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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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

ERRATA

On p. 1180, vol. 170, fourth line from bottom of page, for "natural" read *material.*

On p. 627, vol. 169, 3d line of 4th headnote, for "town" read *term.*

On p. 487, vol. 168, first line of first readnote, for "proving" read *procuring.*

On p. 884, vol. 168, 3d headnote, 3d line, for "admission and" read *admission of.*

On p. 903, vol. 168, 2d headnote, second line, for "degree" read *decree.*

On p. 110, vol. 168, 21st line from bottom of page, for "his" read *its.*

On p. 1133, vol. 168, 2d headnote, 4th line, for "charge" read *change.*

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* BOURLAND.

Opinion delivered May 3, 1926.

1. VENUE—TRANSITORY ACTION.—A suit to cancel a deed to land is transitory and not local, and may be brought in any county in which jurisdiction over the persons of the defendants can be obtained.
2. EQUITY—GENERAL PRAYER FOR RELIEF.—A complaint setting forth no cause of action except for cancellation of a mortgage will be confined to that relief, though it contains a general prayer that the title be quieted as against all defendants.
3. INJUNCTION—CONFLICT OF JURISDICTION.—Where the same person executed two mortgages conveying the same land to different persons, and separate suits were brought by different plaintiffs in different counties to cancel each of the mortgages, there is no such conflict between the suits as will entitle one of the courts to restrain the suit in the other court.

Prohibition to Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; writ denied.

Rose, Hemingway, Cantrell & Loughborough, for petitioner.

Sam T. & Tom Poe, for respondent.

McCULLOCH, C. J. This is an application for a writ of prohibition to restrain the chancery court of Sebastian County (Fort Smith District) from proceeding with a cause therein which was instituted against petitioner, United States Fidelity & Guaranty Company, a foreign corporation, and the Union Trust Company, a banking institution in the city of Little Rock, by Jennie P. Fulton and her daughter, Audrey Mae Fulton. The

basis of the application is that there is another action involving the same subject-matter now pending in the chancery court of Pulaski County, which was instituted prior to the commencement of the action in the Sebastian Chancery Court, and that, there being a conflict in the assumption of jurisdiction by both courts, this court ought to prevent the conflict by restraining the Sebastian Chancery Court from assuming jurisdiction of the subject-matter of the action which had previously been assumed by the chancery court of Pulaski County. The two actions will be referred to herein as the Pulaski County action and the Sebastian County action.

The following is the status of the controversy as appears from the pleadings in the two actions and as shown in the exhibits filed with the petition for prohibition: Prior to July 26, 1924, A. W. Fulton was an employee of the Union Trust Company of Little Rock, and the petitioner, United States Fidelity & Guaranty Company, became security for Fulton to the Union Trust Company to indemnify the latter against default of the former. Fulton defaulted for a large sum of money, and the petitioner herein paid the amount to the trust company under its contract of indemnification. On the date mentioned above, Fulton and his wife, Jennie P., who was the owner of certain real estate in the city of Little Rock constituting her homestead, joined in a conveyance to the Union Trust Company, as trustee, conveying said property for the use and benefit of the petitioner. Subsequently the Union Trust Company conveyed the property to petitioner, and the latter took possession and has remained in possession since that date.

On July 13, 1925, Jennie P. Fulton executed to Sam T. Poe, as trustee, a deed conveying said property to secure payment of an indebtedness of $2,500 to Sam T. Poe, Tom Poe and W. F. Sharp, and on October 12, 1925, the petitioner herein and the Union Trust Company, as trustee, instituted an action in the chancery court of Pulaski County against Sam T. Poe, Tom Poe, W. F. Sharp, Jennie P. Fulton and A. W. Fulton to cancel the

mortgage just referred to as a cloud on the title. The complaint in that action, after setting forth the default of A. W. Fulton to the Union Trust Company and the payment to the latter by the United States Fidelity & Guaranty Company under its obligation, and the conveyance of the Little Rock real estate, as stated above, and the execution of the mortgage from Jennie P. Fulton to the Poes and Sharp, reads as follows: "The said Union Trust Company, as trustee for the said United States Fidelity & Guaranty Company, is the absolute owner of said property, and the said defendants, Jennie P. Fulton and A. W. Fulton, at the time they executed the said deed of trust to the said Sam T. Poe, trustee, had no title whatsoever, but nevertheless the defendants, Sam T. Poe, Tom Poe and W. F. Sharp, are asserting the validity of said deed of trust. The said deed of trust constitutes a cloud upon the plaintiffs' title and has destroyed the marketability and impaired the value of said lot. The plaintiffs are without adequate remedy at law." Then follows the prayer, which is that the title of the plaintiffs "be quieted and confirmed as against all of the said defendants, and that the said deed of trust be canceled as a cloud upon their title." Original process was issued against all of the defendants in the action to the sheriff of Pulaski County, who immediately served the same on Sharp and Tom Poe, but has been unable to serve Sam T. Poe, Jennie P. Fulton or A. W. Fulton.

On November 25, 1925, petitioner and the other plaintiff in the action, Union Trust Company, caused to be issued and served upon Jennie P. Fulton, by an officer in the State of Oklahoma, a summons with a copy of the complaint annexed thereto, pursuant to the terms of our statute authorizing such service in another State. Crawford & Moses' Digest, § 1157. On October 15, 1925, three days after the commencement of the Pulaski County action, Jennie P. Fulton and her daughter, Audrey Mae Fulton, commenced the Sebastian County action against petitioner and the Union Trust Company to cancel the deed executed by Jennie P. Fulton and A. W. Fulton to

Union Trust Company on July 26, 1924, conveying the Little Rock property, and also a bill of sale for personal property, executed to the Union Trust Company by Jennie P. Fulton and her daughter, Audrey Mae. It was alleged, in substance, in the complaint in that action, that said conveyances were procured by fraud and duress. Summons was duly issued in that action on the day the complaint was filed and the same was immediately served on the two defendants therein, the United States Fidelity & Guaranty Company and the Union Trust Company. The service on each of the defendants was in Pulaski County, where the Union Trust Company was domiciled and where the United States Fidelity & Guaranty Company had its principal office in the State. Both of the defendants later appeared in that action and filed a motion to quash the service, which was overruled. Previous to this time there had been an action instituted by each of the respective parties against the other, but those actions have each been dismissed and have no bearing on the present controversy with reference to the jurisdiction of the respective courts wherein the two present cases are pending.

On February 5, 1926, the petitioner and the Union Trust Company appeared in the Sebastian County action and filed a demurrer and separate answers, setting up, among other defenses, the pendency of the suit in the Pulaski Chancery Court, and on that day the Sebastian Chancery Court, on the application of the plaintiffs in that action, issued an order restraining the petitioner and the Union Trust Company from prosecuting in any other court a suit involving the same questions in issue in the Sebastian Chancery Court.

It must be conceded, and, as we interpret the argument of counsel for petitioner, it is conceded, that the chancery court of Sebastian County has jurisdiction of the subject-matter of the action therein instituted, which was one to cancel a deed executed by the plaintiffs therein to certain property, including real estate situated in Pulaski County. It is not an action for the recovery of

real property or for an injury to real property. It is not a local action, but is transitory, and could have been brought in any county where jurisdiction over the persons of the defendants could be obtained. *Jones* v. *Fletcher,* 42 Ark. 422; *Pickett* v. *Ferguson,* 45 Ark. 177. The contention of counsel for petitioner is that the subject-matter of the action is, at most, one of concurrent jurisdiction which may be exercised by the court first acquiring it over the persons of the defendants to the exclusion of all other courts which might have obtained jurisdiction, and that jurisdiction was first acquired by the chancery court of Pulaski County by the filing of petitioner's complaint and the issuance of process thereon.

The first important inquiry is to determine whether or not there is identity of the two causes of action set forth in the two complaints. In the Pulaski County action the rights set forth are confined to the cancellation of the mortgage executed to the Poes and Sharp. There is no other cause of action set forth in the complaint. It is true that there is a general prayer that the title be quieted as against all of the defendants, which included Mrs. Fulton, but there are no facts set forth in the complaint sufficient to constitute any other right of action or any other relief, and the general prayer must be confined to the statement of facts as set forth in the complaint. Now, the Sebastian County action is of a wholly different nature, for the facts set forth in the complaint are that the deed of conveyance executed by the Fultons was induced by fraud and duress, and the relief sought is the cancellation of that deed. We fail to discover any identity between the two causes of action so as to cause a conflict in the attempt of the two courts to exercise jurisdiction at the same time. The two actions may proceed concurrently without conflict, for one is to cancel the mortgage to the Poes and Sharp, who are the real parties in interest, the Fultons being only nominal parties by reason of having been the grantors in the mortgage, and the other action being for a different purpose

and to which the Poes and Sharp are not parties. It is therefore clear that the chancery court of Sebastian County is properly proceeding with the exercise of jurisdiction without any conflict with the jurisdiction of the chancery court of Pulaski County. It will be observed that the injunction issued by the Sebastian Chancery Court does not specifically restrain the parties from attempting to prosecute the action in the Pulaski Chancery Court. It merely operates as a restraint upon the petitioner from "instituting or prosecuting any action in any court involving the same issues as the action herein pending." The injunction only operates against an attempt to adjudicate in the Pulaski Chancery Court, as between petitioner and the Fultons, the validity of the conveyance by the latter to the former, for that is the issue raised in the Sebastian Chancery Court and must be determined there. If the chancery court of Sebastian County subsequently renders an erroneous order or decree, the error would have to be corrected by appeal, for the jurisdiction of that court over the subject-matter set forth in the complaint is complete.

We are not at liberty, nor is it necessary, to discuss in this opinion the question whether or not a cause of action is stated in the complaint in the Pulaski Chancery Court—whether the deed of trust executed to the Poes and Sharp subsequent to the deed of the Fultons to the Union Trust Company constituted a cloud on the title conveyed. That is a question which must be decided by the chancery court of Pulaski County, and if any error is committed in that proceeding it may be corrected by appeal.

There being no conflict in the jurisdiction, it is not appropriate for this court to attempt to restrain the exercise of jurisdiction by the Sebastian Chancery Court, and the writ of prohibition is therefore denied.

MOTT v. FIRST NATIONAL BANK.

Opinion delivered May 10, 1926.

TRIAL—TRANSFER OF ACTION FROM LAW TO EQUITY.—In an action at law upon a note an answer by one of the makers alleging that she signed the note through mistake and that she had no intention of being bound, if sufficient to constitute a defense, did not state a defense exclusively cognizable in equity, and a motion to transfer the action to equity was properly denied.

Appeal from Cross Circuit Court; *G. E. Keck,* Judge; affirmed.

Killough, Killough & Killough and *G. W. Barham,* for appellant.

Ogan & Shaver, for appellee.

McCULLOCH, C. J. Appellee instituted this action against appellant and against John M. Graham as joint makers of a promissory note. Graham defaulted, and judgment was rendered against him. Appellant filed an answer denying that she signed the note set forth in the complaint, and stating further that, "if she did in fact sign said note, it was signed through mistake on her part," and that she "had no intention of being bound." Appellant then moved to transfer the cause to equity on the ground that the answer presented an equitable defense. The court overruled the motion to transfer, and the cause proceeded to trial before a jury, resulting in a verdict and judgment in favor of appellee.

It is conceded that there was no error in the trial of the cause, and the sole ground urged here for reversal is that the court erred in refusing to transfer the cause to the chancery court.

Our statute provides that an action properly commenced by proceedings at law shall be transferred to equity on motion by either party for the trial of "any issue which heretofore was exclusively cognizable in chancery," and that "if all the issues are such as heretofore were cognizable in chancery, though none were exclusively so, the defendant shall have the right to have them all tried as in cases of proceedings in equity."

Crawford & Moses' Digest, § 1045. In the case of *Horsley* v. *Hilburn,* 44 Ark. 458, this court, in construing the statute, held that the transfer of a case to equity is not imperative except when the answer presents some defense exclusively cognizable in equity, or when all of the issues are cognizable in equity but not exclusively so. If it be conceded that the statement in the answer with reference to the mistake in the execution of the note and the absence of an intention to become bound was sufficient to constitute a defense at all, it was one which was available in an action at law, and was entirely adequate. It was not a defense which was exclusively cognizable in equity, for it could be made at law as well as in equity.

Counsel for appellant insist that the cancellation of the note was involved, and that this made it an equitable defense exclusively, but we cannot agree with counsel in this contention. The note was the basis of the action at law, and was, of course, exhibited with the complaint and introduced in evidence. It became a part of the record in this case, and a judgment for the defendant on the issues presented constituted a bar to any future action on the note, and was tantamount to its cancellation.

The court was correct therefore in refusing to transfer the cause, and the judgment is affirmed.

HENDERSON v. ROAD IMPROVEMENT DISTRICT NO. 1 OF HOT SPRING COUNTY.

Opinion delivered May 10, 1926.

1. HIGHWAYS—IMPROVEMENT DISTRICT—COLLATERAL ATTACK.—Where a road improvement district was created by a special statute, the validity of the district cannot be assailed except by showing that the statute is void on its face.
2. HIGHWAYS—IMPROVEMENT DISTRICT—ATTACK ON ASSESSMENTS.—Where the correctness of an assessment is assailed on a collateral attack, in a suit brought after the expiration of the time allowed by the statute, the presumption in favor of the validity and

correctness of the assessment is conclusive, unless the assessment is arbitrary on its face.

3. PLEADING—STATEMENTS OF CONCLUSION.—Allegations by defendants, in a suit to enforce a tax lien for highway improvement, that the assessments were arbitrary and unreasonable were mere statements of a conclusion and not of facts sufficient to overturn the validity of the assessment.

Appeal from Hot Spring Chancery Court; *Jabez M. Smith,* Special Chancellor; affirmed.

C. T. Cotham and *Houston Emory,* for appellant.

McCULLOCH, C. J. Appellee is a road improvement district created by special statute. Special Acts 1921, pp. 16, 228. The statute lays off certain road districts in Hot Spring County by sections and creates a separate district or section for the completion of each one of the specified roads, the boundaries of each district or section being described in the statute. The road to be constructed under the section involved in this litigation is one that runs in a general westerly direction from a certain street in Malvern, designated as a public road. The statute names the commissioners and authorizes the formation of plans for the improvement, the assessment of benefits, the issuance of bonds, and contracts for the construction of the improvement. The statute provides, in substance, that, after the benefits have been assessed, the list shall be filed and notice published and an opportunity given for owners of property to be heard as to the correctness of the assessments. A period of twenty days is provided in the statute for suit to contest the validity of the assessments.

The assessments were completed and approved, and the road was constructed, and this suit was instituted by the commissioners of the district against appellants and other property owners who were delinquent in the payment of their taxes, to enforce the tax lien. Appellants appeared and filed answers and cross-complaints contesting the validity of the assessments on the ground that their property would not be benefited. It was alleged by appellants, in general terms, that the assessments were

arbitrary and unreasonable, and there was a specific allegation in the answer that the lands of appellants lie north of a certain mountain which constitutes an impassable barrier to the use of the road. The court sustained a demurrer to the answer, and rendered judgment in favor of the district for the enforcement of the tax lien.

The district was, as before stated, created directly by legislative enactment, and the validity of the district cannot be assailed except by showing that the statute is void on its face. *House* v. *Road Improvement District,* 158 Ark. 357. The defense offered by appellants to the enforcement of the taxes constitutes a collateral attack on the validity of the assessments made in accordance with the statute. In the latest case on this subject, we said:

"Where the correctness of an assessment is assailed on collateral attack in a suit brought after the expiration of the time allowed by statute, the presumption in favor of the validity and correctness of the assessment is conclusive, unless the assessment is arbitrary on its face." *Farelly Lake Levee Dist.* v. *Hudson,* 170 Ark. 1106.

There is nothing to show that the assessment of benefits in the present case is void on its face. The appraisal of benefits was a matter of judgment and opinion, and the appraisement made by the officers of the district pursuant to the statute is conclusive on collateral attack. Appellants had the opportunity to challenge the correctness of the assessments when the list was filed and notice thereof published in accordance with the statute, hence it is too late now to challenge their correctness. The allegations of the complaint that the assessments were arbitrary and unreasonable were mere statements of a conclusion and not a statement of facts sufficient to overturn the validity of the assessments. *Salmon* v. *Board of Directors,* 100 Ark. 366.

We are of the opinion that the chancellor was correct in sustaining the demurrer, and the decree is therefore affirmed.

WALDEN v. FALLIS.

Opinion delivered May 10, 1926.

1. SALES—CONTRACT—ILLEGALITY.—A contract for the sale of a stock of goods, in which the seller, who was the postmistress, agreed to resign her office and recommend the appointment of the purchaser as her successor, would be void as against public policy.
2. CONTRACTS—CONSTRUCTION—JURY QUESTION.—If a written contract, whether it consists of one or more instruments, unequivocally manifests the intention of the parties, the court should declare its effect; but if it is not clear, from a consideration of the contract as a whole, what the intention of the parties is, whether the ambiguity is patent or latent, the question is one for the jury to determine.
3. CONTRACTS—CONSTRUCTION.—In arriving at the intention of the parties where the language of a contract is susceptible of more than one construction, it should be construed in the light of the circumstances surrounding the parties at the time it is made.
4. EVIDENCE—EXPLANATION OF WRITTEN CONTRACT.—Where a contract for sale of a stock of merchandise was ambiguous as to whether payment was conditioned on the appointment of the vendee as postmaster, or whether the clause as to such appointment merely fixed a time for payment, parol evidence was properly admitted to explain its terms.

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

STATEMENT OF FACTS.

Marvin Fallis and Esther Fallis sued T. M. Walden, Owen Walden and Curtis Walden, doing business under the firm name of T. M. Walden & Sons, to recover $500, alleged to be the balance due for the purchase price of a stock of merchandise. The following contract was made Exhibit A to the complaint:

"This agreement, entered into between Esther Fallis, Marvin Fallis, hereinafter known as parties of the first part, and T. M. Walden & Sons, known as party of the second part.

"Whereas, party of the first part has this day sold to party of the second part the following property:

"The entire stock of goods now belonging to Walden & Fallis, at Charlotte, the fixtures, notes receivable,

accounts rec., money on hand and in banks to credit of Walden & Fallis, one-ton Ford truck, for which the party of the second part agrees to pay at once a deed to the place now known as Frank Bullington place and ($1,000) one thousand, in cash, to be paid as follows: $500 to be paid when Curtis Walden becomes postmaster of the Charlotte office. Provided the appointment is made within the next eight months from date of this agreement."

A contract executed on the same day was made Exhibit B to the complaint. It is as follows:

"This agreement entered into this day between Esther Fallis, known hereafter as party of the first part, and Curtis Walden, hereafter known as party of the second part.

"The party of the first part hereby agrees to resign as postmaster at Charlotte, Arkansas, within the next sixty days from this date and to recommend and lend her influence, together with the influence of her husband, Marvin Fallis, for the appointment of the party of the second part to said position as postmaster at Charlotte, Arkansas.

"The party of the second part hereby agrees that, should he be appointed postmaster and later resign the said office, he will recommend and lend his influence toward the appointment of Marvin Fallis or Esther Fallis for the place. (The following inserted with ink and pen): 'provided either should desire appointment, on condition if said Curtis Walden should resign without selling stock of goods.' "

According to the testimony of Marvin Fallis, his wife was postmistress at Charlotte, Arkansas, and it was agreed between the parties at the time the contract was executed that she was to resign as postmaster, but that she did not do it. The $500 mentioned in the contract was not to be paid as a consideration for the postoffice so as to retain it in the store. The parties thought that they could secure the appointment of Curtis Walden as postmaster inside of eight months; but the

understanding was that the $500 should be paid in any event, and was not conditioned upon the appointment of Curtis Walden to be postmaster. It was contemplated that he should be appointed, and the clause was inserted with that understanding, meaning to be merely a time fixed within which the $500 should be paid; but it was further understood that, if he was not appointed within eight months, the $500 was to be paid at the end of that time. After the expiration of the eight months, demand was made for the payment of the $500, and the defendants refused to pay it.

Owen Walden was a witness for the defendants. According to his testimony, he informed Marvin Fallis that he did not want the business at all unless he could get the postoffice in the purchase price, and that Fallis promised him that the postoffice should go in as a part of the purchase price. It was thought to be illegal to insert this unconditionally in the contract, but it was understood that the defendants were not to pay the $500 unless they got the postoffice. The contract was drawn in such a way that it would not show the sale of the postoffice. Esther Fallis refused to resign, and none of the defendants were ever appointed as postmaster.

The jury returned a verdict in favor of the plaintiffs, and from the judgment rendered the defendants have duly prosecuted an appeal to this court.

W. M. Thompson and *S. M. Bone,* for appellant.

Charles F. Cole and *J. Paul Ward,* for appellee.

HART, J., (after stating the facts). It is insisted by counsel for the defendants that the judgment should be reversed because the two instruments in writing set out in our statement of facts were executed on the same day and should be considered together in interpreting the meaning of the contract sued on. It is contended that, when so considered, it is manifest that the $500 was not to be paid unless Curtis Walden was appointed postmaster as specified in the contract. In other words, it is contended that the two instruments show on their face that the payment of the $500 was not intended as

an unconditional obligation of the defendants, but that it rested upon the condition that Curtis Walden should be appointed postmaster, and the case of *Belding* v. *Vaughan,* 108 Ark. 69, is cited to sustain their contention.

In the first place, it may be stated that, if this was the effect of the contract, it is illegal as being against public policy.

In *Edwards* v. *Randle,* 63 Ark. 318, it was held that a contract for the sale of the fixtures of a postoffice, in which the seller, who was the postmaster, agreed to resign his office and recommend the appointment of the purchaser as his successor, is void as against public policy. To the same effect see *McGuire* v. *Corwine,* 101 U. S. 108; 6 R. C. L., § 141, pp. 736 and 737; and 13 C. J., § 375 (I), p. 438.

We do not think, however, that the contract is unambiguous and calls for the construction sought to be placed upon it by counsel for the defendants On the other hand, we do not think the intention of the parties appears clearly from the written instruments, but are of the opinion that there is a latent ambiguity in the contract which calls for an explanation by the introduction of parol evidence, and that the court properly submitted the question to the jury.

This court is committed to the rule that if the written contract, whether it consists of one or more instruments, unequivocally manifests the intention of the parties, the court should declare its effect. On the other hand, if it is not clear, from a consideration of the contract as a whole, what the intention of the parties is, whether the ambiguity is patent or latent, the question is one for the jury to determine. *New York Life Insurance Co.* v. *Allen,* 143 Ark. 143; *Battle* v. *Draper,* 149 Ark. 55; and *Wisconsin & Arkansas Lbr. Co.* v. *Fitzhugh,* 151 Ark. 81.

In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction, it should be construed in the light of

the circumstances surrounding them at the time it is made. *Arlington Hotel Co.* v. *Rector,* 124 Ark. 90; *Fort Smith Light & Traction Co.* v. *Kelley,* 94 Ark. 461; and *Keopple* v. *National Wagonstock Co.,* 104 Ark. 466.

The parties will be presumed to have known, and the testimony shows that they did know, that it was against public policy for them to contract for one of the plaintiffs to resign as postmaster and secure the appointment of one of the defendants as postmaster in her stead. When these and other circumstances attending the transaction are considered, we are of the opinion that its terms were ambiguous, and that the court was warranted in admitting parol evidence to explain its terms and in submitting the question to the jury.

No objection was made to the form or to the substance of the instructions. In submitting the theory of the defendants, the court instructed the jury that, if it believed from the evidence that the $500 mentioned in the contract filed with the plaintiff's complaint was to be paid only on the condition that the postoffice at Charlotte, Arkansas, was to be delivered to the defendants and Curtis Walden was to be appointed as such postmaster, its verdict should be for the defendants.

On the other hand, as submitting the theory of the plaintiffs, the court instructed the jury that, if it should believe from a preponderance of the evidence that the $500 in question was not a consideration for Mrs. Fallis' resigning from the postoffice, but that the time mentioned in the contract that the payment of the $500 should be made was when Walden became postmaster, was merely to fix the time of its payment, then the verdict should be for the plaintiffs.

The jury by its verdict has accepted as true the testimony of the plaintiffs, and, in the light of the attendant circumstances, we think the court properly held that the instruments exhibited with the complaint were ambiguous, and their meaning was properly left to the jury to be determined.

It follows that the judgment will be affirmed.

KINDER v. LOONEY.

Opinion delivered May 10, 1926.

1. INJUNCTION—ENCROACHMENT ON FRANCHISE.—Injunction is the appropriate remedy to protect a party in the enjoyment of an exclusive franchise against continuous encroachments; the jurisdiction resting on the ground of its necessity to avoid a multiplicity of suits and to give adequate protection of the franchise.
2. INJUNCTION—EXCLUSIVE FRANCHISE—ENCROACHMENT.—To entitle the owner of a franchise to relief in equity, it is not necessary that the franchise should be exclusive, in the sense that the grant of another similar franchise to be exercised and enjoyed at the same place would be void; it being exclusive as to one attempting to exercise the same franchise without legal sanction.
3. PUBLIC SERVICE COMMISSIONS—REGULATION OF MOTOR BUSSES.—Motor busses operating as public carriers between municipalities are "common carriers," within Gen. Acts of 1921, p. 177, conferring on the Railroad Commission jurisdiction of all matters pertaining to the regulation and operation of common carriers.
4. PUBLIC SERVICE COMMISSIONS—REGULATION OF MOTOR BUSSES.—The Railroad Commission could not arbitrarily decline to issue a certificate of public convenience and necessity to one who, in good faith, applied for a license to operate busses between certain municipalities and offered to comply with the rules prescribed by the Commission.
5. PUBLIC SERVICE COMMISSIONS—RESTRICTING NUMBER OF BUSSES.—Before the Railroad Commission can limit the number of certificates of public convenience and necessity issued to companies over a given route, there must be a finding, based upon evidence, that such restriction will result in a benefit to the public.
6. PUBLIC SERVICE COMMISSIONS—RIGHT TO OPERATE MOTOR BUSSES.—The holder of a certificate or license from the Railroad Commission to operate busses between certain municipalities cannot enjoin another from operating his busses over the same route where the latter has made proper application for a certificate or license to operate over the same route, but his application has not been acted upon by the Railroad Commission.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy*, Chancellor; reversed.

STATEMENT BY THE COURT.

On the 9th day of March, 1926, appellee filed a complaint in equity against appellants to restrain them from operating a passenger transportation business by motor

bus lines between the city of El Dorado, Union County, Arkansas, and other points in the State.

On the 11th day of March, 1926, appellants filed an answer in which they denied insolvency and denied that they had not complied with the requirements of the Railroad Commission in the operation of their business.

The record shows that the appellants were employees of W. H. Johnson of Shreveport, Louisiana, who operates motor busses between cities within the State of Arkansas. W. H. Johnson did business as the Union Bus Line, and operated motor busses under a schedule approved by the Arkansas Railroad Commission in December, 1925. At that time he had a station in the city of El Dorado, Arkansas, and maintained a schedule for his motor busses running south. He allowed the appellants the use of his station and required them to maintain his schedule of operation and to give satisfactory service. They paid him a certain per cent. of all the passenger tickets sold.

The record shows that W. H. Johnson, doing business as the Union Bus Line, filed an application with the Arkansas Railroad Commission for a permit to operate motor busses between the city of Camden and intermediate points, and that said application was set down for formal hearing before the Commission at El Dorado, Arkansas, on March 29, 1926.

The record also shows that the rules promulgated and adopted by the Commission require a hearing to be had upon every application filed covering a route upon which a previous permit has been granted.

W. H. Johnson, doing business as the Union Bus Line, filed his application for a permit to operate a bus line as above stated, and complied with the rules and regulations of the Arkansas Railroad Commission as to filing bonds, etc. The hearing of his application was deferred by the Arkansas Railroad Commission until March 29, 1926, because of the crowded condition of its docket.

The record shows that W. H. Johnson was operating motor busses under the rules of the Arkansas Railroad

Commission during the year 1925. On the 5th day of February, 1926, the Arkansas Railroad Commission granted a certificate of convenience and necessity to J. P. Looney of El Dorado, Arkansas, to operate motor busses over the route specified in his application. The permit granted him was to operate a motor bus line on the same schedule and over the same route as that applied for by W. H. Johnson, doing business as the Union Bus Line. J. P. Looney is a taxpayer of El Dorado.

On the 13th day of March, 1926, the cause was submitted to the chancery court on final hearing, and it was decreed that appellants be enjoined from operating motor busses or motor vehicles for the transportation of passengers in Union County, Arkansas, until such time as they have complied with the laws of the State of Arkansas and the regulations of the Arkansas Railroad Commission, and have obtained from said Commission a permit or certificate of necessity and convenience to transact such business.

The case is here on appeal.

Kirby & Hays and *Oren Parmeter,* for appellant.

Coulter & Coulter and *R. M. Hutchins,* for appellee.

