday following and died about six o'clock from the effects of the wound. One witness testified

that he saw Den Garrison on Saturday prior to the shooting; that witness and Garrison hauled rice together to DeWitt. When witness next saw Garrison, he was lying on a bed at defendant's house complaining of being shot. Witness saw a hole in his leg which was a fresh wound, and he stayed with Garrison from that time on until the following Wednesday about eleven o'clock. Garrison gradually grew worse from the time witness first saw him after he was shot until he died.

The defendant offered testimony by several witnesses to the effect that, after the shooting and after Garrison had been removed to a neighbor's house, he made a statement which was written down by a party in the presence of the justice of the peace in which Garrison stated that the shooting was accidental; that Weakley was a good friend of his, and that he should not be punished for the shooting, and that he did not want Weakley punished for it.

One of these witnesses, L. L. Brown, a justice of the peace, testified that he had known the defendant for many years; that he had never known him to be in any trouble except drinking; that his reputation for peace and quietude in the community in which he lived was good, and that he lived within one block of the defendant for about fourteen years. On cross examination of this witness the following occurred:

"Q. What is the general reputation of the defendant for morality? MR. BOTTS: We object to that. A. Good as far as I know. Q. Did you ever have any complaint, Squire, of him having these dances and drinking parties and crap games out there at his place? MR. BOTTS: We object to that. COURT: You have his reputation in issue? MR. BOTTS: I did not put his reputation in issue for specific acts. COURT: You have it in issue. MR. BOTTS: That is not competent testimony. COURT: I have passed on it. [Exception saved by defendant.] A. I heard them talking about this game up there. Q. You have had complaint about having these dances and drinking parties out there for young boys?

MR. BOTTS: We object to that. COURT: Objection overruled. [Exception saved.] Q. Basing your opinion on that, tell the jury whether or not you consider his reputation for morality, good or bad? A. From what I have heard from the general discussion it is not so very good. Q. You would not consider a man's reputation good if he would permit young boys to come there and gamble all night? COURT: That is common knowledge. MR. BOTTS: Defendant objects to these questions and remarks of the court." Objection overruled and exceptions saved.

There was testimony to the effect that the appellant was a hard drinker; that during the time he was drinking and for several days thereafter he did not seem to know what he was doing. He was unable to work, easily excited and highly nervous. One witness testified that he saw the defendant a short time after the shooting, and he appeared as though he had been on a drunk; that for two or three days after the defendant had been drinking he would not act in his right mind—did not seem to know what he was doing and did not talk naturally; that he acted the same way on this occasion. Another witness testified that he was in the army with the defendant during the world war; that when defendant had been drinking for two or three days he did not know what had taken place and did not realize what he had done or what had been done to him; that on these occasions he would disobey the officers and did not seem to realize anything about what was taking place.

The defendant's brother, after testifying as above, stated that in his opinion the excessive drinking of poisonous alcohol by the appellant had diseased his mind to the extent that when he took a few drinks of whiskey he was temporarily insane and did not know what he was doing; that this condition of mind was growing worse from year to year.

The defendant himself testified that the only thing he knew about the shooting was what they told him about it. He had no ill feeling toward the deceased. On the contrary, they had always been the best of friends. When

they told him about the shooting, he would not believe it, and, when they took him in to where Garrison was, the latter said there was no cause in the world for the defendant to shoot him, and that it was an accident. He had never had a quarrel with Garrison. About six years before he (defendant) had got to drinking. He could not resist the temptation. It affected his mind. He quit for about two years and later got to drinking again, and his mind was more greatly affected than before. During the time he was drinking he was not at himself. He was nervous, and if some one spoke to him it would frighten him until he did not know what he was doing. On cross examination he stated that he had had four dances at his house; that he had been drinking during the dance, and did not know where he got the gun or whether it was loaded or not. He didn't want the boys to shoot craps and told them so. He told Garrison and others that they could have the dance if they did not bring any whiskey.

The court instructed the jury defining murder in the second degree and told them in effect that, in order to convict the defendant, the evidence upon the part of the State must show that the killing was unlawful, that it was unnecessary, not justifiable or excusable, that it was willful, that is, intentional, and was done with malice; that malice denoted the state of mind and the act that prompts the motive of the defendant; that it was an act done wickedly and without due regard for the rights of one's fellow man—an act done cruelly; that, if the shooting was unlawful and done with a deadly or dangerous weapon in the use of such deadly or dangerous weapon, the law implies malice, and the State was not required to prove it; that it was necessary for the State to prove that the deceased died in a year and a day from the time of the infliction of the injury and the shot was the cause of his death, and that it occurred in Arkansas County within five years before the finding of the indictment. The court then instructed the jury as to the form of the verdict in case they should find defendant

guilty of murder in the second degree, and the punishment for such crime.

The court further instructed the jury that it was the contention of the appellant that if he shot Garrison he was under the influence of intoxicating liquor to such an extent as to render him incapable of knowing right from wrong; that, where the charge was murder in the second degree, it is unnecessary to prove a specific intent to kill; that if one voluntarily becomes too drunk to know what he is about and without provocation assaults and beats another person, and such assault causes the death of the other person, he would be guilty of murder in the second degree.

The court gave correct instructions on the credibility of witnesses and reasonable doubt. The court further announced the law to be that, if the killing is unlawful and a deadly or dangerous weapon is used, the inference of malice could not be rebutted; that, if the killing was not an unlawful killing, it would be a justifiable or excusable killing, and the defendant would be relieved.

The appellant asked the court to instruct the jury "that voluntary intoxication is no defense to this charge, but that if you believe from a preponderance of the evidence that at the time of the alleged shooting the defendant was laboring under such a defect of reason from disease of the mind, regardless of the cause of such mental condition, as not to know the nature of the act he was doing, or, if he did know it, that he was ignorant that he was doing what was wrong, then you will find the defendant not guilty."

The appellant also asked the court to instruct the jury on the lower degrees of homicide, which prayers the court refused.

The jury returned a verdict of guilty of murder in the second degree and fixed the punishment at five years in the State penitentiary. From the judgment pronouncing sentence in accordance with the verdict, the appellant prosecutes this appeal.

1. The jury might have found from the testimony of the witnesses for the State, which it was their sole province to accept or reject, that the appellant shot and killed Garrison while appellant was in a state of voluntary intoxication, and that there was no provocation whatever on the part of Garrison. The testimony on behalf of the appellant tended to prove that the appellant did not know what he was doing at the time of the shooting, and did not know that he had shot Garrison. Such being the state of the record, the court did nor err in holding that there was no testimony to justify the giving of instructions on any lower degree of homicide than that of murder in the second degree. There was no room for an instruction on manslaughter under the undisputed evidence both for the State and the appellant. *Kinslow* v. *State,* 85 Ark. 515; *Bradshaw* v. *State,* 95 Ark. 409.

Mr. Bishop says: "A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime. The intention to drink may fully supply the place of malice aforethought so that, if one voluntarily becomes too drunk to know what he is about and then with a deadly weapon kills another, he does murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder." Bishop's New Criminal Law, p. 296, § 401. This is the doctrine applied by us in *Byrd* v. *State,* 76 Ark. 286, 289, where we said: "But no specific intent to kill is necessary to constitute the crime of murder in the second degree under our statute, and the law is that the intention to drink may fully supply the place of malice aforethought, so that if one voluntarily becomes too drunk to know what he is about and then without provocation assaults and beats another to death, he does murder the same as if he was sober."

While the instructions of the court were long and involved, yet there is no erroneous declaration of law

announced in any of them, and they were not calculated to confuse and mislead the jury. The charge of the court on the issue as to whether or not the killing was done with malice or whether it was the result of *mania a potu* — insanity produced by intoxication — was in accordance with the doctrine announced by this court in *Byrd* v. *State, supra.* See also *Casat* v. *State,* 40 Ark. 511. If the killing was the result of voluntary intoxication without provocation and by the use of a deadly weapon, then it was murder in the second degree, unless the appellant at the time was laboring under such a diseased condition of the mind, a fixed insanity caused by continued intoxication, that he was incapable of knowing the nature of the act he was doing, or, if he did know the nature of the act, that he did not know it was wrong.

While the testimony of the defendant and of several witnesses was to the effect that drinking so affected the appellant's mind that he did not know what he was doing during the period of his intoxication and for several days thereafter, yet there was no testimony in the record tending to show that appellant was afflicted with delirium tremens or any other form of mental disease produced by intoxication, and that the killing was the result of such disease rather than the result of a mere temporary loss of reason caused by voluntary intoxication. The court, therefore, did not err in refusing appellant's prayer for instruction No. 2. The doctrine of *Martin* v. *State,* 100 Ark. 189, upon which appellant relies to sustain this instruction has no application to the facts of this record.

2. One of the appellant's assignments of error is that the court erred in permitting the State to prove by witness L. L. Brown that he heard some complaint or rumor against the dances that defendant had permitted to take place at his house and also erred in permitting the witness to be asked about specific acts of misconduct on the part of the appellant. Brown, witness for appellant, testified on direct examination that he had

known appellant many years; had never known him to be in any trouble except drinking; that his reputation for peace and quietude in the community where he lived was good. The court, on cross examination, permitted the State to ask the witness if he had heard any complaint about the appellant having dances and drinking parties and crap games at his house for young boys. There was no error in the ruling of the court. In the first place, the appellant by the question asked the witness on direct examination put in issue appellant's general reputation for peace and quietude in the community in which he lived.

Now, peace and quietude in the legal sense — the sense contemplated by the question — signifies "public quiet, order and security; public tranquillity and obedience to law. Hence, that public order and security which is commanded by the laws of a particular sovereign, lord or superior. * * * Hence, analogously, of the peace established by any laws." Webster's Dictionary. Public peace is "a condition of order that conforms to the requirements of the laws." Funk & Wagnalls' Dict. The witness Brown was justice of the peace, and one of the questions asked him on cross examination was if there had ever been any complaint of the dances, drinking parties and crap games had at appellant's home, and in answer to this question he stated that he had heard them talking about this game up there. He was further asked if there hadn't been complaint about the dances and drinking parties for young boys, and if he hadn't heard of the general discussion of appellant's past record, and from that discussion whether he considered appellant's reputation for morality good or bad. He answered that from the general discussion it was not so very good.

These questions were legitimate on cross examination to show that the reputation of appellant in the community where he lived was not very good for peace and quietude. The questions on cross examination were responsive to the issue raised by appellant by the partic-

ular form of the questions asked the witness on direct examination concerning appellant's reputation for peace and quietude. In the second place, the questions propounded the witness on cross examination were proper in order to test the accuracy of the statements of the witness on his direct examination and his credibility.

In *St. L. I. M. & S. Ry. Co.* v. *Stroud,* 67 Ark. 112, we said: "There could be no doubt that when a witness is put on the stand to attack or defend character he can only be asked on the examination in chief as to the general character of the person whose character is in question, and he will not be permitted to testify to particular facts either favorable or unfavorable to such person; but when the witness is subjected to cross examination, he may then be asked, with a view to test the value of his testimony, as to particular facts." *Clark* v. *State,* 135 Ark. 570-73; *Carr* v. *State,* 147 Ark. 524.

3. The court did not err in refusing to allow appellant to prove the alleged dying declaration of Garrison. The proper foundation was not laid for the admission of such testimony.

4. There are several other assignments of error urged for reversal of the judgment in the brief of appellant's counsel but it would unduly extend this opinion to discuss them. Suffice it to say, we have examined them and find no prejudicial error in the rulings of the court.

The judgment is therefore affirmed.

WALKER-LUCAS-HUDSON OIL COMPANY v. HUDSON.

Opinion delivered June 8, 1925.

1. CORPORATIONS—TRANSFER OF PROPERTY TO OFFICER.—A transfer by a corporation of an oil and gas lease to one of its officers is not void, and is voidable only when unfair or fraudulent.

2. CORPORATIONS—TRANSFER OF LEASE TO OFFICER—BURDEN OF PROOF.—An officer of a corporation who takes from it a transfer of an oil and gas lease has the burden of showing that the transfer was made in good faith and was fair to the corporation.

3. TRUSTS—LACHES.—While laches is not applicable against an express trust during its continuance, the repudiation of the trust entitles the beneficiaries to immediate relief, and opens the door to the defense of laches.

4. CONTRACTS—TIME OF PERFORMANCE.—Time may be of the essence of a contract for the sale or lease of real property, not only by the express agreement of the parties, but from the very nature of the property itself.

5. MINES AND MINERALS—VIGILANCE IN ASSERTION OF RIGHTS.—Parties interested in mineral property of any kind must be vigilant and active in asserting their rights.

6. EQUITY—LACHES IN ASSERTING RIGHTS.—There is no hard and fast rule as to what constitutes a reasonable time for parties to act after facts come to their knowledge; each case being governed by its own circumstances, depending upon the situation of the parties, the extent of their knowledge or means of information, great changes in value, the want of probable ground for imputing intentional fraud, the absence of any reasonable hindrance to assertion of rights, and the like.

7. EQUITY—LACHES.—When the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have got upon inquiry provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence.

8. MINES AND MINING—LACHES.—Parties claiming an interest in oil and gas leases cannot sit by and say nothing if a loss arises and at the same time assert their rights if the venture should prove to be a profitable one.

9. EQUITY—LACHES.—Where a corporation was financially unable to develop an oil and gas lease, and transferred the case to one of its directors, who thereupon expended his time, energy and money in developing it, into a paying proposition, a suit to cancel such transfer, brought by the corporation two years after such

transfer, will be barred by laches, in the absence of any fraud or excuse for the delay.

10. TRUSTS—REPUDIATION.—Where an officer of a corporation held a lease for the corporation as trustee, his demand of the corporation that it transfer the lease to himself individually was a repudiation of the trust.

11. NOTICE—FACTS PUTTING ON INQUIRY.—Whatever puts a party on inquiry amounts to notice where the inquiry becomes a duty and would lead to knowledge of the requisite facts by the exercise of ordinary diligence and understanding.

12. MINES AND MINERALS—LACHES.—Stockholders delaying two years before suing to set aside a transfer of an oil and gas lease to an officer and trustee were guilty of laches where circumstances within their knowledge put them upon inquiry which, if pursued, would have led to complete knowledge of the whole transaction.

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

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellee to establish its alleged undivided one-half interest in an oil and gas lease in which the legal title is in appellee and also to have an accounting from appellee of the royalties collected by him.

The suit was defended by appellee on the ground that he was the owner of the legal title of the one-half undivided interest in the oil and gas lease claimed by appellant.

It appears from the record that appellant, Walker-Lucas-Hudson Oil Company, was duly organized as a corporation under the laws of the State of Arkansas on February 24, 1921, and it was authorized under its charter to acquire, own, and operate oil lands and leases. J. T. Walker, H. S. Lucas, George Williams and Ira M. Hudson were the original subscribers to the stock of said corporation. Walker, Lucas and Hudson each subscribed for $1,000 of the stock. Lucas and Hudson paid in the sum of $850 each for his stock and Walker's stock was issued to him for services performed in promoting the corporation. George Williams transferred to the corporation 110 acres of oil and gas leases and

was to receive therefor $34,000 in cash and $10,000 in the stock of the company. He received the stock; but never received any money. The money was to be paid out of the proceeds of the sale of stock, and the amount promised was never realized therefrom. The oil and gas leases on the 110 acres of land were on undeveloped territory and for that reason the promoters were not able to sell additional stock in the corporation.