HART, J., (after stating the facts). The Arkansas Railroad Commission gave J. P. Looney what was termed a certificate of public convenience and necessity to operate motor busses over the same route and practically under the same schedule as attempted to be operated by the Union Bus Line.

In 5 Pomeroy's Eq. Jur. (2 ed. § 2016), it is said that an injunction is the appropriate remedy to protect a party in the enjoyment of an exclusive franchise against continuous encroachments. Prof. Pomeroy said that "the jurisdiction rests on the firm and satisfactory ground of its necessity to avoid a ruinous multiplicity of suits, and to give adequate protection to the plaintiff's property in his franchise."

In § 2017, Prof. Pomeroy says that it is not necessary, "to entitle the owner to relief in equity, that the franchise should be an exclusive franchise in the sense

that the grant of another similar franchise to be exercised and enjoyed at the same place would be void."

The reason given is that, "as to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another."

This brings us to the question of whether or not the Union Bus Line, for which appellants were working, was acting in violation of law in operating its motor busses, and also to a consideration of the interpretation of our statute establishing the Arkansas Railroad Commission and giving it power to regulate public utilities and service corporations, and the rules and regulations adopted by the said Commission.

The act in question was passed by the Legislature of 1921, and comprises twenty-seven sections. General Acts of 1921, p. 177.

Section 5 of the act provides that the jurisdiction of the Commission shall extend to and include all matters pertaining to the regulation and operation of all common carriers, etc., and this court has held that motor busses operating as public carriers between municipalities are included in the words "all common carriers." *Mason* v. *Intercity Terminal Ry. Co.*, 158 Ark. 542.

Section 6 provides that those engaged in public service business shall establish and maintain adequate and suitable facilities and shall perform such services in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public. This section and others also gives the Commission authority to establish rates and maintain the same.

Section 20 provides for an appeal to the circuit court from any order made by the Commission.

Among other rules promulgated by the Arkansas Railroad Commission is the following:

"(1). No person or motor transportation company shall begin to operate any motor-propelled vehicle for the transportation of persons or property, or both, for

compensation between fixed termini or over a regular or irregular route in this State, without first obtaining from the Railroad Commission a certificate declaring that a public convenience and necessity require such operation."

We all agree that the States have the undoubted right to regulate motor vehicles operating for hire as common carriers within the State, and that the statutory regulation of motor vehicles varies in the different States. The statutes of many States creating public service commissions require certificates of public convenience and necessity before any such company can begin or carry on business. Other statutes give public service commissions the power and authority to limit or restrict the number of motor vehicles operating as public carriers over given routes to a number sufficient to meet the public convenience and necessity. Such legislative enactments have commonly been sustained in the courts.

The statute under consideration in this case does not confer express authority upon the Arkansas Railroad Commission to establish a rule that no automobile transportation company shall operate for the transportation of persons for hire over a regular route in this State without first having obtained from the Commission a certificate declaring the public convenience and necessity require such operation.

It is claimed, however, that such authority in the Commission is necessarily implied by the language of § 5, providing that the jurisdiction of the Commission shall extend to and include all matters pertaining to the regulation and operation of all common carriers. In other words, it is claimed that giving the Commission jurisdiction over all matters relating to the operation of common carriers gives it the right to promulgate a rule that no motor busses shall operate as common carriers over a given route until they have obtained a certificate of public convenience and necessity, and that this requirement is a prerequisite to their operation.

No adjudicated case has been cited in support of this contention, and a majority of the court expressly

reserves this question for future determination, for the reason that the conclusions we have reached under the facts of this case render it unnecessary for us to decide the question.

Assuming that the Legislature had passed a statute in the language of the rule promulgated by the Commission and copied above, we do not think that it would give the Commission the power to arbitrarily decline to issue a certificate of public convenience and necessity, or to restrict and limit the number of corporations desiring to operate over a given route without a hearing. All the authorities hold that statutes regulating public service corporations are enacted to promote the common welfare as well as to protect parties who invest money in such public service corporations. It is true that laws regulating them are primarily based on the public needs, and not to promote the desire of such corporations to serve the public.

Now, if it be conceded that the rule promulgated by the Commission is necessarily implied under the terms of the act creating the Commission and defining its powers, it follows that the Commission could not decline to issue a certificate of public convenience and necessity to a company applying in good faith therefor and offering to comply with the rules of the Commission with respect to bonds and other conditions imposed upon such applicants, without adequate reason therefor.

A certificate of public convenience and necessity is nothing more than written evidence that the party obtaining it has complied with the provisions of the statute and the reasonable rules and regulations of the Commission. It will be noted that the rule itself does not restrict the number of certificates of public convenience and necessity which may be issued to companies operating motor busses for hire over a given route. If the Commission may limit the number, it must act in a reasonable manner and upon evidence. It must determine the question with justice and fairness to the public, as well as to the public service corporations. It cannot restrict the

number of certificates of public convenience and necessity issued to companies over a given route without reasonable evidence tending to show that such restriction would result in a benefit to the public. The decision of the Commission limiting the number of such certificates must in any event be based upon a finding that the public needs in the premises will be best served thereby.

In the case at bar, the Union Bus Line had an established station, and was operating a bus line over the route in question during the year 1925. Application was made to the Commission for a certificate to operate during the year 1926, and the conditions prescribed by the rules and regulations of the Commission had been complied with. Owing to the crowded condition of the docket of the Commission, the hearing of the application was postponed until the 29th day of March, 1926. In the meantime the applicant desired to operate motor busses over the route and under the schedule set forth in its application. J. P. Looney had already obtained a certificate of public convenience and necessity over the same route and under the same schedule as that applied for by the Union Bus Line.

The record shows that the rules promulgated and adopted by the Commission require a hearing to be had upon every application filed covering a route upon which a previous permit had been granted, and that, owing to the number of cases before the Commission, it could not hear this application before March 29, 1926, and it was therefore set down for hearing on that date.

The record also shows that the Commission expressed the view that it was a violation of its rules and regulations for any applicant to operate a bus line until it was issued a permit to do so, but that it has been the custom with all applicants running competitive lines to continue their operations until a final hearing should be had upon their case.

Under the facts stated, the majority of the court is of the opinion that J. P. Looney had no right to an injunction against the Union Bus Line, or its employees, until after the final hearing by the Commission of its appli-

cation and the rejection of the same. If the Commission, on final hearing, had denied the application of the Union Bus Line for a certificate of public convenience and necessity, and the company itself, or through its employees, had attempted to operate in violation of the orders of the Commission, then Looney, under the principles of law above announced, would have had a right to enjoin them from so operating. If the Union Bus Line had deemed itself aggrieved by the ruling of the Commission on final hearing, it would have had an appropriate method of review under § 20 of the act in question. Until there was a final hearing in the matter, the Commission could not intelligently determine whether or not public necessity and convenience required it to limit or restrict the number of companies operating over the route in question.

The result of the views of a majority of the court is that the decree of the chancellor was wrong and should be reversed, and the complaint of the plaintiff will be dismissed here.

McCULLOCH, C. J., (dissenting). The use of public highways by a public carrier is a privilege which the State may give or withhold, and the privilege may be granted upon such terms as may be determined by the lawmakers. Such use may be regulated, and, as a part of the regulation, the number of conveyances to be used on a given route may be limited. Pond on Public Utilities, §§ 714, 715. Now, if the statutes of this State have conferred upon the Commission the power to issue permits and determine the number of such permits to use a given route (and I think such power is conferred in the statute), then it necessarily follows that such use cannot be taken without first securing a permit—not even during the period of delay while an application is being considered by the Commission or while the proceedings are in progress. The burden is on the applicant to show that the public convenience requires additional service, and that he is entitled to a permit to furnish the same. Pond on Public Utilities, § 820.

Our statute provides a remedy by appeal to the circuit court of Pulaski County from erroneous orders of the Commission. Acts 1921, p. 177, § 20. An applicant cannot bid defiance to the order of the Commission and use the highway without a permit, nor is he entitled to use the highway while the application is pending. He must wait until he gets the permit.

I dissent from that part of the opinion of the majority which holds that, until there has been a final hearing by the Commission and determination of an application, the applicant may continue to use the highway.

STALLINGS v. GALLOWAY-KENNEDY COMPANY.

Opinion delivered April 12, 1926.

CORPORATIONS—AUTHORITY OF OFFICERS TO EXECUTE MORTGAGE TO THEMSELVES.—The authority of the officers of a private corporation to execute a mortgage for valuable consideration conveying the corporate property to themselves individually cannot be questioned by subsequent creditors of the corporation, where neither the stockholders nor existing creditors are complaining.

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

Gregory & Holtzendorff, Cooper Thweatt and *Bogle & Sharp,* for appellant.

S. S. Jefferies and *Lee & Moore,* for appellee.

SMITH, J. Prior to 1914 F. M. Kennedy was engaged in the sawmilling business, with his wife as an equal partner, under the firm name of F. M. Kennedy Company. O. C. Galloway owned a sawmilling business which was operated under the name of the J. B. Galloway Company. In 1914 the Kennedy Company and the Galloway Company merged and formed a corporation, which was chartered under a corporate name of Galloway-Kennedy Company, hereinafter referred to as the company. The capital stock of the corporation was $20,000, of which Galloway and his wife each owned 22½ per

cent., and Kennedy and his wife each owned 25 per cent. The remaining five per cent. of the stock was owned by a brother of Galloway. The corporation prospered, and large dividends were earned, those for the year 1919 being between twenty and twenty-five thousand dollars. In 1918 the capital stock was increased to $75,000, which was owned in the same proportions as the original capital stock. In 1920 came the financial slump, which greatly disturbed the lumber market. The company had at that time thirty thousand dollars worth of timber on the river bank, all of which was paid for, much of which floated away, was stolen or rotted. In addition, a fire destroyed much property belonging to the company. This property was only partially insured, and all the insurance was not collected.

The company borrowed from the Merchants' & Planters' Bank of Clarendon, Arkansas, the sum of $20,000, and to secure the same executed a mortgage covering all the corporate assets. This mortgage was duly recorded. Later, and on the 10th day of February, 1920, the company borrowed from Galloway and Kennedy individually the sum of $18,000, and to secure the same executed a second mortgage on its corporate assets to Galloway and Kennedy, who had each loaned $9,000 to the company. This loan was evidenced by a note due one year after date and payable to O. C. Galloway and F. M. Kennedy. On November 14, 1921, Kennedy made the following indorsement on the back of the note: "As security for $11,233.33, I hereby transfer to Carrie C. Kennedy my one-half interest in this note." And a little later Galloway made an indorsement on the note reading, "For value received, I hereby transfer this note to Emma Galloway." Emma Galloway was the wife of O. C. Galloway and a sister of F. M. Kennedy, and Carrie Kennedy was the wife of F. M. Kennedy. On the dates the note was so indorsed Kennedy and Galloway indorsed on the margin of the record where the mortgage was recorded a transfer of their respective interests in the mortgage to their wives.

The company became involved, and was sued by a number of its creditors. The first of these suits was commenced November 4, 1921, by C. R. Stallings, who made both Galloway and Kennedy parties because of their failure, as officers of the company, to comply with § 1715, C. & M. Digest, requiring officers of a corporation to file a verified annual report of the affairs of the corporation. The contract out of which this suit by Stallings arose was dated May 4, 1920, and the corporation made no defense. Galloway and Kennedy answered, and alleged that they had complied with the statute by filing the report. Stallings recovered judgment on December 7, 1921, against both the corporation and Galloway and Kennedy, and an appeal was prosecuted from that judgment to this court. It appeared that the report had been prepared and filed, but it had not been verified, and we held on the appeal that the filing of an unverified report did not comply with the law, and the judgment against Galloway and Kennedy was affirmed because of their noncompliance with the statute. *Galloway* v. *Stallings*, 154 Ark. 16. Later other creditors of the corporation, whose suits were commenced after the institution of the Stallings suit, recovered judgments against both the company and Galloway and Kennedy. The sole ground of liability asserted against either Galloway or Kennedy in any of these suits arose out of their failure to file the report required by § 1715, C. & M. Digest.

Stallings' judgment amounted to $5,230, and upon this judgment he caused an execution to be issued, which was levied upon the corporate property and upon certain lands and town lots owned by Galloway individually in the city of Clarendon, and on certain other lands belonging to Kennedy individually. There was a sale under this execution, and Stallings became the purchaser of most of the lands sold, and among other lands purchased by him was the mill site, for which he paid $500. The lands and lots sold at this execution sale lacked $734.66 of bringing enough to satisfy Stallings' judgment, with the interest and costs. Mrs. Galloway took an assign-

ment from Stallings of his interest in the unsatisfied judgment.

After this execution sale the Merchants' & Planters' Bank filed suit to foreclose its mortgage, and all the judgment creditors were made parties defendant, as were also Galloway and Kennedy individually and the Galloway-Kennedy Company, and Mrs. Galloway and Mrs. Kennedy as the apparent owners of the second mortgage executed by the Galloway-Kennedy Company to Galloway and Kennedy. This foreclosure suit was commenced August 16, 1922, and a decree of sale was rendered. This mortgage was originally for the sum of $20,000, but had been reduced by payments thereon to $6,417.13, and for this amount judgment was rendered. A commissioner was appointed to sell the mortgaged property, and at the sale made by the commissioner the property ordered sold was sold to Mrs. Kennedy for the sum of $9,800. The commissioner duly reported this sale, and when his report came on for confirmation the judgment creditors filed exceptions thereto and objected to its approval. It was alleged in these exceptions that bidding had been stifled, but no testimony was offered to support that charge.

By appropriate pleadings these creditors question the validity of the mortgage from the company to Galloway and Kennedy, and also the assignment of their respective interests to their wives, it being charged that there was no authority or consideration for the execution of this mortgage, and that the transfer by Galloway and Kennedy of their interests therein, if the mortgage was valid, was without consideration, and was done for the fraudulent purpose of cheating and defrauding the judgment creditors of Galloway and Kennedy. These judgment creditors prayed that the mortgage from the company to Galloway and Kennedy be canceled, and that the assignment thereof to Mrs. Galloway and Mrs. Kennedy be declared void, and they asked the court to adjudge the priority of the judgment liens of the respective creditors. It is conceded, however, that it will not

be necessary to adjudicate the question of priority if the mortgage from the company to Galloway and Kennedy, and the assignment thereof, be upheld, for the reason that the excess of the fund derived from the commissioner's sale over the debt due the bank (and the company has no other assets) will not be sufficient to discharge the second mortgage.

All the parties who are attempting to enforce judgments against the company or Galloway and Kennedy individually were made parties to the foreclosure suit of the bank, and the final decree in that cause adjudicated the rights of the parties as follows: The court found that the mortgage from the company to Galloway and Kennedy was valid and constituted a lien prior and superior to any of the judgments, and that the transfer by Galloway and Kennedy of their interests in the mortgage and the note which it secured was not a voluntary transfer but was made for a valuable consideration. The report of the sale of the corporate property to Mrs. Kennedy was approved, and the court decreed that the commissioner pay over to Mrs. Galloway and Mrs. Kennedy the excess in his hands, after paying the bank, derived from the sale, which Mrs. Kennedy had paid to the commissioners, one-half to each, and the judgment creditors have appealed. Other facts will be stated in the opinion.

The judgment of Stallings is prior in time to all the other judgments, and under this judgment the corporate property was sold, subject to the mortgage of the bank, and subject also to the mortgage from the company to Galloway and Kennedy, if that mortgage is valid, as it was of record before the contract was entered into out of which the Stallings suit against the company arose.

The first question which naturally arises is whether the company mortgage to Galloway and Kennedy is valid. We think it is. The authority of the officers of the company to execute it is questioned; but, in answer to this objection, it may be said that no stockholder of the company has ever questioned the authority of the corporate officers to execute this mortgage, and none of the

judgment creditors were creditors of the corporation when the mortgage was executed and placed of record. The court below specifically found the fact to be that the mortgage was based upon a valuable consideration, and of the correctness of this finding we entertain but little doubt. Certainly the finding is not clearly against the preponderance of the evidence.

It was shown by the testimony of the cashier of the Merchants' & Planters' Bank that separate accounts were kept in the bank with the corporation, and with Galloway and Kennedy, each of whom had an individual account. The cashier of the bank testified that the books of the bank show that on February 7, 1920, a charge of $9,000 was made against the personal account of Kennedy, and on the same date a charge of $9,000 was made against the personal account of Galloway, and the account of the company showed a deposit of $18,000, said deposit consisting of two items of $9,000 each, and on the same date the bank issued to the company a draft, payable to the White River Lumber Company, for $17,594.72. Galloway and Kennedy each explained how they obtained the money deposited to their individual accounts, and that the Galloway-Kennedy Company had a pending lawsuit with the White River Lumber Company, which was settled by paying that company the $17,594.72 evidenced by the draft above mentioned, and that they loaned the corporation the money for that purpose.

The next question which arises is whether the assignment of this mortgage to the wives of the mortgagees was fraudulent. The court below found that it was not, and we do not think that finding is against the preponderance of the evidence.

As an evidence of the fraudulent intent of Galloway and Kennedy, it is argued that their wives paid nothing for the stock of the corporation owned by them. As has been said, the corporation was organized in 1914, and, if it be conceded that Mrs. Galloway and Mrs. Kennedy paid nothing for their stock—a fact which they deny—we see no fraud in this. There were then no creditors.

Both Galloway and Kennedy were personally solvent, and so also was the corporation itself. Indeed, it was very prosperous until the financial disaster of 1920 brought ruin to so many people. The books of the corporation showed the ownership of this stock by Mrs. Galloway and Mrs. Kennedy, and there is no contention that there was ever any attempt to conceal this fact. There was no reason why Galloway and Kennedy might not have given the stock to their wives, if the transaction was in fact a gift.

Mrs. Galloway and Mrs. Kennedy each had separate bank accounts; and each owned separate property. Both Galloway and Kennedy show the money received by them from their wives within three years of the date of the assignment of the mortgage to them. We do not set out the testimony on this subject, as it would serve no useful purpose, but both Galloway and Kennedy became indebted to their wives by the appropriation and use of the dividends paid on the corporate stock owned by their wives. Cash money was borrowed, as is evidenced by checks drawn on individual accounts carried by these ladies. Property was sold which they individually owned, and each of these ladies owned Government bonds, which their husbands sold and used the proceeds of these sales. In these various ways both Galloway and Kennedy had become indebted to their wives in amounts largely exceeding any sum these ladies may receive from the commissioner under the order of the court.

In this connection it may be stated that there is no question in this case about the wives of Galloway and Kennedy permitting their husbands to so use their property as that it was a basis of credit. Indeed, the undisputed fact is that Galloway and Kennedy themselves became liable, not because of any personal obligation on their part, but only because they had made an abortive effort to comply with the law in filing the annual report of the corporation of which they were the executive officers. Credit had been extended solely to the corporation. The obligations which were reduced to judgments were

those of the corporation for which Galloway and Kennedy became liable only through the omission to verify the report which they filed in an attempt to comply with the law. *Galloway* v. *Stallings, supra.*

We are cited to the numerous cases in which this court has held that transactions between husband and wife affecting the rights of creditors, especially when the husband is insolvent at the time of the occurrence, are to be scrutinized with care in passing upon the good faith of the transaction. The case of *Davis* v. *Cramer,* 133 Ark. 224, is especially pressed upon our attention. In that case it was said: "A man must be just to creditors before he can be generous to relatives. Therefore where an insolvent debtor makes a voluntary transfer of his property, which is not exempt under the law from his debts, to those who are near of kin, whether he intends it as a fraud or not, it operates as a fraud on his creditors, for the reason that such a transfer hinders, delays or defeats them in the collection of their claims. *Wilkes* v. *Vaughan,* 73 Ark. 174; *Simon* v. *Reynolds-Davis Gro. Co.,* 108 Ark. 164."

Numerous other cases to the same effect are cited, but we do not decide anything which impairs the authority of those cases. We do hold, however, that they are not applicable to the facts of this case. It may be conceded that Galloway and Kennedy became insolvent by reason of the judgments rendered against them as officers of the Galloway-Kennedy Company by reason of their failure to file a report complying with the law. But the assignment of the mortgage was not voluntary. On the contrary, the court below found—and we think that finding is not contrary to the preponderance of the evidence—that the assignment was based upon a valuable and sufficient consideration.

It is true this assignment to the wives of the assignors proved to be a preference of them as creditors against the other creditors of the corporation who later became judgment creditors of Galloway and Kennedy. But that fact does not defeat the assignment. The assignment

was not challenged within the time and manner which would have defeated it as a preference of the wives over the other creditors.

In the case of *Waters* v. *Merit Pants Co.*, 76 Ark. 252, this court said: "It is settled by the decisions of this court that an insolvent husband, when justly indebted to his wife, may, without fraud, prefer her claim to that of other creditors, and make valid appropriation of his property to pay it, even though the result be to deprive other creditors of the means to satisfy their claims. But such transactions between husband and wife are viewed by the courts with suspicion, and the perfect good faith of the transaction must be established by proof. Where the wife asserts, as a consideration for conveyance of his property to her, a claim of debt against her insolvent husband for money loaned to him many years previous, no note or other written evidence of an agreement to repay being shown to have been executed, and the alleged debt having become stale by long lapse of time, as in this case, her bare statement should be corroborated by some other evidence of the existence of a valid debt, before the courts can accept it in support of the conveyance. For a discussion of the law on this subject reference is made to the recent case of *Davis* v. *Yonge*, 74 Ark. 161, and nothing need be added here on the subject."

The demands here are not stale. None of the items comprising them were three years old, and some were only a few weeks old, and there are evidences of the genuineness of these items which cannot be disregarded, but which are in fact undisputed.

The various judgment creditors discuss the question of the priority of their liens. The court below held that Stallings had ceased to be a judgment creditor, by reason of the execution sale and his assignment of the balance due on his judgment to Mrs. Galloway, and upon this finding the other creditors, whose judgments were rendered at subsequent terms of the court, insist that they have prior and superior claims to the surplus in the commissioner's hands.

We do not consider it necessary to decide the question of priority among these creditors, for the reason that the lien of the mortgage from the company to Galloway and Kennedy is prior and superior to these judgments, and the fund here in litigation is insufficient to discharge that lien, which we hold was acquired by Mrs. Galloway and Mrs. Kennedy for a valuable and sufficient consideration.

The decree of the court below is correct, and it is therefore affirmed.

SMITH, J., (on rehearing). It is insisted in the brief filed in support of the petition for rehearing that Galloway and Kennedy did not assign their respective interests in the notes secured by the mortgage given by the Galloway-Kennedy Company to them until after judgments had been rendered against them, and that therefore the assignees took subject to the right of the judgment creditors to subject the mortgaged property to the payment of their judgments.

In answer to this contention, it may be said that Kennedy assigned his interest in the mortgage to his wife on the 14th day of November, 1921, which was prior to the rendition of the judgment in favor of the appellant Stallings, which was the first of the judgments to be recovered; and Galloway assigned his interest in the mortgage to his wife on June 3, 1923, which was prior to the rendition of the judgment in favor of the appellant Thweatt, but subsequent to the rendition of the judgment in favor of the appellant Stallings.

Only two of the judgment creditors have appealed from the decree of the court below, which is set out in the original opinion, these being Stallings and Thweatt, and it appears from that opinion that Mrs. Galloway took an assignment from Stallings of his interest in the unsatisfied judgment in his favor. He therefore is in no position to complain, for Mrs. Galloway now owns such interest in that judgment as has not been satisfied; and, as to appellant Thweatt, it may be said that he did not recover his judgment until after both Galloway and Kennedy had

assigned their respective interests to their wives; and, as also appears from the original opinion, no creditor complained of this preference within the time when complaint might effectively have been made.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. CECIL.

Opinion delivered April 26, 1926.

1. RAILROADS—LIABILITY FOR DAMAGE BY FIRE.—Under Crawford & Moses' Dig., § 8569, a railway company is liable, not only for injury to or destruction of property by such extraordinary hazards as the operation of a locomotive engine, but also by the acts of its servants or employees, such as burning off the right-of-way or building fires thereon or in proximity thereto.
2. RAILROADS—DAMAGE BY FIRE—SUFFICIENCY OF COMPLAINT.—Under Crawford & Moses' Dig., § 8569, a complaint alleging that defendant railway company "caused and permitted fire to escape" from its right-of-way, is sufficient, in the absence of a motion to make the complaint more specific.
3. RAILROADS—LIABILITY FOR DAMAGE BY FIRE—NEGLIGENCE.—In an action under Crawford & Moses' Dig., § 8569, against a railway company for damage to property by fire caused by the acts of its employees in permitting fire to escape from its right-of-way it was unnecessary to allege or prove negligence on the part of defendant or its employees.
4. RAILROADS—LIABILITY FOR DAMAGE BY FIRE—ATTORNEY'S FEE.—In an action against a railway company for damage to property by fire under Crawford & Moses' Dig., § 8569, it was proper to render judgment for a reasonable attorney's fee as incident to a judgment for damages.

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

James B. McDonough and *Joseph R. Brown*, for appellant.

Lake, Lake & Carlton, for appellee.

SMITH, J. Appellee sued the appellant railway company, and for his cause of action alleged "that the defendant, the Kansas City Southern Railway Company, on the 3d day of October, 1922, through the negligence of

its employees, who were engaged in the operation and work of said railway company along its right-of-way, caused and permitted fire to escape from the defendant's right-of-way and spread over on plaintiff's land, on which his orchard was located, and to burn over same, the result of said negligence being the burning and destroying of 406 peach trees and one-fourth of a mile of rail fence, to the plaintiff's damage in the sum of $1,100."

The answer of the appellant railway company denied specifically all the allegations of the complaint.

The jury returned a verdict for appellee in the sum of $380, and, after this had been done, appellee filed a motion for the allowance of an attorney's fee, and upon hearing this motion the court fixed a fee for appellee's attorneys of $75, and judgment was rendered for the damages assessed by the jury and the attorney's fee assessed by the court.

For the reversal of this judgment, it is insisted that the complaint stated a cause of action under which it was necessary for appellee to prove that the fire which destroyed appellee's orchard was caused by the negligence of some one of appellant's employees, and that no negligence was shown, and that the judgment should be reversed for this reason; and it is also insisted that, in no event, should an attorney's fee have been allowed.

Appellee insists that his cause of action was predicated upon § 8569, C. & M. Digest, which reads as follows: "All corporations, companies or persons, engaged in operating any railroad wholly or partly in this State, shall be liable for the destruction of, or injury to, any property, real or personal, which may be caused by fire, or result from any locomotive, engine, machinery, train, car or other thing used upon said railroad, or in the operation thereof, or which may result from, or be caused by, any employee, agent or servant of such corporation, company or person upon or in the operation of such railroad, and the owner of any such property, real or personal, which may be destroyed or injured, may recover all such damage to said property by suit in any court, in

the county where the damage occurred, having jurisdiction of the amount of such damage, and upon the trial of any such action or suit for such damage it shall not be lawful for the defendant in such suit or action to plead or prove as a defense thereto that the fire which caused such injury was not the result of negligence or carelessness upon the part of such defendant, its employees, agents or servants; but in all such actions it shall only be necessary for the owner of such property so injured to prove that the fire which caused or resulted in the injury originated or was caused by the operation of such railroad, or resulted from the acts of the employees, agents or servants of such defendant, and, if the plaintiff recover in such suit or action, he shall also recover a reasonable attorney's fee, to be ascertained from the evidence in the case by the court or jury trying the same. Provided, that the penalty prescribed by this section shall apply only when such employee, agent or servant is in the discharge of his duty as such."

This statute has several times been construed by this court, and it will be necessary only to call attention to the construction placed upon the statute in these prior decisions.

In the case of *Clark* v. *St. L. I. M. & S. R. Co.*, 132 Ark. 257, which cited the case of *Kansas City Sou. Ry. Co.* v. *Wilson*, 119 Ark. 143, the statute was considered and construed.

We there said that, while this statute was somewhat involved and ambiguous, it was the intention of the Legislature, in enacting it, to make railroads liable, not only for injury to or destruction of property caused by such extraordinary hazard as the operation of a locomotive engine, etc., but also for the damage by fire caused "by the positive affirmative act of the servants or employees of railway companies in the operation of the railroad," and it was there also said that "the language (of the statute) is sufficiently broad to include such acts as the burning off and clearing up of the right-of-way or roadbed, or such acts as the building of fires on the right-of-way, or

in proximity thereto, while engaged in the work of repairing the railroad track or roadbed for the operation of trains." We there quoted with approval from the case of *Missouri Pacific R. Co.* v. *Cady,* 24 Pac. 1088, the following language from the Supreme Court of Kansas: "The burning of dry grass, weeds and other combustible material which annually accumulates on the right-of-way is caring for the roadway and track." See also *Valley Lbr. Co.* v. *Westmoreland Bros.,* 159 Ark. 484.

Appellant insists that appellee did not allege, and did not prove, a cause of action under this statute, even as construed in the Clark case, *supra,* for the reason that it was not alleged that the railway company had set out the fire; nor was that fact proved. We think, however, that the allegations of the complaint, copied above, should be construed as containing this allegation. The complaint does allege that the railway company "caused and permitted fire to escape from the defendant's right-of-way." This allegation is not very definite or specific, but there was no motion to make it more definite and specific.

Concerning this allegation appellant says: "The complaint herein does not charge that the employees of the railroad company caused, or started, the said fire, which resulted in the damage complained of. It charges the employees caused and permitted fire to escape from the defendant's right-of-way to the plaintiff's land. It necessarily follows that a cause of action has not been stated under the statute referred to. The said statute applies only to a case where the employee has caused the fire. 'Cause' here is used as a verb, and is synonymous with the words 'produce,' 'to bring about.' 'Cause' means 'to produce or bring in existence,' says the Century Dictionary and Webster's International Dictionary. The above meanings are also given the word in the following cases:" (which are cited).

We think the allegation that appellant "caused" the fire charged that appellant "produced it" or "brought it about," that is, by some positive affirmative act the

railway company caused the fire. The complaint does not state what this act was, but, as we have said, there was no motion that this should be required.

It is true the complaint alleged that the railway company had "negligently caused and permitted fire to escape from the railroad's right-of-way," and the instructions given by the court submitting appellee's theory of the case required a finding of negligence, but this was an unnecessary allegation, and appellant was not prejudiced because this additional burden of proof was placed upon appellee.

The court gave, at the request of appellant, instructions which required the jury to find, before returning a verdict for appellee, that the employees of the railway company, while engaged in the operation and work of the railroad, caused and permitted fire to escape from the railroad right-of-way on to appellee's land. The jury was also told that "if the fire did not originate from any act of negligence of the employees of the defendant in setting out a fire for the purpose of clearing up the roadbed or right-of-way, and, if there was no negligence on the part of the defendant, a verdict must be rendered for the defendant."

In view of this instruction and the verdict returned by the jury in appellee's favor, the jury must have found that the fire which destroyed appellee's orchard was set out by the employees of the railway company while clearing up the right-of-way, and also made the unnecessary finding that this was negligently done.

Appellant insists that there is not only no testimony showing negligence, but that there is no testimony to support the finding that its employees set out the fire which destroyed the orchard. Passing upon this question we must, of course, give to the evidence which tends to support the verdict its highest probative value, and, when thus viewed, it may be stated as follows:

Jess Bass, who was twenty-one years old at the time of the trial, testified that he was a schoolboy when the fire occurred in 1922, and that, as he was returning from

school, he saw a fire southeast of the orchard, burning along the right-of-way, and that the fire was only about one hundred yards from the orchard, and that, when he passed again the next day, he saw that the fire had continued through the woods, to the orchard, and had burned the fruit trees.

Hal Barnes testified that he noticed where a pile of cross-ties had been burned on the right-of-way of the railroad, and that he saw some embers there freshly burned. These embers were about sixty or seventy-five feet from the point where the orchard cornered with the right-of-way fence, and the grass was burned from the point where the orchard cornered with the railroad right-of-way fence to the place where the pile of embers was on the right-of-way, and it looked as if it were recently burned.

The section foreman admitted that he had burned off the right-of-way, but he testified that the portion near appellee's orchard had been burned off on September 30, which was three days before the burning of the orchard, which occurred on October 3, and that the pile of ties had been burned in August.

The questions of fact in the case have been passed upon by the jury, and there has been a finding adverse to appellant's contention as to the origin of the fire, and in our opinion the testimony is legally sufficient to support the verdict.

As to the attorney's fee allowed by the court, it may be said that no complaint is made that the fee is excessive if the railway company is liable therefor, and on the question of liability it may be said that, inasmuch as we have held that the statute applies to damages resulting from a fire which the employees of a railroad set out on the right-of-way, and which is allowed to escape therefrom, the court was not in error in allowing the fee. In other words, if the statute applies, and the railroad is liable thereunder (and we have concluded that this liability was alleged, and the jury has found that it was proved), the party damaged has the right, as an incident

to a recovery under the statute, to recover also a reasonable attorney's fee, and it was therefore proper to render judgment for the attorney's fee as well as for the damage itself.

No error appearing, the judgment is affirmed.

HOLT v. STATE.

Opinion delivered May 10, 1926.

1. CRIMINAL LAW—HARMLESS ERROR.—On a trial for grand larceny, refusal of the court to require the sheriff to return money taken from defendant's person at the time of his arrest was not prejudicial where he was represented at the trial by counsel of his own selection.
2. CRIMINAL LAW—PLACING ACCUSED IN PENITENTIARY.—An order directing the sheriff to place the accused in the penitentiary for safe-keeping with instructions to the keeper not to permit any one to visit accused except his attorneys without an order from the sheriff *held* not prejudicial.
3. CRIMINAL LAW—RESETTING CASE IN DEFENDANT'S ABSENCE.—The resetting of a felony case is not such a substantive step in the trial of a case as requires the presence of the accused when it is made; and where it appears that accused was granted a further postponement of the case, no prejudice could have resulted from resetting the case in his absence.
4. CRIMINAL LAW—ADMISSIBILITY OF STATEMENTS BY ACCUSED'S WIFE.—Statements made by accused's wife in his presence, made at the time both were arrested on the charge for which accused was tried, with reference to her taking a package which he handed her, was admissible.
5. LARCENY—ALLEGATION OF OWNERSHIP.—An indictment for larceny in taking the property of S. is sustained by proof that it belonged to S. and wife jointly, but was in the exclusive possession of S.

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

C. Floyd Huff, for appellant.

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

WOOD, J. Bob Holt was indicted and convicted of the crime of grand larceny. The indictment charged that he, in the county of Garland and State of Arkansas, in March, 1925, did feloniously steal, take and carry away the sum of $55,000 in gold, silver and paper money, the property of one Pete Sirbu. He was sentenced by judgment of the court to imprisonment in the State Penitentiary for a period of five years, from which judgment is this appeal.

1. Upon the arrest of the appellant there was taken from his person certain jewelry and other personal property and the sum of $147. Before his trial, and while the appellant was incarcerated in the Garland County jail, and before his case was set for trial, he moved the court to require the sheriff to return to him the money taken from his person at the time of his arrest. The court refused, and appellant makes this a ground of his motion for a new trial. There was no error in the court's ruling. The record does not show that the appellant was prejudiced in the trial of the cause by reason of this ruling of the court. It does not appear that the appellant, because of such ruling, was not represented at the trial by counsel of his own selection, for, although the attorney who appeared for him and made the motion, notified the court that he desired to withdraw from the defense of the appellant after the motion was overruled, nevertheless the court appointed the same counsel appellant had employed, to represent him, and appellant was so represented at the trial.

Therefore, since the ruling could not have prejudiced appellant on the merits of the cause, it does not constitute grounds for reversal of the judgment. The court can only reverse for errors of the trial court prejudicial to the rights of the appellant on the trial of the merits of the cause.

2. It is next contended that the court erred in directing the sheriff of Garland County to deliver the appellant to the warden of the State Penitentiary for safekeeping from November 18, 1925, to January 24, 1926. But it

appears from an agreed statement of facts set forth in the record that, at the time the court ordered the sheriff to deliver the appellant to the warden of the State Penitentiary for safekeeping, the prosecuting attorney represented to the court that the facilities for safekeeping of the appellant in Garland County were faulty. Thereupon the court made the order, with directions to the keeper of the State Penitentiary not to allow any one to visit the appellant except his attorneys without order from the sheriff of the county. Since the appellant, by this order of the court, was not deprived of his constitutional right to confer with his counsel, appellant was in no manner prejudiced by the ruling of the court directing his incarceration in the State Penitentiary for safekeeping until such time as his trial might be had.

3. In the agreed statement of facts set forth in the bill of exceptions, it is shown that "shortly after the appellant's case had been set for December 2, 1925, the circuit court was advised by the prosecuting attorney that it would be impossible for the State's witnesses to be in Hot Springs on that date, and said cause was continued for resetting, and defendant's attorney was notified thereof; that, prior to said continuance, C. Floyd Huff, as attorney for the defendant, was notified by the prosecuting attorney of the names of the witnesses to be used by the State of Arkansas in the prosecution of the indictment for grand larceny, and was further advised that, if there were any witnesses whose testimony he desired taken, the State of Arkansas was ready at any time to cross any interrogatories that he might propound; that on the date of the first setting of said case for trial in the circuit court, to-wit, the 2d day of December, 1925, for the reasons above set forth by the State of Arkansas for a continuance and resetting, the court held no session on that date; that thereafter, on the 11th day of January, 1926, the circuit court, in the absence of C. Floyd Huff, his attorney, set the trial of this defendant for the 25th day of January, 1926, and immediately served notice thereof upon his attorney, C. Floyd Huff, of the setting of said

case for trial, and the defendant at the time was in the walls of the State Penitentiary at Little Rock, Arkansas, where he remained until the night of January 24, 1926, as above stated."

The appellant contends that the resetting of his case on the 11th day of January, while appellant was in the penitentiary, without notice to him of the action of the court, and without his presence or the presence of his attorney, was a substantive step in the cause, and deprived him of a constitutional right. But we are convinced that the change in the date set for the trial, as evidenced by the above recital of the record, did not result in any prejudice to the rights of the appellant. The date set for appellant's trial was changed from December 2, 1925, to January 25, 1926, thus giving the appellant more time to prepare for his trial. Nevertheless, appellant, on the latter date, moved for a further postponement of the trial. Therefore it clearly appears that appellant could not have been prejudiced by the postponement of the trial from December 2, 1925, to January 25, 1926, as appellant was still asking for further time. The setting and resetting of cases are mere preliminary steps for the trial. They are not substantive steps that require the presence of the defendant and his counsel and such steps as necessarily result in his prejudice. In order to constitute prejudicial and therefore reversible error, it would be necessary to show affirmatively that the appellant's rights were in some manner prejudiced by the resetting of his case. In the case of *Mabry* v. *State,* 50 Ark. 492-498, we said: "We do not depart from the rule that the probability of prejudice by an order made in the absence of a defendant prosecuted for a felony is all that need be shown to reverse a judgment of conviction (*Bearden* v. *State,* 44 Ark. 331, and cases cited), but adhere to its corollary, that we will not reverse for that cause when it is plain the defendant has lost no advantage by his absence."

The above recitals of the record plainly show that the appellant lost no advantage by the postponement of

his cause from December 2, 1925, to January 25, 1926, but, on the contrary, it appears, from appellant's act moving for a further postponement, that the ruling of the court in resetting the cause was to appellant's advantage rather than to his prejudice.

4. Garland Van Sickle, one of the officers who went to Detroit after appellant and his wife, after they had been indicted and arrested for grand larceny, testified that appellant's wife, in appellant's presence, stated that they knew the laws of Arkansas, and that "any time your husband hands you anything you have got to take it." She stated she had the package rolled up in a newspaper; that her husband gave her the package, and she took it and got in a taxicab and went to her apartment. She did not state what was in the package. Witness asked them, when they were sitting there in the little room, how they got out of Hot Springs, and one of the two spoke up and said, "We left in a hurry—we left our dinner cooking—we left a chicken cooking." They said they drove the sedan car to Hope, and took the train there. The statements of appellant's wife in the presence of appellant were not in the nature of testimony of a wife against a husband. In the recent case of *Stotts* v. *State,* 170 Ark. 188, we said: "What the appellant's wife said under the circumstances was not in the nature of testimony against her husband, but what was said and done by her was the same as if it had been said and done by some other person." That case rules this. The court did not err in admitting the testimony.

5. The appellant asked the court to instruct the jury as follows: "The court instructs the jury that, if you find from the evidence that the money alleged in the indictment as having been stolen from the prosecuting witness, Sirbu, was not the money of said Sirbu, but was the joint money of Peter Sirbu and his wife, Mary Sirbu, then you will find the defendant not guilty." The court refused this prayer, but gave the following: "The indictment alleges that the property obtained by the defendant in this case was the property of the prosecut-

ing witness, Peter Sirbu; if you find from the evidence that the money alleged to have been taken was the joint property of Peter Sirbu and his wife, or that a part of the property taken was the property of the wife of Peter Sirbu, the proof of ownership in Peter Sirbu of the property alleged to have been taken will be sufficient, if you find from the evidence that, at the time said money was taken, the witness, Peter Sirbu, had the possession thereof, and the right to its exclusive use and control." The court did not err in refusing appellant's prayer, which was not an accurate statement of the law applicable to the facts of this record. The instruction which the court gave was a correct declaration of law applicable to the facts. Sirbu testified that the money which his wife brought from Ohio was deposited in her name, but belonged to them both, and either could draw it out. When his wife arrived with the money he counted it, wrapped it in a newspaper, and put it in his handbag, and later gave it to Hall and Franklin at the Hatterie Hotel. The appellant went under the name of Hall. The testimony was therefore sufficient to warrant the jury in finding that the money was in the exclusive possession and control of Sirbu at the time it was stolen by appellant. *Monk* v. *State,* 105 Ark. 12; Joyce on Indictments, page 489, § 427.

There are no reversible errors in the record, and the judgment is therefore affirmed.

OIL CITY IRON WORKS *v.* BRADLEY.

Opinion delivered May 10, 1926.

1. FRAUDS, STATUTE OF—PROMISE TO PAY ANOTHER'S DEBT—JURY QUESTION.—If the evidence is in conflict as to whether a promise to pay another's debt is independent or collateral, the question is for the jury.

2. FRAUDS, STATUTE OF—PROMISE TO PAY ANOTHER'S DEBT—WHEN NOT COLLATERAL.—Whenever the main purpose of the promisor is not to answer for another, but to subserve some pecuniary or

business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

3. FRAUDS, STATUTE OF—PROMISE TO PAY ANOTHER'S DEBT.—A finding that a promise by the vendor of an oil drilling rig to see that laborers employed in drilling an oil well got paid for their wages was independent and not collateral is sustained by proof that the vendor was interested in having the well drilled, in order that it might collect the price of the rig.

4. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY—EVIDENCE.—An agent may testify as to his agency and the extent of the authority with which he is clothed.

5. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY.—An agent having the exclusive management of a corporation dealing in oil well drilling rigs had apparent authority to bind the corporation to pay the wages of laborers employed in drilling an oil well where the corporation was interested in having the well drilled in order to collect the price of a rig.

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

STATEMENT OF FACTS.

B. B. Bradley, D. W. Clark, Truman Works, Jim Coleman, Rufus Robbins and N. C. Phillips brought separate suits in the justice court against the Oil City Iron Works to recover the amounts alleged to be due them for wages. Each one recovered judgment for the amount sued for, and the defendant appealed to the circuit court. The cases were consolidated and tried together in the circuit court.

According to the evidence for the plaintiffs, they were employed by R. C. Houston to drill an oil well near Princeton, in Dallas County, Arkansas, during the year 1923. Houston got behind in the payment of their wages, and H. V. Miller, the agent of the Oil City Iron Works, came to the oil well where the plaintiffs were working and paid part of the plaintiffs in full and the rest of them part of their wages. Houston again got behind with the wages of the plaintiffs, and they notified him that they were going to quit work. Miller came to the well again

with Houston, and told the plaintiffs that the Oil City Iron Works had sold Houston the drilling rig and that Houston owed it a balance on the purchase price. Miller told the plaintiffs that, if they would continue work and finish the well, the Oil City Iron Works would see that they got paid for their labor. Miller further told the plaintiffs that, in the event they failed to strike oil in the well that they were digging and Houston should remove the drilling rig and rent it out, the rents would be paid through the Oil City Iron Works, and that it would see that their wages were paid out of the first rents received for the rig.

Miller further stated that, in the event the drilling rig was sold, his company would pay the plaintiffs their wages out of the proceeds of the sale. The plaintiffs relied upon these representations, and returned to work. They would not have continued to work if Miller had not assured them that the Oil City Iron Works would see that they got their money. They worked on a few days longer, and Miller came out one afternoon and gave them a written notice as follows:

"You are hereby notified that all the drilling machinery, tools, derrick, and so forth on this location are the property of the Oil City Iron Works, and that the said Oil City Iron Works is in no wise liable for the payment of any labor bills that may hereafter accrue for labor done in and about this well, and you are especially notified that no claim that you may hereafter have against any person for any labor so done shall operate as a laborer's lien against the said Oil City Iron Works and the above mentioned property."

H. V. Miller was a witness for the defendant. According to his testimony, he was the agent for the Oil City Iron Works, and sold the drilling rig in question to R. C. Houston for $12,500. Five thousand dollars of this amount was paid in cash, and Houston gave three notes for $2,500 each for the balance of the purchase price. The title in the drilling rig was retained in the seller until the balance of the purchase price should be paid. Hous-

ton made default in the payment of the first note, and Miller lent him $150 to pay the wages of his laborers operating the drilling rig in November, 1923. Miller told the laborers that, if he was in their place, he would work a few days longer, and, if Houston did not pay them, he would quit. He promised them, if Houston moved the rig and rented it, that the money for the rent would have to come through his company, and he would see that Houston paid their wages.

On cross-examination Miller admitted that he knew that the plaintiffs had a right to file a lien against the drilling rig for their labor, but stated that he did not make them any promises to keep them from doing so. He stated further that he thought Houston had a good chance to bring in the well that he was drilling.

The jury returned a verdict for the plaintiffs in the amounts sued for, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

C. W. Smith and *R. H. Little,* for appellant.

D. D. Glover and *John L. McClellan,* for appellee.

HART, J., (after stating the facts). If the evidence is in conflict as to whether the promise is independent or collateral, the question is for the jury. *Davis* v. *Patrick,* 141 U. S. 479.

As was said in *Emerson* v. *Slater,* 22 How. (U. S.) 28, "whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

Our cases on the subject support this rule. *Grady* v. *Dierks Lumber & Coal Co.,* 154 Ark. 255; *Black Brothers Lumber Co.* v. *Varner,* 164 Ark. 103; and *Moraz* v. *Melton,* 167 Ark. 629.

According to the testimony of B. B. Bradley, H. V. Miller, the agent of the Oil City Iron Works, told the

plaintiffs that, if they would continue on with the work and finish the well, his company would see that they got paid for their labor. This evidence, in the absence of other attending circumstances, would constitute a collateral contract to pay the debts of R. C. Houston, who had originally employed the plaintiffs to drill the well for him. The jury, however, had a right to interpret Miller's promise in the light of the surrounding circumstances and his subsequent admissions, and in that light it cannot be said that the verdict of the jury in favor of the plaintiffs is without legal evidence to support it.

The evidence shows that the Oil City Iron Works had sold to Houston a drilling rig for $12,500. He paid $5,000 in cash and gave three notes for the balance of the purchase money. Houston failed to pay the first note, and Miller gave him further time on it. Houston told Miller that the laborers were about to quit work, and Miller lent him $150 with which to pay their wages. Miller went with Houston and saw him pay this money to the laborers. After the payment was made, Miller gave them the written notice which is incorporated in our statement of facts. He had already told the laborers that, if they would continue the work and finish the well, his company would see that they got paid for their labor. He told them further that Houston owed a balance on the purchase price of the drilling rig, and in substance told them that the payment of the purchase price was to be made out of the profits from drilling the well.

When these facts are to be considered, the jury might have found that the Oil City Iron Works was primarily to be benefited by the work of the plaintiffs in drilling the well, because in that way the debt of Houston for the purchase price of the drilling rig would be paid to the Oil City Iron Works. In other words, the jury might have inferred that the payment by Houston of the balance of the purchase price of the drilling rig, which amounted to $7,500, depended upon the continued and successful drilling of the oil well. The jury might have inferred from this that the promise of Miller in behalf of the Oil City

Iron Works was not one purely collateral, but was made to advance the interest of his company.

Houston was apparently destitute of any other property, and the successful performance by the plaintiffs of their drilling operations would enable the Oil City Iron Works to obtain the balance of the purchase price of the drilling rig. Hence the jury might have found that the agreement of Miller in behalf of his company was not a collateral contract to the obligation of Houston, but that it was an original promise for the pecuniary benefit of the Oil City Iron Works.

It is next insisted that, conceding the promise of Miller to be an original one, it was not within the real or apparent scope of his authority to make it.

We cannot agree with counsel in this contention. According to the testimony of H. V. Miller, the Oil City Iron Works was engaged in the business of manufacturing and selling oil and gas well-drilling rigs, supplies and equipment, and he was agent for the company. He sold the drilling rig in question to Houston for $12,500. He received $5,000 in cash and took three notes for $2,500 each from Houston for the balance of the purchase money. The title to the drilling rig was also retained in the seller until the notes were fully paid. Miller had full authority to sell and collect for the rigs and machinery of the kind sold to R. C. Houston. He had the exclusive management and control in the State of Arkansas of the business of the Oil City Iron Works. Under these circumstances it was at least within the apparent, if not the real, scope of his authority to have made a contract with the plaintiffs to continue drilling the oil well in order that his company might be paid the balance of the purchase money of the drilling outfit.

An agent may testify as to his agency and the extent of the authority with which he was clothed. *Pine Bluff Heading Co.* v. *Bock*, 163 Ark. 237. As we have just seen, Miller testified that he had the exclusive management and control in the State of Arkansas of the business of the Oil City Iron Works. The general rule is that a principal is

bound by all acts of a general agent which are within the apparent scope of his authority, whether they have been authorized or not. *Security Life Ins. Co.* v. *Bates,* 144 Ark. 345; *Battle* v. *Draper,* 149 Ark. 55, and *Bartlett* v. *Yochum,* 155 Ark. 626.

It follows that the judgment must be affirmed.

NOWLIN-CARR COMPANY *v.* COOK.

Opinion delivered May 10, 1926.

1. MASTER AND SERVANT—INDEPENDENT CONTRACTOR.—In an action against an alleged employer and employee for negligence causing injury to plaintiff, evidence *held* to establish that the alleged employee was in fact an independent contractor, and that the alleged employer was not liable for the negligence of such independent contractor.
2. MASTER AND SERVANT—LIABILITY OF INDEPENDENT CONTRACTOR.—Evidence *held* to sustain a finding that plaintiff was injured by the negligence of an independent contractor.
3. APPEAL AND ERROR—AFFIRMANCE OF JUDGMENT.—Where, upon the same cause of action, the jury returned a verdict for $600 against an alleged employer and $400 against an alleged employee, and the former verdict was not sustained by the evidence, the verdict and judgment against the latter, being sustained by evidence that he was an independent contractor, will be affirmed.

Appeal from Clark Circuit Court; *James H. McCollum,* Judge; reversed as to Nowlin-Carr Company and affirmed as to Flanagin.

McMillan & McMillan and *J. A. Sherrill,* for appellant.

W. H. Mizell and *H. B. Means,* for appellee.

SMITH, J. Appellee sued H. Flanagin and the Nowlin-Carr Company jointly for damages alleged to have been suffered by him by reason of the loss of a finger while operating an equalizer saw at a sawmill which appellee alleged was operated by Flanagin for the Nowlin-Carr Company.

The following verdict was returned by the jury: "We, the jury, find for the plaintiff in the sum of $1,000

as follows: $600 against the Nowlin-Carr Company and $400 against H. Flanagin." Upon this verdict judgment was rendered against Flanagin for $400 and against the Nowlin-Carr Company for $600, and these defendants have appealed from that judgment.

The complaint filed in the case alleged that on August 4, 1923, appellants were engaged in the manufacture of staves, with Flanagin in charge of the mill for the Nowlin-Carr Company. That appellee, who was known to be without experience, was placed in charge of the equalizing saws, and, after working about fifteen minutes, the latch on the carriage, which had become worn, and which, on account of its worn condition, was likely to come loose, did come loose and permitted the carriage, on which appellee was required to place bolts of wood to be conveyed into the equalizing saws, to swing his hand into the saw, and cut off one of his fingers.

At the time of appellee's injury Flanagin was operating the mill under the following contract for the output of the mill:

"CONTRACT OF SALE.

"Made at Arkadelphia, July 2, 1923, between H. Flanagin as contractor and Nowlin-Carr Company as the company.

"Conditions: The contractor sells to the company 400,000 pieces red and white oak staves, delivery to begin September 1 and be completed January 1, 1924; deliveries to be made in carload quantities; stock to be thoroughly seasoned and finished and manufactured so as to prevent shrinkage and dressing and pointing; price to be f. o. b. Arkadelphia, Arkansas, and ranging from $35 to $60.

"If it shall become necessary during the life of this contract to advance any funds to the contractor on stock undelivered, it is well understood that said advance is for the convenience of the contractor, who shall allow the company $10 for each advance ordered. Advances shall be determined on the following basis: The company shall count and measure the stock upon which

advances are to be made, and the company will advance the contractor on each one thousand staves inspected on the yard, on which all claims have been paid or which will be paid with the funds advanced, not to exceed the following basis: Payrolls to be made every two weeks by the company on the basis of the actual cost of the labor at the mill and cutting and hauling of the bolts and buying the timber, on the basis of 75 per cent. of the value of the staves, whether on the mill-yard or on the yard at the railroad. No advances will be made on stock unless yarded. Positively no drafts will be honored nor advances made except as above outlined, and not oftener than twice monthly. The total amount of funds to be advanced or outstanding on undelivered stock on this contract shall not exceed $5,000. No funds nor credits derived from shipments or deliveries of staves shall be credited on securities until all unsecured advances have been paid.

"The right to defer advancing funds is reserved in case of strikes, panics, etc.

"The company reserves the right to require indemnity bonds at its own expense. Advances made shall constitute a lien on all stocks, and the contractor agrees to keep all stock free from other liens, and to maintain fire insurance payable to the company covering funds advanced, and to furnish the company with a lease covering the location of the stock for a period sufficient to protect the contract. The company reserves the right to sell the property in the event the contractor attempts to move or sell same without the company's consent.

"To enable the contractor to perform his part of this contract, it is agreed that the company shall furnish rent-free to the contractor to be operated solely by the contractor without liability to the contractor, a boiler and engine to be furnished contractor f. o. b. loading point, who shall maintain a fire insurance policy in favor of the company, the premiums to be paid equally by the company and the contractor, and the machinery to be redelivered to the company at Arkadelphia when

this contract is terminated. This machinery is furnished to manufacture staves solely for the company. It is further agreed that the company shall be entitled to require delivery of the staves called for above and to charge the contractor $2.50 per thousand for the undelivered portion thereof, and any portion of said staves refused by the company shall be charged to the company at $2.50 per thousand."

It was shown in the testimony that the men employed at the mill were paid in the following manner: Checks were furnished Flanagin by the Nowlin-Carr Company, which were filled out by Flanagin for the amounts due the employees to whom the checks were payable, and Flanagin wrote his name across the checks. The checks were then signed by a representative of the Nowlin-Carr Company, and were then delivered by Flanagin to the employees to whom they were payable, and were paid by the bank on which they were drawn, out of funds belonging to the company.

A witness named McDaniel, who was employed at the mill, was asked for whom he was working, and answered: "Nowlin & Carr, I suppose." An objection was made to this answer, when witness was asked to state for whom Flanagin was working, if he knew, and he answered, "Well, he (Flanagin) told me he was working for Nowlin & Carr just like myself. He was cutting these staves so much a thousand, and he was drawing so much a month there until he checked up." On his cross-examination the witness testified: "I was working for Mr. Flanagin. He hired me." He was then asked, "Well, you were not working for Nowlin-Carr?" and answered: "If I was to work for you and somebody else sent my checks, I am working for you; no matter where my money come from, I am working for you."

The testimony on the part of both appellants was to the effect that the contract set out above fully and truthfully stated the relation between Flanagin and the Nowlin-Carr Company; that Flanagin had sole charge of the operation of the mill; that he employed and discharged

all the labor, and that Flanagin alone directed the men what to do and how to do it, and that no one connected with the Nowlin-Carr Company had any control or part whatever in the operation of the mill, except as stated in the contract. Flanagin denied that he had ever stated to McDaniel that he was working for the Nowlin-Carr Company; but we must assume that the jury credited the testimony of McDaniel on this disputed question rather than that of Flanagin. However, proof of Flanagin's declaration would not bind the Nowlin-Carr Company nor change the contract under which the mill was being operated.

This contract was in writing, and provided that the Nowlin-Carr Company should pay Flanagin a stipulated price per thousand for staves, and should advance the money to meet the payrolls of the employees, and the method employed in issuing the checks was adopted in order that the Nowlin-Carr Company might know that there were no liens for labor against the staves on which the advances were made.

Flanagin testified that he bought the machinery from the Arkadelphia Milling Company, of Arkadelphia, and that it was his property, except the boiler and engine, which the Nowlin-Carr Company furnished free of rent.