A. W. Cooper of the Dixie Petroleum Company, who was a friend of Ira M. Hudson, told the latter that both their companies needed acreage in proved territory and that he knew of a piece of five acres; but his company was not able to buy it all. Cooper told Hudson that his company would take one-half of it, if Hudson's company and some one else would take the balance. Hudson, Walker and Lucas were all officers and directors of their corporation. Hudson was the treasurer. Hudson talked over the matter with Walker and Lucas and they set out to find some one to take a fourth interest in the lease and procured the El Dorado Oil Syndicate to take a one-half interest in the lease.

On the 15th day of April, 1921, Ira M. Hudson procured an assignment from J. R. McCaldin to an oil and gas lease of 4.571 acres and paid him cash therefor the sum of $6,250. By the contract he agreed to pay an additional sum of $6,250 within five days from date. Hudson then further agreed to pay McCaldin $12,500 out of one-half of the first money collected from the first oil produced and saved from said land after accounting to the original lessor for the royalty of one-eighth reserved by him. Under the terms of the agreement the El Dorado Oil Syndicate was to become the owner of a one-half interest in said lease, the Dixie Petroleum Company the owner of a fourth interest, and the Walker-Lucas-Hudson Oil Company the owner of a fourth interest.

The contract further provided that in the event either of the parties should fail to furnish to Hudson its proportionate part of the $6,250, which Hudson

was required to pay within five days from the date of the contract, then the other parties to the contract should have the right of furnishing the part of the party who failed to pay his proportionate part and should become the owner of said part.

Appellant was unable to pay the whole of the cash payment which was $1,562.50. Appellant paid $500 of this amount and Hudson advanced the balance of it to the corporation. The other parties paid their respective amounts as they became due. The contract recites that Ira M. Hudson, although appearing in the lease from McCaldin to himself in his personal capacity, is a matter of fact acting as trustee for the said El Dorado Oil Syndicate, the Dixie Petroleum Company and Walker-Lucas-Hudson Oil Company. The lease from McCaldin to Hudson, and the contract between Hudson and appellant and the other two oil companies were both executed on the 15th day of April, 1921. Appellant failed to pay his proportionate part of the $6,250, which was to be paid five days after the date of the contract.

On account of the failure of appellant to make said payment, an additional contract was entered into by appellant and Hudson on the 26th day of April, 1921. This contract recites that on account of the failure of appellant to make said payment, it is agreed that appellant should pay Hudson out of the sale of stock, $3,125 by noon of April 30, 1921. The contract recites that if said amount is not paid on the date mentioned, the corporation releases said lease to Hudson. The agreement further provides that it cancels and covers any other agreement made regarding the said lease.

On April 30, 1921, Ira M. Hudson and appellant entered into an additional contract whereby it is recited that Ira M. Hudson is the owner of the oil and gas lease in question in this case described as one and one-eighth acres, and that he contracted with appellant for the drilling of a well for oil or gas on said land. The contract provides that appellant should start drilling on said tract within ten days and drill a well to completion

as rapidly as possible. In consideration appellant was to receive a seven-sixteenth interest of all the oil and gas produced from said well.

Subsequently appellant made a contract with other parties to finish drilling the well for it. Hudson made certain advancements which were used by appellant in drilling the well and these amounts were repaid him after a producing well was brought in. Hudson accounted to appellant for the royalties due it under the contract with him of the date of April 30, 1921. After the contract of April 15, 1921, between appellant and Hudson had been executed, appellant sold stock to various persons upon the faith that it owned the whole of said lease as provided in the contract. Most of the stock sold was in small amounts of one and two hundred dollars. Subsequently the directors and stockholders of appellant claimed that Hudson held the whole one-fourth of said lease as trustee for appellant and demanded that he convey to appellant the interest claimed by him, and also account to it for the royalties claimed on said interest.

Upon the failure of Hudson to comply with this request, the present suit was instituted on March 31, 1923. Other facts will be stated and referred to in the opinion.

The chancellor found that Hudson was the owner of the undivided interest in said lease claimed by appellant, and to reverse an adverse decree against appellant in this respect this appeal has been prosecuted.

R. M. Hutchins, Mahony, Yocum & Saye and *J. N. Saye,* for appellant.

Patterson & Rector, for appellee.

HART, J., (after stating the facts). It appears from the record that Hudson secured an oil and gas lease from J. R. McCaldin to 4.571 acres of land in proved territory in the El Dorado gas and oil field on the 15th day of April, 1921. On the same day Hudson entered into a written agreement with appellant and two other oil companies to transfer said oil and gas lease to them

for the price he had agreed to pay McCaldin. Appellant was to receive a one-fourth interest in said oil and gas lease; and the two other corporations the remainder of it. Appellant was a corporation organized for the purpose of acquiring and operating oil and gas leases and Hudson was the treasurer and a director in said corporation. Upon the failure of appellant to pay the purchase price required of it by the terms of the contract, Hudson demanded that its interest in the lease should be transferred and assigned to him. This was done on the 30th day of April, 1921.

This brings us to a consideration of the question of whether this contract was void or voidable. This court has held that while such contracts are only voidable, they are more closely scrutinized than ordinary contracts, and that the burden is upon those claiming under them to prove that they are made in good faith and fair to the corporation. Hence the burden was upon Hudson to show the fairness to the corporation of the transfer of the lease to him and the transfer is illegal only where it is unfair or fraudulent. *Ward* v. *McPherson,* 87 Ark. 521; *American Mortgage Co.* v. *Williams,* 103 Ark. 484; and *Nedry* v. *Vale,* 109 Ark. 584.

In addition to this, it may be stated that under the terms of the contract of April 15, 1921, Hudson became the trustee for appellant and the two other companies securing an interest in the lease on the 4.571 acres in the proved territory. In this connection it may be stated that this trust was put to an end, or at least repudiated, by the agreement of April 30, 1921, whereby Hudson by a contract secured appellant's interest in said lease.

The present suit was not commenced until March 31, 1923, and it is the contention of Hudson that appellant is barred by laches. In this connection it may be stated that laches is not applicable against an express trust so long as the trust continues; but the repudiation of the trust entitles the complainants to immediate relief and opens the door to the defense of laches. *Patterson* v. *Hewitt,* 195 U. S. 309.

The principle is recognized that time may become of the essence of a contract for the sale or lease of real property, not only by the express agreement of the parties, but from the very nature of the property itself. This principle is especially applicable where the property is of such a character that it will likely undergo sudden, frequent, or great fluctuations in value. In respect to mineral property of all kinds the parties interested must be vigilant and active in asserting their rights. *Waterman* v. *Banks,* 144 U. S. 395.

There is no hard and fast rule as to what constitutes a reasonable time within which the interested parties must act after the facts come to their knowledge. Each case must be governed by its own circumstances, depending upon the situation of the parties, the extent of their knowledge, or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the absence of any reasonable hindrance to the assertion of the alleged rights and the like. *Hammond* v. *Hopkins,* 143 U. S. 224, and *Hoyt* v. *Latham,* 143 U. S. 553.

It is well settled that when the question of laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence. *Johnston* v. *Standard Mining Co.,* 148 U. S. 360.

In *Twin-Lick Oil Company* v. *Marbury,* 91 U. S. 587, it is said that the right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time after the facts connected therewith are made known, or can by due diligence be ascertained, and that the determination of what constitutes a reasonable time must be arrived at by a consideration of all the elements which affect that question.

All of the cases above cited recognize that the time within which the interested parties must act in the case of mineral lodes and gas and oil leases is much shorter

than ordinary cases, because in the development of such property, courage and energy are required, and the courts look with disfavor upon the claims of those who have lain idle while awaiting the results of such development. It has been repeatedly pointed out that mining property is subject to sudden and enormous decreases as well as increases in value. Considerable amounts of money are necessary to develop such property, and those claiming an interest in it cannot sit by and say nothing if a loss arises and at the same time assert their rights if the venture should prove to be a profitable one. This principle has been uniformly recognized and applied by this court according to the facts of each case. *Gibson* v. *Herriott,* 55 Ark. 85; *Norfleet* v. *Hampson,* 137 Ark. 600; *Stewart Oil Co.* v. *Bryant,* 153 Ark. 432, and *Cartier* v. *Hengstler,* 166 Ark. 303.

Tested by the rules above announced, we do not think that appellant was entitled to recover on account of its delay in bringing the suit. It does not appear that Walker, Lucas or Williams had any money upon which to operate, and they were largely dependent upon Hudson for financial backing in promoting the business of the corporation. They were unable to sell stock in it by the mere ownership of leases in undeveloped territory. Hudson found out that the corporation might acquire an interest in 4.571 acres in proved territory. After consultation with his associates it was decided that Hudson should put up the money to acquire an interest in the lease and that the corporation should reimburse him. It was thought that this could be done by the proceeds of the sale of the stock. Their expectations in the sale of the stock did not materialize, and the corporation was unable to make the payments required by the terms of the lease under which they acquired the one-fourth interest. Hudson was not willing to put up the money himself and let the corporation receive the gain, if any. Hence he demanded that the interest of the corporation in the lease be transferred to him.

There is nothing to indicate fraud in this transaction. Hudson knew that the corporation had no assets except the leases in proved territory and the small amount of money which he and another associate had put up. Under these circumstances it was natural that he should not be willing to put up the money and let the lease remain as an asset of the corporation. In other words, he desired that if he alone took the risk he should reap all the gain which might be derived from the venture.

It is true that by the very terms of the contract itself he was a trustee for appellant. But, as we have already seen, the contract was not absolutely void, and his action in requiring the corporation to assign the lease to him was at least a repudiation of the trust. His associates in the corporation waited for two years before asserting their rights in the premises. In the meantime Hudson had made a contract with the corporation whereby it was to drill a well for him, and he advanced it certain money to carry out this contract. After the well became a producing one, Hudson accounted to the corporation for its share of the oil produced by the well. The chief stockholders of appellant were promoters of the corporation and associates of Hudson, and from the beginning they had knowledge of the successive steps taken by the corporation and by Hudson himself to find oil upon the land in question. Hudson expended considerable money in drilling the well, and it required much energy to carry on the enterprise.

His associates now claim that he dominated them in the matter, and that because of the lack of funds they had to make a contract relinquishing the rights of the corporation in the lease on the proved territory to Hudson. Conceding this to be true, they should have acted promptly to assert their rights in the courts and have sought to have avoided the contract on the ground that it was procured by fraud or duress before Hudson had expended so much time, energy and money in developing the land. They have given no excuse whatever for their

delay, and we think that it would be inequitable to allow them to maintain this action.

With regard to the other stockholders the case is not so clear; but we think they too are guilty of laches under the circumstances. Most of them visited El Dorado near where the leased land was situated after they bought their stock in 1921. They saw Hudson and the other officers of the corporation and talked with them. The records of the corporation were open for their inspection. As soon as Hudson secured the contract whereby the corporation assigned its interest in the lease to him, he had the records of the corporation to reflect that fact. There was no concealment of any act by him. When they discovered oil, he began to account for the royalties to the corporation and the stockholders in turn received their share of it. This course continued for a year or more before the present controversy arose and this suit was instituted. Under these circumstances the stockholders were put upon notice of facts, which, if pursued by them, would have led to complete knowledge of the whole transaction.

This court is in accord with the Supreme Court of the United States in holding that whatever puts a party on inquiry amounts to notice where the inquiry becomes a duty and would lead to knowledge of the requisite facts by the exercise of ordinary diligence and understanding. *Waller* v. *Danby,* 145 Ark. 306.

The result of our views is that the decree of the chancellor was correct, and it will therefore be affirmed.

McLAUGHLIN v. FORD.

Opinion delivered June 8, 1925.

1. STATUTES—CONSTRUCTION OF AMENDATORY ACT.—A statute amending a prior act from and after its passage becomes a part of the prior act and stands with reference to future transactions as though the act had originally been enacted in the amended form.
2. STATUTES—GENERAL AND SPECIAL STATUTES DISTINGUISHED.—The difference between a general and special statute is that a general statute applies to all of a class, while a special statute applies to one or two or a part of a class only.
3. STATUTES—GENERAL STATUTES.—To make a law applicable to municipal corporations general, it is not necessary that it should operate upon all cities and towns within the State, but it is sufficient if it applies to all cities and towns coming within the designated class.
4. STATUTES—GENERAL AND SPECIAL STATUTES.—In determining whether a statute is general or special, the form of the statute does not control, and a statute in the form of a general law would be a special act if it could apply only to one city or town.
5. STATUTES—CLASSIFICATION OF MUNICIPAL CORPORATIONS.—The Legislature may classify counties, cities and towns according to population, as such classification rests upon substantial differences in situation and needs.
6. STATUTES—GENERAL ACT.—Although Acts 1913, p. 48, and the act of the Special Session of 1923, amendatory thereof, providing for a commission form of government for cities of the first class, applied to those cities only which might have a population of 25,000 or more, according to the last census, such acts were not special, but were applicable to all cities which in the future might have the requisite population.
7. MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES.—Municipal ordinances contrary to the general laws of the State are void.
8. MUNICIPAL CORPORATIONS—POWERS OF CITY COMMISSION.—Under statutes authorizing a city commission to exercise all the functions usually exercised by city councils, such commission is authorized to fix the salaries of employees of the city, which may be done either by resolution or ordinance.

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

STATEMENT OF FACTS.

Appellants, who are citizens and taxpayers of the city of Fort Smith, Arkansas, brought this suit in equity

against certain persons respectively named as mayor, commissioners, city attorney, city clerk, city treasurer, and chief of police of the city of Fort Smith, to enjoin them from receiving an excess salary in these various offices, and to account for the excess salaries already received by them.

According to the allegations of the complaint, the Legislature of 1913 provided for a commission form of government for cities of the first class. Acts of 1913, p. 48. The city of Fort Smith complied with the terms of the act and organized under its provisions a commission form of government. The Legislature at its special session in October, 1923, amended § 12 of the act above referred to so as to increase the salary of the officers of cities of the first class which have a population of 25,000 people or more.

The defendants filed a demurrer to the complaint, which was sustained by the court. The plaintiffs were given leave to amend their complaint, but declined to do so, and expressly elected to stand upon their complaint. It was therefore decreed that the complaint of the plaintiffs be dismissed for want of equity.

To reverse that decree, the plaintiffs have duly prosecuted an appeal to this court.

T. S. Osborne, for appellant.

Sam R. Chew, G. L. Grant, A. M. Dobbs and *Geo. W. Dodd,* for appellee.

HART, J., (after stating the facts). The appeal in this case involves the construction to be given to §§ 11 and 12 of the acts of 1913, and § 2 of the special Acts of 1913 above referred to.

So much of § 11 as is necessary to a decision of the case reads as follows:

"Section 11. The board of commissioners shall, at the first regular meeting after the election of its members, or as soon as practicable thereafter, appoint by a majority vote a city clerk and attorney or attorneys for the city, a city engineer, chief of police, city physician,

chief of fire department and such other officers and assistants as shall be provided for by ordinance and necessary to the proper and efficient conduct of the affairs of the city, and shall prescribe the powers and duties of such officers and employees; may assign particular officers and employees to one or more of the departments, may require any officer or employee to perform duties in two or more departments, and may make such other rules and regulations as may be necessary and proper for the efficient and economical conduct of the business of the city."

Section 12 reads as follows:

"Section 12. The compensation of the mayor and commissioners for all services shall be as follows:

"The mayor shall receive an annual salary of twenty-four hundred ($2,400) dollars, and each commissioner an annual salary of two thousand ($2,000) dollars, until otherwise provided by law; such salaries shall be payable in equal monthly installments, and no salaries of any such officers shall ever be increased or diminished during the time for which he is elected, or after the primary elections for their nominations have been held. Every other officer or assistant shall receive such salary or compensation as shall by ordinance be provided, payable in equal monthly installments, to be fixed by the board, and shall be payable monthly, or at such periods as the board shall determine. Until fixed by the board the salaries of all other officers and employees in force prior to the first primary election shall continue." Acts of Arkansas, 1913, pp. 63-65.

The amendatory act which was approved October 10, 1923, reads as follows:

"Section 12. The compensation of the mayor and commissioners for all services shall be as follows:

"The mayor shall receive an annual salary of twenty-four hundred ($2,400) dollars, and each commissioner an annual salary of two thousand dollars ($2,000), until otherwise provided by law; such salaries shall be payable

in equal monthly installments; provided, that in cities which have a population of 25,000 or more according to the latest census taken by authority of the United States government the mayor shall receive an annual salary of $3,000, and each commissioner shall receive an annual salary of $2,700, payable monthly as aforesaid. Every other officer or assistant shall receive such salary or compensation as shall by ordinance be provided, payable in equal monthly installments, or at such period as the board shall determine. Until fixed by the board, the salaries of all other officers and employees in force prior to the first primary election shall continue." Acts of Arkansas, October, 1923, Special Session, p. 119.

The record shows that the defendants were respectively mayor, commissioners, city attorney, city clerk, city treasurer, and chief of police of the city of Fort Smith, when the last United States census was taken, and it was ascertained by that census that the city had a population of more than 25,000 people. Since that time they have received the increase of salary provided by the amendatory act. The purpose of this lawsuit on the part of the taxpayers is to prevent them from receiving said increase of salary in the future and to compel them to account for that which has already been received by them.

The amendatory act under which they claim the increase in salary, was approved October 10, 1923, which was less than thirty days from the 17th day of September, 1923, which was the date on which the governor issued his proclamation for the special session. Hence they claim that the act is void under the rules of law announced in *Booe* v. *Road Improvement District No. 4*, 141 Ark. 140.

In that case it was held that the requirement of the Constitution of at least thirty days' notice to be given of the intention to apply for a local bill is mandatory, and that, where the record shows that thirty days did not elapse from the date of the issuance of the governor's proclamation for a special session until the date of the

passage of the bill, such special bill will be held to be unconstitutional because the notice required by the constitution could not have been given. On the other hand, the defendants seek to uphold the decree of the chancery court on the ground that the amendatory act approved October 10, 1923, became a part of the act of 1913, and is a general act.

In this connection it may be stated that the amendatory provision of the special session of 1923 from and after its passage became a part of the act of 1913, and in its relation to the sections of that act affected by it, stood with reference to future transactions as though the act had originally been enacted in the amended form. *Mondschein* v. *State*, 55 Ark. 389; and *Abney* v. *Warren*, 143 Ark. 572.

Therefore, the question is presented whether the provisions of the original act as it stands after the amendatory section is introduced is a general or special act. The difference between a general and special statute is that a general law applies to all of a class, while a special statute applies to one or two or a part of a class only. *L. R. & F. S. Ry. Co.* v. *Hanniford*, 49 Ark. 291, and *Little Rock* v. *North Little Rock*, 72 Ark. 195.

In the case last cited the court said to make a law general it is not necessary that it should operate upon all cities and towns in the State; but that it is sufficient if it applies to all towns and cities coming within the designated class. The court recognized, however, that the form of the statute does not control, and that a statute in form of a general law would be a special act if it could apply only to one city or town in the State. These general principles of law are in accord with the general rule as announced in the courts of last resort of the various States. The validity of the acts in which counties and cities have been classified according to population, resting on substantial differences in situation and needs have been generally recognized. One of the reasons for sustaining a classification on the basis of popu-

lation is that those having a small population may ultimately have one much larger, and on that account have need for more officers, and also may be required to pay larger salaries in order to secure more efficient service.

To say that a general law cannot be passed to govern and regulate cities having a certain designated population or more, because only one city of that class exists, is to hold that no law can be passed to provide for future wants or necessities. Cities and counties are recognized in our Constitution as governmental sub-divisions, and each one has its appropriate part in the administration of the local government. Municipal corporations can exercise only the powers which the Legislature confers, and these may be enlarged or abridged, or entirely withdrawn at its pleasure.

If the power to classify and regulate the subject of cities generally be admitted, the question of local legislation is at an end. The reason is that, although it may happen that but one city may fall within the class named by the Legislature, it does not follow that other cities may not in the future come within the class and thereby be governed by the provisions of the act. If the power to classify cities according to population for purposes of regulation exists, that ends the matter. Our Constitution provides for the organization of cities (which may be classified) and incorporated towns. Section 3, article 12, of the Constitution of 1874.

As above stated, if the power to classify exists, it is political or legislative and not judicial. It may be, as contended by counsel for the plaintiffs, that Fort Smith is the only city in the State which falls within the provisions of the original act and the amendatory act; but, when the provisions of both acts are considered, it will be readily seen that other cities may come within the provisions of the act in the future.

The discovery of oil and gas and other minerals in certain localities causes towns and cities to spring up in an almost incredibly short space of time. Hence the Legis-

lature in its discretion has the power to classify cities according to population, not only in respect to the powers to be exercised by such cities, but also in respect to the salaries of their officers.

The case of *Ark-Ash Lumber Co.* v. *Pride & Fairley,* 162 Ark. 235, can have no application under the facts of this case. In that case the act by its terms applied to existing highways, and it was manifest that Mississippi County alone was the only county which could ever come within the provisions of the act. Therefore, the act was held to be a special one and unconstitutional, because the notice required by the Constitution for special acts could not in the nature of things have been given.

Again it is claimed that the act is a special one because the amendatory act applies to cities which have a population of 25,000 or more, according to the latest census taken by the authority of the United States. This would be true, if the terms of the act had only applied to cities having that population at the time of the passage of the act. This would show clearly that the act was intended to be a special one, although in form a general law. Such was the case in *Ark-Ash Lumber Co.* v. *Pride & Fairley,* 162 Ark. 235. For the reason that the terms of the act made it only apply to existing highways, we held that the restriction as to population must be deemed to relate to the last Federal census, at the time of the passage of the act.

As we have already seen, the present act is prospective in its operation, and any city at any time in the future which will have a population of 25,000 or more according to the census of the United States may come under its provisions. That is to say, whenever a city at any time is shown by the census of the United States to have a population of 25,000 or more, then such city comes within the terms of the act, and its officers may receive the salary provided for therein. The officers which are provided for in the increase in salaries are the mayor and the commissioners.

This brings us to a consideration of the increase in salary for the other officers. Our Constitution provides that no municipal corporation shall be authorized to pass any laws contrary to the general laws of the State. Article 12, § 4, of the Constitution of 1874. In construing this section this court has uniformly held that ordinances contrary to the general laws of the State are void. *Morrilton* v. *Comes,* 75 Ark. 458, and *Tomlinson Brothers* v. *Hodges,* 110 Ark. 528.

It will be noted that § 12 of the original act passed by the Legislature in 1913 provides for the payment of certain stipulated amounts to the mayor and commissioners, and provides that no salaries of any such officers shall ever be increased or diminished during the time for which they are elected, or after the primary election for their nominations are held. The amendatory act passed by the Legislature at its special session in October, 1923, provides that the mayor and commissioners shall receive a certain stipulated salary until otherwise provided by law. This was repugnant to the original act, and under the ordinary rules of statutory construction repealed it. The amendatory act also provided that every other officer or assistant shall receive such salary or compensation as shall by ordinance be provided, payable in monthly installments, or at such periods as the board shall determine. Thus it will be seen that, as to the other officers or assistants, the amendatory act in express terms provides that they shall receive such salaries as shall be provided by ordinance.

It is claimed, however, that the increase of salary was given these officers by resolution, instead of ordinance. This did not make any difference. The board of commissioners under the act are given the power to exercise all respective functions usually exercised by city councils.

According to the allegations of the complaint, the increase in salary was given to these officers by a resolution passed by the board of commissioners, and this was

in legal effect an ordinance enacted by them. It does not matter whether the city atorney, city treasurer, and other named persons shall be designated as officers or employees. The statute refers to them as officers or assistants and the board of commissioners is given full power to appoint them and to provide for their compensation. The ordinance or resolution under which they were originally appointed and the subsequent one authorizing them to receive such salary as shall be authorized by ordinance expressly conferred upon the board of commissioners, the power to fix their salary and such act could not in any sense be said to conflict with any other act of the General Assembly.

It is obvious that the general acts of the Legislature under which cities and towns generally are governed do not apply to cities which have adopted the commission form of government. The reason is that special statutes provide for the government of cities adopting that form of government, and they are necessarily exclusive in the matter.

It follows that the decree of the chancellor must be affirmed.

HAYES v. GAMMON.

Opinion delivered June 8, 1925.

1. PRINCIPAL AND AGENT—EVIDENCE OF AGENCY.—Evidence *held* to sustain finding of agency.
2. SALES—MISREPRESENTATION AS DEFENSE.—A stipulation against warranties in a contract of sale does not estop the purchaser or the indorser of their notes, given in consideration of the sale, from setting up the defense to their validity that the contract was procured by fraudulent representations.
3. APPEAL AND ERROR—ADMISSION OF EVIDENCE HARMLESS WHEN.—The admission of incompetent evidence was harmless where it tended only to prove a fact admitted by appellant.

Appeal from Crittenden Circuit Court; *G. E. Keck*, Judge; affirmed.

R. V. Wheeler, for appellant; *Chas. M. Bryan, Prewitt Semmes* and *Arthur G. Brode,* of counsel.

Caraway & Isom and *Berry, Berry & Berry,* for appellee.

SMITH, J. Appellant, T. H. Hayes, sued appellee John Gammon and Berry and S. M. Gammon, the sons of John Gammon, who composed the co-partnership of S. M. Gammon & Brothers, upon a series of notes aggregating $1,500, representing the balance alleged to be due upon the sale of a second-hand passenger bus. The sons of John Gammon who composed the firm of Gammon Brothers, were both minors, and a verdict was directed in their favor on this account, from which action of the court no appeal was taken.

The notes given by Gammon Brothers were indorsed by their father, and judgment was prayed against him as indorser. In addition, the defendant John Gammon was sued on an open account for $50, and, as no denial of this indebtedness was made, judgment was rendered therefor; but, upon a trial before a jury on the issue of liability on the notes, there was a verdict and judgment in favor of John Gammon, from which is this appeal.

Appellant was the owner of a second-hand White truck, which had been converted into a passenger bus, and was bought by Gammon Brothers to be used for that purpose. The testimony shows that Hayes requested one Rudd to negotiate a sale of the bus to the Gammon boys, and the most important question of fact in the case is whether Rudd was the agent of Hayes in selling the bus to the Gammon Brothers. These boys testified that Rudd approached them about buying the bus, and represented to them that it was only two years old, and appellee John Gammon testified that when he indorsed the purchase money notes he inquired the age of the bus and was told by Rudd that it was two years old.

Hayes denied that Rudd was his agent, and testified that Rudd had no authority to make any representations concerning the bus, and that he was not advised, until

after appellee had refused to pay the notes, that any representations in that respect had been made. Hayes did admit, however, that he had requested Rudd to speak to the Gammon boys about the bus.

Rudd testified that he did not represent either party to the trade, and that he had not been paid anything by either, and did not expect to be compensated for what he had done, but on his cross-examination he admitted that he was acting as agent for Hayes, and he admitted having stated both to the Gammon Brothers and to their father that the truck was only two years old. If it be said that the admission of Rudd that he was the agent of Hayes was a mere conclusion of the witness, it may be said that this question was submitted to the jury under instructions which are not complained of, and that the testimony warranted the statement by Rudd that he was the agent of Hayes and supported the finding by the jury that such was the fact.

It is undisputed that Hayes requested Rudd to speak to the Gammon boys about buying the bus, and it is likewise undisputed that Rudd negotiated the sale, that he got in touch with the boys and brought them to Hayes' place of business, where the bus was shown them. A written contract of sale was prepared, and its execution by Gammon Brothers was procured by Rudd, and later the endorsement of appellee John Gammon was secured by Rudd, who received both the contract and the indorsed notes and delivered them to Hayes.

Gammon and his sons testified that they traded with Rudd as the agent of Hayes, and that they relied upon the representation of Rudd as to the age of the bus, and the boys testified that they were induced by this representation to buy the bus, and appellee John Gammon testified that this representation induced him to endorse the notes.

It is insisted that this testimony was erroneous, as it permitted the jury to find that an agency existed from the proof of the acts and declarations of the alleged agent.

We think, however, that this testimony was competent, and that, taken in connection with Rudd's own testimony and other testimony showing both Rudd's apparent and actual authority, the jury was warranted in finding that Rudd was, in fact, the agent of Hayes in negotiating the sale.

The contract of sale was signed by the Gammon Brothers and contained the recital that "the property is transferred in its present condition, and no warranties, guaranties or covenants as to its condition are made, and the said party of the second part accepts it as it is."

It is insisted that in view of this recital appellee is estopped from questioning the validity of the consideration for the notes which he signed as indorser. This is not, however, a suit for a breach of warranty. On the contrary, appellee is defending upon the ground that the execution of the contract was induced by a false and fraudulent representation in regard to the age of the car. Of course, an old car might have been in good condition, or a new car might have been in bad condition, but appellee is not defending on the ground that there was any breach of warranty in regard to the condition of the bus. His defense is that he was induced to buy an old truck which he would not have bought but for the false and fraudulent statement concerning its age, which induced its purchase.