We think the testimony set out above made no issue for the jury whether Flanagin was operating the mill for the Nowlin-Carr Company. Certainly Flanagin, although he did not own everything about the mill, was an independent contractor. The law of the subject has been so frequently and thoroughly discussed by this court that we will not again discuss it here. The full discussion and review of the authorities in the very recent case of *Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, renders this unnecessary.

We conclude therefore that the court was in error in submitting the question of the liability of the Nowlin-Carr Company for appellee's injury.

The cause was submitted to the jury upon two theories; first, that appellee was known to be an inex-

perienced man, and was placed at work without any instructions as to the manner in which he should perform the duties of his employment to protect himself from injury; and second, that the latch on the carriage had became defective through wear. We think there was sufficient testimony to carry both these issues to the jury.

Appellee testified that he was a farm-hand, and knew nothing about sawmilling. That he was employed on Tuesday and put to work in the woods, and worked there until Saturday morning, when he asked Flanagin what he had for him to do, and Flanagin told him to run the equalizer. Appellee testified that he told Flanagin he did not know anything about running the equalizer, but that he would try, and Flanagin answered, "Well, you can try, and if you can't, that's all a mule can do." Appellee further testified that no one told him anything, and he just started to work. He had never seen a stave-mill before, nor a bolt equalizer, and his only instruction was to go to the equalizer and do the equalizing. There was a lever for letting the bolts on to the carriage, which carried them to the saws, and this he learned to operate without any instruction. There were two circular saws which sawed off and evened up the two ends of the bolts as the carriage on which the bolts were placed conveyed the bolts into the saws. No one told witness how to hold the bolts as they were conveyed into the saws. Appellee had been at work about fifteen minutes, when his hand came in contact with one of the saws, and he lost a finger. Appellee further testified that, if the latch had held in position, he would not have been injured. Appellee also testified that Flanagin said, immediately after the injury, that he had intended to instruct appellee, but had been busy and bothered about the boilers, and for that reason had not done so. That Flanagin carried appellee to a doctor, and on the way said, "I feel that I am to blame for it; you are the first inexperienced hand I ever put there."

Henry Cates, an experienced employee, who had worked at the equalizer, testified that "it seemed like

the slide that went back over the rod might have been worn, and that's what caused it to jump off; that the weight of the bolt naturally pulled the carriage into the saw."

Appellee admitted that he observed the saws and knew the danger of coming in contact with them, but his duties required him to use the saws, and we think there was a question for the jury whether his employer was negligent in failing to instruct him how to perform his duties without incurring unnecessary risk of danger, and that there was also a question as to the defect in the machine. The testimony on the part of appellants was to the effect that there was no defect, but this was a question for the jury. We conclude therefore that the question of Flanagin's liability was a question for the jury.

The judgment in this case against the Nowlin-Carr Company must be reversed, and, as the case has been fully developed, it will be dismissed as to that appellant.

Moreover, the judgment against Flanagin can only be affirmed for $400, for this was the amount of the verdict against him. There was only one cause of action; only one injury; and there could therefore be only one recovery. Of course, two or more persons might be liable for the injury, but the liability would be joint, and not several. *Spears & Purifoy* v. *McKinnon,* 168 Ark. 357.

It is true there was a verdict against the Nowlin-Carr Company for $600, and if this were the only verdict we would affirm the judgment pronounced thereon against Flanagin for that amount, but, for some reason not explained in the record, the jury returned a verdict against Flanagin for a smaller amount, and, as we hold that Flanagin is liable, we can affirm the judgment against him only for the amount of the verdict returned against him.

The judgment against Flanagin for $400 is therefore affirmed; that against the Nowlin-Carr Company for $600 is reversed and dismissed.

KNEGO v. STATE.

Opinion delivered May 10, 1926.

1. CRIMINAL LAW—INTRODUCTION OF COPY OF WRITING.—It was not error to permit a witness to introduce a copy of a written instrument where the original was not in the possession of the witness, and was not the basis of the prosecution.
2. CRIMINAL LAW—NECESSITY OF MOTION FOR NEW TRIAL.—An objection to admission of evidence will not be considered on appeal where it was not included as a ground in appellant's motion for new trial.
3. FALSE PRETENSES—EVIDENCE.—In a prosecution for obtaining money from an insurance company by falsely pretending that a certain car with a particular motor number was stolen, it was admissible to prove that defendant subsequently obtained a license in another State upon the same kind of car having the same motor number.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; affirmed.

Reinberger & Reinberger, for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried, and convicted in the circuit court of Pulaski County, First Division, for the crime of obtaining money under false pretenses, and was adjudged to serve a term of one year in the State Penitentiary as a punishment therefor, from which is this appeal.

The testimony introduced by the State showed that appellant traded an old automobile for a Star sedan car, motor No. 220694, to the Pine Bluff Motors Company, agreeing to pay a difference of $584.45 in ten monthly installments of $58.45 each, which was evidenced by notes; that he signed a contract for the purchase of the car, which contained a charge of $77.50 for "service charge and insurance"; that the purchase money notes were assigned to the Motors Finance Company, which insured the car on said written application of appellant with the National Union Life Insurance Company; that afterwards appellant procured another insurance policy

upon the car from the Home Fire Insurance Company upon the representation that the car was fully paid for and was not insured with any other company; that the latter policy contained a condition that there could be no recovery if there was any other insurance on the car; that both policies insured appellant against loss in case the car should be stolen; that appellant afterwards reported to the Home Fire Insurance Company that the car had been stolen from him in front of the Blue Dragon Cafeteria in Little Rock, Arkansas, and, upon the representation that no other person had any interest therein and that there was no other insurance on the automobile, he obtained $641.25 from the company in settlement of his claim; that later he made proof of his loss to the National Union Fire Insurance Company and collected $624 from it, which was paid to the Motors Finance Company in settlement of the purchase money notes which he had executed to the Pine Bluff Motors Company; that, after collecting the two policies of insurance, appellant secured a license in Illinois on a Star sedan with the same motor number.

In the course of the trial W. M. Snyder, who sold appellant the sedan, was permitted to testify, over appellant's objection and exception, that appellant signed a contract for the purchase of the car, which contained an application for insurance thereon, and to introduce a blank form of said application.

Pinchback Taylor, who was connected with the Motors Finance Company, and who was local agent of the National Union Fire Insurance Company of Pittsburgh, and who wrote the insurance on the sedan car in that company, was permitted, over the objection and exception of appellant, to introduce an office copy of the application made by appellant for the insurance, the original having been attached to his daily report and sent to his insurance company in Pittsburgh, Pennsylvania.

Appellant testified in his own behalf, and the prosecuting attorney was permitted, over his objection and

exception, to interrogate him concerning the destruction by fire of a Nash car in Aurora, Illinois, which he owned, and upon which appellant collected insurance. Appellant's testimony, in substance, was to the effect that he had no knowledge of an application for insurance being incorporated in the contract for the purchase of the sedan car or that the National Union Fire Insurance Company of Pittsburgh had written a policy upon it, until he was requested to make proof of the loss so that the Motors Finance Company could collect the insurance to pay the purchase money notes which it had bought. Appellant also testified that he applied for insurance in Illinois on the stolen car, believing that it would be found, and that he had never seen the sedan after it was stolen.

Appellant first contends for a reversal of the judgment because the trial court permitted witness Snyder to introduce a signed copy of appellant's application for insurance without first showing that the original was not in existence. The original application had been assigned to the Motors Finance Company, and was not in the possession of the witness when testifying, and besides, this was a prosecution for obtaining money under false pretenses and not a suit based upon the application for insurance. The testimony was competent.

Appellant next contends for a reversal of the judgment because the trial court permitted Pinchback Taylor to testify that appellant signed an application for insurance on the car to the National Union Fire Insurance Company of Pittsburgh, and to introduce a copy thereof, without showing that the original was not in existence. The testimony was admissible upon the same ground that Snyder's testimony was admitted, and for the additional reason that the original was in the possession of the insurance company out of the State. *Ritter* v. *State,* 70 Ark. 472.

Appellant next contends for a reversal of the judgment because the prosecuting attorney was permitted

to examine him relative to the burning of the Nash car in Aurora, Illinois. The objection and exception made to the examination of the prosecuting attorney was not included as a ground in appellant's motion for a new trial, and cannot therefore be considered by this court on appeal.

Appellant contends, lastly, for a reversal of the judgment upon the ground that testimony was wanting to show that the car was not stolen. The jury was warranted in drawing an inference that it was not stolen from the fact that appellant afterwards obtained a license on the same kind of a car with the same motor number in Illinois. The jury was not compelled to accept blindly appellant's explanation that he obtained the license because he thought the car would be found at a later date. The explanation was not altogether believable.

No error appearing, the judgment is affirmed.

MURDOCK v. SURE OIL CORPORATION.

Opinion delivered May 10, 1926.

1. MINES AND MINERALS—FAILURE TO DRILL OIL WELL—REMEDY OF LESSOR.—Where the lessees of an oil and gas lease were under obligation to drill eight offset wells, the lessors will not be entitled to declare a forfeiture for failure to drill the full number required if the lessees substantially developed the lease by drilling five offset wells around the inside and near the boundary lines, but the lessors will be remitted to their claim for damages.
2. MINES AND MINERALS—FAILURE TO DRILL OIL WELL—REMEDY OF LESSOR.—Where the lessees of an oil and gas lease have proceeded to develop the property in good faith and to pay the purchase price out of the oil produced from the lease, as agreed, it was not error to refuse to declare a lien upon the leasehold for the unpaid purchase price and to decree a foreclosure thereof because the lessees drilled only five offset wells instead of eight.
3. EQUITY—JURISDICTION.—The jurisdiction of equity is to be determined from an inspection of the bill.
4. EQUITY—COMPLETE RELIEF.—When equity acquires jurisdiction of a cause for one purpose under *bona fide* allegations, all matters at issue will be adjudicated, and complete relief afforded.

5. MINES AND MINERALS—FAILURE TO DRILL WELLS—DAMAGES.—Where the lessors of an oil and gas lease were to be paid a proportionate part of the oil produced therefrom, and the lessees were to drill eight offset wells, but drilled only five, and a substantial portion of the oil was drained from the lease by wells on adjacent land, the lessors were entitled to recover damages thereby sustained.

6. APPEAL AND ERROR—DIRECTIONS ON REVERSAL.—Allegations of bill for cancellation of assignment of oil lease or declaration of equitable vendor's lien on leasehold for balance of consideration due, because of breach of contract by not drilling necessary offset wells, being equitable in nature and cognizable in court of equity, cause will be remanded, on reversal of decree of dismissal, for determination of damages, where such issue was not fully developed by evidence.

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

Kitchen & Harris, for appellant.

Cravens & Cravens, C. E. Cooper and *McGuire & Marshall,* for appellee.

HUMPHREYS, J. Appellants instituted this suit against the appellee corporations in the chancery court of Union County to cancel the assignment of an oil lease to the SW¼, SE¼, section 16, township 16 south, range 15 west in said county, which assignment was executed by appellants and others to Sure Oil Corporation for a consideration of $200,000, to be paid out of the first 7/16 of the first oil and gas produced from the leased premises, which sold same to the Federal Oil & Marketing Corporation on condition that it would perform all the covenants contained in said assignments. It was alleged that appellee corporations had breached the provisions of the assignment by failing to drill the necessary offset wells and, by reason thereof, made it impossible for appellants to ever recover their proportionate part of the consideration which had been extracted by wells on adjoining lands.

The bill contained, first, a prayer for a cancellation of the assignment and damages for the value of appellant's part of the oil which had escaped through wells on land immediately south of the leasehold; and second, a

prayer that, if the covenants had not been breached to the extent justifying a cancellation of the assignments, appellants be decreed an equitable vendor's lien on the leasehold for the amount yet due on the total consideration for the assignment.

I. F. Ikard, who was one of the owners of the lease, was made a party defendant because he would not join as a party plaintiff in the suit, and, by reason of that fact, appears now as one of the appellees.

Appellees, except I. F. Ikard, filed answers denying the allegations of the complaint and challenging the jurisdiction of the court, on the alleged ground that, if there was any breach at all, it was partial, and therefore exclusively cognizable in a court of law.

The cause was submitted upon the pleadings and testimony, which resulted in a decree dismissing appellant's bill, from which is this appeal. The assignment of the lease, which constituted the contract between the parties, specified a consideration of $200,000 to be paid out of 7/16 of the first oil and gas produced from the leasehold premises, and provided for the immediate development of the leasehold by drilling a well in the northeast corner and one in the northwest corner, and "to drill all necessary offset wells to properly protect said lease, provided that it shall not be required to drill more than a total of eight wells on the entire tract, and each of said offset wells shall be drilled with reasonable promptness and not later than thirty days after it becomes necessary to drill such offset well, unless delayed by some unforeseen contingency or unavoidable delay."

The record reflects the following facts: Prior to July, 1923, appellees drilled a well in each corner of the forty-acre tract and one equidistant between the wells in the northwest and southwest corners, making in all five wells. The well in the southwest corner was numbered three and the one in the southeast corner numbered four. These two wells were 989 feet apart. The land adjoining the forty acres on the south was covered by two leases known as the Ramage and Bement, the Ram-

age being south of the east and the Bement south of the west end of the forty. There was a well in the northwest corner of the Bement lease, numbered one, which was 150 feet south and 150 feet east of the southwest corner of the Sure lease. In July and August, 1923, wells were drilled in the northeast corners of the Bement and Ramage leases, designated as Bement No. 2 and Ramage No. 1. The distance between Bement No. 1 and Bement No. 2 is 356 feet. The distance between Bement No. 2 and Ramage No. 1 is 489 feet. The distance between Sure No. 3 and Bement No. 2 is 345 feet. The distance between Sure No. 4 and Ramage No. 1 is about 345 feet. Sure No. 3 is almost due north of Bement No. 1, and was intended as an offset of Bement No. 1. If an offset were drilled due north of Bement No. 2, according to the customary distance that wells are drilled from the boundary line, it would be 400 feet from Bement No. 2. Ramage No. 1 was intended as an offset of Bement No. 4, but was not directly south of it. The location and distance between these wells discloses that two wells, Sure Nos. 3 and 4, were immediately north, and three wells, Bement Nos. 1 and 2 and Ramage No. 1, were immediately south of the line separating the forty-acre tract from the Bement and Ramage leases, through which oil was being extracted from the lands. Bement No. 2 and Ramage No. 1 came in with a production of 800 barrels each per day, which had decreased at the time the testimony was taken to an output of 150 barrels each per day. They were and are commercial wells. When Ramage No. 1 and Bement No. 2 were brought in, appellants notified appellees to drill wells directly north of each well to prevent them from drawing oil from the forty-acre tract. This they refused to do, and this suit followed. A decided majority of the witnesses testified that there was no offset well on the Sure lease to Bement No. 2 and that there was no direct offset well to Ramage No. 1, and that such wells should have been drilled; and the testimony of nearly all the practical operators tended to show that the loss of production on account of a fail-

ure to drill the wells was between 60,000 and 70,000 barrels, when considered in connection with the estimated amount of oil sold to various parties from the Bement and Ramage wells, which oil was probably worth $40,000. George L. Hess testified, in substance, that there had been a loss of only about 5,920 barrels of oil on account of the failure to drill direct offset wells to Bement No. 2 and Ramage No. 1. Offset wells would have cost $16,000 each. A large amount of oil had been extracted from the forty-acre tract through the five protection wells appellees had drilled upon it, and a large amount was being produced and sold at the time this suit was instituted and thereafter, but there was testimony tending to show that appellant would not be able to collect the entire consideration for the assignment of their lease unless offset wells were drilled to Bement No. 2 and Ramage No. 1. At the time C. E. Murdock testified that he had received $21,130.50 out of 7/16 of the oil produced through the five development wells, and E. R. Owen received $17,360.71 prior to the institution of the suit and $3,279.92 after the institution thereof out of 7/16 of the oil produced.

Appellant's first insistence for a reversal of the decree is that the court erred in refusing to cancel the contract of assignment under the rule announced in the case of *Blair* v. *Clear Creek Oil & Gas Co.*, 148 Ark. 301, to the effect that, where a duty rests upon a lessee to drill protection wells to prevent the escape of oil and gas from the leased premises through wells upon adjoining land, and he refuses or fails to do so or to account for the oil and gas thus lost, the lessor may declare a forfeiture of the lease and obtain a cancellation thereof in a court of equity. In the case cited the lessee was draining the leasehold estate of gas through wells drilled upon adjacent lands, thereby destroying the leasehold estate. The breach in that case amounted to a complete failure to proceed under the terms of the contract—so complete a breach that it was an abandonment of the lease; hence cancellation was the remedy. Not so in the

instant case. On the contrary, the lessees had substantially developed the property by drilling five wells around the inside and near the boundary lines. In such cases equity will not decree a forfeiture and cancellation of the lease, but will remit the lessor to his claim for damages.

Appellant next contends for a reversal of the decree for the alleged reason that the court did not declare a lien upon the leasehold for the unpaid purchase price of the assignment and decree a foreclosure thereof to satisfy same. We are unable to discern in the evidence that appellants will be unable to collect full consideration for the assignment out of the 7/16 of the oil produced, if reimbursed for their part of the oil already lost or which may be lost on account of drainage by Ramage No. 1 and Bement No. 2. There is nothing in the evidence indicating an effort on the part of the lessees to defraud appellants, but only a difference of opinion between appellants and appellees, and, for that matter, between the witnesses, as to whether it would be good business judgment to drill the offset wells contended for. We think good faith on the part of appellees was manifested by the amount of money they expended in the development of the lease, and that this good faith should shelter them from the harsh remedy of being compelled to pay the whole consideration in cash on account of a partial breach in failing to drill the offset wells demanded by appellants.

Lastly, appellants contend for a reversal of the decree of dismissal and a remand of the cause for a determination of the damages they have sustained on account of the loss of oil through drainage by Ramage No. 1 and Bement No. 2. Appellees attempt to sustain the decree against this attack upon the ground that the damages claimed were for a partial breach exclusively cognizable in a court of law. The jurisdiction of the cause must be determined from an inspection of the bill. The allegations therein are equitable in nature and cognizable in a court of equity. There is no intimation

therein that the failure to drill offset wells to Ramage No. 1 and Bement No. 2 constituted a partial breach of the assignment. When equity acquires jurisdiction of a cause for one purpose under *bona fide* allegations, all matters at issue will be adjudicated and complete relief afforded. *Horstman* v. *LaFargue,* 140 Ark. 558. The right of appellants to recover for a partial breach is founded on the protection paragraph of the written assignment. Our construction of that paragraph is that appellants were entitled to as many as eight offset wells, if necessary, to prevent the escape and loss of any substantial amount of oil from the leased premises, irrespective of the cost of drilling the wells. According to the terms of the assignment, appellants were to be paid out of 7/16 of the oil produced, and it was important to appellants for the oil to be conserved by offset wells. They contracted that eight should be drilled by appellants for this purpose, if necessary, and, as long as a substantial part of the oil was being drained by wells on adjoining land, they were entitled to the contract number of offset wells, irrespective of distances between them, and, not having obtained them all, were entitled to damages for a failure to drill any part of them. According to the decided weight of the evidence, a substantial part of the oil was lost on account of drainage through Ramage No. 1 and Bement No. 2. The trial court did not pass upon the amount of damages, and that issue was not fully developed by the evidence.

The decree is therefore reversed, and the cause is remanded for that purpose, with privilege to each side to take additional testimony upon that point.

DuVal and Rice v. State.

Opinion delivered May 17, 1926.

Criminal law—proof of other crimes.—Proof of other crimes committed several years prior to the commission of the offenses of which defendants were convicted was inadmissible, and was prejudicial where the evidence as to defendant's guilt was conflicting.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; reversed.

Frank B. Pittard, for appellant.

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

McCulloch, C. J. Appellants, Dave DuVal and Jethro Rice, together with George Seymore, were each indicted for the separate offenses of possessing a still-worm, for manufacturing mash, and for manufacturing liquor, and by consent all the cases against all of the defendants were tried together, resulting in the conviction of each of them for the offenses named, and DuVal and Rice have prosecuted their appeal to this court.

John Hopper and two other prohibition officers testified in substance that, after receiving information that a still was being operated on a certain farm about twenty-five miles east of Little Rock, in Pulaski County, they went to the place in an automobile; that, as they approached the house, they saw Rice open the door and look out, and then slam the door, and, as they speeded their car up and got close to the house, all three of the defendants jumped out of a back window and ran away, and were caught by two of the officers. The witnesses testified that, when they went into the house, they found a two hundred-gallon copper still, complete with a worm and cap, and that it was in full operation, and whiskey was coming out of the worm.

Witness Hopper was permitted to testify, over the objection of appellants, that he had seen them with large quantities of whiskey in their possession several years before this occurrence, and the State was permitted, over appellants' objection, to prove by the court sten-

ographer that appellant DuVal, in testifying in the trial of one Rudd in the Pulaski Circuit Court about two years prior to this occurrence, stated that he (DuVal) had theretofore been engaged in the business of selling liquor, but had quit the business. Hopper testified that he and other officers caught appellant Rice with twenty gallons of whiskey in a Ford car, several years before this occurrence.

The testimony in the case was sufficient to warrant the verdict of conviction, but we are of the opinion that the court erred in admitting testimony concerning appellants having whiskey in their possession several years before the occurrence under investigation. The court, in admitting the testimony, recognized the rule of law on the subject to the effect that proof of illegal acts in the manufacture, sale or transportation of liquor at other times and places than the time and place of the commission of the offense under investigation must relate to acts not too remote. But we think that the court failed to give proper application to that rule, for the evidence in this case related to acts several years prior to the commission of the offenses for which appellants were convicted. We have had many cases on this point, which are reviewed in the more recent ones of *Noyes* v. *State,* 161 Ark. 340; *McMillar* v. *State,* 162 Ark. 45, and *Melton* v. *State,* 165 Ark. 448, but in all the cases where we declared such testimony to be competent it related to acts which were close enough to the principal act involved in the investigation to treat the conduct as being so continuous as to throw light on the charge under investigation. In the present case there was no testimony tending to show illegal acts on the part of either of the accused between the acts involved in the present charge and those which the officers testified occurred several years prior thereto. It may often be a matter of discretion with the trial court to determine how close the acts must be in point of time to justify the admission of proof of distinct illegal acts of the kind under investigation, but, where there is an intermission of a year or two, it is clear that

prior acts can have no bearing on the question under investigation as to the guilt or innocence of the accused.

It is the contention of the Attorney General that the error of the court is harmless for the reason that each of the accused admitted the truth of the testimony of the officers concerning their prior acts, but these admissions did not render harmless the testimony previously introduced by the State. It was competent for the State to cross-examine the accused concerning prior unlawful or immoral conduct, regardless of time, for the purpose of testing their credibility, but this did not render harmless the error of the court in allowing the State to introduce independent testimony on the subject and to allow the jurors to consider the same for the purpose of determining the guilt or innocence of appellants of the crime charged in the indictment. If the jury had accepted the testimony of appellants, they would have exonerated them of the charge in the indictment, for they testified that they had nothing to do with the still found in the house by the officers, that they went out to the place to see Seymore on business, and did not go inside the house at all. If the jury had believed appellants, they would have acquitted them, and the jury may have been influenced by the improper testimony referred to above.

Reversed, and remanded for a new trial.

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

Opinion delivered May 17, 1926.

RAILROADS—NEGLIGENCE IN KILLING DOG.—Proof that defendant's locomotive engineer could have seen plaintiff's dog approaching the track 300 yards ahead of the train, in time to avoid killing him, *held* to sustain a verdict for the plaintiff.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

E. T. Miller and *Warner, Hardin & Warner,* for appellant.

George G. Stockard, for appellee.

McCULLOCH, C. J. Appellee sued appellant for the value of a dog killed by one of appellant's trains at the station of Rudy, in Crawford County, Arkansas. The dog was killed by a northbound passenger train which did not stop at Rudy and was traveling at a speed of about forty miles per hour. It occurred just before sunset.

There is a trestle 1,260 feet south of the station, and the track is straight from that point northward beyond the station. The dog was killed on the track opposite the station platform, and a witness introduced by appellee testified that he saw the dog on the station platform, walking northward beside the track, but was "angling" toward the track; that the train at that time was crossing the trestle south of the station, and, just before the train reached the station platform, the dog walked onto the track and was struck and killed.

The evidence in the case tends to show that the crossing whistle was blown at or near the trestle, and nothing else was done toward avoiding the killing of the dog. The engineer testified that he was keeping a lookout, but did not see the dog and knew nothing of the killing until it was reported to him afterwards. Another witness introduced by appellant testified that the dog was walking north on the platform a short distance east of the track, and that, when the train was thirty or forty steps south of the station, the dog started to cross the track, and was walking up the middle of the track when struck by the train. The jury returned a verdict in favor of appellee, and fixed the damage at the sum of fifty dollars.

The only question raised here is the legal sufficiency of the evidence. We have concluded that the evidence is sufficient to sustain the verdict. At a distance of about 1,260 feet the engineer either saw, or, if keeping a lookout, could have seen, the dog walking along the platform near the railroad track and in the direction of the track—"angling toward the track," as stated by one of the witnesses, and nothing was done thereafter to

avoid the injury. The perilous position of the dog was discovered, or could have been discovered, in time to have prevented the injury; at least the jury could have so found from the testimony.

Affirmed.

BALD KNOB SPECIAL SCHOOL DISTRICT v. McDONALD.

Opinion delivered May 17, 1926.

SCHOOLS AND SCHOOL DISTRICTS—VERBAL CONTRACT OF EMPLOYMENT OF TEACHER.—While Crawford & Moses' Dig., § 8917, requiring contracts for employment of teachers by school districts to be in writing, is mandatory, a verbal contract may be ratified by a district by accepting the teacher's services, but, in the case of a partial performance, the ratification extends only to the period of performance.

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

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

Brundidge & Neelly, for appellee.

McCULLOCH, C. J. Appellee is a school-teacher by profession, and in September, 1924, the directors of appellant school district entered into a verbal contract with him whereby he was employed as superintendent of schools for a term of eight months, beginning September 15, 1924, at a salary of one hundred and fifty dollars per month. He acted in the capacity in which he was employed for about seven weeks from the commencement of the term, and was then discharged by the board, after a hearing upon charges preferred against him for certain misconduct. He was paid for his services actually performed at the rate stipulated in the verbal contract, and he instituted this action against the district to recover the salary for the remainder of the term for which he was employed. The district defended on the ground that the contract was void by reason of not being in writing, and also on the ground that appellee's discharge was rightful on account of certain misconduct. The

trial court decided that the contract, though verbal, had been ratified, and, on the other issues in the case, directed a verdict in favor of appellee.

The authority conferred upon directors of school districts with reference to the employment of teachers and superintendents is limited under the statute to employment by written contract "specifying the time for which the teacher is to be employed, the wages to be paid per month, and any other agreement entered into by the contracting parties." Crawford & Moses' Digest, § 8917; *Griggs* v. *School District*, 87 Ark. 93; *Marr* v. *School District*, 107 Ark. 305. The right of appellee to recover, however, is asserted on the ground that the directors ratified the contract by permitting appellee to perform services thereunder for a portion of the term. The decisions of this court support the contention that an invalid contract for the employment of a teacher or superintendent may be ratified, and in one of our cases (*Dell Special School District* v. *Johnson*, 129 Ark. 211) we applied that rule to a verbal contract. In that case, however, the teacher had completely performed the contract for the full term of employment. In other cases we have held that partial performance of the contract would constitute a ratification for the full term, but in none of those cases was there a verbal contract involved. *School District* v. *Goodwin*, 81 Ark. 143; *School District* v. *Jackson*, 110 Ark. 262; *School District* v. *Hundley*, 126 Ark. 622.

There is now presented to this court for the first time the question whether or not part performance of such a contract, with the acquiescence of the directors and patrons of the district, constitutes a ratification so as to validate the contract in its entirety. Our conclusion is that the ratification extended only to the period of performance and not to the entire contract, otherwise the statute would be entirely ignored. We hold that the statute is mandatory, and that the directors have no authority to make a contract in any other form. They may ratify such a contract by accepting the services of the teacher

or superintendent, but the ratification extends, as before stated, only to the period of performance. The question of liability under such a contract partially performed is the same as that of liability under a verbal contract for any other personal services, which is governed by the Statute of Frauds, and this court has held that partial performance of a contract for personal services does not take a verbal contract out of the operation of the Statute of Frauds except to the extent of imposing liability for that part which was performed. *Meyer* v. *Roberts,* 46 Ark. 80; *Henry* v. *Wells,* 48 Ark. 485; *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79.

It is unnecessary to discuss the other features of the case, for the reason that, under the view of the law expressed above, there was no liability of the district to appellee except for the part of the service actually performed, which has been discharged by payment.

The judgment is therefore reversed, and the cause dismissed.

BETTERTON *v.* ANDERSON.

Opinion delivered May 10, 1926.