In the case of *Mitchell Mfg. Co.* v. *Kempner,* 84 Ark. 349, the purchaser of a patented machine sought to have stricken from the written contract of sale a recital that it was not warranted in certain respects, it being insisted by the purchaser that a warranty had been made. The relief prayed was denied on the ground that the purchaser had signed a contract and did not contend that the execution of the contract itself was procured by the use of any false or fraudulent representation. But it was there said: "It is said that 'when the vendor positively misrepresents a material fact which is peculiarly within his own knowledge and of which the purchaser is ignorant, the fact that he refuses to give a warranty is not

inconsistent with his liability for fraud.' 20 Cyc. p. 60, and cases cited. While this is doubtless a correct statement of the law on the subject, yet it is equally true that where there is in the written contract an express stipulation against warranty the proof of such misrepresentation must be clear and satisfactory, for the practical effect of giving relief on account of the misrepresentation is to disregard the terms of the contract. The proof in this case is not sufficient to justify us in granting the relief."

Here it is not contended that there was any breach of a warranty, but that the execution of the contract itself was procured through a false and fraudulent representation concerning a material fact—that of the age of the car—upon which the purchasers relied and had the right to rely. Appellee John Gammon testified that he asked Rudd the age of the bus and was told it was two years old, and that he believed this representation and relied upon it and would not have indorsed the notes had he known the statement was not true.

It was not error, therefore, to submit to the jury the question whether the execution of the contract had been procured through fraud. *Joe Lyons Machinery Co.* v. *Wiegel, ante* p. 572.

The contract of sale required the purchaser to insure the bus for the benefit of appellant, and an application for insurance was made to a local fire insurance agent, who issued the policy as requested, but when his report to the insurance company was made showing the number of the engine of the bus, the company directed that the policy be canceled on account of the age of the bus. The admission of this testimony is assigned as error.

Error is also assigned in admitting the testimony of C. A. Farris. This witness testified that there was prepared and in use for automobile dealers a "Red Book," known as the National Used Car Report, which was intended to advise dealers the age of any particular car which they take in exchange or otherwise acquire. This book did not show the age of any car back of 1917, but

from that date down gave the serial numbers of all cars for each year, and by reference to this book one could tell immediately the year in which any car of standard make was made. Farris testified that the number of the bus in question indicated that it had been made prior to 1917.

If this testimony, and that of the insurance agent, is incompetent as hearsay, as contended by appellant—a point we do not decide—the admission of the testimony was harmless, as appellant admitted that the bus was an old one, and he testified that he would not have sold it at the price he did but for that fact, and by his admission the car was at least as old as a 1917 model of the White trucks, and the testimony objected to only tended to prove a fact which was admitted by appellant. Another witness, whose testimony was undisputed, testified that he knew the truck which had been converted into a bus in 1914, and, as we understand the testimony of this witness, it was an old truck then.

The testimony on the part of appellee is that a return of the bus was tendered, that it required constant repair, and was practically worthless, and we think, upon the whole case, the jury was warranted in finding that the execution of the contract of sale was procured by a false and fraudulent representation of a material fact, and that the consideration for the notes sued on had failed.

Upon a consideration of the whole case we find no error, and the judgment of the court below is affirmed.

CLARKSON v. STATE.

Opinion delivered June 8, 1925.

1. CRIMINAL LAW—HEARING OF APPLICATION FOR CHANGE OF VENUE.—Upon the hearing of an application for a change of venue, the court's inquiry is limited to the determination of the credibility of the affiants in the supporting affidavits.
2. CRIMINAL LAW—ABSENCE OF WITNESS—DILIGENCE.—Where appellants failed to employ diligence to secure the attendance of a material witness, who was out of the State at the time of trial, they were not entitled to complain of being forced to trial without him.
3. JURY—TERM OF SERVICE.—Under Crawford & Moses' Digest, § 6374, the term of service of jurors is four weeks, and jurors who have served only two weeks are not for that reason ineligible for further service.
4. CRIMINAL LAW—INSTRUCTIONS—WEIGHT OF EVIDENCE.—An oral instruction to the jury, in response to a report of inability to agree, that better and fairer evidence could not be had, and that it was the jury's province to decide the case, and for them to retire to consider their verdict further, *held* not prejudicial as expressing an opinion as to the weight of the evidence or the credibility of this witness.
5. CRIMINAL LAW—LANGUAGE OF COURT—WHEN HARMLESS.—Where the prosecuting attorney in argument stated that the participation of a youthful witness in the crime had been induced by the accused, and that he would not prosecute the witness, the court's remark, in overruling objection to the argument, that the argument was one which the prosecuting attorney had a right to make under the testimony, *held* not prejudicial.
6. CRIMINAL LAW—REMARK OF PROSECUTING ATTORNEY.—Defendant can not complain of a remark of the prosecuting attorney that he would not prosecute a State's witness because of his youth, although his guilt was shown.
7. CRIMINAL LAW—JURY'S RECOMMENDATION OF MERCY.—Under Acts 1923, No. 76, a circuit judge is not bound by the recommendation of the jury to suspend the sentence of a convicted person.

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

Jno. P. Roberts and *R. A. Rowe*, for appellants.

H. W. Applegate, Attorney General, and *John L. Carter*, Assistant, for appellee.

SMITH, J. This is the second appeal by the appellants from judgments of the Sebastian Circuit Court,

Greenwood District, sentencing them to the penitentiary. *Clarkson* v. *State,* 165 Ark. 459. The judgments on the former appeal were reversed because the court, in the application of a rule of practice of the circuit court, declined to hear a petition for a change of venue on the ground that the petition therefor had not been filed within the time prescribed by the rules of the court.

Upon the remand of the cases another petition for change of venue was filed and overruled, and this action is assigned as error, and it is now insisted that the court should have made an order changing the venue upon either the original or the second petition therefor.

We did not determine upon the former appeal that the venue should have been changed, but decided only that the court erred in refusing to hear and determine the appellants' right to a change of venue. Upon the remand of the causes the petition was heard on the testimony of the supporting affiants to the petition for the purpose of determining the credibility of the affiants. This is the practice which we have many times approved, but in approving that practice we have always pointed out that the inquiry of the court should be limited to a determination of the question of the credibility of the affiants.

Upon the examination of the affiants who made the supporting affidavits upon which the petition was based the court found the affiants were not credible persons within the meaning and requirements of the law, and denied the petition. This order was based upon a finding that the affiants were not familiar with the state of public sentiment in regard to appellants except in limited portions of the jurisdiction in which they were to be tried, and, without setting out the testimony, we announce our conclusion that this finding does not appear to have been arbitrarily made.

The legal sufficiency of the testimony is not questioned, but appellants insist that they were prejudiced by being required to go to trial in the absence of a material witness. The testimony of this witness would have been material to appellants' defense, but the court found

that diligence had not been employed in securing the attendance of the witness. Besides, it was shown that the witness was absent from the State at the time of the trial.

At the beginning of the trial appellants asked that six members of the panel of twenty-four jurors then present be discharged, on the ground that these six persons had been members of the regular panel which had served for the preceding two weeks, and had thus completed their term of service. Appellants are mistaken in assuming that the six jurors had become ineligible for further service after having served two weeks. By § 6374, C. & M. Digest, it is provided that "the term of service of any person summoned to serve on the petit jury in the circuit courts shall be limited to four weeks, and no person serving for such time shall be eligible for further service during that term or the next succeeding term. Provided, nothing in this section shall be construed to limit the time of service of any juryman who may be, at the time of expiration of his service, impaneled on a jury actually engaged in trying a cause."

In the case of *Humphrey* v. *State,* 74 Ark. 554, the term of court commenced September 19, 1904, on which day the petit jury was excused until October 3 following, and on October 8 the court adjourned until October 24, and on the 9th day of November following, when the defendant's case was called for trial, he moved to discharge the petit jury because the members thereof were not eligible for further service under the provisions of the statute which we have quoted. It was held by this court on the appeal that under this statute four week's actual service was necessary to render a person ineligible for further service during the term for which he was impaneled, and that the jurors in that case had not served four weeks and were eligible. In the instant case the jurors had served only two weeks.

After the causes had been submitted to the jury and had been under consideration for some time, the jury reported that they were unable to agree, whereupon the

court gave certain oral instructions in regard to the duty of jurors in considering causes submitted to them. This charge was as follows: "Of course, it is of the greatest importance that this case be decided, and there is no other way under the law and the Constitution to decide the guilt or innocence of a party except by a jury. You have been duly selected by both parties, and I do not know of any better people that we could get on this jury to determine the case that I feel would be better qualified to do it than you are, or to look into it more intelligently, or that would have better or fairer evidence than you have, and, while the court don't tell you which way to decide it, as that is entirely your province to decide it under the law and the evidence introduced, and with this admonition from the court, we hope you will be able to decide the case; and you will now retire to further consider your verdict."

It is the opinion of the majority—in which the writer does not concur—that there was no prejudice in giving this instruction, that it did not contain any expression of opinion as to the weight of the evidence or the credibility of the witnesses, but meant simply that the case had been fully developed and that the jury was in possession of all the testimony upon both sides of the question.

It is my opinion, however, that, in view of the conflict in the testimony, the statement of the court, that better and fairer evidence could not be had, was fairly open to the construction by the jury that there was testimony which should be disregarded as not being as fair and good as other testimony, and that, if this fair and good testimony only were considered, there would be no difficulty in arriving at a verdict.

A witness named Self, who was a boy sixteen years old, gave damaging testimony against appellants, and in the argument to the jury the prosecuting attorney stated that the boy's participation in the crime, which the witness had testified to, had been induced by the persuasion of appellants, and that the prosecuting attorney would not prosecute a boy under such circumstances. An objec-

tion was made to this argument, which was overruled, and in overruling the objection the court stated that it was an argument which the prosecuting attorney had the right to make under the testimony.

It would have been better had the objection been overruled without comment, but we do not think the comment constituted prejudicial error calling for the reversal of the case. We do not understand that the court stated that the testimony sustained the argument of the prosecuting attorney, but that it was proper for the prosecuting attorney to argue that the testimony did show that appellants had induced the witness' participation in the crime.

As to the statement of the prosecuting attorney that he would not prosecute the witness Self on account of his youth, although witness' guilt was shown, this was a matter about which appellants had no right to complain.

The jury found both appellants guilty, but the verdict contained a recommendation that the sentence of appellant Viola Clarkson, the wife of her co-defendant, be suspended, but, notwithstanding this recommendation, the court pronounced sentence upon them both.

Under act 76, Acts 1923, page 40, circuit judges are authorized, under certain circumstances, to suspend the sentences of convicted persons, but the act vests this discretion in the judge, and not in the jury. It would, of course, be proper for the court to consider any recommendation the jury might make in the matter, but the jury can only recommend and cannot control the discretion vested in the judge. *Kelley* v. *State,* 133 Ark. 261.

Other errors are assigned and are discussed by learned counsel for appellants, but we do not think these assignments of error are of sufficient importance to require discussion by us.

It is the opinion of the majority that no error was committed, and the judgment is therefore affirmed.

FURST & THOMAS v. VARNER.

Opinion delivered June 8, 1925.

EXCEPTIONS, BILL OF—NECESSITY OF FILING WITHIN TIME.—Where a bill of exceptions was not filed within the time fixed by the court, a bill filed pursuant to a vacation order of the trial judge extending the time was unavailing.

Appeal from White Circuit Court; *E. D. Robertson,* Judge; affirmed.

Avery M. Blount, for appellant.

John E. Miller and *Cul L. Pearce,* for appellees.

SMITH, J. The only error assigned for the reversal of the judgment in this case is that the court below erred in giving and in refusing to give certain instructions.

The order overruling the motion for a new trial was made on January 31, 1924, at which time the court allowed ninety days for preparing and filing a bill of exceptions. The court adjourned on February 16, 1924, until May 19, 1924, but on April 8 the trial judge made an order in vacation extending the time for filing the bill of exceptions for thirty days. The court was not in session at any time between February 16 and May 19. A bill of exceptions was filed with the clerk of the trial court on May 29.

In the case of *Routh* v. *Thorpe,* 103 Ark. 46, it was said that "* * * before a purported bill of exceptions can be considered as a part of the record on this appeal, it is necessary that the transcript brought to this court must show that the bill of exceptions was duly filed with the clerk within the time fixed by the court while in session." Other cases to the same effect are cited by appellee.

Here, the court while in session allowed ninety days for filing the bill of exceptions, and it was not filed within the time limited. The additional time allowed for that purpose was given in vacation and was unavailing.

The errors complained of are of such nature as can be brought to the attention of this court only by a bill of exceptions, and, as the bill of exceptions was not filed within the time fixed by the court while in session, the one filed cannot be considered, and the judgment of the court below must therefore be affirmed, and it is so ordered.

SMALLEN v. STATE.

Opinion delivered June 8, 1925.

1. EMBEZZLEMENT—INDICTMENT—INTENT.—In a prosecution for embezzlement, an indictment was not demurrable for failure to allege an intent to deprive the employer of its money if, when read as a whole, it clearly charged such intent.
2. CONTINUANCE—FAILURE TO USE DILIGENCE.—A continuance for an absent witness alleged to be sick was properly denied for lack of diligence where the defendant did not procure a subpoena for the witness until the day before the case was set for trial and the sheriff was unable to serve same, and it did not appear how sick the witness was.
3. EMBEZZLEMENT—INSTRUCTIONS AS TO INTENT.—In a prosecution for embezzlement, instructions *held* to cover the question of intent.
4. EMBEZZLEMENT—FRAUDULENT INTENT.—It is essential to the crime of embezzlement that there be a fraudulent intent on the part of a fiduciary to convert property of another to his own use.

Appeal from Cross Circuit Court; *G. E. Keck*, Judge; affirmed.

J. C. Brookfield and *S. A. Gooch*, for appellant.

H. W. Applegate, Attorney General, and *John L. Carter*, Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried, and convicted in the circuit court of Cross County, criminal division, for the crime of embezzlement, and adjudged to serve a term of two years in the State Penitentiary as a punishment therefor, from which is this appeal. The indictment was entered on the 10th day of September, 1924, and is as follows:

"The grand jury of Cross County, in the name and by the authority of the State of Arkansas, accuse Thomas O. Smallen of the crime of embezzlement, committed as follows, viz: In the county aforesaid, on the 19th day of November, 1923, the said Thomas O. Smallen, then and there being above the age of sixteen years and then and there being the clerk, servant, employee, agent, and bailee, and by virtue of his employment as such, having delivered and entrusted to his possession, care, and custody $1,864.70 in gold, silver, and paper money of the United States, of the value of $1,864.70, the property of the said Bank of Vanndale, did then and there unlawfully, fraudulently, and feloniously embezzle and convert to his own use said $1,864.70 without the consent of said owners, bailors, and employers; against the peace and dignity of the State of Arkansas."

The cause was continued and set for trial on the 1st day of February, 1925, and, at plaintiff's request, was passed until the 6th day of February, 1925. On the day before the trial, appellant filed a motion for a continuance, which he amended on the day of the trial. The motion, in substance, alleged that John W. Brawner, who was in attendance at court until February 4, 1925, and whom appellant expected to use as a witness, left at that time for his home in Leachville, in Mississippi County, where he was detained by illness; that, as soon as appellant heard of his absence, he obtained a subpoena for him, which the sheriff served by telephone; that the testimony of Brawner was material and necessary to his defense, setting out in detail the facts to which he would swear, if present. In support of the motion, appellant introduced the clerk of the court, the sheriff of the county, and himself.

E. L. Cooper, the clerk, testified that appellant applied to him after office hours on February 4 for a subpoena for John W. Brawner, whereupon he requested the sheriff to proceed as if he had a subpoena, promising to issue it the morning of the 5th, which he did.

H. E. Proctor, the sheriff, testified that he telephoned on the night of the 4th of February in an effort to serve

the subpoena, but failed to get Brawner, and that he had taken no further steps in the matter.

Appellant testified that he called Brawner over the telephone and received information that he was sick in bed and could not come to the phone; that he did not know Mr. Brawner was going to leave town at the time he left.

The court, after hearing the testimony detailed above, overruled appellant's motion for continuance over his objection and exception.

Appellant then filed the following demurrer to the indictment, which was also overruled over his objection and exception, to-wit: "That the facts stated in the indictment do not constitute a public offense, nor are the statements of facts sufficient to charge the crime of embezzlement under the laws of the State of Arkansas."

The testimony introduced by the State in the trial of the cause tended to show that appellant was interested in a gin company at Sikestown, Missouri; and, in the operation of same, embezzled $1,864.70 of the bank's money by drawing a draft in that sum for the bank on November 19, 1923, on the Farmers' Gin at Sikestown, which draft was never paid by said gin company, but was returned unpaid and found in the bank when its doors were closed.

The testimony introduced by appellant tended to show that he was not interested in said gin, but that loans were regularly made to it by the bank with the approval of the board of directors just as the other loans were made, and that the draft in question was drawn in an effort to collect part of the indebtedness the gin company owed the bank.

Appellant relies for a reversal of the judgment upon the following assignments of error; first, that the court erred in overruling appellant's demurrer to the indictment; second, that the court erred in refusing to grant a continuance on account of the absence of witness J. W. Brawner; third, that the court erred in refusing to give instructions Nos. 1, 2, and 3, requested by appellant.

(1) Appellant contends that the indictment is fatally defective because it does not allege intent to deprive the bank of its property. It is true the word "intent" does not appear in the indictment, but this was unnecessary as the language used, when read as a whole, clearly charges appellant with such intent. This point was settled adversely to appellant's contention in the case of *Kent* v. *State,* 143 Ark. 439, wherein an indictment identical with this in all essentials was upheld.

(2) The contention of appellant that the court erred in refusing to grant a continuance on account of the absence of witness J. W. Brawner is without merit, because appellant failed to show that he exercised proper diligence to procure the attendance of the witness. He did not ask for a subpoena for the witness until after office hours on February 4, and did not secure its issuance until February 5. At that time the witness was in an adjoining county, and the sheriff was unable to get in communication with him over the telephone. Appellant telephoned and ascertained that the witness was sick. Just how sick is left to surmise. Appellant should have gotten out a subpoena for the witness and had it served at an earlier date. He had ample time to do so, but took a chance of using J. W. Brawner as a witness without resorting to process until it was too late to get him in time for the trial. Due diligence was not shown. The law requires that a defendant exercise proper diligence to secure the attendance of his witnesses. *Sheptine* v. *State,* 133 Ark. 239.

(3) The three instructions requested by appellant which the court refused to give are as follows:

1. "Unless you find from the evidence that the defendant actually used or caused to be used the money charged to have been embezzled for his own benefit, your verdict should be for the defendant."

2. "You must be convinced beyond a reasonable doubt that the defendant converted the money alleged to his own use, or to the use of some one for him with the specific intent to deprive the true owner of the benefit of such money before you can convict in this case."

3. "If you find from the evidence that the bank, through its officers, was advised and knew of the transactions and use of moneys alleged to have been embezzled, you will find for the defendant."

Appellant does not seriously contend in his brief that instructions Nos. 1 and 2 were not fully covered by the instructions which the court gave. The fact is they were fully covered by the court's instructions to the jury. Appellant strenuously insists that none of the instructions given by the court covered the point of the necessity of the intent on appellant's part to commit the crime of embezzlement. It is true that an essential of the crime of embezzlement is a fraudulent intent on the part of a fiduciary to convert the property of another to his own use. *Fleener* v. *State,* 58 Ark. 98. We think the instructions given by the court make that plain. The statute defining embezzlement was read to the jury, which provides that the fiduciary committing the crime must do so with the intent to convert the property to his own use. Again, the court told the jury that "the essence of this crime is the taking or using the money of another person, without his consent and against his will, fraudulently." Again, the court told the jury that in order to convict appellant, it must be necessary for them to find that he unlawfully, fraudulently, and feloniously embezzled and converted to his own use said $1,864.70 without the consent of the owners thereof. And again, the court told the jury "that if the board of directors of the Bank of Vanndale knew about the transaction as it was going on, knew about this loan having been made, or was being made, and knew that this money was being paid out, and consented to the said paying out of such funds or to the making of said loan, then the defendant would not be guilty of any crime."

We do not see how, with these instructions as a guide when the issue of fact was so clearly drawn, the jury could have convicted appellant without finding that he converted the money to his own use with an intent to deprive the bank of it.

No error appearing, the judgment is affirmed.

VALLEY PLANING MILL COMPANY v. LENA LUMBER COMPANY.

Opinion delivered June 8, 1925.

1. VENDOR AND PURCHASER—BREACH OF CONTRACT.—In a suit to enforce specific performance of a contract of sale of land, which provided for a cash payment and delivery of indorsed notes coincident with delivery of the deed, where the cash payment was held up on discovery of the insufficiency of the indorsements on the notes, and the vendor agreed to give further time to secure other indorsements, failure of the purchaser to make such cash payment while the indorser's financial ability was being investigated did not constitute a breach of the contract by the purchaser.
2. FRAUDS, STATUTE OF—MODIFICATION OF CONTRACT.—The general rule that a material modification of a contract within the statute of frauds must be in writing to be valid has no application where the charge does not affect an essential part of the contract, but merely substitutes a mode of performance thereof not within the statute.
3. VENDOR AND PURCHASER—ARBITRARY FORFEITURE.—Where time is not made the essence of a contract for the sale of land, and steps toward completion of the executory contract have been continued the vendor cannot summarily and arbitrarily stop the negotiations, without reasonable notice to the vendee to perform.
4. VENDOR AND PURCHASER—INNOCENT PURCHASER.—One who purchased land with full knowledge that the vendor had contracted to sell the land to another and that a cash payment had been made, and completion was awaiting the approval of an indorsement of the purchase money notes, *held* not an innocent purchaser, though he was informed by his vendor that the deal had fallen through, no inquiry from the other party having been made.

Appeal from Saline Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

Martin, Wootton & Martin, for appellant.

Briner & Utley, W. D. Brouse, Gannaway & Gannaway and *R. E. Wiley,* for appellee.

HUMPHREYS, J. This suit was brought on November 29, 1924, in the chancery court of Saline County by appellee against appellants to enforce the specific performance of a written contract of sale and purchase of 5,000 acres of timber land in Saline County, particularly describing same. The memoranda evidencing the agree-

ment were in the form of a letter of acceptance and a receipt which are as follows:

"August 23, 1922.
Little Rock, Ark.

"Lena Lumber Company,
Benton, Ark.

"Gentlemen: I am this day accepting your proposition on the 5,000 acres of timber lands, more or less, in Saline County in fee for the price and terms below: $5,000 cash to bind the trade as forfeit or to be refunded in case abstract proves to be worthless. $10,000 down when title is shown to be good, $10,000 note for one year from today at 7 per cent. interest, and one note for $10,000 due two years from today at 7 per cent. interest. The interest on the second note is to be paid one year from today when first note is paid, and I am to retain lien on land and timber until both notes are paid. These notes are to be secured by the Citizens' National Bank of Boston, Mass. The purchase price is $35,000 on the terms mentioned above.

"Yours very truly,
"(Signed) R. R. McINTOSH.

"Accepted this August 23, 1922. Lena Lumber Company, by H. Faisst, Pres."

"To Lena Lumber Company:

"Received of the Lena Lumber Company check in the sum of $5,000 as payment on account of purchase of five thousand acres more or less in Saline County, a list of which lands has been submitted as shown on plats. It is agreed that a further sum of ten thousand dollars is to be paid when warranty deed and abstract showing good title are delivered. As a further consideration, you are to give two notes as balance purchase money, each in the sum of $10,000, payable one and two years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, the said notes to be guaranteed by the Citizens' National Bank, of Boston, Massachusetts, and a vendor's lien retained on the land to

secure the payment of said notes. You are to have a reasonable time to examine the abstract of title after the abstracts are delivered to you for examination; and it is agreed that your failure to complete this transaction within a reasonable time, condition that the title be good, will be sufficient cause to declare forfeiture of the five thousand dollars this day paid on account of this purchase.

"R. R. McINTOSH.

"Accepted: Lena Lumber Company, by H. Faisst, President, this day August 23, 1922."

It was alleged that, after the abstract was approved and accepted, appellee drew its draft for $10,000 on the Citizens' National Bank of Boston to pay the balance of the cash consideration, and executed two notes evidencing the balance of the purchase money, which papers, together with the deed of McIntosh to it and the muniments of title, were delivered to the People's Bank of Little Rock under agreement that the draft should be forwarded for collection and the notes for indorsement, after which the notes should be delivered to McIntosh and the deed and other muniments of title to appellee; that it was discovered that the indorsement by the Citizens' National Bank of Boston of notes secured by mortgage on real estate was not enforceable, whereupon McIntosh waived the bank's indorsement, and agreed to accept such indorsement in lieu thereof as would meet the approval of W. E. Lenon, president of the People's Bank; that it tendered the personal indorsement of Guy A. Ham, president of the Citizens' National Bank of Boston, and while W. E. Lenon was investigating his financial condition, McIntosh, without notice to appellee, sold and conveyed said lands to the Valley Planing Mill Company with the knowledge on its part of the contract between McIntosh and appellee; that McIntosh kept the $5,000 cash payment, obtained the notes and draft from the People's Bank, and returned them to appellee, claiming that appellee had forfeited its rights under the contract for the sale and purchase of said lands by failure

to furnish acceptable indorsement on the two $10,000 notes.

R. R. McIntosh filed an answer admitting the execution of the contract for the sale of said lands to appellee and the receipt of the initial payment of $5,000, but denied every other material allegation in appellee's bill, and alleged that appellee breached the contract to his damage in the sum of $5,000. He prayed for the dismissal of appellee's bill for the want of equity.

The Valley Planing Mill Company filed an answer adopting the answer of McIntosh, and, by way of further defense, alleging that it purchased said land from appellee for $34,500; that, in order to make the payment, it mortgaged the lands for $20,000, to the Arkansas National Bank of Hot Springs, which is a first lien thereon; that it purchased the land in good faith and without knowledge of appellee's claim.

The Arkansas National Bank intervened, alleging that it accepted the mortgage from the Valley Planing Mill Company in good faith for $20,000 in the belief that said company was the owner of said lands, and prayed that its rights be protected by declaring its lien prior and paramount to that of all other persons.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a finding of the issues for appellee, and a rendition of the decree for specific performance of the contract between McIntosh and appellee. In order to effect specific performance thereof, appellee was ordered to pay $30,000 principal and $251 interest to the commissioner of the court, who was to pay the Arkansas National Bank of Hot Springs out of the fund the amount due on the mortgage and to pay the balance to appellee, Valley Planing Mill Company; and said Arkansas National Bank was ordered to release its mortgage upon payment of same; and the Valley Planing Mill Company to execute a deed for said lands to appellee upon payment to it of the balance of said fund. Appellee paid the amount to the commissioner, whereupon he filed a commissioner's deed to

appellee for said lands, which was confirmed by the court and ordered to be delivered to appellee. A supersedeas bond was executed, and an appeal duly prosecuted to this court. Upon application, an injunction was issued against all parties restraining them from cutting timber on said land during the pendency of the appeal.

The facts necessary to a determination of the issues involved on the appeal are, in substance, as follows: R. R. McIntosh was the owner of the lands in question by purchase from the Hamlin Stave Company. The People's Savings Bank advanced the purchase money for the lands to his vendor and held his unrecorded deeds as security for the advancement until he could sell the lands. On August 3, 1922, he entered into a contract for the sale and purchase of them to appellee for $35,000, $5,000 of which amount was paid in cash, pending the consummation of the deal. The examination of the abstract by appellee's attorneys was completed on October 18, 1922, and accepted with a written understanding that McIntosh might procure patents for about forty pieces of the land at a later date and have them recorded. After the acceptance of the abstract, the parties met at the People's Savings Bank to close the deal. McIntosh executed a deed for the lands to appellee, drew a draft for $10,000 on the Citizens' National Bank of Boston, and appellee executed two notes to McIntosh for $10,000 each evidencing the balance of the purchase money; and these, together with the abstract and other muniments of title, were left in the People's Savings Bank with directions to forward the draft for collection and the two notes for the indorsement of the Citizens' National Bank of Boston; and when the draft was paid and the notes returned, to deliver them to McIntosh, and the deeds, abstracts, and other muniments of title, when patents were obtained, to appellee. About this time it was discovered that the national banking law prohibited a national bank from indorsing notes of this kind: so an attempt was made to close up the deal on the basis that Guy Ham, the president of said bank, should personally

indorse the notes in the place of the bank. This arrangement was agreed upon dependent upon the approval of Ham's indorsement by W. E. Lenon. While W. E. Lenon was investigating the solvency and sufficiency of Guy Ham as indorser upon the notes, McIntosh became apprehensive lest the first deal might fail, and, having an opportunity to sell the lands to the Valley Planing Mill Company, gave it a week's option to buy same for $34,500 on condition that the deal with the Lena Lumber Company should fail. At the time he executed the option, he gave the Valley Planing Mill Company a copy of his written contract with the Lena Lumber Company. The Valley Planing Mill Company obtained information that W. E. Lenon was not satisfied with the personal indorsement of Guy Ham upon the two $10,000 notes and that the draft had been returned unpaid, whereupon it paid McIntosh $34,500 and obtained a deed from him to the lands. This understanding was obtained through conversation with W. E. Lenon, but it is quite evident that, at the time of the conversation, Lenon had not determined whether he would approve Ham's personal indorsement. The Valley Planing Mill Company made no inquiry of appellee concerning the matter. On November 9, W. E. Lenon went away on a hunting trip before he had completed his investigation of the financial condition of Guy Ham. The sale of the lands by McIntosh to the Valley Planing Mill Company was completed November 14 before Lenon returned from the hunting trip and before he had decided whether the individual indorsement of Guy Ham on the notes would be sufficient. Appellee had no notice of the option which McIntosh had executed to the Valley Planing Mill Company, and the first information it received of the sale was contained in a registered letter written to it by McIntosh claiming that, on account of the failure to comply with the terms of the contract of sale and purchase, he was forfeiting the contract by taking down the deposit of $5,000 and returning it, the draft for $10,000 and the two notes for $10,000 each.