1. JUSTICE OF THE PEACE—JUDGMENT ON VERDICT.—A justice of the peace committed error in rendering judgment for the amount sued for, where the jury found for the plaintiff, without specifying the amount due.
2. JUSTICES OF THE PEACE—AUTHORITY TO MODIFY JUDGMENT.—While a justice of the peace has power to quash void process or to set aside a void judgment, and an appeal will lie from his judgment either granting or refusing that relief, he has no power to modify or change the judgment or to grant a rehearing for the correction of errors after ten days from the rendition of the judgment, as provided by Crawford & Moses' Dig., § 6450.
3. APPEAL AND ERROR—HARMLESS ERROR.—The error of dismissing an appeal from a justice of the peace, instead of affirming his judgment, was not prejudicial, as the effect of the order is the same as an order of affirmance.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

E. D. Chastain, for appellant.

D. H. Howell, for appellee.

McCULLOCH, C. J. Appellee sued appellant before a justice of the peace to recover the sum of $187, alleged to be due for rent of land, and also caused an attachment to be issued and levied on certain property. Appellant's defense was that he was not to pay money rent, but was to pay a share of the crop. The case was tried before a jury, and, after the jury was impaneled, appellant paid to appellee, or to the constable, the sum of $30.50 as rent on the hay land, leaving a balance of $156.50, which was the rent claimed on corn land. The jury returned a verdict in the following form: "We, the jury, find a verdict in favor of the plaintiff, and sustain the attachment." The justice of the peace thereupon entered judgment in favor of appellee against appellant for the recovery of $156.50 and the costs, and the judgment entry contained a recital as follows: "There being no further controversy except plaintiff's alleged contract for $8 per acre for 19½ acres of corn land, the cause proceeded to hearing. After taking testimony and hearing arguments by counsel, the court instructed the jury that the only question for them to decide was whether the defendant should pay corn or money rent." This judgment was rendered on November 10, 1924, and on January 27, 1925, appellant presented a motion to the justice of the peace to set aside the judgment on the ground that, since the verdict of the jury did not specify any amount, the justice of the peace had no authority to render judgment except for costs. This motion was denied by the justice of the peace, and appellant thereupon prosecuted an appeal to the circuit court. The justice of the peace sent up a transcript containing all of his docket entries, including the judgment and the original papers, and when the cause came on for trial the matter was submitted to the court solely upon the transcript, and the court rendered a judgment dismissing the appeal.

It is contended that the justice of the peace should not have rendered a judgment where the verdict failed to specify any amount, and this contention is correct, but it was a mere error, and did not make the judgment void, the court having jurisdiction of the cause. It was an error which could only be corrected by appeal within the time specified by statute. *Taylor* v. *Hathaway,* 29 Ark. 597. No appeal was prosecuted from that judgment, and, instead of appealing, appellant, after the time therefor had elapsed, presented a motion to set aside the judgment—at least such was the effect of the motion, though the prayer was that the judgment be reformed so as to make the entry conform to the verdict of the jury.

It has been held by this court that a justice of the peace has power to quash void process or to set aside a void judgment, and that an appeal will lie from his order or judgment either granting or refusing that relief. *Scanland* v. *Mixer,* 34 Ark. 354; *Woolum* v. *Kelton,* 52 Ark. 445; *Knight* v. *Creswell,* 82 Ark. 330; *Dale* v. *Bland,* 93 Ark. 266; *Metcalf* v. *Railway Co.,* 101 Ark. 193. Those were cases, however, where either the judgment or the process was void, but in the present case, as we have already seen, the judgment was not void but was merely erroneous. The justice of the peace had no power to modify or change the judgment, or to grant a rehearing merely for the correction of errors, after ten days from the rendition thereof. Crawford & Moses' Digest, § 6449, 6450. The effort of appellant was not merely to correct an error in the entry of the judgment, but to correct the judgment itself and set it aside. The recitals in the transcript show that the entry reflected the judgment, and that the justice intended to render it, and that there was no error in the entry of the judgment, the error being in the judgment itself. There was no testimony introduced in the circuit court tending to show that there had been an error in the entry of the judgment. The justice was correct therefore in refusing, after the expiration of ten days, to modify his judgment.

The circuit court should not have dismissed the appeal, but should have affirmed the judgment of the justice refusing to set aside the former judgment. This error, however, goes merely to the form and not to the substance, for the effect is the same as if the circuit court had affirmed the judgment of the justice instead of dismissing the appeal. Nothing else was presented to the court except the transcript from the justice, and appellant was not entitled to any relief on his appeal. The form of the court's order is therefore unimportant, as the effect of the order is the same as if the judgment had been affirmed. For this reason the judgment of the circuit court will be affirmed, and it is so ordered.

SECURITY LIFE INSURANCE COMPANY v. LEEPER.

Opinion delivered May 10, 1926.

1. INSURANCE—REINSTATEMENT OF POLICY—ENLARGEMENT OF CONDITIONS.—In a suit upon a reinstated policy of life insurance, which contained a stipulation allowing reinstatement as a matter of right upon compliance with certain requirements, the insurer has no right to enlarge the terms upon which the reinstatement can be obtained.
2. INSURANCE—ENLARGEMENT OF CONDITIONS OF REINSTATEMENT.—Where a life insurance policy gave an absolute right of reinstatement upon terms which did not include a new contract with reference to a forfeiture in case of suicide, the insurer had no right to impose that additional feature upon the assured in procuring a reinstatement.
3. RELEASE—FRAUD—EVIDENCE.—Evidence *held* to establish that there was no fraud in the procurement of a release.
4. CONTRACTS—MISTAKE OF LAW.—A mistake of law, in the absence of fraud or undue influence, does not afford ground for the abrogation or reformation of a contract.
5. INSURANCE—SETTLEMENT OF CLAIM—MISTAKE.—Settlement of a claim under a life insurance policy on the advice of persons relied on by beneficiary in accepting as true statement by insurer's representative that there was no liability thereunder, *held* not void for mutual mistake of law, of which insurer's representative had superior knowledge.

Appeal from Chicot Circuit Court; *Turner Butler,* Judge; reversed.

Arthur S. Lytton, O. C. Burnside, and *W. G. Streett,* for appellant.

John Baxter and *R. W. Wilson,* for appellee.

McCULLOCH, C. J. This is an action instituted by appellee on a life insurance policy in the sum of $5,000 to recover an unpaid balance, alleged to be justly due, there having already been paid a part of the sum named in the policy. Appellant defended on the ground that there was no liability at all on account of violation of a clause in the policy against suicide within one year, and defended also on the ground that there had been a settlement of the disputed claim, and that appellant had executed a release in consideration of the sum agreed upon.

The policy in question was issued on July 10, 1919, on the life of James E. Leeper, in the sum of $5,000, payable to his wife, the appellee, Julia Edna Leeper. There was a provision in the policy that, in the event the assured committed suicide within one year from date thereof, the amount payable should be limited to the sum of one annual premium. There was also a provision in the policy for a reinstatement in case of lapse or forfeiture for nonpayment of premiums. There was a forfeiture or lapse on March 10, 1921, by reason of failure to pay a premium, but on March 15, 1921, application for reinstatement was made in accordance with the terms of the policy, and a reinstatement was granted. The application reaffirmed the statements of the original policy, and recited an agreement that "in the event of self-destruction, whether sane or insane, within one year from the date of approval by the company of this application for reinstatement, the amount payable as a death benefit under said policy shall be equal to two annual premiums on said policy, and no more."

James E. Leeper committed suicide on November 1, 1921, at the town of Dermott, Arkansas, where he and his wife, the appellee, resided, and a few days thereafter appellee made proof of the death to the company.

On November 13, 1921, Mr. C. V. Hicks of Chicago, who is a lawyer by profession and a member of appellant's legal staff, went to Dermott for the purpose of adjusting the claim with appellee. He remained there two days, and an agreement was finally entered into between appellee and Hicks, acting for appellant, whereby the latter paid the sum of $2,500 in full settlement of appellee's claim under the policy. A written release was signed by appellee, reciting the terms of the policy and agreeing to accept the sum named in full settlement.

James E. Leeper had borrowed from appellant $200, and on the trial of the cause the jury returned a verdict in favor of appellee for the sum of $2,300, being the amount of the policy after deducting the sum of $2,500, already paid, and the $200 loan.

The first contention of appellant is that there is no liability under the policy because of violation of the stipulation against suicide within one year, the contention being that the stipulation in the application was controlling, and that the period ran from the date of the approval of the application. We are of the opinion, however, that the point made by counsel is concluded by the decision of this court in the case of *New York Life Insurance Co.* v. *Adams,* 151 Ark. 123. That case, the same as the present one, was a suit on a reinstated policy which contained a stipulation allowing reinstatement as a matter of right upon compliance with certain requirements, and we decided that the company "had no right to enlarge the terms upon which reinstatement could be obtained." In that case the original policy contained no warranty of the truth of the answers of the assured, and this court decided that the company had no power to require a stipulation in the application for reinstatement that the answers and statements of the assured should be treated as warranties. The only provision in the policy now before us with respect to suicide related to the period running from the date of the original policy, and, since the policy gave an absolute right of reinstatement upon

terms which did not include a new contract with reference to suicide, appellant had no right to impose that additional feature upon the assured in procuring reinstatement. The trial court was correct therefore in holding that the company was originally liable under the policy, notwithstanding the stipulation in the application.

Appellee seeks to escape the effect of her settlement of the claim and her release executed to appellant on three grounds, namely: (1). That Hicks, the agent of appellant, perpetrated a fraud on her by misrepresenting the state of the law with reference to the effect of the suicide clause set forth in the application for reinstatement; (2) that the settlement was made under a mutual mistake of the parties as to the law with reference to the effect of the suicide clause; and (3), that she was mentally incapable of entering into a contract of settlement at the time the release was signed. These questions were submitted to the jury, and the verdict was, as before stated, in favor of appellee.

There is very little, if any, dispute as to the material facts concerning the execution of the release by appellee and the attendant circumstances. James E. Leeper was the postmaster at Dermott, and, four days after his death, appellee was appointed postmistress, and she was acting in that capacity until after this settlement was made with appellant. Appellee gave her personal attention to the management of the postoffice, and worked from seven o'clock in the morning until seven o'clock in the evening. She had several clerks or assistants in the office. When Hicks arrived in Dermott on November 14, 1921, he called upon appellee at the postoffice, and discussed with her the question of liability under the policy, and showed her the suicide clause set forth in the application for reinstatement. He asserted to her at that time that the company was not liable for more than two premiums on account of the violation of the suicide clause, and he adhered to that assertion throughout subsequent negotiations. There were several interviews between Hicks and appellee, and at the second one, which was late in the

afternoon of the second day of Hicks' visit to Dermott, he made appellee an offer to pay $1,000 in full settlement, which offer appellee declined. The settlement was made that night, at a meeting at the office of a bank in Dermott, at which meeting there were present, in addition to Hicks and appellee, a Mr. Franklin, the cashier of the bank, who was appellant's local agent, and a Mr. Helmstetter, and Judge Hammock, the chancellor of that district, both of the latter being personal friends of appellee, and they attended the meeting as her friends and advisers. This meeting had been previously arranged. In the discussion there Hicks renewed the claim that the policy had been forfeited, and that there was no liability on account of the breach of the suicide clause. Hicks also renewed his offer of $1,000, which was again declined, and thereupon Helmstetter requested Hicks to leave the room for a while so as to permit a conference between the others present. Franklin was, as before stated, local agent of appellant, but did not attend the meeting in that capacity, and had no authority from the company to make a settlement or to participate therein. After a conference between those who remained in the room, lasting twenty or thirty minutes, Hicks was recalled and was asked to increase his offer of settlement to $2,500, it being urged upon him by those present that it would be good business policy, even if there was no liability, as the company was doing a considerable amount of business in that locality. Hicks accepted the offer, after some hesitancy, and after being assured by Judge Hammock that, if the company found fault with him in making the settlement for that sum, they would volunteer to defend his course in the matter. The settlement was then closed at this meeting, the release was signed, and the money was paid over to appellee. It is not contended that there was any misrepresentation made by Hicks as to any facts concerning the contents of the policy or any other fact, but that there was merely a misstatement of the law concerning the legal effect of the stipulation in the application for reinstatement. It

seems clear to us that there is not the slightest evidence of any fraud involved in the statement concerning the legal effect of this stipulation. The Adams case, *supra*, was decided by this court on December 19, 1921, more than a month after this settlement was made, therefore the question of law involved was, at least, an open one in this State at the time of the settlement. There was no representation as to any particular decision of this court or of any other court, but merely a claim on the part of Hicks that the stipulation in the application was legally controlling. There is nothing to show that this contention was not made in perfectly good faith, for the law on the point was unsettled until the subsequent decision of this court. It must be remembered, too, that the parties were dealing at arm's length, and appellee had her friends and advisers present, and had no right to rely upon the statement of appellant as to the law applicable to the case. She and her advisers had the same opportunities as Hicks did to ascertain the state of the law on the subject. The record is entirely devoid of any act of fraud or any fraudulent intent on the part of Hicks, and that feature of the case may readily be eliminated.

Nor do we think that the evidence is legally sufficient to show lack of mental capacity on the part of appellee at the time she made the settlement. It is true that some of the witnesses, including witness Franklin, testified that appellee was laboring under intense mental strain on account of the tragic death of her husband—that she was a mental wreck, as some of them stated. These statements were, however, mere conclusions of a relative degree of lack of mental capacity, for the undisputed evidence shows that appellee was a woman of intelligence and business capacity. She was engaged in business for herself at the time of the death of her husband, and she immediately took charge of the postoffice and operated it and was attending to the affairs of the postoffice during both of the days when her interviews with Hicks occurred. Her own testimony shows beyond dispute

that, while she was laboring under mental strain, she was fully capable of making a contract, for she acted with the utmost caution, and refused to make any settlement under the policy, even though a very substantial sum was offered, until she finally met with her friends and submitted a counter proposal, which was accepted by Hicks. It is only natural that she should have been laboring under more or less mental strain, but this settlement occurred two weeks after the death of her husband, and there is no indication that she was lacking in that degree of mental capacity to make a valid contract. There was nothing hasty about the negotiations between appellee and Hicks, but there were different interviews during the period of two days, and this settlement was negotiated after deliberate conference, not only between Hicks and the others present at the meeting, but the counter proposal was agreed upon in Hicks' absence, and was submitted to him in appellee's presence by her friends and advisers. We are clearly of the opinion that the contract was entered into by appellee advisedly and deliberately, and that she was capable of making the contract at that time.

The final contention is that there was a mutual mistake as to the law which induced the settlement, and that appellee is not bound by it. It is a rule of almost universal application that a mistake of law, in the absence of fraud or undue influence, does not afford grounds for the abrogation or reformation of a contract. Such has been the rule declared by this court. *Lawrence County Bank* v. *Arndt,* 69 Ark. 406; *Phoenix Assurance Co.* v. *Boyette,* 77 Ark. 41. In those cases it was held that, where the contract was induced by reliance upon the superior knowledge of one of the parties, grounds for reformation were thus afforded, and this was found to be an exception to the general rule. Those cases, however, related to questions of the interpretation of the contract, and the effect of each of the decisions was that the court would place such interpretation upon it as was represented at the time of its execution by the party

having the superior knowledge on the subject. The present case is not one like those cited, which concern the representations made at the time of the execution of the original contract, but it is one where the representations or mistake arose at the time of the settlement of liability under the original contract. But, at any rate, this is not a case where the question of superior knowledge on the subject is important, for, as before stated, the parties were dealing at arm's length, and Hicks was representing an adverse interest, whilst appellee was acting upon the advice of those upon whom she relied in accepting as true the statement that there was no liability under the contract. This is merely an instance of adverse claims with respect to liability, and which was compromised and settled. If it be the law that, whenever parties settle their differences concerning liability in an uncertain state of the law and it afterwards turns out that they were mistaken the settlement can be disregarded, then there is no stability whatever about such a settlement, even though made in the utmost good faith. The law has been definitely settled to the contrary by the Supreme Court of the United States in the case of *Mutual Life Insurance Co.* v. *Phinney*, 178 U. S. 327, where the court, speaking through Mr. Justice Brewer, said:

"But whether that statement of the agent was correct in matter of law is doubtful; whether true or false, or, more accurately, whether correct or not, in its interpretation of the law applicable to this contract, is immaterial. It was merely a statement of what he supposed the law was, and the insured was under the same obligations to know the law that the company, or its agent, was. The jury evidently proceeded upon the supposition that the insurance company, located in New York, knew what the law of that State was; the insured, residing in Washington, did not, and when the agent stated what the condition of the contract was, he misrepresented the law of New York, of which the insured was ignorant, and, being ignorant, was not bound by any

act based thereon in the way of abandonment or rescission. But surely no such rule as that obtains. When two parties enter into a contract, and make it determinable by the law of another State, it is conclusively presumed that each of them knows the law in respect to which they make the contract. There is no presumption of ignorance on the one side and knowledge on the other."

Upon the whole case we are convinced that there is no theory supported by legally sufficient evidence upon which appellee can escape the effect of her voluntary settlement and release of all claims against the company under the policy. There was no fraudulent mispresentation, nor duress, nor lack of mental capacity. It is merely a case of voluntary settlement of a disputed claim of liability, and the settlement is conclusive upon both parties.

It follows that the judgment must be reversed, and it is so ordered, and, the facts being undisputed, judgment will be entered here dismissing the complaint.

WOOD and HUMPHREYS, JJ., dissent.

HUMPHREYS, J. The undisputed testimony in the case shows that the settlement was procured upon the representation of V. Y. Hicks, an attorney from Chicago in the employ of the insurance company, that, under the law applicable to the suicide clause in the renewal policy, appellee could only recover two annual premiums. He professed to know the law, and assured appellee and her advisers that such was its effect. He was apprised by appellee and her advisers that they did not know the law, and that they were making settlement with him in reliance by them upon his representation. He was in error as to the law and its effect. The suicide clause was of no avail to appellant as a defense to the cause of action. Appellee was entitled to recover the face of the policy at the time the settlement was made. *New York Life Insurance Company* v. *Adams,* 151 Ark. 123. The law declared in the case cited was the law in Arkansas at the time Hicks induced the settlement by misstating the law and its effect to appellee. The most that can

be said for Hicks is that he thought he knew the law, and was in good faith. His good faith cannot help appellee unless the company pays her what it justly owed her at the time the settlement was induced. The misstatement of the law by one who professed superior knowledge induced the settlement. The settlement could not have been accomplished except through a mutual mistake of law. Under these circumstances the settlement should not be treated as an accord and satisfaction, and, for the reason stated, Justice WOOD and myself dissent from the majority opinion.

PARAGOULD v. ARKANSAS LIGHT & POWER COMPANY.

Opinion delivered May 10, 1926.

1. DAMAGES—BREACH OF CONTRACT—BURDEN OF PROOF.—In an action to recover damages for breach of a contract, the burden is on the plaintiff to establish such damages; but where the defendant claims that plaintiff could and should have minimized the damages so found, the burden is on the defendant to prove such fact.
2. DAMAGES—BREACH OF CONTRACT—DUTY TO MINIMIZE DAMAGES.—Where a party who has breached his contract subsequently offers a new contract, the other party is not required to accept such offer in order to minimize his damages, if the offer is conditioned upon a cancellation, extinguishment or rescission of the claim for damages for breach of the original contract.
3. DAMAGES—BREACH OF CONTRACT—DUTY TO MINIMIZE DAMAGES.—In a suit by a city to recover damages caused by defendant light company's breach of its contract to furnish power at agreed rate to do the pumping for the city's waterworks, defendant cannot maintain that the city should have minimized the damages by using defendant's power at its primary rate where to do so would have required large additional expense by the city and where there was no established rate of which the city had the right, independently of contract, to avail itself.
4. DAMAGES—BREACH OF CONTRACT.—Where the authority of a city to maintain its waterworks plant ceased upon the creation by the Legislature of a waterworks district to take over such plant and the acceptance thereof by the city, the city could not claim subsequent damages for breach of a contract to furnish power for such waterworks.

Appeal from Greene Circuit Court; *G. E. Keck,* Judge; modified.

Block & Kirsch, for appellant.

Robt. E. Fuhr and *Robinson, House & Moses,* for appellee.

SMITH, J. This is the second appeal in this case. The opinion on the former appeal is found reported in 146 Ark. 1. On the former appeal it was decided that the Arkansas Light & Power Company, hereinafter referred to as the company, had contracted with the city of Paragould, hereinafter referred to as the city, to furnish electrical power to do the pumping for the city's waterworks plant for a period of ten years, and that the company had breached its contract and was liable to the city for the damages resulting from this breach. The cause was remanded on the former appeal for the assessment of the damages.

By the terms of the contract the company agreed to furnish power for a period of ten years at the rates fixed in the contract, which were not in any event to exceed forty per cent. of the bills collected by the city from its consumers, at the rate to the consumers then in effect.

The performance of the contract was begun on February 7, 1917, and continued until July 24, 1918, at which time the company gave notice that, after thirty days, it would discontinue furnishing the city power at the contract rates, and, pursuant to this notice, the company discontinued its service on August 25, 1918, after which time the city resumed the use of the steam power plant with which it had done the pumping prior to the time its contract with the company became effective, and this suit was commenced to recover damages for the breach of the contract.

There existed in the city two waterworks improvement districts, known as Districts Nos. 1 and 2, and the city had, pursuant to the provisions of § 5739, C. & M. Digest, taken over and was operating the steam pumping plant when its contract with the company was made.

During the pendency of the litigation, and before the decision of this court on the first appeal, there was passed at the extra session of the General Assembly on February 26, 1920, an act numbered 397, "providing for the formation of an improvement district in the city of Paragould for the purpose of repairing, extending, enlarging, reconstructing, rebuilding and taking over the waterworks system in said city, and providing for additional sources of water supply for the demands of the city."

Pursuant to the power conferred in this special act, Waterworks Improvement District No. 3 was organized. This new district included all the territory embraced in Districts Nos. 1 and 2, and included the entire city, which was an area considerably larger than the original Districts Nos. 1 and 2.

By this special act, District No. 3 superseded Districts Nos. 1 and 2, and the new district took over the waterworks system of the old districts, and it was provided that the commissioners of the new district should enlarge and reconstruct the existing districts, and should remain in control thereof and operate the same until all the debts of both the old and the new districts had been paid, after which the control of the system should pass to the city.

The initial ordinance of the city council to make the special act of the General Assembly effective was passed on May 19, 1920, and the final ordinance creating the district and appointing the commissioners was enacted by the city council on July 23, 1920, and the commissioners of the new district qualified thereunder. After the organization of District No. 3 and the qualification of its commissioners, it was moved in the court below that the new district be made a party plaintiff to the action, by reason of its relationship to Districts Nos. 1 and 2, but this motion was overruled, and the trial proceeded between the original parties.

The company admits that, under the decisions of this court on the former appeal, it is liable to the city for the damages occasioned by the breach of its contract, but it

insists that the city could and should have minimized its damages by using its power at what it calls its primary rate, and that its liability for the breach of the contract could not extend beyond the time when Improvement District No. 3 was organized. On the other hand, the city contends that it is entitled to recover, as the measure of its damages, the difference between the contract price for the necessary power and the actual costs incurred by it in generating this power, and that it is entitled to recover the total of this difference up to the time of the expiration of the contract between the city and the company.

The cause was submitted to the court without a jury, and the court found that the city was bound by the so-called primary rate, and that the city's right to recover ceased with the creation of Waterworks Improvement District No. 3, and a judgment was rendered in accordance with these findings, from which the city has appealed. In order that a final judgment might be rendered upon this appeal, the court further found the damages sustained by the city in the operation of its plant in excess of the contract price, first, to the time of the organization of Waterworks Improvement District No. 3, and second, to the time of the institution of this suit. The correctness of these findings is not questioned by the company, its insistence being that the findings upon which the court based its judgment are correct and that the judgment should be affirmed.

There is, first, much discussion as to the burden of proof, each insisting that this burden rests upon the other. But we are of opinion that, it having been adjudged that the company had breached the contract and was liable for the damages resulting therefrom, the burden of proof was upon the city to establish its damages, but, in so far as it was contended that the damages thus shown might and should have been minimized, that burden was upon the company. The law is so declared in the annotated cases cited in the note to § 197 of the chapter on Damages in 8 R. C. L., page 655, and in the text to the section cited it is stated that "where it is claimed that expenditures were

unreasonably incurred (in performing the service which the defaulting party should have performed), the burden is on the defendant to prove such to be the fact." *Arkansas Short Leaf Lbr. Co.* v. *McInturf,* 134 Ark. 284.

It is very earnestly insisted by the company that the city should not have continued to use the plant which it had in use when the contract was made with the company to furnish the necessary power, but that the city should have used the power which the company was prepared to furnish, and would have furnished, at what it calls its primary rate.

The city's plant was equipped to burn coal, and it was shown that the price of coal advanced constantly from the time the original contract between the city and the company was made until 1920, when the price of coal began to decline. The testimony shows that the company operated in a number of cities and towns of the State, and that it had established a rate available to all consumers of its power using the company's 2300 3-phase service. The service in the city of Paragould was a 2-phase service until the spring of 1921, and there is a question whether this service is interchangeable, but, conceding that it is, we do not regard that fact as controlling here, for reasons which will be hereinafter discussed.

It is an admitted fact that the city could not have availed itself of the company's primary rate without changing from a steam to an electrical plant, and to do this additional machinery would have been required, which would have cost $6,000. The court found that the city should have purchased this machinery, in order that it might avail itself of the company's primary rate, and assessed the cost of this machinery as a part of the damages which the city should recover.

We are of opinion, however, that the city was not required to incur this expense in order that its damages might be minimized. After the company had breached the contract, various propositions were made and negotiations conducted looking to an adjustment of the differences growing out of the company's default, and we

think it quite clear that the company's attitude in these negotiations was that of a party having the right to contract as to the rates to be charged, rather than that of a public utility company which was required to furnish service at a fixed price to any one desiring it. This primary rate had never been approved by or filed with any governmental agency having authority to fix or to regulate rates. Indeed, long after the controversy had arisen, the president of the company, in offering to furnish the power which its original contract required it to furnish, coupled to this offer the condition that the acceptance thereof should be in full settlement of the city's claim for damages which had then accrued as a result of the company's breach of the contract. This offer is contained in a letter dated January 18, 1919, addressed to the city council, and the first paragraph thereof reads as follows: "In behalf of the Arkansas Light & Power Company, we beg to submit the following proposition in full settlement of the controversy now pending between said company and the city of Paragould, to wit:" It will be remembered that nearly five months had then expired since the date of the company's default.

It is, of course, the law that the company could not impose a condition that the city waive any valid claim for damages, even though the company did in fact have a rate not dependent upon contract. The excellent brief filed on behalf of the company concedes this to be the law. We copy from this brief the following statement of the law, which is fully sustained by the authorities: "As a general proposition of law, it is true that any offer made by a party who has breached his contract toward performing the contract which was breached, or entering into a new contract, need not be accepted by the other party in order to minimize damages, if that offer results in a cancellation, extinguishment or rescission of the claim for damages for the breach of the original contract. But if the offer as made does not result in the waiver of the breach of contract, and the other party is still in the same position

to recover on said breach of contract, this rule does not apply."

We do not copy the letter from the president of appellee company to the city council in full, but it may be said that it contains no reference to any primary rate available to all persons. The letter is a proposition to make a private contract, and, while the contract proposed is similar to what the company shows its primary rate was, it is pointed out that there is a material difference in the discounts for excess of power used between the rates offered in this letter and those allowed in the primary rates.

It is insisted by counsel for the company that, in February, 1919, shortly after the above letter was written, the manager of the company in Paragould made the city a definite proposition for furnishing power for its water plant, which proposition was based on the primary rate and which did not include any condition or requirement that the acceptance of same should constitute a waiver of damages for the breach of the contract. This witness did testify that he made the city a proposition "based on the primary power rate, along the same line." But the manager's offer contained no reference to the alleged primary rate and was dependent upon the price of coal, and it is conceded that the discounts contemplated in his proposition were not identical with those called for in the primary rate. In other words, we think the manager's proposition was nothing more nor less than an offer to make a new contract.

That there was no established rate which the city had the right, independently of contract, to avail itself of, and which the company must have furnished, independently of any contract so to do, is conclusively shown by the fact that, after breaching the contract, the company, on October 1, 1918, of its own motion and without permission so to do from any one, raised its primary rate. So that if, when the contract was breached, the city had applied for service under the then existing primary rate, and had obtained it, after incurring the expense of $6,000 to install

the machinery necessary to make the company's service available, it would have found its rate increased, with no assurance that it would not be raised still higher as the price of coal continued to advance.

Counsel cite and review the cases which have been decided by this court since the passage of the act of April 1, 1919 (act 571, Acts 1919, p. 411), appearing as §§ 1607 *et seq.*, C. & M. Digest.