Appellant's first contention for a reversal of the decree is appellee's failure to pay the $10,000 draft. The insistence is made that this constituted a breach of the contract, thereby preventing appellee from demanding its specific performance. We do not think the failure to pay the draft under the circumstances in this case constituted a breach of the contract. As we read the contract, its payment was to be coincident with the indorsement of the notes and concurrent with the delivery of the deed as contended by appellee. Payment thereof was not refused but withheld pending the acceptance of the personal indorsement of the two notes by Ham, which indorsement had been offered and was being considered as a substitute for the indorsement of the Citizens National Bank of Boston. The validity of the indorsement of the Citizens National Bank of Boston had arisen when the parties came to close the contract. All the parties recognized that the contract had provided for an indorsement of the two $10,000 notes, which could not be enforced. When this discovery was made, appellee offered to substitute the individual indorsement of Guy A. Ham for that of the bank, which was satisfactory to McIntosh if it should meet with the approval of W. E. Lenon whose bank had advanced the money to McIntosh with which to purchase the land. Pending the investigation and decision of W. E. Lenon relative to the sufficiency of Ham's personal indorsement, the matter was left *in statu quo*. The failure to pay the $10,000 draft during the time W. E. Lenon was considering the acceptance of Ham's personal indorsement in lieu of that of the bank, could not, in good conscience, be treated as a refusal to pay same in the sense of breaching the contract.

Appellant's next contention for a reversal of the decree is that appellee's offer of Ham's indorsement in the place of the indorsement of the bank, provided for in the contract, and the agreement of McIntosh to accept Ham's indorsement subject to the approval of W. E. Lenon constituted a material change

in the original contract and was void because not in writing. The contract in question related to the sale and purchase of real estate; and, in order to be enforced, must have been in writing to meet the requirements of the statute of frauds. *St. L. I. M. & S. R. Co.* v. *Beidler,* 45 Ark. 1. The general rule is that a material modification of a contract within the statute of frauds must be in writing in order to be valid and binding. Such a contract cannot be modified in essential parts by parol agreement so as to be valid against a plea of invalidity under the statute of frauds. *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 445. There is a marked difference, however, between a modification of a written contract in the essentials required to meet the statute of frauds and an agreement for a substituted method of performance not within the statute. The former is required to be in writing in order to be enforceable as against a plea of the statute of frauds, whereas the latter is valid if in parol. The reason of the distinction is that the purpose of the statute of frauds is to require contracts to be certain and definite which it attempts to regulate, but does not attempt to regulate a substituted mode of performance thereof not within the statute. *Cummins* v. *Arnold* (Mass)., 37 Am. Dec. 155; *Lowe* v. *Freadwell,* 12 Me. 441; *Conroy* v. *Toomay,* 234 Mass. 384; *Long* v. *Hartwell,* 34 N. J. L. 116; *Moore* v. *McAllister,* 34 Miss. 500; *Sharpe* v. *Wickoff,* 39 N. J. Eq. 346; *Warden* v. *Christ,* 106 Ill. 326; *Welsh* v. *McIntosh,* 130 Penn. 641. It is true that the written contract provided that the two $10,000 notes evidencing the deferred payments should be indorsed by the Citizens National Bank of Boston, Mass. Neither party knew at the time that such an indorsement was not enforceable. It was discovered that the national banking law prohibited national banks from making such indorsements, whereupon it was orally agreed that Guy A. Ham should indorse them if W. E. Lenon would accept him as the indorser in lieu of the bank. This arrangement had relation solely to the performance of the con-

tract and not to an essential thereof necessary to meet the requirement of the statute of frauds. It was not necessary, therefore, under the rule announced in the authorities last cited, for the agreement for a substituted indorsement to be in writing.

The facts in the instant case bring it within the doctrine announced in the case of *Adams* v. *Rhodes,* 143 Ark. 172, to the effect that where time is not made the essence of a contract in a memorandum for the sale of land, and steps toward a completion of the executory contract have been continued, the vendor cannot summarily and arbitrarily, without reasonable notice to the vendee to perform, stop negotiations. Under such circumstances, reasonable notice must be given a vendee to pay the consideration and accept the deed so that he might have an opportunity to comply and protect himself. 39 Cyc. 1370. The vendor will not be permitted to spring a surprise upon the vendee by abruptly announcing a forfeiture without extending a reasonable time to the vendee to perform. In the instant case, while negotiations were pending for the substitution of the indorser, McIntosh declared a forfeiture without giving appellee notice that the tendered indorsement was not sufficient, and without extending appellee a reasonable opportunity to furnish an indorsement which would be acceptable to W. E. Lenon.

The next and last contention of appellants for a reversal of the decree is that the Valley Planing Mill Company is an innocent purchaser of the lands for value. The Valley Planing Mill Company took its option on the lands with full knowledge of the executory contract for the sale of same by McIntosh to appellee. In fact, it was furnished with a copy of the contract between McIntosh and appellee. It exercised its option to buy without making any inquiry whatever of appellee as to whether it had forfeited its rights under the contract. It was known to the Valley Planing Mill Company that appellee had made a $5,000 cash payment to McIntosh and

that the matter was pending, awaiting the approval of the abstract of title by the attorneys. Instead of inquiring from appellee, it relied solely upon the statement of McIntosh that appellee had refused to comply with its part of the contract, and a statement of W. E. Lenon that the personal indorsement of Guy A. Ham on the two $10,000 notes was not satisfactory to him. Had inquiry been made of appellee, the Valley Planing Mill Company would have received information that the matter was in abeyance, awaiting the decision of W. E. Lenon as to whether the indorsement of Ham would be sufficient after getting further information as to his financial condition. At the time Lenon made the statement to appellee's representative that he was not satisfied with Ham's personal indorsement, Lenon had not completed his investigation of Ham's financial condition. He had the matter under advisement, and had agreed to get a report from Bradstreet, and then make his decision and report to appellee, and give appellee an opportunity to furnish other security if Ham's indorsement was not sufficient. The rule is: "Notice of facts putting a man of ordinary prudence on inquiry is tantamount to knowledge of the facts to which the inquiry might lead." *Halloway* v. *Eagle,* 135 Ark. 205, and cases cited therein. Had the Valley Planing Mill Company prosecuted the inquiry, it could have easily ascertained the real situation. We think, under the circumstances, that it should have made inquiry from some representative of appellee before exercising an option which it took from McIntosh, subject to the rights of appellee under a written contract with him for sale and purchase of the lands, a copy of which had theretofore been furnished to it.

No error appearing, the decree is affirmed.

DAVIS *v.* LAWSON.

Opinion delivered June 8, 1925.

MUNICIPAL CORPORATION—VOID IMPROVEMENT DISTRICT—CONTRACTS.—A special improvement district within a city, declared on direct attack to be void *ab initio* for failure of a majority of taxpayers to sign the petition for the improvement, *held* not to be a *de facto* district, and all obligations entered into by it were nullities.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

Melbourne M. Martin, for appellant.

J. C. Marshall, for appellee.

HUMPHREYS, J. This suit was brought by appellants against appellees in the circuit court of Pulaski County, third division, for mandamus to enforce a levee and collection of assessments on property in Street District No. 350 in Little Rock, to pay fees for services rendered the district under employment of its commissioners, evidenced by certificates of indebtedness issued to them by said commissioners. Payment of the certificates was resisted on account of the invalidity of the district *ab initio.* The complaint alleged that after the organization of the district and within the thirty day limitation prescribed by law, a suit was filed in the Pulaski Chancery Court by certain property owners challenging the validity of the district, which was sustained on the ground that a majority in value of the owners of real property within the district had not signed the second petition, praying that the improvement be made; that, until the filing of said suit, no one had questioned the validity of the district nor the authority of the commissioners to employ appellants; that said commissioners in good faith employed appellants, and appellants in good faith performed the necessary services for said district before the institution of the suit attacking the validity thereof, for which certificates of indebtedness were issued to them.

A demurrer was filed to the complaint by appellees upon the ground that the facts stated in the complaint

were insufficient to constitute a cause of action, which demurrer was sustained by the court.

There being no dispute as to the facts, the complaint was dismissed, from which dismissal an appeal has been duly prosecuted to this court.

The only question arising out of the pleadings for determination by this court is whether a special improvement district within the limits of a city, declared, on direct attack, void *ab initio,* had a *de facto* existence before the suit was brought so as to enter into binding obligations. Under our Constitution, no power or authority is vested in municipal councils to make assessments for local improvements without the consent of a majority in value of the owners of real property in the improvement district. This court said in the case of *Improvement District No. 1 of Clarendon* v. *St. Louis Southwestern Ry. Co.,* 99 Ark. 508 that "The fact that the requisite number of property owners has consented to the formation of a local improvement district is jurisdictional, and is in the nature of a condition precedent to the exercise of such power by the municipal council, and without such consent first obtained all proceedings therefor are null and void." This court has also said in two cases, quoting from *Schumm* v. *Seymour,* 24 N. J. Eq. 144: "It is a general and fundamental principle of law that all persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or its officers to make the contract. *Newport* v. *Railway Company,* 58 Ark. 275; *Watkins* v. *Griffith,* 59 Ark. 357.

Appellant relies upon the cases of *Whipple* v. *Tuxworth,* 81 Ark. 391 and *Street Grading District No. 60* v. *Hagadorn,* 186 Fed. 456, in support of his contention that the district in question had a *de facto* existence, so that it might enter into binding contracts. Neither case is in point. In the Whipple case, the chancery court ruled that it was valid, from which no appeal was taken. The court ruled that it was a *de facto* district from that date until it was declared to be a void district by the Supreme

Court. In the Hagadorn case, the only question passed upon was whether the court had jurisdiction to appoint a receiver.

The district in question never was a *de facto* district, and all proceedings had and done with reference thereto were nullities.

No error appearing, the judgment is affirmed.

BURRIS v. STATE.

Opinion delivered June 15, 1925.

1. HOMICIDE—RELEVANCY OF EVIDENCE.—In a prosecution for murder when the killing occurred during a dispute over an account which deceased alleged was owing by defendant, evidence that deceased improperly failed to give credit on another man's account was incompetent.
2. CRIMINAL LAW—STATEMENT OF FACT.—In a prosecution for murder, where a witness was asked what, if anything, deceased did toward making an attack on defendant, his reply that he made no attack was the statement of a fact, not of a mere conclusion.
3. HOMICIDE—THREATS.—In a prosecution for murder, testimony that deceased told M. that M. ought to go and give defendant a whipping was properly excluded, as it was not a threat of violence on deceased's part, and defendant was not entitled to prove it as material or to contradict M. in regard to his statement concerning it.
4. CRIMINAL LAW—COURT'S MISUNDERSTANDING OF QUESTION.—Where the trial court, in refusing to permit a propounded question to be answered, misunderstood the question, it was counsel's duty to remove such misunderstanding.
5. CRIMINAL LAW—SELF-SERVING STATEMENTS OF ACCUSED.—Where insanity was one of the defenses in a murder case, oral and written statements made by defendant to others that he believed himself to be insane were self-serving declarations and incompetent.
6. CRIMINAL LAW—EXCLUSION OF EVIDENCE—HARMLESS ERROR.—In a murder trial, where one of the defenses was insanity, refusal to permit an expert to testify whether defendant would be capable of determining the difference between right and wrong was harmless where he had already testified that defendant would not be capable of deliberation and premeditation with

reference to his acts under excitement, since the answer of the witness to the excluded question would have been a mere repetition.

7. CRIMINAL LAW—SELF-SERVING DECLARATION.—In a murder trial, testimony of a witness that, immediately after the killing, defendant stated to him that deceased forced him to do what he had done to protect himself was incompetent as part of *res gestae.*

8. WITNESS—TESTIMONY OF FAMILY PHYSICIAN.—In a murder trial, the testimony of physicians as to defendant's mental condition, based on mere observation of defendant during their attendance as family physician and by observing him on the witness stand, but not from any information received for the purpose of treating him, *held* admissible, as Crawford & Moses' Digest, § 4149, only excludes testimony of a physician received while attending the patient in a professional character, and which was necessary to enable him to prescribe as a physician.

9. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Defendant's requested instruction on the subject of reasonable doubt was properly refused when covered by the charge given.

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

E. K. Edwards, James S. Steel, Abe Collins and *DuLaney & Steel,* for appellant.

H. W. Applegate, Attorney General, and *Darden Moose,* Assistant, for appellee.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Little River County for the crime of murder in the first degree, alleged to have been committed by killing Lillard Johnston. The case was transferred to Sevier County on appellant's petition for change of venue, and the trial resulted in appellant's conviction of murder in the second degree.

It is undisputed that appellant shot and killed Lillard Johnston—it was so conceded on the trial—but it was contended on behalf of appellant that he acted on what appeared to him to be imminent danger of death or great bodily harm about to be inflicted by the deceased, so as to justify appellant in firing the fatal shot in necessary self defense. It is also contended that appellant was

insane at the time of the encounter which resulted in Johnston's death.

The killing occurred on January 2, 1925, in the town, or village, of Ogden, in Little River County, at a garage and gasoline filling station formerly operated by appellant. Johnston lived at Ashdown and was the district agent of the Magnolia Petroleum Company, a corporation selling and distributing motor oils and gasoline. Appellant had been purchasing oil and gasoline from Johnston, but had recently gone into bankruptcy, and the business had been purchased and was being operated by a man named Wood.

Johnston, accompanied by J. J. Matthews, the State's principal witness, drove over from Ashdown on the morning that the killing occurred, for the purpose of collecting from appellant an account of $409, claimed to be unpaid and due from appellant to the oil company. Appellant claims that he made a settlement with Johnston prior to that time, and that he owed the company very little, if anything. Witness Matthews, who, as before stated, was the State's principal witness, testified that he and Johnston drove over from Ashdown that morning to see appellant about paying the balance of his account; that they first drove to appellant's residence and were informed by the latter's wife that he was at the garage, but that when they reached the garage they were told that appellant was across the railroad track at the store of Hull & Furlow, and they then proceeded to that store, where they found appellant and left there with him to walk back to the garage, which was situated on the west side of the railroad, facing south on the street or road which crossed the railroad at right angles east and west. Matthews' narrative of the incidents thereafter occurring is as follows: After remaining in Hull & Furlow's store a few minutes, appellant started out of the door, with Johnston and witness following, and as they went out of the door appellant inquired of Matthews if they wanted to see him, and Matthews replied that he did, and appellant said, "Make it

snappy, for I am in a hurry." The three men started walking across the railroad, in the direction of the garage, and appellant stated that he had filed a petition in bankruptcy, that he had heard that Johnston was personally responsible for all of the account except $100, and he felt like they (Matthews and Johnston) ought to have advised him before that; that Johnston replied, "I have told you two or three times that I only had an authorized credit for $100," and appellant disputed that statement. They continued walking towards the garage with appellant doing most of the talking, and he offered to pay $59 that had been charged to Johnston on commission account. Witness asked appellant whether he had sold the gasoline and oil on hand, and appellant replied that he had not. In the conversation it was mentioned that appellant's mother had sold the garage building to Mr. Wood, and that the oil and gas on hand were listed in the bankruptcy proceedings as assets. Witness stated that just as he was on the point of turning to leave them Johnston said to appellant, "I am deceived in you, and don't appreciate a bit the way you have done about it," whereupon appellant replied "I am not going to take any abuse;" then Johnston said, "I have said it, and am not going to take it back, and do not appreciate it a damn bit." The two men were from four to six feet apart at that time, and appellant then remarked that he did not intend to take any rough talk, and Johnston said that he "staid by his statement and did not appreciate it a damn bit," adding the remark to appellant, "Burris, you are a low-down dirty crook." Appellant had his hand in his overcoat pocket all the time, and at this point he drew his pistol and fired immediately, two shots being fired in quick succession. At the first shot Johnston said, "Why, Burris!" and then began to crumple and stagger or fall for a distance of four or six feet, and that when the second shot was fired he cried "Oh!" and fell to the ground. He died almost immediately. Witness then

asked for a telephone so that he could call a doctor, and appellant said, "Run over to the store and call the doctor quick; I have played hell; he is as good a friend as I had." Witness testified that Johnston had on an overcoat, and gloves on both hands, and that his hands were held down but were not in his pockets.

There is a conflict in the testimony, appellant giving a different account of what happened, though he agreed with witness Matthews as to some of the things that were said.

Appellant's narrative was that he had had a settlement with Johnston previous to that day, and that when he went into bankruptcy he owed nothing to Johnston or to the oil company except the sum of $13.50 for two barrels of oil; that he had heard that Johnston had said that he was coming over there to have a settlement with him or have trouble, and that he knew that Johnston always carried a pistol; that after he and Johnston and Matthews got to the garage and the conversation was continuing concerning Johnston's claim of indebtedness and the bankruptcy, and appellant not owning the building, Matthews said, "I have information that you sold out for $4,100 in cash," and added, with an oath, that he (appellant) had put Johnston "in a hell of a bad light," and that Johnston was going to have to pay the account to his company; that Johnston then said, "Yes, Burris, as much as I have done for you, you have acted a low-down son of a bitch from start to finish," and appellant replied, "Lillard, I do not feel like being talked to like that," and that Johnston said, "Well, I have not said a God damn word to take back, you God damned low-browed son of a bitch, I am going to stamp your head off." Johnston, according to appellant's narrative, then lunged forward and grabbed appellant with his left hand and grabbed for the pistol and attempted to wrench it from appellant's hand, and appellant fired the pistol, but was unable to state how many shots he fired. He said that when

he fired the pistol, Johnston stopped and backed off and leaned over and fell. The undisputed testimony is that Johnston was unarmed.

Appellant testified on cross-examination that when Johnston grabbed his hand, he (Johnston) threw one of his hands into his pocket and tried to get appellant by the collar and struck him in the breast. He stated that Johnston grabbed the gun with his left hand. Appellant's testimony is not very clear as to whether he shot because Johnston threw his hand in his pocket or because he was trying to wrench the pistol out of his hand, but at any rate his claim was that Johnston was engaged in an assault upon him, either to get the pistol away from him or to draw one from his pocket, and he thought his life was in danger and fired the shot. There was enough to justify the submission of the question whether or not appellant fired the shot under the apprehension of danger or violence from Johnston, and the court did in fact submit that issue in sufficient instructions.

Another witness for the State testified that he was standing on the front porch of a store on the east side of the railroad, and something attracted his attention to the parties over in front of the garage, whereupon he walked out a few steps and witnessed the encounter from a distance of about ninety steps; that he heard the report of the pistol shots and saw Johnston fall to the ground, and that at the time this occurred the two men were six or seven feet apart. He further testified that he went over to the place where the body was lying and found that Johnston had on his overcoat and gloves and had nothing in his hand, that the gloves were either canvas or knit gloves. He said that there was no scuffling at the time or before the shooting; that appellant was standing with his back to the garage and that Johnston's hands were not in his pockets.

There was another eye-witness, introduced by appellant—a man named Crouch—who was working at the

garage at the time, and he corroborated the statement of appellant, that Johnston had hold of appellant's hand and that the two men were scuffling, and that Johnston was following up appellant, who was attempting to retire, when the latter fired the fatal shot. There was other testimony introduced in the case, but there were only three witnesses who claimed to have seen what occurred at the time of the killing.

The assignments of error are very numerous, there being fifty-eight assignments in all, relating to all phases of the evidence and to the court's charge and in refusing to give instructions requested by appellant.

It is first contended that the court erred in refusing to permit appellant to prove by witness Matthews that Johnston had failed to credit the account of one O'Connell, a customer of the oil company, with certain amounts that had been paid. Counsel contend that this evidence was competent as shedding light on the contention that Johnston was presenting a false account against appellant and was endeavoring to force the latter to pay it. It was competent, of course, to prove the claims made by both Johnston and appellant at the time of the encounter with respect to the state of the account, which appears to have been the cause of the rupture between the two men, but the fact that Johnston had improperly failed to give credit on another man's account had no bearing upon the question involved in this trial. The only effect it could have had would have been to impeach the character of the dead man for honesty, and we know of no rule of law which would permit that to be done.

It is next contended that the court erred in admitting the following question and answer in the cross-examination of witness Matthews: "Q. What, if anything, did Johnston do toward making an attack upon Burris? A. There was no attack made." The contention is that this was merely the statement of a conclusion, and that the witness should not have been permitted to do that. We do not think that this was a statement of

a conclusion, but one of fact, namely, that Johnston made no attack. The word "attack" defines itself, and when the witness said that no attack was made he stated a fact, not a conclusion.

In the testimony of witness Wood, who was introduced by the appellant, the following question was sought to be propounded: "Q. Did J. J. Matthews at that time tell you that Mr. Johnston said that he extended more credit to Burris than was allowed, and that Johnston told him that he ought to go down there and give Burris a whipping?" This question had been propounded by appellant's counsel to Matthews on cross-examination, and Matthews had replied in the negative. The court refused to permit the witness Wood to answer the question. There is a long colloquy in the record between the trial judge and counsel with respect to the form of the question and the effect of it. The court stated to counsel that they were entitled to prove threats on the part of Johnston against appellant, and also were entitled to show contradictory statements of witness Matthews on material matters in order to impeach his credibility, but that this question would not elicit proof of a threat on the part of Johnston or a contradictory statement of Matthews on material matters. We think that the court was correct in its ruling. The question related to an alleged statement of Johnston to the effect that witness Matthews—not Johnston himself—"ought to go down there and give Burris a whipping." That is the way we understand the question, and evidently the trial court understood it that way. Now, it would have been competent to prove a threat of Johnston and also to impeach witness Matthews as to a contradictory statement concerning this threat, for proof of the threat was a material matter, but Johnston's statement that Matthews ought to whip appellant was not a threat of violence on Johnston's part; therefore appellant was not entitled to prove it as a material matter or to contradict witness Matthews in regard to his statement concern-

ing it. If the trial judge misunderstood the question propounded to the witness, it was the duty of counsel to remove that misunderstanding, as it is evident from the colloquy between court and counsel that the court had a correct conception of the law and was willing to admit competent evidence of threats and also impeaching evidence.

In bringing forward proof of appellant's mental condition, his counsel introduced numerous witnesses, both expert and non-expert. The non-expert witnesses related their experience and observation of appellant and stated that they considered appellant to be mentally unbalanced. Appellant's mother testified in the case concerning his condition from childhood up to the date of the trial, and her testimony tended to show appellant was insane.

There are assignments of error with respect to the court's refusal to permit two of the witnesses—appellant's mother and a witness named Hull—to testify concerning statements made by appellant to them orally and also in writing. These statements were in substance to the effect that appellant was insane. Witness Hull would have testified that he received a letter from appellant stating that physicians had advised him that he (appellant) was bordering upon insanity. Appellant's mother testified that at one time appellant, while working on some machinery, had said to her "Don't bother me; you can't realize the condition I am in; I don't know a thing." These were statements of self-serving declarations of the appellant himself and were not competent. Of course, the non-expert witnesses should have been permitted to tell of their observations of appellant and of any unusual conduct of his which tended to show that his mind was unbalanced, but a mere statement, whether made orally or in writing, that he believed himself to be insane, was not such a statement as could properly form the basis of an opinion as to his mental condition. These witnesses were allowed to testify as to other facts which

influenced them in concluding that appellant was mentally unbalanced. His mother testified as to his condition from infancy, giving an account of diseases which had begun in early childhood and relating many instances upon which she based her conclusion that he was not of sound mind. We think there was no error committed by the court in excluding the testimony concerning appellant's statement of his own mental condition.

Dr. Kitchens was introduced by appellant as an expert witness and testified fully as to his observation of appellant and his opinion concerning the latter's mental condition. Error is assigned on the court's refusal to permit the following question to be asked: "Under his condition as you have observed it, and the history of the case, do you think that under excitement he would be capable of determining the difference between the right and the wrong thing to do with reference to any specific act?" Of course, appellant was entitled to prove the substance of the matter which this question would have elicited, namely, as to whether or not appellant was capable of knowing the difference between right and wrong with reference to the specific act under investigation (*Bell* v. *State,* 120 Ark. 530), but the witness was permitted to cover the same ground in another statement. After giving the full history of the case as derived from his own observation, and even as to what other physicians had told him, Dr. Kitchens stated his opinion to be that appellant was insane and had been so for about two years. He made the following statement: "I don't think that he would be capable of deliberation and premeditation with reference to his acts under excitement." Now, this latter statement was a sufficient answer to the inquiry which the court afterwards excluded, and the answer of the witness would have been a mere repetition of what he had already said. Therefore, there was no error in the court's refusal to permit the question to be in substance repeated.

Appellant offered to prove by witness Crouch, who claims to have been standing in front of the garage door at the time the killing occurred, that immediately after the shooting appellant walked into the garage and made this statement to him, "Frank, I would not have done it for anything in the world, but he forced me to do it to protect myself." The contention is that this testimony was competent as part of the *res gestae*. If the alleged statement had been one concerning a fact, and not a mere conclusion, it would, we think, have been competent under the rules stated by this court in *Combs* v. *State*, 163 Ark. 550; but we think that the statement was nothing more than a conclusion to the effect that appellant had been forced to fire the shot in order to protect himself, which was no more than a statement that he had acted in self-defense. If he had made a statement at that time and under those circumstances concerning a specific act of Johnson which led appellant to believe that he was in danger, the statement would have been competent. The court was correct in refusing to allow this statement of a conclusion to go to the jury as part of the *res gestae*.

It is contended that the court erred in permitting the State to introduce in rebuttal two physicians, Dr. York and Dr. Phillips, concerning appellant's mental condition. These physicians both testified that they had been acquainted with appellant for a number of years, had practiced in his family, and had treated him for disease on different occasions. Over the objection of appellant they were permitted to testify as to his mental condition. The statute on this subject reads as follows:

"Section 4149. No person authorized to practice physic or surgery, and no trained nurse shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician or do any

act for him as a surgeon or trained nurse." Crawford & Moses' Digest.

It will be observed that the statute only excludes the testimony of a physician as to information "necessary to enable him to prescribe as a physician." The statute does not exclude all of the testimony of a physician because he had attended the person in a professional capacity, but the exclusion is limited to information which was necessary to enable the physician to prescribe. Neither of these witnesses had ever examined appellant as to his mental condition or treated him for mental disease, and they both testified that they were basing their opinions upon mere observations of the appellant during their acquaintance with him as family physician and by observing him while he was on the witness stand, but not from any information received for the purpose of treating him. It is true that one of the physicians said that on one occasion he gave appellant medicine for a nervous trouble, but he did not examine him with a view of ascertaining his mental condition, or treat him for any mental disease.

Counsel rely mainly upon the announcement of the law on the subject made by this court in the case of *Triangle Lumber Co.* v. *Acree,* 112 Ark. 534, but we find nothing on examination of the opinion in that case which would justify us in holding that this testimony was incompetent. There is nothing in the opinion to justify the conclusion that we meant to ignore the distinction that under the statute the testimony of a physician is not to be excluded except such as related to information essential to the treatment of the patient. Both of these physicians were cross-examined by counsel and by the court with reference to the basis of their opinions, and the answers of the physicians justified the court in holding that the opinions were not based upon information received which was necessary for the physicians to prescribe.

This covers all the assignments of error with respect to the introduction of testimony.

The assignments of error with regard to the court's charge are too numerous to discuss in detail. We have examined them all, and find that every phase of the case was properly submitted to the jury. The court gave twenty-four instructions at the instance of the State and fifteen at the instance of the appellant, covering all questions relating to the law of self-defense and insanity, and the law as to the burden of proof and reasonable doubt. Many of the assignments relate to refused instructions which we find were fully covered by other instructions given by the court at the instance of the State as well as the appellant. This is particularly true as to the iustructions on the subject of reasonable doubt, which was very fully covered by the court charge.

Upon the whole, we find that the record is free from prejudicial error, and the judgment is therefore affirmed.

BAYOU METO DRAINAGE DISTRICT NO. 1 *v.* KOCHTITZKY.

Opinion delivered June 15, 1925.

1. DRAINS—EXTRA EXPENSE IN CLEARING RIGHT-OF-WAY.—Under a contract for construction of a drainage ditch, requiring trees and shrubs to be cut off the right-of-way, the contractor was not entitled to extra compensation for the expense of clearing this right-of-way by the use of teams for removing debris, though, in making the contract he expected to be able to effect such clearing with a dredge boat; such expense not falling within a clause providing for payment for extra work not specified in the contract.
2. DRAINS—EXTRA EXPENSE—LIABILITY OF DISTRICT.—Under a contract for the construction of a drainage district which obligated the contractor to remove logs and stumps from the right-of-way, though, in making the contract, the contractor contemplated removing them with a dredge boat, the fact that the commissioners knew that he would not be able to do so without the use of teams did not render the district liable to pay the contractor extra for doing the work in that way.

3. DRAINS—GUARANTY OF YARDAGE CONSTRUED.—A contract for the construction of a drainage ditch, by which the district guaranteed the contractor all excavations of 90 per cent. of the total yardage in the district on the total mileage as estimated by its engineer, *held* to mean that the guaranty applied to the total yardage, and not to each item in the specifications.
4. INTEREST ON RETAINED PERCENTAGE.—Under a contract for the construction of a drainage ditch, with provisions for a retained percentage by the district, the contractor was entitled to interest on the percentage retained by the district from the date of the completion of the work to the date of the decree, notwithstanding that he had agreed that any floating timber should be removed at his expense, where it does not appear that the district incurred any expense on this account.
5. DRAINS—DAMAGES FOR UNCOMPLETED WORK.—Under the contract for the construction of a drainage ditch, the district was not entitled to damage for failure to complete the work.
6. DRAINS—DAMAGES FOR DELAY IN COMPLETING DITCH.—Under a contract for constructing a drainage ditch, providing that unavoidable delays or extension of time with the consent of the district's engineers should not be charged against the contractor. the drainage district was not entitled to damages for delay in completing the work and for extra engineering charges during alleged overtime, where such delays were unavoidable, and the commissioners acquiesced therein, and did not intimate an intention to make charge therefor.