The case of *Harrison Electric Light Co.* v. *Citizens' Ice & Storage Co.*, 149 Ark. 502, is cited. In that case the ice company had contracted with the public utility company for electric current at a fixed price per month. The utility company increased the charge after having filed with the Corporation Commission a schedule of its rates. The ice company brought suit to enjoin the utility company from cutting off its service when it refused to pay the new rate. It was held by this court on the appeal that, where a public utility filed a schedule of increased rates with the Corporation Commission, the new rates superseded contractual rates theretofore established, as there could be no valid contract against the power of public control by the Corporation Commission.

In the case of *Arkansas Natural Gas Co.* v. *Norton Co.*, 165 Ark. 172, the gas company had filed its schedule of rates with the Arkansas Corporation Commission, which was created by the act of 1919 above referred to, and the Norton Company demanded that it be furnished gas at these rates. The utility company refused to furnish gas in accordance with its scheduled rates, and the consumer paid the rate demanded to prevent the service being discontinued, and sued to recover the excess paid over the scheduled rates. It was held on the appeal to this court that the payment had not been made voluntarily, and might be recovered. In so holding we said that the law will not tolerate a discrimination in the charges of public utility corporations, and that all are entitled to have the same service on equal terms and at a uniform rate at the hands of corporations which have become public utility companies.

These cases are not in point, for the reason that the act of 1919 had not been passed when the company breached its contract, and it was not shown that the company filed with the Corporation Commission, after its creation, any schedule of its rates. Upon the contrary, its attitude throughout towards the city was that it would furnish power to the city only upon such conditions as it might agree by contract to do, and, if power were furnished in accordance with this so-called primary rate, this would be done as a matter of contract. Moreover, the original contract herein sued on fixed a price at which the power would be furnished to the city's plant under the conditions existing at the time the contract was made, and all the subsequent offers of service involved the expenditure by the city of $6,000 to obtain the service which the contract required the company to give without this expenditure. Had the city entered into one of the new contracts proposed, it too might have been breached had the price of coal continued to advance, or if, for any other reason, the company had elected not to perform.

We conclude therefore that there was no primary or permanent rate which the city could with certainty have availed itself of in an attempt to minimize its damages, and the city was therefore entitled to recover the increased cost of operating its plant with the facilities it had when the original contract was made.

But we think the right to recover this excess in cost did not extend beyond the time when Waterworks Improvement District No. 3 was organized. The city by its ordinances elected to proceed under the special act creating this district. The city was operating under the authority of § 5739, C. & M. Digest, when the original contract was made. This section gives to the city and town councils of the State, after the construction of waterworks or gas or electric light works has been completed and paid for by an improvement district, the power to take over and operate such works, and, as an incident to this power, to make necessary contracts in regard thereto. But, after Improvement District No.

3 had been organized, the control of the city ceased. Section 5739, C. & M. Digest, was no longer applicable to this contract, for the reason that the commissioners of that district were placed in charge of it under the ordinances enacted to make the special act of 1920 effective, and the commissioners were directed to operate the plant until the debts of both the old and the new districts had been paid. Moreover, District No. 3 was not the entity with which the company had contracted. It was a different and a larger district, and the city, as a contracting party having authority to operate, had passed out of existence. The doctrine of the case of *Harrison Electric Light Co.* v. *Citizens' Ice & Storage Co., supra,* is applicable here, for, as was there said, there can be no valid contract against the power of public control.

The court below found the fact to be that, from the date of the breach of the contract by the company to the date of the approval of the second petition by the property owners in Waterworks District No. 3, the city incurred expenses in excess of the contract price in the performance of the contract in the sum of $22,127.64, and that the interest thereon, computed on the basis of settlement provided for in the contract, amounted to $5,910.36, and, as the correctness of this finding is not questioned, judgment will be rendered here for the total of these two amounts.

Justices WOOD and HART dissent.

MCCULLOCH, C. J. I concur in the judgment of reversal for the reason that the city is entitled to recover all that it is allowed under the opinion of the majority, and more. I discover no sound theory upon which the damages should be limited to such as accrued up to the organization of the new improvement district. The damages, and the right of action to recover same, accrued upon the breach of the contract, and there would seem to be no good reason why appellee should benefit by the change in the control of the public utility in the city or that the city should be held to have forfeited its right

to recover the damages because it relinquished control to another public agency. The city was the public agency in the control of the utility, and the change of control was merely from one agency to another—both being for the public. All damages recovered by the city inure to the benefit of the public, hence it is wholly immaterial that there has been a change to the agency which is in the future to control the utility.

The damages suffered by the public from the breach of the contract were not mitigated in any degree by the change in the control of utility, for, as before stated, the public was the sufferer from the breach of the contract, regardless of the particular agency which represented the public in the control of the utility. There was neither in fact nor in law a mitigation of damages, and I think that the city should be permitted to recover for all the damages which accrued from the breach.

SIMMONS v. TURNER.

Opinion delivered May 17, 1926.

1. APPEAL AND ERROR—FINAL DECREE.—A decree is final which canceled certain deeds and settled the issues as to the title to land, though it may be necessary to have a further decree to adjust the account between the parties.
2. PARTITION—ADVERSE POSSESSION—JURISDICTION.—Equity has no jurisdiction of an action for partition of lands of which the defendants are in possession holding adversely to the plaintiff.
3. QUIETING TITLE—ADVERSE POSSESSION—JURISDICTION.—Under Crawford & Moses' Dig., § 8362, a plaintiff cannot invoke the jurisdiction of equity to confirm or quiet title in her to lands of which defendants are in the exclusive possession, claiming title adversely to her.
4. EQUITY—JURISDICTION OF LAW COURT.—In a suit for partition and for confirmation of title to property which was adversely held by defendants, matters alleged as grounds of equitable relief, which were merely ancillary and subsidiary to a legal title when established at law, should not be given primacy merely for the

purpose of defeating the jurisdiction of the law court to adjudicate the legal title and right to possession.

5. TRIAL—WRONG FORUM—TRANSFER.—Where a complaint in equity stated a good cause of action at law, instead of overruling a demurrer and motion to dismiss, the court should have treated the demurrer and motion as a motion to transfer to the law court, and have transferred the cause to that court.

Appeal from Bradley Chancery Court; *E. G. Hammock,* Chancellor; reversed.

D. A. Bradham and *W. S. Goodwin,* for appellant.

Williamson & Williamson, for appellee.

WOOD, J. This action was instituted December 14, 1923, in the chancery court of Bradley County by Mrs. Bessie Turner against George T. Simmons and his wife, Mrs. Beulah Simmons, and J. B. Hurley. Plaintiff alleged in substance that she and Mrs. Beulah Simmons were the owners of an undivided interest as tenants in common of eighty acres of land in Bradley County, which she described; that the defendants were in possession of said lands and claiming to be the sole owners thereof, and had been for three years, and she prayed that certain instruments, copies of which were made exhibits to her complaint, be canceled and set aside as clouds on her title, and that title to the land described be confirmed in the plaintiff and in Beulah Simmons as tenants in common, share and share alike, and that the lands be partitioned between them, and the plaintiff have immediate possession of her share of the lands and a judgment for rents. The defendants demurred, and also moved to dismiss the complaint. The demurrer stated that "the complaint does not state a cause of action in equity," and the motion to dismiss stated that the defendants "are in actual, open, notorious and adverse possession of the lands in suit and actually occupying the same at the present time, and were so occupying the same at the time of the institution of this suit; that the complaint does not state a cause of action cognizable in equity, but does state a cause of action cognizable at law." The demurrer and motion to dismiss were overruled. The defendants

then answered denying all the allegations of the complaint.

Samuel C. Brown obtained a patent from the United States Government to one hundred and sixty acres of land in Bradley County, including the eighty acres in controversy. He lived on this land as his homestead until his death. He died intestate, leaving a widow and two daughters. The elder daughter married G. W. Wagnon and the younger married W. C. Carter. Wagnon and his wife had two daughters, Ressie and Beulah. Ressie married Turner, and Beulah married Simmons. At the time of the death of Samuel C. Brown his daughter Turza was a small child, living on the homestead with her mother, Mrs. Samuel C. Brown. The other daughter, Mrs. Wagnon, was living with her husband, G. W. Wagnon, in Calhoun County. After the death of Brown, Wagnon and his wife moved on the homestead of Samuel C. Brown in Bradley County, and lived with and took care of Mrs. Samuel C. Brown and Turza as long as Mrs. Brown lived, and after her death they continued to take care of Turza until she married W. C. Carter and moved on the other half of the 160 acres of the Brown homestead not involved in this action. After the death of Mrs. Brown, Wagnon and his wife continued to live on the 80 acres in controversy until the death of Mrs. Wagnon, and after the death of Mrs. Wagnon, about 1887, Wagnon continued to live on the land until his death on June 24, 1921. Mrs. Ressie Turner and Mrs. Beulah Simmons are the sole and only heirs at law of Mr. and Mrs. G. W. Wagnon, and they, with the children of Mrs. Turza Carter, are the only heirs at law of Mr. and Mrs. Samuel C. Brown. George W. Wagnon executed two warranty deeds to his son-in-law, G. T. Simmons, conveying the north forty-acre tract of the eighty acres in controversy. The first deed was not recorded. The second deed was dated September 29, 1913, and was placed of record. Simmons and his wife still live on this north half of the land in controversy, and have so lived since 1908. At the death of Brown, in 1870, the 160 acres on which he

lived as his homestead passed to his widow, Mrs. Samuel C. Brown, for her life, she having a homestead and dower right therein, the reversionary interest in his estate being in Mrs. Wagnon and Mrs. Carter. At the death of Mrs. Brown the fee title vested in the two heirs of Samuel G. Brown, Mrs. Wagnon and Mrs. Carter. After the death of Mrs. Brown the land constituting the original 160 acres was partitioned between Mr. and Mrs. Wagnon and Mr. and Mrs. Carter. Wagnon and wife retained possession of the eighty acres in controversy, and Carter and Mrs. Carter took the other eighty acres not in controversy in this action. At the death of Mrs. Wagnon, Wagnon acquired a life estate in the land in controversy by curtesy, his two children, Mrs. Ressie Turner and Mrs. Beulah Simmons, having the reversionary interest, and at the death of Wagnon, in 1921, the fee title to the land passed to them as tenants in common and as the only surviving heirs of Mrs. Wagnon, who owned the fee to the land. The above is the history of the title in controversy substantially as it is stated by counsel of Mrs. Ressie Turner, and as alleged in her complaint.

On the other hand, the defendants in their answer alleged that Brown gave the lands in question to Wagnon for a good consideration, and placed him in possession thereof; that Wagnon made improvements and had continued in possession for over forty years; that Wagnon did not come into possession of the land by reason of a life estate vested in him by curtesy, but that he acquired the title while Mrs. Brown, his wife's mother, was still living. The defendants claimed the land therefore by adverse possession, and further set up that the plaintiff, having waited until the death of Wagnon to institute the action, was barred by laches and limitation from maintaining the same.

The trial court heard the cause upon the evidence adduced to sustain the contention of the respective parties, and entered a decree canceling the various instruments, copies of which were attached as exhibits to the plaintiff's complaint, and confirming and quieting

title to the land in controversy in the plaintiff and the defendant, Mrs. Beulah Simmons, as tenants in common, and directed that the lands be partitioned between them; appointed commissioners to make the partition, and directed that Mrs. Turner and Mrs. Simmons should each have the right to immediate and absolute and unconditional possession of that portion of said land allotted to them on said partition, for which writ of assistance may issue upon the request of the parties interested. The commissioners were also directed to report the value of the permanent improvements and by whom made and the rents of the tract of land for the years 1921 to 1925 inclusive, and the cause was continued as to the rights of the respective parties concerning the rents, improvements and taxes until the same is finally disposed of by the Supreme Court. From that decree is this appeal.

1. The appellee moved to dismiss on the ground that there is no final decree because the court continued the cause for further report of the commissioners as to improvements, rents and taxes. But the decree from which this appeal is prosecuted canceled a decree of confirmation and the various instruments, copies of which were made exhibits to the appellee's complaint, and which are designated in the decree. The decree also vested the absolute title in fee simple in the land in controversy in Mrs. Turner and Mrs. Simmons, share and share alike. Thus the decree canceled instruments and settled the issue as to the title to the lands in controversy between the appellants and the appellee. As to these matters the decree was final.

Perhaps the leading case in our reports on this subject is that of *Davey* v. *Davey,* 52 Ark. 224-227, where this court, speaking through Mr. Chief Justice COCKRILL, said: "Where the decree decides the rights to the property in contest and directs it to be delivered up, or directs it to be sold, and the complainant is entitled to have it carried into immediate execution, the decree must be regarded as final to that extent, although it may be neces-

sary for a further decree to adjust the account between the parties. *Forgay* v. *Conrad,* 6 How. 206; *Thompson* v. *Dear,* 7 Wall, 342." And further, "it is allowed also where a distinct and severable branch of the cause is finally determined, although the suit is not ended." See also *Seitz* v. *Meriwether,* 114 Ark. 289-296, and cases there cited; *Robertson* v. *Yarbrough,* 160 Ark. 223. In the last case, *supra,* we said: "A consideration of the substance of the decree makes it clear that there was a complete and final determination of the cause, so far as it related to the appellant's assertion of title in her complaint and the assertion of title made by appellees in their cross-complaint." The motion to dismiss is therefore overruled.

2. When the appellee's complaint is boiled down, the essence of it is that she is the owner in fee simple, under a legal title, deraigned as set forth in her complaint, as a tenant in common with her sister, Mrs. Simmons, of an undivided half interest in the east half of the SW¼ of section 13, township 12 south, range 12 west, in Bradley County, Arkansas, of which lands the appellants, Mrs. Beulah Simmons and her husband George T. Simmons, were in possession and had been for several years, claiming to be the absolute owners thereof and refusing to recognize the appellee's interest therein; that a certain decree of the Bradley Chancery Court had been fraudulently obtained by G. W. Wagnon, appellee's father, who had only a life interest in the lands, confirming and vesting title absolutely in him; that he had executed various conveyances and a will, and that appellants had executed certain instruments and conveyances, all of which were clouds on appellee's title; that appellee was entitled to a partition and immediate possession of her share of the lands, and to have the decree and instruments designated as clouds on her title canceled.

The appellee's complaint does not state a cause of action within the jurisdiction of the chancery court. The appellee cannot have partition of lands in equity of

which appellants are in possession, holding adversely to the appellee and denying her title. Nor can the appellee invoke a court of chancery to confirm or quiet title in her to lands of which the appellants are in the exclusive possession, claiming title adversely to her. Section 8362, C. & M. Digest. A court of equity has no jurisdiction to determine that one who is claiming under a purely legal title has such title and the right of possession against one who is already in possession claiming the legal title thereto, and holding the same adversely against all the world. If the appellee's complaint had stated any grounds of purely equitable jurisdiction wholly distinct from and independent of her suit for partition, or for confirmation of her title, then the court of chancery, having jurisdiction for one purpose, would retain it for all. But, after a careful analysis of appellee's complaint, we do not discover that it alleges any ground of purely equitable cognizance independent of her suit for partition and to quiet title. On the contrary, the appellee's complaint does not allege any equitable title in the appellee or any grounds whatever to justify her in invoking the jurisdiction of a court of chancery to obtain the relief which she seeks. The primary purpose of appellee's complaint is to have herself declared to be the legal owner and entitled to the partition and immediate possession of her share of the land in controversy and the rents and profits that have accrued therefrom since the death of her father in 1921. The other matters set forth for relief are subsidiary, and would be but ancillary to a legal title after the same had been established at law. These have no place until the legal title has been first determined at law, and they should not be given primacy merely for the purpose of defeating the jurisdiction of the law court to adjudicate the legal title and right to possession.

Conceding, without deciding, that the allegations of her complaint are true, she has a complete and adequate remedy at law, and must resort to the forum of a law court to establish these alleged rights. The doctrine

above announced has been established by a long line of decisions of this court. *Byers* v. *Danley,* 27 Ark. 77-96; *Trapnall* v. *Hill,* 31 Ark. 345; *Lawrence* v. *Zimpleman,* 37 Ark. 644; *London* v. *Overby,* 40 Ark. 155; *Criscoe* v. *Hambrick,* 47 Ark. 235; *Hankins* v. *Layne,* 48 Ark. 544-550; *Head* v. *Phillips,* 70 Ark. 432; *Eagle* v. *Franklin,* 71 Ark. 544; *Landon* v. *Morris,* 75 Ark. 6; *Cannon* v. *Stevens,* 88 Ark. 610; *Lacotts* v. *Pike,* 91 Ark. 26-29; *Hill* v. *Cherokee Const. Co.,* 99 Ark. 84-87; *Moore* v. *Jackson,* 164 Ark. 602.

3. Appellants' demurrer to the complaint, and motion to dismiss, in which the sufficiency of the complaint to state a cause of action in equity is challenged, were overruled by the court. It follows from what we have said that the court erred in these rulings. The complaint, however, does state a cause of action at law. The court therefore should have treated appellant's demurrer and motion to dismiss as a motion to transfer to the law court, and should have granted same and entered an order transferring the cause to the law court. Section 1041, C. & M. Digest; *Grooms* v. *Bartlett,* 123 Ark. 255.

For the error indicated the judgment is reversed, and the cause will be remanded with directions to enter an order transferring the cause to the law court.

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

Opinion delivered May 17, 1926.

1. RELEASE—MISTAKE OF FACT.—Where a release of liability was procured from a passenger injured in the derailment of a train by means of false representations, made by a surgeon connected with the railroad hospital, to the effect that her injuries were cured, when in fact they were not, the release was not binding.
2. RELEASE—RESCISSION—TENDER OF SUM PAID.—Where a passenger was induced to sign a release of liability for personal injuries by false representations, she is not bound in this State to return the sum paid before suing to recover the damage sustained,

though the injury was received and the release executed in another State, in which she would have been bound to make such return before suing, if her suit had been brought in that State.

3. CONTRACTS—ENFORCEMENT OF REMEDY.—When a party comes into court to enforce his remedy upon a contract, that remedy will be enforced in accordance with the laws of the State regulating the remedy, and not according to the remedy of the State where the contract was made.

4. TRIAL—GENERAL OBJECTION TO INSTRUCTION.—Under a general objection to an instruction, the Supreme Court will determine whether or not there are any inherent defects therein, and, if so, whether, construing the charge as a whole, the giving of the instruction was prejudicial to appellant.

5. TRIAL—ERRONEOUS INSTRUCTION CURED BY OTHER INSTRUCTIONS.—An instruction in a personal injury case that, if the sum paid by the railroad to the plaintiff was not sufficient to compensate her for damages sustained, the jury should find the amount necessary to compensate her and deduct the amount already received, though erroneous as submitting only the question whether the passenger was sufficiently compensated, was not prejudicial where other instructions submitted the issue whether the release of the railroad was procured by fraud and the issue as to the railroad's liability.

6. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.—Where, from the language used or the relation which the instructions bear to each other, they may be read together without conflict and as a harmonious whole, they will be so treated.

7. CARRIERS—INJURY TO PASSENGER—BURDEN OF PROOF.—While, in an action by a passenger to recover for personal injuries received in a train wreck, the passenger had the burden of alleging and proving the liability of the carrier, she met this burden and established a *prima facie* case when she proved that she was a passenger on defendant's train, and that the train was derailed, resulting in her injury.

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

E. T. Miller and *W. J. Orr,* for appellant.

J. T. Coston, for appellee.

WOOD, J. Lulu M. Cox instituted this action in the Mississippi County Circuit Court against the St. Louis-San Francisco Railway Company. The plaintiff alleged that on September 1, 1922, she was a passenger on one

of defendant's trains going from St. Louis, Missouri, to Osceola, Arkansas; that the train was derailed near Starland, Missouri, resulting in severe injuries to plaintiff's person and to her damage in the sum of $3,000, for which sum she prayed judgment.

The defendant answered and set up a written release executed October 25, 1922, in which it was recited that, on September 1, 1922, Lulu M. Cox was a passenger on train No. 805 of the St. Louis-San Francisco Railroad Company, which train was derailed at bridge No. 9705, near No. 76, Missouri; that she received severe personal injuries and loss and damage to personal property, which she claimed rendered the railroad company liable in damages; that the railroad company denied liability, and she, being desirous to compromise and adjust the entire matter, settled for the consideration of $1,575, to her in hand paid, and she forever released the railroad company from any and all liability for damages for such injuries, and acknowledged full satisfaction of all liability of the company to her. The release further recited that, at the time she received the money and executed the release, she was of lawful age and legally competent to execute the release, and before executing it she had fully informed herself of its contents and executed it with full knowledge thereof; that she had read the same, and understood it. The defendant alleged that the release was executed in Missouri, and, under the laws of that State, before plaintiff could maintain the action to cancel the release, she would have to tender to the defendant the amount of money paid to her in consideration of the release, which plaintiff had not done.

The plaintiff testified that she was a passenger on defendant's train coming from Ohio to Osceola, Arkansas; that the train was wrecked at Starland, Missouri; that plaintiff was severely injured. She was taken to the Frisco Hospital in St. Louis, Missouri, where two x-ray pictures were taken. She was treated by Dr. Woolsey, a surgeon of the railroad company. She was in the hospital exactly two months. While there she

made a settlement with the railroad company. The consideration paid her was $1,575. In order to get her to sign the release, Dr. Woolsey represented to her that the injury to her ankle was all right, but that it would be easily injured again. He seemed to think it was all right. He told witness to take the crutches and use them. He said witness was all right, but must take precaution not to injure it again. Witness would be as strong as ever when the bones had had time to finish healing and time for the swelling to go down. These statements were made before witness signed the release, and, if she had not believed what he said, she would not have executed the same. She refused to settle until Dr. Woolsey told her it was all right. Witness signed the release about a week before she came home in November. Witness was suffering horribly, and went to Memphis to consult Dr. Campbell, who told her that she needed a brace. He stated that her ankle was dislocated, and she would have to have it rebroken. She went to a hospital in Memphis, and had the ankle broken and reset on November 10. Dr. Campbell performed the operation. Witness suffered a great deal. She was in the hospital at Memphis two weeks and a day. Witness still has to use a brace and crutches. Witness was a teacher, and was not able to follow her profession. On cross-examination witness described the derailment of the train resulting in her injury, and stated that, after she was taken to the hospital, two x-ray pictures were taken. She understood the purpose of those pictures was to take a picture of the bones, and she asked to see them, but they would not show them to her. She was anxious to go home. Witness further detailed the injuries and the treatment she received after leaving the hospital, which it is unnecessary to set forth.

On cross-examination in regard to the release she stated that she received the money and executed the release; that she read the release, and understood it; after describing her injuries and treatment at the hospital in Memphis, she concludes her testimony by saying

that Dr. Campbell had informed her that he could not give her complete relief, and that her injury was permanent. She stated, in answer to a question, that she had scarcely any movement in her ankle, and demonstrated the same before the jury, saying that she could move it backwards and forwards a little, but not to the side. Witness weighed about 208 pounds when she was injured. Her ankle was turned over, the main portion of the foot turning in and the heel out.

Dr. Campbell testified that his specialty was orthopedic surgery. He qualified as an expert in the treatment of injuries and diseases of the bones, joints and deformities thereto. He attended Mrs. Cox, who gave witness a history of her injury. When she came to see witness in November, 1922, she was walking on crutches with difficulty and with much pain. Her left ankle was swollen and tender, and her left foot was markedly turned out, showing an unreduced Potts fracture. Witness then described the operation which he performed to refracture and realign the bones into position—a rather extensive procedure on both bones. Witness described in detail the effect of the operation and result of the injury. The effect of the witness' testimony was that, when Mrs. Cox came to see him, the fracture to her ankle was unreduced. She had a deformity that appears in cases where the fracture has never been set. The operation witness performed would not have been necessary if the fracture had been properly set and no complications thereafter, and if the bones had united in their proper positions, and if the treatment had continued of holding the foot in the proper position for a sufficient length of time, which requires six months or a year. Witness could not state definitely that she did not have proper attention at the hospital in St. Louis, because witness had seen the patient a number of weeks after the fracture was set. Witness knew that fractures often became misplaced and had to be done over. Witness concluded his cross-examination by stating, in effect, that the two fractures which witness had described, to the

limb of Mrs. Cox, if properly reduced within a reasonable time after the accident, and proper instructions as to the use of the limb had been followed, would have united perfectly, and there would have been a realignment of the ankle in six months. But Mrs. Cox was 54 years of age, and a fracture of her joint might have been a permanent disability, even under the best treatment from the first. She should not have attempted to put her weight on that limb for six or eight weeks after the injury, and then with support. She would probably have to use crutches on account of the pain at that time, and should have been protected by arch supports and braces. As a rule, one could not discard crutches in such cases after the removal of the cast under one or two months, the time differing in different individuals.

The defendant introduced Dr. Howell, who qualified as an expert physician and x-ray specialist. He examined the x-ray pictures of an ankle made an exhibit to Dr. Campbell's deposition showing the fracture of the tibia at the point and also a fracture of the fibula. He stated that it was not uncommon for a person to grow up with a deformed ankle and then to have the same straightened out and to have a perfect ankle. It was not a serious thing to have a tibia or fibula fractured. The usual result of a fracture of that kind, if a person puts weight on the leg before it is perfectly united, is a displacement. His testimony was to the effect that a woman of Mrs. Cox's age and weight, with two small bones of her leg broken, as the x-ray pictures taken by Dr. Campbell indicate, if she was injured on September 1 and left the hospital November 1, purposely or otherwise, on that leg, she would likely have just what the picture indicates.

Dr. Woolsey testified that he was a physician and surgeon connected with the Frisco Employees' Hospital Association in St. Louis. He qualified as an expert. He attended Mrs. Cox in the hospital in St. Louis. He explained in detail the treatment of Mrs. Cox, and his testimony tended to prove that his treatment was the usual treatment given patients in her condition, and

that it was the correct treatment. He stated that Mrs. Cox left the hospital voluntarily. She was receiving free treatment, and would have received such treatment if she had remained longer. At the time she left, witness didn't tell her that her ankle was entirely healed. It was not healed. It would have required about three months' more treatment for a complete healing. It was still necessary for her to use crutches when she left the hospital. At the time Mrs. Cox signed the release on October 25, 1925, witness passed her room at the hospital when the claim agents were there, and they later told witness that they had settled with Mrs. Cox. These agents asked witness if it were all right for Mrs. Cox to go home, and witness replied that it was if she went on crutches. Witness didn't tell her or the claim agents that the ankle had completely healed and that it was as good as ever. Witness never told Mrs. Cox that her ankle would be as good as ever.

The testimony of the claim agents who made the settlement with Mrs. Cox and took the release was to the effect that they were authorized to pay her the amount named in the release, and Mrs. Cox stated that she would take it and was glad to get the money, because she wanted to get back to her school; that she had a contract, and wanted to get back on November 1 to fill that contract. These witnesses stated that, during the negotiations, they did not ask Dr. Woolsey if Mrs. Cox was entirely healed, cured, and all right, and they did not hear Dr. Woolsey say anything to Mrs. Cox about her injury being healed. The question of her condition at that time was not discussed. Mrs. Cox first broached the subject of a compromise on October 24. She was not ready to settle before that day. One of the witnesses stated that he had met Mrs. Bragg, Mrs. Cox's daughter. He was asked this question: "Weren't you around there trying to get Mrs. Cox to settle, and didn't she (Mrs. Bragg) ask you not to settle with Mrs. Cox in her absence?" Witness answered, "Nothing of the kind was said."

Mrs. Cox was recalled in rebuttal, and testified that the two claim agents were in her room when Dr. Woolsey came there and opened the door, and seemed surprised that they were there. Witness had not then signed the papers. One of the agents said, "Isn't this woman all right?" and Dr. Woolsey said, "She is all right—it will take a little time to reduce that swelling—she will be all right." The witness, on cross-examination, stated that, on a former trial of the case, about a year before, she had stated, in answer to a question, that, while she and the claim agents were in a conversation in regard to the settlement, and after a part of the conversation, Dr. Woolsey came to the door and opened it and looked in, and they asked him about the condition of witness' ankle, and he said it was healed. They also asked him how long it would be before witness would walk, and the doctor said, "Well, witness ought to walk within four months from the time she was injured." Witness had then been injured two months. Witness further stated that on the former trial she had stated that there wasn't anybody present except the two adjusters when she signed the release, and that is what she now states.

Mrs. Bragg testified for the plaintiff, in rebuttal, that she was the daughter of Mrs. Cox. She went to see her mother about three weeks after she was injured. Witness met Harwell, one of the claim agents. She asked him to come to the hospital, because her mother stated that they had been suggesting a settlement. Witness did not want her mother to settle unless witness was present, and told Harwell that witness did not want any mention made of settlement unless witness was present. He agreed on his word as a gentleman. Witness had not given her mother instructions not to settle until witness came again. She knew nothing about witness' talking to Harwell. Witness stated that her mother kept off of her leg until she went to Memphis.

In its instruction No. 1 the court told the jury in effect that if, at the time of or before the release was executed and the consideration paid the plaintiff, Dr.

Woolsey misrepresented the condition of her ankle and made her believe that her physical condition was much better than it really was, and that she was ignorant of her real physical condition, and that such representations caused her to execute the release, then she would not be bound by it, and the jury would disregard the same and find for the plaintiff.

Instruction No. 2 was as follows: "The plaintiff has been paid the sum of $1,575, and if you find that the sum of $1,575 was sufficient to compensate the plaintiff for the damages which she has sustained, then your verdict will be for the defendant; on the other hand, if you find that the sum of $1,575 which she received was not sufficient to compensate her for the damage which she has sustained by her injuries, then your verdict will be for the plaintiff for such a sum as you may find, from a preponderance of the evidence, would compensate her for the damage which she has sustained, but you will deduct therefrom the said sum of $1,575."

Instruction No. 3 in effect told the jury that if they found for the plaintiff they should take into consideration certain elements of damage (naming them), and allow the plaintiff compensation therefor, and concluded the instruction as follows: "But, if you find that her damages amount to more than $1,575, you will deduct said sum from the amount of your verdict."

The defendant, in its prayers for instructions numbered 3 and 4, in effect prayed the court to instruct the jury that the release which it pleaded in defense to the action was binding on both parties to the settlement, unless the plaintiff could prove that she was induced to enter into the same through the misrepresentation of the defendant as to the nature and extent of her injuries, and that she was ignorant of her condition; that, if the release were valid, the plaintiff would be bound by the amount named therein, although the jury might believe that her injuries would have entitled her to more; that, if a fraud was perpetrated upon her, it was her duty, as soon as she discovered the fraud, to have tendered to the defendant

the amount she received in settlement. The court modified these instructions, and gave the same in substance, except that the court refused to tell the jury that it would be the duty of the plaintiff, if the settlement was made through misrepresentation of the defendant and fraud thereby perpetrated upon her, to tender to the defendant the amount of the settlement as soon as she discovered the fraud. The court also instructed the jury that the burden of proof was upon the plaintiff to show that the release was obtained through false representations on the part of the defendant. The verdict and judgment were in favor of the plaintiff, and the defendant duly prosecutes this appeal.

1. This court has held in *St. Louis, etc. Ry. Co.* v. *Hambright,* 87 Ark. 615, quoting syllabus: "If the chief surgeon of the railroad company in good faith represents to an injured employee that his injuries are slight and temporary, when they are serious and permanent, and thereby misleads him into signing a release of the railroad company from damages, such release is not binding." In this case we held also that it is not a condition precedent to the maintenance of the action that the consideration for the release be tendered to the defendant before the action is instituted. And in *St. Louis, etc., Ry. Co.* v. *Smith,* 82 Ark, 105, we held in effect that, where a passenger was induced to sign the receipt by false representations, which she relied on as to its contents, she would not be bound to return the sum paid before suing to recover the damages sustained. See also *Industrial Indemnity Co.* v. *Thompson,* 83 Ark. 575-584; and *Pekin Cooperage Co.* v. *Gibbs,* 114 Ark. 571, where we said: "Nor is a releasor required to return that which in any event he would be entitled to retain, either by virtue of the release itself or of the original liability, but credit must be given on the judgment." See also *Kilgo* v. *Continental Casualty Co.,* 140 Ark. 336-343.

Under the doctrine of the above cases it is not a condition precedent to the maintenance of this action by the appellee that she tender to the appellant the considera-

tion received by her for the execution of the release. In other words, in this jurisdiction the failure of tender is a matter that does not reach to the basis of the right of action itself. It is not a matter of substance relating to the right to maintain an action, but pertains only to the procedure or remedy. "The broad, uncontroverted rule is that the *lex loci* will govern as to all matters going to the basis of the right of action itself, while the *lex fori* controls all that is connected merely with the remedy." 5 R. C. L., p. 917, § 11. In *Shores-Mueller Co.* v. *Palmer,* 141 Ark. 64-70, we said: "It is well settled in this State that, when a party comes into court to enforce his remedy upon a contract, that remedy will be enforced in accordance with the laws of this State regulating the remedy, and not according to the remedy of the State where the contract was made. *Lawler* v. *Lawler,* 107 Ark. 70, and *Huff* v. *Iowa City State Bank,* 134 Ark. 495." See also *Person* v. *Williams-Echols Dry Goods Co.,* 113 Ark. 467-470.

In Missouri it is held that "a plaintiff cannot recover as against a settlement on the ground that it was induced by fraud, where he had not tendered back the amount received as consideration for the settlement." *Althoff* v. *St. Louis Transit Co.,* 102 S. W. 642, and cases there cited. See also *Metropolitan Paving Co.* v. *Brown, etc.,* 274 S. W. 815. Learned counsel for appellant contend that, since the release under review was executed in Missouri, the Missouri rule as stated above should apply here. But the Missouri Supreme Court treats the matter of tendering or refunding of the consideration for the release in such cases as "a matter going to the basis of the right of action itself." It is a matter of substance, a condition precedent to the maintenance of the action. But under our decisions, as above stated, a failure to refund or make tender of the consideration for the release in such cases relates only to the remedy, and is not a matter of substance pertaining to the right of action itself. It is a universal rule that laws relating to the remedy can have no extraterritorial effect. As is said

in 5 R. C. L., p. 941, § 28, "it is a universally established rule that the affording of remedies in one State for enforcing a contract made in another, depends entirely upon judicial comity, and that the remedies and procedure are therefore governed entirely by the *lex fori*. Considering the matter apart from the principle of comity, there is not the same reason for looking to the intent of the parties in the case of the remedy as in the case of matters pertaining to the substance, for the parties do not necessarily look to the remedy when they make the contract." See numerous cases cited in note.

2. The issue as to whether or not the release was executed under circumstances which constitute fraud on the rights of the appellee was submitted to the jury under correct instructions. The issue was one for the jury under the evidence. The instructions on the issue of fraud conformed to the law as declared by this court in *St. Louis I. M. & S. Ry. Co.* v. *Hambright, supra*; *Chicago Rock Island Ry. Co.* v. *Smith,* 128 Ark. 223; *Western Cabinet, etc., Co.* v. *Davis,* 121 Ark. 370. There was a sharp conflict in the evidence. The verdict of the jury on the issue of fact is conclusive here.

3. Prayer for instruction No. 2, set out above, given at the instance of the appellee, relates only to the question as to whether or not the amount paid appellee was sufficient to compensate her in damages for the injuries she had sustained. If the jury found from the evidence such sum was not sufficient, they should find from a preponderance of the evidence an amount necessary to compensate her for the damages she had sustained, and deduct therefrom the amount she had already received. If this instruction stood alone, the ruling of the court in giving the same would be erroneous and prejudicial, because it does not submit the issue as to whether or not the appellant was liable under the evidence, and does not submit the issue as to whether or not the release was procured by fraud, and makes the entire case turn on whether or not the appellee had received a sufficient sum to compensate her for the damages she had

sustained. But, when this instruction is considered in connection with the other instructions immediately preceding and following, it occurs to us the jury could not have been misled, and that the giving of the instruction was not prejudicial. Instruction No. 2 is sandwiched between 1 and 3, in which the court submitted to the jury the issue as to whether or not the release was obtained through fraudulent representation made by the appellant's agents, and if the jury found for the appellee on the issue of liability, and also for the appellee on the issue of alleged fraud in the release, then they should consider certain elements in determining the amount of her damages. Instruction No. 2 was obviously meant to tell the jury that, if they found for the appellee on the other issues, then her damages should not exceed the sum which had already been paid her, unless the jury believed and found from a preponderance of the evidence that the sum already paid was not sufficient to compensate her for the damages which she had sustained. It tells the jury to deduct the sum already paid from any amount of damages which they found the plaintiff had sustained in excess of that sum.

The bill of exceptions, as corrected by *nunc pro tunc* order of the trial court, which order the court had a right to make, and which we must accept as the true bill, shows that no specific objection was made to instruction No. 2. *Freel* v. *State,* 21 Ark. 213; *Huffman* v. *Sudbury,* 128 Ark. 559-562. Such being the case, the court cannot consider the specific objection here urged to the instruction by the appellant. If the appellant desired that the instruction should cover the particular matters of which it now complains, it should have first drawn the attention of the trial court to these matters by specific objection. *St. Louis, etc., Ry. Co.* v. *Carter,* 93 Ark. 589. Appellant having failed to offer any specific objection to the instruction in the court below, under the general objection made to the instruction we can only consider such instruction to determine whether or not there are any inherent defects therein, and, if so,

whether, in the setting or connection which the instruction has in the charge as a whole, the giving of the instruction was prejudicial to the appellant. We are convinced that when the instruction (No. 2) is so considered in connection with instructions numbered 1 and 3, given at the instance of the appellee, and also with prayers of the appellant for instruction numbered 3 and 4, which were modified and given as modified, it was not calculated to mislead or confuse the jury. Instruction No. 2 was not prejudicial to the appellant. The charge as a whole was not contradictory, and fully submitted all the contested issues of fact to the jury. In *St. Louis, etc., Ry. Co.* v. *Rogers*, 93 Ark. 564-573, we said: "If, from the language used or the relation which the instructions are made by the whole charge to bear toward each other, it is readily seen that they are to be read together without conflict and as a harmonious whole, and they can be so read, then it is our duty to so treat them." Since the announcement of this rule in the above case, it has been consistently followed by this court in numerous cases. See *Miller Rubber Co.* v. *King,* 147 Ark. 302-308; *Yellow Rose Mining Co.* v. *Straight,* 133 Ark. 206-213; *St. Louis, etc., Ry. Co.* v. *Cobb,* 126 Ark. 225-230.

4. The appellant contends that the court's charge was defective because it in effect ignored the question of the defendant's liability for the derailment, and in effect directed a verdict for the plaintiff on that issue. At the conclusion of the testimony the appellant asked the court to instruct the jury to direct a verdict in its favor because, under the pleadings and the evidence, the plaintiff is not entitled to recover. The court refused this prayer, and in instruction No. 3, given at the instance of the appellee, told the jury, "if you find for the plaintiff, you will, in fixing the amount of damages, take into consideration the damages," etc. This instruction No. 3 was sufficient to submit the issue as to the liability of the appellant under the pleadings and all the testimony adduced. The appellant did not ask any more specific

submission on the issue of appellant's liability. The other instructions in the cause, given both at the instance of the appellee and the appellant, were on the issue as to the release and its effect on the appellee's alleged cause of action. The appellee alleged that she was a passenger on one of appellant's interstate trains, and that the same was derailed, and that she was thereby injured. The appellant admitted these allegations. The appellee proved the above allegations, and that was sufficient to carry the issue of liability to the jury, and, in the absence of any exculpatory evidence, justified the verdict of the jury in favor of the appellee on that issue. While the burden was upon the appellee to allege and prove the liability of appellant, she met this burden and established a *prima facie* case when she proved that she was a passenger on appellant's train and that the train was derailed, resulting in her injury. *Gleason* v. *Ry. Co.*, 140 U. S. 435-444; *Kelly* v. *Jackson*, 6 Peters 632. There is no error which calls for reversal of the judgment, and the same is therefore affirmed.

EVERSMEYER v. McCOLLUM.

Opinion delivered May 17, 1926.

1. DEEDS—APPLICATION OF RULE IN SHELLEY'S CASE.—The rule in Shelley's Case is applicable only when the language used in the conveyance creates a limitation to the heirs in general of the grantor.
2. REMAINDERS—APPLICATION OF RULE IN SHELLEY'S CASE.—Under a conveyance to A and her husband for their natural lives with remainder over to her children, the rule in Shelley's Case has no application, and the deed conveyed only a life estate to A and her husband, with remainder to her children.
3. REMAINDERS—WHEN CONTINGENT.—Where land was conveyed to A and her husband for their natural lives and at their death to A's children or descendants, and, if none such be in existence at their death, to a named child of the husband by a former marriage, *held* that during A's lifetime her child was a contingent remainderman, to whom no title passed.

4. REMAINDERS—RIGHTS OF CONTINGENT REMAINDERMAN.—Grantees of a contingent remainderman may bring an action to prevent waste of the remainder estate, but not to quiet title in themselves subject to the estate of the life tenant.

Appeal from Hempstead Chancery Court; *C. E. Johnson,* Chancellor; reversed in part.

STATEMENT OF THE FACTS.

James H. McCollum brought this suit in equity against P. F. Hein, W. M. Kennedy, J. B. Yates, D. R. Hammet and A. G. Guise, to enjoin them from cutting timber on the lands embraced in the complaint, and to declare that the plaintiff's title to said land may be confirmed and quieted forever, subject to the life estate of the defendant P. F. Hein; that an oil and gas lease executed by P. F. Hein to J. B. Yates be canceled, and that the plaintiff have a decree against the defendants for the value of all the crossties made by them of the timber which they had cut on said land.

P. F. Hein filed a separate answer in which he asserted title to the land embraced in his complaint, and filed a cross complaint against the plaintiff and A. H. Eversmeyer and Hattie Eversmeyer, his wife, and Dr. W. B. H. Pool and Jessie G. B. Pool, his wife, and asked that they be made defendants to the action.

In the event it was decreed that P. F. Hein only owned a life estate in 220 acres of land to which he asserted title, and which is described in the complaint, during the life of Mary Pool, he asked to recover against A. H. Eversmeyer, from whom he had a warranty deed to said land, the sum of $8,800 on account of failure of his title.

The suit involves the construction of a deed from T. R. Billingsley and wife to Mary Pool and others, executed on the 18th day of July, 1910. Omitting the description of the land, the body of the deed is as follows:

"That T. R. Billingsley and wife, Lou Billingsley, of Hempstead County, Arkansas, for and in consideration of the sum of forty-five hundred dollars ($4,500), the

receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto Mary A. Pool for and during her natural life, and at her death to Philander Pool, if alive, for and during his natural life, and at his, Philander's, death, the said Mary A. Pool being dead, if there should be a child or children born of the said Mary Pool or descendants, and if none such be in existence on the death of Philander Pool, then said land shall go to and become the property of Nannie L. Mason (formerly Nannie L. Pool), the following lands lying in the county of Hempstead and State of Arkansas, to-wit:

"To have and to hold the same unto the said Mary A. Pool for and during her natural life, and at her death to Philander Pool, if alive, for and during his natural life, and at his, Philander's, death, the said Mary A. Pool being dead, if there should be a child or children born to the said Mary Pool or descendants of such child or children, the land herein described shall go to such child or children or their descendants, and, if none such be in existence on the death of Philander Pool, then said land shall go to and become the property of Nannie L. Mason (formerly Nannie L. Pool), with all appurtenances thereunto belonging."

The record shows that on February 22, 1910, Philander Pool, Mary Pool, his wife, William B. H. Pool and Nannie L. Mason and her husband J. A. Mason filed an *ex parte* petition in the Henderson Circuit Court for the purpose of having sold 176 acres of land situated in Henderson County, Kentucky.

The petition alleges that William B. H. Pool, who is 27 years of age, is the child of Mary Pool, and the only child born to her now living. Philander Pool is alleged to be 69 years and Mary Pool 66 years of age. The petition further alleges that Philander Pool resides in McCracken County, Kentucky, and that William B. H. Pool resides in the State of Arkansas, and that Nannie L. Mason resides in Union County, Kentucky. The reason given for selling the land is its inconvenient location to the home of the petitioners and the infirm condition of

Philander Pool and Mary Pool. The petitioners ask that the proceeds of sale, after paying the costs, be paid in the following manner: One-third to Philander Pool and the remainder of the proceeds to be reinvested by the court in other real estate with the title thereto in the same manner and as provided by the conditions and provisions of the deed of B. H. Hendrick and wife to Philander Pool and others. The deed of B. H. Hendrick and wife was executed on the 11th day of September, 1889, and contains the following:

"One-third to Philander Pool and the other two-thirds to his wife, Mary Pool, for and during her natural life, and at her death to go to Philander Pool, if alive, for and during his natural life, and if at his, Philander's, death, the said Mary Pool being dead, there should be living a child or children born of the said Mary Pool, or descendants of such child or children, said land shall go to such child or children, or their descendants, and, if none such be in existence at the death of said Philander Pool, then said balance of two-thirds of said land shall go to and become the property of Nannie L. Pool and her heirs forever."

On June 4, 1910, the same petitioners filed in the same court a supplemental petition with which was submitted the written proposition of T. R. Billingsley of Hempstead County, Arkansas, to sell and convey to them for a consideration of $4,500, 220 acres of land in Hempstead County, Arkansas, which is described in said supplemental petition, and which is the land in controversy in this suit.

The prayer of the petition was granted by said Henderson Circuit Court, and the sum of $4,500 of the remaining two-thirds of the proceeds of the sale of the land in Henderson County, Kentucky, was ordered by said Henderson Circuit Court to be invested in said Hempstead County, Arkansas, lands.

The commissioner was ordered and directed to pay said sum of $4,500 to said T. R. Billingsley upon the delivery of a warranty deed conveying said land to said

petitioners. In the order with reference to the vesting of the title to said Hempstead County land in the petitioners the following language is used:

"Said deed is to vest in the petitioners the same title in said land and by the same conditions and terms as the two-thirds interest was vested in them in the conveyance filed in this cause—that is, to Mary A. Pool, for and during her natural life, and at her death to the said Philander Pool, if alive, for and during his natural life, and at his, Philander's, death, the said Mary Pool being dead, [if] there should be a child or children born of the said Mary Pool, or descendants of such child or children, said land shall go to such child or children or their descendants, and if none such be in existence on the death of Philander Pool, then said two-thirds of said land shall go to and become the property of Nannie L. Pool (now Nannie L. Mason) and her heirs forever."

Pursuant to this order the deed of T. R. Billingsley and wife as copied above was executed.

On September 20, 1915, Mary Pool instituted an action in the chancery court of Hempstead County, Arkansas, against T. R. Billingsley, Philander Pool, Nannie L. Mason and William B. H. Pool, to reform the deed above referred to from T. R. Billingsley so as to vest the title in fee simple in said Mary Pool. In her petition Mary Pool alleges that William B. H. Pool was only her foster son.

William B. H. Pool filed an answer in which he denied all the allegations of the petition, and alleged the truth to be that he was the lawful son of Mary Pool and her husband, Philander Pool.

The court found from the evidence that there was no equity in the complaint of Mary Pool, and it was decreed that it should be dismissed for want of equity. No appeal was taken from this decree.

On the 8th day of April, 1918, Philander Pool and Mary Pool, his wife, for the consideration of $2,500 paid by A. H. Eversmeyer, conveyed to him by warranty deed

the 220 acres of land involved in this suit. This deed was duly filed for record on April 16, 1919.

On the 6th day of November, 1919, A. H. Eversmeyer and Hattie Eversmeyer, his wife, for the consideration of $1,000 paid by P. F. Hein, conveyed to him by warranty deed the 220 acres of land involved in this suit. This deed was duly filed for record on the 16th day of February, 1920. On the 5th day of November, 1919, Nannie L. Mason, who was the daughter of Philander Pool by a former wife, executed a quitclaim deed to Mary Pool to the 220 acres of land involved in this action. This deed was duly filed for record on the 16th day of February, 1920.

On the 27th day of November, 1915, William B. H. Pool executed a quitclaim deed to his wife, Jessie G. B. Pool, to the 220 acres of land in this suit. This deed contained a proviso that she was to make a deed to James H. McCollum to the south 80 acres for defending the title to said lands. This deed was filed for record on December 1, 1915.

On July 1, 1916, William B. H. Pool and Jessie G. B. Pool, his wife, executed a warranty deed to James H. McCollum to said 80 acres of land, which is also involved in this suit.

The record shows that Philander Pool is now dead. The evidence as to whether or not William B. H. Pool was born as the fruits of the marriage of Philander Pool and Mary Pool will be stated and discussed under an appropriate heading in the opinion.

On the 6th day of November, 1924, a decree was entered of record in which the court found that Philander Pool was dead; "that Mary Pool was eighty years of age; that William B. H. Pool was, at the time of the execution of the Billingsley deed and at the time of the filing of the suit herein, and at the time of the trial, the only child of Mary Pool; that plaintiff was the owner of the 80 acres of land described in the complaint, and Jessie G. B. Pool was the owner of the other 140 acres in controversy, subject to the estate for the life of Mary

Pool; that the Yates oil and gas lease should be canceled; that the deeds from Mary Pool and Philander Pool to Eversmeyer and from Eversmeyer and wife to Hein should be canceled, except as to the estate for the life of Mary Pool; and that the plaintiff's title to the 80 acres and the title of Jessie G. B. Pool to the 140 acres should be quieted and confirmed, subject to the said life estate; that the defendants, P. F. Hein and W. M. Kennedy, should be perpetually enjoined from cutting timber and crossties and committing waste on the plaintiff's 80 acres; that in the exchange of lands the said P. F. Hein had paid the sum of $8,240 for the 220 acres, which sum was the agreed value of said 220 acres by and between the said A. H. Eversmeyer and wife and P. F. Hein at the time of the sale and exchange of said lands, and that the agreed value of the Nevada County land, at the time of the sale and exchange, was $12,000; that, on account of the infirmities and failure of title of the Hempstead County land, said P. F. Hein had been damaged in the sum of $8,240, and was entitled to recover said sum from the said A. H. Eversmeyer and Hattie Eversmeyer, his wife. Decree was entered in accordance with said findings, canceling said oil and gas lease and deeds, and quieting and confirming plaintiff's title to the 80 acres and Jessie G. B. Pool's title to the 140 acres, subject to said life estate, and perpetually enjoining the defendants, Hein and Kennedy, from cutting crossties and timber or permitting waste on plaintiff's said 80 acres, and rendering judgment against the defendant Hein in favor of plaintiff for $70.80, and rendering judgment against the defendants A. H. Eversmeyer and wife in favor of P. F. Hein on his cross-complaint for $8,240, and declaring the same to be a lien on the Nevada County land and said life estate in said Hempstead County land, and ordering said land sold in default in the payment of said sum, and for which execution might issue."

The case is here on appeal.

Jobe & Jobe, for appellant.

U. A. Gentry, for appellee.

HART, J., (after stating the facts). The decision of the chancellor is based upon the theory that the deed of T. R. Billingsley and wife to the 220 acres of land in Hempstead County, Arkansas, conveyed a life estate to Mary Pool with the remainder to Dr. W. H. B. Pool, who was found to be her son.

In the first place it is sought to reverse the decree upon the theory that the Billingsley deed conveyed the fee to Mary Pool, under the rule in Shelley's Case, as declared in *Hardage* v. *Stroope,* 58 Ark. 303, and *Ryan* v. *Ryan,* 138 Ark. 362.

Mary Pool and Philander Pool, her husband, conveyed the land by warranty deed to A. H. Eversmeyer, and he in turn conveyed it by warranty deed to P. F. Hein, who claims to be the present owner.

We do not think the rule in Shelley's Case has any application under the language of the Billingsley deed. In looking for the intention of the grantor we must be guided by the words which he has used, reading them in the light of established principles of law. Under the terms of the deed of T. R. Billingsley, the entire fee in the 220 acres in controversy is conveyed. The fee is carved up into a life estate for the benefit of Mary Pool and her husband, Philander Pool, with the remainder over to Dr. W. H. B. Pool, her child, and, in case of his death before the life tenants, to other persons. It is clear from the language used that it was intended that Mary Pool and her husband should only have an estate during their natural lives, and that upon their death the land should go to the child or children born of Mary Pool, or the descendants of such child or children. The deed further provides that, if there be no child or children or their descendants in existence at their death, then the land should become the property of Nannie L. Mason, who was the child of Philander Pool by a former wife. Thus it appears from the language used that the words, "child or children born of Mary Pool or descendants of such child or children," meant the issue of Mary Pool living at her death, or at the death of her husband

Philander Pool, and not the whole line of succession which would be included under the words, "heirs of the body," and the words used must necessarily be construed to be the words of purchase, and the rule in Shelley's Case does not apply. The language of the deed clearly gives a life estate to Mary Pool, with the remainder over to her son, Dr. W. H. B. Pool, under the rule announced in the repeated decisions of this court. *Horsley* v. *Hilburn,* 44 Ark. 458; *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18; *Georgia State Savings Association* v. *Dearing,* 128 Ark. 149; and *Gray* v. *McGuire,* 140 Ark. 109, and cases cited.

The rule in Shelley's Case is applicable only when the language used in the conveyance creates a limitation to the heirs of the grantor in general. If the limitation is to the heirs of the body of the grantee, the rule in Shelley's Case does not apply.

Philander Pool is dead, and Mary Pool is still alive. It follows then that the chancellor was correct in holding that only a life estate was conveyed to Mary Pool, and his holding that Dr. W. H. B. Pool is the remainderman depends upon whether the proof shows him to be the son of her marriage with Philander Pool.

On this phase of the case the testimony is in irreconcilable conflict. Philander Pool and Mary Pool were both witnesses in the case, and both testified in positive language that Dr. W. H. B. Pool was not their son.

According to the testimony of Philander Pool, he was 76 years old when he testified in January, 1916, and he married Mary Pool in 1881. His wife had a miscarriage in 1885, and the attending physician persuaded him to take a child which he brought to his house, and tell his wife that it was a child born unto her. The child was less than twenty-four hours old when the physician brought him there. They reared the child as their own, and always spoke of him as their son. Dr. W. B. H. Pool is the child in question. Mary Pool was of nearly the same age as her husband, and corroborated his testimony in the matter.

On the other hand, Dr. W. B. H. Pool testified that he was raised and educated by Philander Pool and Mary Pool, and was always told by them that he was their own son. There never was any intimation that such was not the case until his mother filed the suit in the Hempstead Chancery Court in 1915, which had for its object the reformation of the Billingsley deed so as to vest title in fee simple in her to the 220 acres of land in question.

U. L. Lovell, who worked for and boarded with the Pools when Dr. Pool was born, told in detail about being sent for the physician, and the birth of the child about seven o'clock in the morning. He worked with the Pools for about eight months after this, and never heard any intimation that Dr. Pool was not the child of Mary Pool. He was present at the house after the physician was summoned, and does not think that any child could have been brought in and substituted as a child born of Mary Pool on that morning, without his knowledge.

Several other persons who lived in the neighborhood testified that Dr. Pool was regarded as the son of Mary Pool and Philander Pool, and that they never heard his birth questioned during his childhood.

When the petition for the division of the Kentucky land in the circuit court of Henderson County was filed, Mary Pool signed the petition in which Dr. Pool was represented to be the child of herself and her husband. At this time he was 27 years of age. The form of the deed used in the conveyance by Billingsley was expressly provided in the order of the court to be the same as that used in the deed to the Kentucky land. It was recognized by the parties that Mary Pool had only a life estate in the Henderson County, Kentucky, land. It would seem that this was the purpose in providing that the grantees should be described in the deed in the same way as they were described in the deed to the Kentucky land. Of course, it could make no difference to Billingsley who the grantees were. He evidently executed the deed in the manner provided by the petitioners in the order they procured from the circuit court in Henderson County, Kentucky.

To avoid the force of their action in the circuit court proceeding in Henderson County, Kentucky, Mary Pool and Philander Pool claimed that they were persuaded by false statements to make the deed in this way.

In the first place, it may be stated that the attendant circumstances do not warrant such a finding, and no statement whatever of what Dr. Pool said to cause them to sign a false application is testified to by them. In the next place, no complaint was made from the time this was done, which was in July, 1910, until Mary Pool instituted the chancery suit in Hempstead County, Arkansas, in September, 1915. The fact that the petitioners asked the Henderson Circuit Court to have two-thirds of the proceeds derived from the sale of the Henderson County land invested in the Hempstead County land and the grantees to be described just as they were in the deed to the Kentucky land, shows that the parties acted with deliberation, and intended for their rights to become the same in the Arkansas land as they were in the Kentucky land.

When all the attending facts and circumstances are considered, it cannot be said that the finding of the chancellor on this point is not sustained by a preponderance of the evidence.

Both A. H. Eversmeyer and P. F. Hein have appealed to this court. The chancellor found that P. F. Hein was entitled to recover on his cross-complaint against A. H. Eversmeyer the sum of $8,240 as damages for the failure of his title.

It is insisted that this is wrong because Dr. Pool had only a contingent remainder in the land under the holding in *Watson* v. *Wolff-Goldman Realty Co.*, 95 Ark. 18, and *Liberty Central Trust Co.* v. *Vaughan*, 167 Ark. 219, and cases cited. Certainly, when the deed was executed, it was uncertain who the remaindermen were, and it is not possible now to ascertain who they will be until the death of Mary Pool. Therefore, under the authorities cited, the remainder was contingent, and no title passes to the contingent remaindermen until the happen-

ing of the contingency, and, strictly speaking, the recovery could not be had.