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

Wallace Townsend, for appellant.

Gray & Morris and *Chas. A. Walls,* for appellee.

McCULLOCH, C. J. Appellant is a drainage district, organized for the purpose of constructing a drainage system in a large area in Lonoke County. The plans contemplated 69.8 miles of ditches, including Bayou Meto for a distance of twenty-five miles, the main ditch, 22 miles in length, and eleven lateral ditches, and a cut-off ditch, in addition to cleaning and dredging Bayou Meto for a distance of 25 miles to make it part of the system. Appellee was the successful bidder for the work, and entered into a written contract with appellant. The work was begun in the year 1920, and most of the work was completed in the year 1922, and there was a final

completion, according to the finding by the chancery court, on May 1, 1923. This is an action instituted by appellee to recover the balance alleged to be due for work done under the contract. Appellant answered denying the amount of earned compensation claimed by appellee, and also filed a counterclaim for damages on account of alleged defective work and for delay in completing the improvement.

The contract called for payment for the work on estimates of the engineer, with the retention of twenty per cent. of each item, to be held back until completion of the contract. It is agreed by both parties that the aggregate retained percentage was $71,763.17, the controversy arising over additional items for which appellee made claim and over items of damage claimed by appellant in reduction of the amount due from retained percentage. There was a reference made to a master, who was to take testimony and state the account, which was done, and the court, on hearing the exceptions to the master's report, rendered a decree in favor of appellee for the sum of $96,102.17, and dismissed appellant's cross complaint for want of equity. There is a small item of $69.48 to be added to the retained percentage, about which there is no controversy except as to allowance of interest thereon. The interest item on that amount is very small, but we see no reason why appellee is not entitled to it.

The first item of any importance claimed by the appellee, in addition to the amount of retained percentage, and which was allowed by the chancery court, is the sum of $9,097.59 for work done on what is termed force account. Section 25 of the specifications reads as follows:

"Force Account. All work not contemplated or set out in these plans or specifications, which will be later found necessary to be done, will be done by the contractor at the actual cost to him, as determined by the engineer, plus 15 per cent. Under this head would come such items as removing and replacing fences, bridges, re-

moving houses, and all other work that cannot be foreseen at this time. Extra work will be paid for only on the written order from the engineer, and should not be undertaken without the engineer's written order to do so."

The claim is based on work done in clearing the right of way. The controversy relates to certain sections of the work along Bayou Meto, which is a deep and wide stream of water with high banks in some places and low banks in other places. The specifications in regard to clearing reads, originally, as follows:

"*Right-of-Way Clearing.* The right-of-way should be a minimum of eighty feet, and in general should be equal to the bottom width of the ditch, plus seventy feet. Widths above that at the discretion of the board and the engineer. Right-of-way for team ditches should not be less than enough to leave a clear ten-foot berm on each side and room for the waste banks.

"All trees and shrubs are to be cut off the entire right-of-way and burned or otherwise removed, to the end that the right-of-way may have a clean, neat appearance. Clearing will be paid for per acre per price bid."

However, before the contract was let to appellee, the last paragraph of § 24 was changed to read as follows:

"That all trees and shrubs are to be cut off the entire right-of-way and removed back or under the spoil-banks, to the end that the right-of-way have a clean, neat appearance."

Other parts of the contract provided that the Bayou Meto excavation should be a width of fifty feet at the bottom, with sloping banks, and the evidence shows that the excavation work was intended to be done, and was done, with a large dredge boat fifty-four feet in width with a boom of sufficient length to deposit the waste seventy-five feet on each side from the center of the stream or ditch. The evidence also shows that it was the intention of appellant to cut the trees, and then remove the stumps and trunks and debris with the dipper of the dredge. All of the parties connected with the work,

including the commissioners, doubtless had in mind that the clearing would be done in that way at the time the contract was made, but there is no specification in the contract with reference to that part of the work except those provisions quoted above. That method was pursued in doing the clearing from the beginning of the work on Bayou Meto at station 3 up to station 429 when it was found that on account of the low banks and the depth of the stream there was not enough waste material to cover the logs, stumps and other debris so as to prevent it floating back into the stream in times of high water and the same could not be handled and deposited by the dredge boat outside of the limits of the right-of-way; hence it was found necessary to clear the right-of-way by use of teams so that the debris could be hauled outside the limits of the right-of-way. Appellee claims that this constituted a change in the contract for which he is entitled to extra pay on force account, as provided in § 25 of the specifications. The chancery court took this view of the matter and allowed appellee the item of $9,097.59, which included the cost of clearing and the fifteen per cent. additional provided by the contract for payment on force account. Our conclusion is that the allowance was improper, and that the item did not fall within the clause providing for payment for extra work. Section 25 was not intended to cover extra cost of different methods of doing the work unless it constituted a change in the plans and specifications. The intention of the parties, as gathered from a fair interpretation of the language used, is that it was to provide compensation for work which was not specified in the contract. There could be no claim on account of change in the method of doing the clearing, for there was no method specified. All that the contract provided on that subject was that the "trees and shrubs are to be cut off the entire right-of-way and removed back or under the spoil-banks, to the end that the right-of-way may have a clean, neat appearance." The effect of this

provision was to require that all of the debris be placed either under the spoil-banks or removed from the right-of-way back of the spoil-banks; otherwise the right-of-way could not "have a clean, neat appearance." Under those terms of the contract, the debris could not be left exposed on the right-of-way, and if there was not sufficient deposit of waste dirt to constitute a spoil-bank to cover the debris, then, under the contract, it was appellee's duty to remove it off of the right-of-way. The contract did not bind appellee to any particular method of doing the work, and he took his chances on doing it in any way that was necessary to accomplish the results specified in the contract. Notwithstanding the fact that he expected to be able to do it with the dredge boat and it turned out that another and more expensive method of work was necessary, it was his loss and not that of the district.

There is much testimony concerning the correspondence and dealings between the parties with reference to this work, and it is contended that the conduct of the commissioners constituted an acquiescence in appellee's doing the work on force account, but we are of the opinion that there was no waiver of the right of the district as to the method in which this work was to be done. It is true that the evidence shows that the commissioners knew that the clearing would have to be done with teams after they passed station 429, but the recognition of this fact by the commissioners did not commit them to an agreement to pay appellee extra for doing the work in that way.

The next item claimed by appellee and allowed by the chancellor, in addition to the retained percentage, is $10.623.72 on account of there being less than the guaranteed amount of excavation. In the specifications prepared by the engineer, which became part of the contract, there was set forth an itemized statement of the mileage of each ditch and the amount of cubic yards of dredging. The aggregate mileage in this statement was 69.8 miles, and 3,046,850 cubic yards of dredging. The contract

contains the following provision with reference to guaranty of total yardage: "The party of the first part (district) further agrees that it will guarantee to said party of the second part (contractor) an excavation of 90 per cent. of the total yardage in said district upon the total mileage as estimated by the engineer of said district." According to the undisputed proof, appellant has been allowed for 3,227,127 cubic yards of dredging. This is 287,277 cubic yards in excess of the total yardage estimated for the whole project. But the contention of appellee is that the language of the guaranty should be interpreted to mean that each item in the specification should be considered separately, so as to entitle him to an allowance of ninety per cent. of each item, regardless of the total. The contention is that the words, "as estimated by the engineer of said district," confirm that interpretation. We do not so interpret the contract, for it appears to us that the language meant that the guaranty applied to the total yardage and not to a separate guaranty on each item. The court was therefore in error in allowing this item.

It is next contended that the court erred in allowing interest on the retained percentage from the date of the completion of the work on May 1, 1923, up to the date of the decree. We perceive no reason why appellee is not entitled to interest on the amount due him from the time it should have been paid to him on the completion of the contract. The funds were not to be retained any longer and the failure to pay at that time started the period for which interest should be allowed. It is the contention of appellant that there should be no allowance of interest for the reason that appellee accepted payment on an estimate pursuant to the resolution of the board of commissioners to the effect that the payment should be made "with the understanding that any floating timber that may enter the stream in the work now performed, shall be removed at the cost of the contractor." There is no evidence that the

expense of removing floating timber would amount to any considerable sum, but, even if it did, this would not prolong the period of payment beyond the completion of the contract in other respects. If there was any expense to the district on this account, there should be a deduction for the cost, but none is shown. There is a slight discrepancy of one month as to the date of the completion of the contract, it being claimed by one party that it was completed on June 1, and by the other that it was completed on May 1. We accept the finding of the trial court as correct, that the contract was completed on May 1, and interest should run from that date.

This brings us to a consideration of the items of damage claimed by appellant in its cross-complaint.

There is a claim of damages in the sum of $24,160.23 for alleged defective work and for delay in completion of the work, and also the additional sum of $4,040 for extra engineering charges during the alleged overtime. We are of the opinion that the chancellor was correct in refusing to allow any part of these amounts. There appears to have been no complaint in regard to the work from station No. 3 up to station No. 340, but when the work reached station 429, estimate No. 34 was made by the engineer, dated June 6, 1921, with the following indorsement thereon: "I recommend that $537.23 be retained to cover the expense of removing logs from the right-of-way from station 340 to 429." Pursuant to the recommendation, this amount was withheld by the board to cover the expense of doing that work, and the indorsement of the engineer must be taken as an estimate that this sum would be sufficient to remove the logs so as to complete the work. The clearing thereafter was satisfactorily done, and the only controversy arose over appellee's claim for extra payment on force account. It is claimed that there were other defects for which damage should be allowed. There is a sharp conflict in the testimony as to the extent of those defects. The evidence is very voluminous. There is an enormous record

before us, but, after having carefully considered it, we can do no more than state our conclusions from this testimony. We are of the opinion that appellant has not shown its right to recover any amount of damage in excess of the $537.23 retained for that purpose, and the retention of that item is not involved in the present controversy. The contract contained the following provision with respect to liquidated damages for delay in completion of the work.

"It is further agreed that if the party of the second part fails or refuses to complete said work in the manner and within the time specified herein, plus allowances made, then and in such event the party of the second part shall pay, in addition to the engineering and inspection charges made in the specifications, an amount equal to 6 per cent. a year on the total contract price to the commissioners of the said drainage district, as liquidated damages of said district for the entire time of such extension beyond the time allowed for completion as outlined in the specifications."

Another provision on the subject of extension of time is as follows:

"No extension of time on account of lack of water, or for other causes, shall be made, unless the engineer shall be notified in writing of the necessity for delay, and shall decide that such necessity exists."

And still another provision of the contract on that subject is as follows:

"But an unavoidable delay shall entitle him to an extension of time allowed for the completion of the work sufficient to cover the time lost by such delay."

Another provision of the contract fixed thirty-eight months as the period within which the work should be completed.

The substance of these provisions, when read together, is that unavoidable delays or extensions of time with consent of the engineer are not chargeable against the contractor as delays for which damages are

to be allowed. There is proof that there were unavoidable delays, especially with reference to the change in the method of clearing the right-of-way below station 429. Communications between the parties show at least that the commissioners acquiesced in this method of doing the work, and there was no intimation of an intention to charge for the necessary delay in doing the work according to the changed method. There is also proof of excessive rains and the overflow of a large part of the area to be drained, which necessarily delayed the work. We are of the opinion that the chancellor was correct in holding that no charge should be made on this account.

Adding to the amount of retained percentage, the item of $69.48 for error in computation, and the item of $3,985.73 for interest from the date of the decree, makes a total of $75,818.38.

The decree dismissing the cross-complaint of appellant is therefore affirmed, and the decree in favor of appellee is modified so as to reduce the sum to be recovered to the amount last named above. It is so ordered.

APPENDIX

OPINIONS NOT REPORTED:

Arkansas Christian College v. *Malone*, appeal from Conway Circuit Court; J. T. Bullock, Judge; affirmed May 18, 1925; per Smith, J.

Arkansas Rice Growers' Co-operative Assoc. v. *Arkadelphia Milling Co.;* appeal from Arkansas Circuit Court, Northern District; George W. Clark, Judge; affirmed June 22, 1925; per McCulloch, C. J.

Bellew v. *Cunningham;* appeal from Pulaski Chancery Court, John E. Martineau, Chancellor; affirmed May 4, 1925; per McCulloch, C. J.

Brown v. *Reynolds;* appeal from Ouachita Chancery Court; George M. LeCroy, Chancellor; affirmed June 29, 1925; per Smith, J.

Carnahan v. *Plum Bayou Levee Dist.;* appeal from Jefferson Chancery Court; H. R. Lucas, Chancellor; affirmed June 29, 1925; per McCulloch, C. J.

Dabbs v. *Kindall;* appeal from Boone Circuit Court; J. M. Shinn, Judge; affirmed June 1, 1925; per McCulloch, C. J.

E. C. Atkins & Co. v. *Rolfe & Warren;* appeal from St. Francis Circuit court; E. D. Robertson, Judge; affirmed June 15, 1925; per McCulloch, C. J.

Green v. *Green;* appeal from Hot Spring Chancery Court; J. P. Henderson, Chancellor; affirmed May 11, 1925; per Humphreys, J.

Hilliard v. *Hilliard;* appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed May 25, 1925; per McCulloch, C. J.

Humble Oil & Refining Co. v. *Bearden;* appeal from Ouachita Circuit Court; L. S. Britt, Judge; affirmed April 20, 1925; per Humphreys, J.

Johnson v. *Kindle;* appeal from Jefferson Circuit Court; T. G. Parham, Judge; affirmed April 20, 1925; per Smith, J.

McKee v. *Legion Oil & Gas Co.;* appeal from Union Circuit Court; L. S. Britt, Judge; affirmed June 22, 1925; per McCulloch, C. J.

McMillan v. *State;* appeal from Logan Circuit Court, Northern District; James Cochran, Judge; affirmed May 4, 1925; per Humphreys, J.

Martin v. *Martin;* appeal from Pope Circuit Court; J. T. Bullock, Judge; affirmed June 1, 1925; per Humphreys, J.

Nelon v. *J. B. Duncan Co.;* appeal from Lonoke Circuit Court; George W. Clark, Judge; affirmed June 22, 1925; per Smith, J.

Perry v. *State;* appeal from Lawrence Circuit Court, Eastern District; Dene H. Coleman, Judge; affirmed July 6, 1925; per McCulloch, C. J.

St. Louis S. F. Ry. Co. v. *McHaffey;* appeal from Mississippi Circuit Court, Chickasawba District; W. W. Bandy, Judge; affirmed with remittitur May 4, 1925; per Humphreys, J.

Smith v. *State;* appeal from Union Circuit Court; L. S. Britt, Judge; affirmed July 13, 1925; per Wood, J.

Tyler v. *State;* appeal from Randolph Circuit Court; John C. Ashley, Judge; affirmed May 4, 1925; per McCulloch, C. J.

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