It is well settled, however, in this State that chancery cases are tried *de novo* upon the record made in the court below, and we do not think that the finding of the chancellor in this respect was against the weight of the evidence.

It appears from the evidence in the record that Mary Pool is over 80 years of age and is very feeble. Dr. Pool is in the prime of life, and is a married man. The record shows that he already has two minor children. P. F. Hein executed an oil and gas lease to the land in question under the belief that he had received a title in fee to the land in his deed from A. H. Eversmeyer, and this lease is canceled. When all these matters are considered, it is plain that the chancellor might have found that he had been already damaged in a sum at least as great as that found by him. Therefore the finding of the chancellor in this respect will be sustained.

Under the authorities above cited, and particularly that of *Watson* v. *Wolff-Goldman Realty Co.*, 95 Ark. 18, James H. McCollum as the grantee of Dr. W. H. B. Pool as the contingent remainderman, and Jessie G. B. Pool as grantee of Dr. W. H. B. Pool, had the right to bring an action against P. F. Hein and the other defendants to prevent waste, but they had no right to have the title quieted in them, subject only to the life estate of Mary Pool. As above stated, no title passed to the contingent remaindermen until the happening of the contingency, which was, if their grantor was living at the time of the death of Mary Pool, and in the interim they would have no right to have the title quieted in themselves subject to the life estate of Mary Pool, because this would interfere with the rights of the two minor children of Dr. Pool, and possibly with the rights of appellants. It may be that Dr. Pool might die before his mother. In which event his two minor children would become the contingent remaindermen, and

the land would go to them at the death of the life tenant, Mary Pool. If the two minor children of Dr. Pool should die before the death of Mary Pool—a contingency which is possible—then Nannie L. Mason would become the remainderman, and, inasmuch as she has conveyed her interest in the land to Mary Pool, the life estate and the remainder would be merged.

For the error in entering a decree quieting the title in James H. McCollum and Jessie G. B. Pool, subject to the life estate of Mary Pool, the decree must be reversed, and the cause remanded with directions to render a decree declaring them to be contingent remaindermen, as decided in this opinion. In all other respects the decision of the chancellor was correct, and the decree will be affirmed except as indicated.

ROOT REFINERIES *v.* GAY OIL COMPANY.

Opinion delivered May 17, 1926.

1. FRAUDULENT CONVEYANCES—CONSTRUCTION OF BULK SALES ACT.—Bulk Sales Act (Crawford & Moses' Dig., § 4870), providing that the sale in bulk of any part or the whole of a stock of merchandise and the fixtures pertaining to the conduct of any such business, otherwise than in the ordinary course of trade and the ordinary prosecution of the business of the seller, shall be void as against creditors of the seller, unless the terms of the act are complied with, *held* comprehensive enough to protect the creditors of wholesale as well as retail merchants.
2. FRAUDULENT CONVEYANCES—BULK SALES ACT—MERCHANDISE.—Merchandise, under the Bulk Sales Act, means something that is sold every day, and is constantly going out of the store and being replaced by other goods.
3. FRAUDULENT CONVEYANCES—BULK SALES ACT—MERCHANT.—A company engaged in refining crude oil into gasoline and other products and in selling such products from day to day in the same way that they are sold by merchants is a dealer in merchandise within the Bulk Sales Act.

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

STATEMENT OF FACTS.

This is an action instituted in the circuit court by the Root Refineries against the Gay Oil Company to recover the sum of $2,253.88, the invoice price of two cars of gasoline and one car of fuel oil.

The defendant filed an answer in which it denied that it purchased the goods sued for from the Root Refineries. It avers the facts to be that it purchased the gasoline and fuel oil in question from the Petroleum Products Company, and alleges that the company is indebted to it in the sum of $3,217.18, and pleads the same as a set-off. The defendant also alleges that the plaintiff is indebted to it in the sum of $61.66 for merchandise.

The record shows that on July 21, 1921, the Petroleum Products Company made a contract with the Rose City Cotton Oil Company of Little Rock to furnish it with fuel oil. The Petroleum Products Company made an agreement with the Gay Oil Company, whereby it was to carry out its contract with the Rose City Cotton Oil Company. By the terms of the contract the Petroleum Products Company was to furnish fuel oil to the Rose City Cotton Oil Company for a stipulated period of time, and the contract contained a provision by which the Petroleum Products Company guaranteed that the cost of the fuel oil furnished would not exceed the cost of coal. The Petroleum Products Company made an agreement with the Gay Oil Company by which the latter should furnish the fuel oil to the Rose City Cotton Oil Company for it under its contract. The fuel oil was furnished by the Petroleum Products Company to the Rose City Cotton Oil Company, and payments were made from time to time. During the months of October and November, 1921, the amount of fuel oil furnished invoiced $3,217.98. The fuel oil thus furnished exceeded the cost of coal, and for this reason the Rose City Cotton Oil Company declined to pay it. In the month of December, 1921, the Gay Oil Company, in the regular course of business, purchased from the Petroleum Products Company the gasoline and oil sued for in this case, amounting to

$2,253.84. Subsequently the Petroleum Products Company sold its physical properties, plant, refinery and real estate to the Root Refineries for a consideration of $130,000. It only retained its stock of oil on hand, which invoiced about $10,000.

According to the evidence for the plaintiff, it notified the Gay Oil Company of the purchase of the property of the Petroleum Products Company, and told the Gay Oil Company that it would fill its orders with the Petroleum Products Company for the two cars of gasoline and one car of fuel oil, provided the account was paid promptly, and that there would be no counterclaim on account of the alleged contract of guaranty between the Petroleum Products Company and the Rose City Cotton Oil Company, and the Gay Oil Company.

According to the evidence for the defendant, it thought that the Petroleum Products Company had shipped it the two cars of gasoline and one car of fuel oil, and did not know the Root Refineries in the transaction at all. In other words, the Gay Oil Company did not know that the Root Refineries had purchased the property of the Petroleum Products Company until after the two cars of gasoline and one car of fuel oil had been shipped to it under the order sent to the Petroleum Products Company.

The jury found against the plaintiff on its claim, and brought in a verdict in favor of the defendant for the amount by which its set-off against the Petroleum Products Company exceeded the claim of the Root Refineries.

From a judgment against it in favor of the Gay Oil Company for said amount the Root Refineries has duly prosecuted an appeal to this court.

Rogers, Barber & Henry, for appellant.

Moore, Smith, Moore & Trieber and *Geo. A. McConnell,* for appellee.

HART, J., (after stating the facts). It is conceded that the claim of the plaintiff was submitted to the jury upon proper instructions and that it is concluded by the verdict of the jury as to the account sued on by it.

It is claimed, however, that there is nothing in the record to show that the plaintiff assumed the debts and liabilities of the Petroleum Products Company, and that it is not liable to the defendant for any claim it might have against the Petroleum Products Company. This is true, but the liability attaches on other grounds.

The Petroleum Products Company sold and conveyed its business and all its property used in connection therewith to the Root Refineries for the sum of $130,000. It only reserved from the sale about $10,000 worth of oil, which it had in stock. It went out of business, and the Root Refineries succeeded to its business and operating plant. This summary sale of the business of the Petroleum Products Company to the Root Refineries was not in the ordinary course of business, and the transaction falls within the prohibition of our Bulk Sales Law. That statute provides that the sale in bulk of any part of, or the whole of, a stock of merchandise and the fixtures pertaining to the conduct of any such business, otherwise than in the ordinary course of trade and in the ordinary prosecution of the business of the seller, shall be void against the creditors of the seller unless the terms of the act are complied with. The language of the act is very broad and comprehensive, and by its terms protects all creditors of merchants alike.

The court has held that the language of the statute is sufficiently broad and comprehensive to protect the creditors of wholesale merchants as well as the creditors of retail merchants. *North American Provision Co.* v. *Fischer Lime & Cement Co.,* 168 Ark. 106.

No attempt was made to comply with the provisions of our Bulk Sales Law. The Petroleum Products Company sold practically all of its business, including its fixtures, to the Root Refineries for $130,000, which is a sum greatly in excess of the claim of the defendant. No other claim has been proved against the Petroleum Products Company. Therefore the assets received by the Root Refineries are far in excess of the claim of the Gay Oil Company.

In reaching this conclusion we are not unmindful that in *Robbins* v. *Fuller,* 148 Ark. 173, it was held that our Bulk Sales statute refers to the trade fixtures connected with the business, and not to the building in which the business is carried on.

The record shows that the Root Refineries bought the physical properties of the Petroleum Products Company for $130,000. This included the real estate, trade fixtures and all the remainder of its property except a stock of oil which invoiced about $10,000. The Petroleum Products Company was engaged in refining oil and selling gas, oil, fuel oil, gasoline and naphtha. While there was no separate valuation of the trade fixtures, in the very nature of things it is inferable that they were worth more than the amount of the claim of the Gay Oil Company, which is the only one proved in this case.

In this connection it may be stated that in *Ramey-Milburn Co.* v. *Sevick,* 159 Ark. 358, it was held that a person operating a veneer mill and sawmills, at which logs were manufactured into lumber and then sold, is not within the purview of our Bulk Sales statute, though he sells substantially all the lumber he has on hand at a particular time. The reason is that the sale of the lumber was only an incident to the operation of the manufacturing plant.

On the other hand, if the main business of Sevick had been to operate a lumber yard, the sale in bulk of his lumber and trade fixtures would have fallen under the ban of the statute, although he might have operated a sawmill and a veneer mill for the purpose of supplying, in whole or in part, stock for his lumber yard.

Merchandise means something that is sold every day, and is constantly going out of the store and being replaced by other goods. *Boise Association of Credit Men* v. *Ellis,* 26 Idaho 438, 144 Pac. 6 L. R. A. 1915E, 917. Such is the effect of our holding in *Fisk Rubber Co., Inc.,* v. *Hinson Auto Co.,* 168 Ark. 418, where it was held that an automobile repair shop did not fall within the prohibition of the statute, although there were occasional

sales of the various accessories which were kept for the purpose of repairing cars. The reason given was that the principal business of the company was repair work, and the supplies were carried for use in that business. The court said that the occasional sales of supplies constituted an inconsequential part of the principal business.

The Petroleum Products Company was refining crude oil, which it purchased, into the various products above enumerated and selling the same from day to day in precisely the same manner as other articles of commerce are bought and sold in trade by merchants. It was doing something more than selling its products as a necessary incident to refining oil. It was engaged in selling its various products in the same way that they are sold by merchants. The record shows that it was making contracts with various companies to supply them with such products as it sold. It made a contract with the Gay Oil Company to carry out some of its contracts which it had made with other companies. When the record is construed as a whole, it shows that the Petroleum Products Company was carrying on a business or trade in merchandise, and that it was not merely engaged in refining oil and selling the refined products as an incident to its main business. Hence the Petroleum Products Company fell within the ban of the statute when it sold its trade fixtures in connection with its other property.

The proof fully established the claim of the defendant against the Petroleum Products Company. Hence the court properly rendered judgment in favor of the defendant against the plaintiff for the amount its claim exceeded the claim of the plaintiff.

It follows that the judgment will be affirmed.

BANKERS' RESERVE LIFE COMPANY v. CROWLEY.

Opinion delivered May 17, 1926.

1. INSURANCE—EFFECT OF FALSE REPRESENTATION.—Where answers in an application for life insurance constituted merely representations, a misrepresentation or omission to answer will not avoid the policy unless willfuly or knowingly made with intent to deceive.
2. INSURANCE—FALSE REPRESENTATIONS—KNOWLEDGE OF AGENT.—A life insurance company will be bound by a policy where the insured made false representations as to his physical condition, if the agent soliciting the insurance was charged with the duty of writing the data concerning the applicant's physical condition, and, in the course of the examination, learned the applicant's true condition.
3. INSURANCE—FRAUD IN PROCUREMENT OF POLICY.—If an insurance agent, in collusion with an applicant, even though acting within the apparent scope of his authority, perpetrates a fraud upon the insurance company by making false and fraudulent representations upon which the insurance is obtained, such fraud will vitiate the policy.
4. INSURANCE—FRAUD—BURDEN OF PROOF.—The burden of proving that a life insurance policy was procured by fraud is upon the insurer.
5. INSURANCE—PENALTY AND ATTORNEY'S FEES.—The twelve per cent. penalty allowed by Crawford & Moses' Dig., § 6155, is given as damages for a failure to comply with the contract of payment, and the attorney's fee is allowed as compensation for the cost of collecting the debt; and such penalty and attorney's fee are collectable in a chancery court as in any other court.

Appeal from Greene Chancery Court; *J. M. Futrell*, Chancellor; reversed in part.

Huddleston & Little, for appellant.

Jeff Bratton, for appellee.

HART, J. This is a suit in equity by the Bankers' Reserve Life Company against J. L. Crowley, administrator of the estate of Elizabeth Crowley, deceased, to cancel a policy of insurance in the sum of $5,000 issued by plaintiff on the 30th day of July, 1923, on the life of Elizabeth Crowley, in which her executor or administrator is named as the beneficiary. The ground on which the policy is sought to be canceled is that the insured

gave false answers in her application for insurance to the following questions:

"13. Name below all causes for which you have consulted a physician in the last ten years: Illness, flu. Number of attacks, 1. Date, Dec. 1922. Severity and duration, five days. Any remaining effects? No. Attending physician name and address. W. J. Blackwood, Walcott, Ark. 14. Are you in good health as far as you know and believe? Yes. 15. Has any medical examiner or physician formally or informally expressed an unfavorable opinion as to your insurability or health? No. 16. Have you had, or been advised to have, any surgical operation? No. 17. Have you ever been under observation, care, or treatment in any hospital, sanatorium, asylum, or similar institution? No. 21. Have you now, or have you ever had, any other disease or any injury? Give details, dates, and names and addresses of doctors consulted. No."

J. L. Crowley, the husband of Elizabeth Crowley, was appointed administrator of her estate, and filed an answer and cross-complaint against the insurance company, in which he denied the allegations of the complaint, and asked for judgment against the insurance company in the sum of $5,000 with interest from the 13th day of November, 1923, at six per cent.; for 12 per cent. penalty, and for reasonable attorney's fees, costs, and all other general relief.

The record contains a stipulation between counsel for the plaintiff and defendant as follows:

"It is undisputed that questions numbered 13 to 17 inclusive and question number 21 were propounded to the assured in the form set out in the complaint and that she gave the answers thereto in the form set out in the complaint, and the only question at issue in this lawsuit is as to whether the answers to these questions, or any of them, were false at the time and were known by the assured then and there to be false, and whether they were made with the false and fraudulent purpose and intent to deceive the plaintiff company, and did in fact deceive

plaintiff company and cause it to issue the policy in question.

"It is undisputed that the policy mentioned and described in the complaint was delivered to the deceased on or about September 1, 1923, and that she departed this life intestate while a resident of Greene County, Arkansas, on or about November 13, 1923, and that J. L. Crowley is the duly appointed, qualified and acting administrator of said estate.

"The above and foregoing facts are undisputed, and it will not be necessary to formally introduce the application for insurance, medical examination made by Dr. W. J. Blackwood, the policy itself, nor the appointment of J. L. Crowley as administrator, it being agreed and understood that each of these instruments may be considered by the court as though formally introduced and identified."

After hearing the testimony in the case, the chancellor found the issue on the question of false representations in favor of the defendant. It was therefore decreed that the complaint of the paintiff should be dismissed for want of equity and that the defendant recover from the plaintiff the sum of $5,000, with accrued interest. The defendant, however, was denied a recovery on his claim under the statute for penalty and attorney's fees.

The plaintiff has duly prosecuted an appeal from that part of the decree allowing a recovery against it. The defendant has taken a cross-appeal from that part of the decree refusing to allow twelve per cent. damages and attorney's fees allowed under § 6155 of Crawford & Moses' Digest.

It is expressly agreed that the answers of the applicant copied above are representations and not warranties. In this connection it may be stated that a noncompliance with a warranty operates as an express breach of the contract of insurance, while false representations render the policy void on the ground of fraud. The questions propounded in the application as set out

above call for answers founded on the knowledge or belief of the applicant, and a misrepresentation or omission will not avoid the policy unless willfully or knowingly made with an intent to deceive. *Metropolitan Life Ins. Co.* v. *Johnson,* 105 Ark. 101.

In *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450, it was held that knowledge affecting the rights of the insured, which comes to the agent of the insurance company while he is performing the duties of his agency in receiving applications for insurance and delivering policies, becomes the knowledge of the company; and the insurance company is bound thereby, where the agent who solicited the business was charged with the duty of asking the applicant questions concerning his physical condition.

It was further held that a life insurance company will be bound under a policy of life insurance where the applicant and insured made false statements concerning his physical condition, where the agent soliciting the insurance was also charged with the duty of writing the data concerning the applicant's physical condition, and where the agent, in the course of the examination, learned the applicant's true condition.

It was also held that if an agent, in collusion with the applicant, even though acting within the apparent scope of his authority, perpetrates a fraud upon the insurance company by making false and fraudulent representations upon which the insurance is obtained, such fraud will vitiate the policy.

The rule established in these cases was expressly reaffirmed in *Home Mutual Benefit Association* v. *Mayfield,* 142 Ark. 240, and *Missouri State Life Insurance Co.* v. *Witt,* 161 Ark. 148.

In the present case Dr. W. J. Blackwood acted for the company in taking the application for insurance and in writing down the answers of the applicant copied above, and also in the medical examination of her. He was likewise the physician of the applicant before she applied for the insurance. Hence, under the principles

of law above announced, in order to cancel the policy and defeat an action on it, it was necessary for the company to prove that the statements and answers as written in the application were false, and that they were intentionally so made by the assured, and that the insurance company relied and acted upon such statements, or that the insured and Dr. Blackwood, as agent of the company, acted collusively in the matter for the purpose of securing the insurance.

In this conection it may be also stated that, under these authorities, the burden of proof of establishing the fraud was upon the insurance company, and, under our rules of practice, findings of fact by a chancery court are allowed to stand upon appeal unless they are clearly against the preponderance of the evidence.

The record shows that Dr. W. J. Blackwood was the agent of the company in taking the application of Mrs. Elizabeth Crowley for insurance. According to his testimony, he had been given blanks by the agent of the insurance company for the purpose of soliciting insurance. He was also the local medical examiner of the company, and made the medical examination of Mrs. Elizabeth Crowley on the 17th day of July, 1923, and the policy was delivered to her on the 30th day of July, 1923. The premium amounted to $219, and a note for that amount was given, signed by J. L. Crowley, the husband of the insured, and by Dr. Blackwood and another person.

J. L. Crowley and Mrs. Elizabeth Crowley, his wife, were tenant farmers in Greene County, Arkansas. On the 12th day of October, 1923, Mr. Crowley carried his wife to Dr. Olive Wilson of Paragould, Greene County, Arkansas, for examination. According to her testimony, Mrs. Crowley gave her a history of having been sick at intervals for four or five years. She stated that she had had attacks of intense pain in the region of her gall bladder and over her appendix and pelvis. She said that the pains came to her quite often. An examination showed that Mrs. Crowley was very tender over the

gall bladder and over the appendix and over the ovaries. According to the doctor, Mrs. Crowley had been suffering from the date of the birth of her last child. The doctor also stated that she could not say that Mrs. Crowley had gallstones at the time she examined her, but she thought of it. She told Mrs. Crowley that nothing would do her any good, and that an operation would be all that would relieve her pain. She thought that an operation was absolutely imperative. Dr. Wilson also stated that, in her opinion, it would have been impossible, from the condition she found, for Mrs. Crowley's ailment to have been only of six weeks' duration. Basing her judgment solely upon her examination, she is of the opinion that the condition of the gall bladder and the appendix could not have resulted within sixty days' time.

Mr. Crowley then carried his wife to the Baptist Memorial Hospital at Memphis, Tennessee, and on November 8, 1923, she was operated on by Dr. J. W. Bodley. In giving the history of herself she stated at the hospital that she had suffered with irregular attacks of pain in the region of the right shoulder blade, accompanied by indigestion; that these attacks had commenced about six years before and had become more frequent during the three months preceding her entrance to the hospital.

We copy from the testimony of Dr. Bodley the following:

"Q. Is there anything in that operative record to indicate how long she had been suffering from the diseases from which she died? A. No, it is something you can't tell. It is impossible for anybody to tell how long it had existed. It probably had existed for a very long time. Gallstones very often exist for life without symptoms. You may have them and I may have them, and you have no reason at all to consider that you are diseased. On the other hand, you might have a gallstone that might have recently been formed, or it might have been there for life, which would suddenly start to giving you trouble and continue to do so until removed. Now, I will

state, however, that the condition at the time of this operation was such that no one could have lived with it for a great length of time without interference; that she may have had a gall bladder disease all her life, so far as I could tell, or any one else, but the condition of her liver was acute; it was the toxic absorption from this liver, I believe, killed her. Q. How long do you think the liver had been in that condition? A. She could not have lived very long with her liver in that condition. It might have been 3 or 4 days or it might have been a week."

Mrs. Crowley died on the 13th day of November, 1923. She was operated on for the removal of the gall bladder and the appendix. She was suffering from chronic gall bladder affection and chronic appendicitis at the time she was received in the hospital. According to the physicians at the hospital, indigestion is the symptom of either a diseased gall bladder, a diseased appendix, or a diseased intestine. It is also the opinion of these physicians that Mrs. Crowley had been suffering from the diseases from which she died for several years; probably six years.

J. M. Rhea, a fire insurance agent, testified that he had a conversation with Dr. W. J. Blackwood with reference to the suit of the Bankers' Reserve Life Company to cancel the policy in question on the life of Mrs. Elizabeth Crowley. This conversation occurred on the 6th day of March, 1924. Dr. Blackwood asked him to see a certain attorney at Jonesboro and find out for what he would take the case for the defendant, and to write him.

Dr. Blackwood denied having had any such conversation with the witness Rhea, and denied having any interest whatever in the case. According to his testimony, and that of his two brothers, who are also physicians, J. M. Rhea was a drug addict. Rhea admitted having once been addicted to the use of morphine, but claimed that he had not used any, except in case of sickness, since the year 1918.

Several other witnesses for the plaintiff testified that Mrs. Elizabeth Crowley was sick in the first part of July, 1923, and two of them stated that Dr. Blackwood had been her attending physician.

One witness testified that Mrs. Elizabeth Crowley had told her early in July, 1923, that she was suffering from gallstone colic.

Several other witnesses testified that she was sick for several days in the first part of July, and complained that her neighbors had not come to see her while she was sick. One of them said that Mr. Crowley had sent him for Dr. Blackwood.

Dr. J. W. Blackwood was a witness for the defendant. He denied having told any one that Mrs. Elizabeth Crowley was suffering from an attack of gallstones in the first part of July, 1923, and that he had been called as a physician to treat her at that time, as testified by one witness for the plaintiff. According to his testimony, he had known Mrs. Elizabeth Crowley for seven or eight years, and was called to see her as a physician in December, 1922, and treated her for influenza. At that time he probably made three or four visits to see her. Mrs. Crowley was taken sick in the fall of 1923, and Dr. Blackwood was called to treat her. He found her suffering from ptomaine poison. Her bowels were running off profusely, and she was vomiting. There was nothing at that time which indicated that she had either a diseased gall bladder or gallstones. Two weeks later, after she had recovered from the ptomaine poison, he was again called to see her. She had a high fever, and examination disclosed that she had an infection of the gall bladder following the ptomaine poison. Dr. Blackwood treated Mrs. Crowley for the infected gall bladder, but advised her husband not to have her operated on. Dr. Blackwood did not know that Mr. Crowley had carried her to Memphis to be operated on until after her death.

According to this witness, the diseased gall bladder could have become chronic in eight or ten days. He also

said that a person may have gallstones and not know it, and live a lifetime and die with something else. Dr. Blackwood stated that Mrs. Crowley had the appearance of being a very healthy woman, and denied in positive terms that there was any collusion whatever between him and Mr. Crowley or his wife in taking the application of insurance in question. He stated positively that she did not have gallstones or a diseased gall bladder at the time he examined her for insurance.

J. L. Crowley was also a witness for the defendant. He denied any knowledge that his wife was suffering with gallstones or a diseased gall bladder at the time the policy of insurance in question was applied for. He remembers about his wife being sick in the first part of July, but states that she only had a chill, and was in bed a day or two at the time. He did not know that his wife was suffering with an infection of her gall bladder until Dr. Blackwood treated her in the fall of 1923. Dr. Blackwood advised against an operation. He then carried his wife to Dr. Wilson, and she diagnosed the case as gall bladder infection, and advised an operation. He took his wife to Memphis on November 8, 1923, where she was operated on, and she died four days later. His wife had chills, headaches, and bad colds, but appeared to be a stout, healthy woman.

According to the testimony of Dr. W. P. Hutchins, he went to examine Mrs. Crowley on the 23rd day of August, 1923, as an agent for an insurance company. She was apparently in good health so far as he could tell from the examination that he made of her. He did not complete his examination, because her husband said that he would not take out any more insurance on her life.

More than a dozen witnesses who were neighbors of the Crowleys testified that Mrs. Crowley was a stout healthy-looking woman, and that they never heard of her being afflicted with any chronic ailment. They denied that she had any sick spell of any consequence in the first part of July, 1923. Some of them were visit-

ing at the house every day, and said that her complexion was good and that she looked well. As some of them expressed it, she was tolerably heavy, and generally her face was red and robust.

The testimony is very lengthy, and it is not practical to set it out at length.

The chancellor made a finding in favor of the defendant; and in considering this case we must bear in mind that the plaintiff is not seeking to cancel the policy on the ground that the insured died of a disease she had prior to the execution of the contract of insurance and which she warranted that she did not have, but upon the ground that, when the plaintiff, for the purpose of ascertaining whether it would issue a policy upon her life, asked Mrs. Crowley certain questions which are copied above, she answered them falsely with the intent to deceive the plaintiff company and thereby induce it to issue the policy sued on.

To prove its case, the plaintiff has established by a number of physicians that, in their opinion, Mrs. Crowley had been suffering with gallstones for several years before she applied for the contract of insurance in question. This testimony falls short, however, of establishing as a fact that her answers to the questions copied above were false and that they were so made for the purpose of inducing the company to issue the policy sued on, regardless of their truth. All of her neighbors testified that she was a stout, healthy-looking woman. It is true that she had had sick spells from time to time and, as she expressed it at the hospital in Memphis, she had suffered from indigestion. There is nothing to indicate, however, that she knew that she was suffering from gallstones at the time she applied for the policy in question. Her conduct and that of her husband when she became ill in the fall tends to show that she had not before that time appreciated the fact that she had any serious ailment. During the course of her previous ailments she had been in bed a day or two, and then recovered. Her condition appeared more serious in the fall, and her

husband sent for Dr. Blackwood. He first treated her for ptomaine poison. She apparently recovered from that, and in two weeks became quite sick again. Dr. Blackwood was again called in, and decided that she was suffering from an infection of the gall bladder, which he attributed to the ptomaine poison. He told the husband that an operation was not necessary, and that his wife would get all right. Mr. Crowley and his wife appear to have not been satisfied with this diagnosis, but immediately went to Dr. Wilson at Paragould, Arkansas, to be examined. After examining Mrs. Crowley, Dr. Wilson advised an operation, and Mr. Crowley carried his wife to Memphis for that purpose.

If there had been collusion between Crowley and his wife and Dr. Blackwood to secure the policy sued on, or previous knowledge on their part that she was suffering from a serious infection of the gall bladder, it does not seem that Crowley and his wife would have gone to Dr. Wilson and subsequently to the hospital at Memphis, without at least consulting with Dr. Blackwood. The conduct of Crowley and of his wife, after she became sick in the fall of 1923, indicates that this was the first time they had knowledge or belief that she had any serious ailment. Before that time she had either treated herself for her periodic spells of sickness, as is quite common, or she had merely called in the family physician. The facts in the record do not reflect that either she or her husband had any knowledge or intimation that she was suffering from a serious ailment prior to her attack in the fall of 1923. All the physicians testify that a person might suffer with gallstones for a long time without knowing it, and Dr. Wilson was not sure that Mrs. Crowley had gallstones when he examined her in the fall of 1923.

Dr. Blackwood and his two brothers, who are also physicians, testified that the witness Rhea was addicted to the use of morphine, and was unreliable. Dr. Blackwood denied in positive terms that he had talked with Rhea about employing an attorney to represent Crowley

in the case at bar. Even if the facts testified to by Rhea are true, it would not have much probative force to establish collusion on the part of Crowley and his wife. Dr. Blackwood might have known, from his examination, that Mrs. Crowley was suffering from gallstones, and might have concealed that fact from her, because he was not only acting as medical examiner for the company, but was also empowered to solicit applications for insurance and to be paid therefor. Then too he might have become angry because the insurance company was seeking to cancel the policy on account of his alleged fraud in securing it, and for that reason was anxious for Crowley to win the case. In any event, there must be sufficient evidence adduced by the insurance company to show collusion between Dr. Blackwood and the Crowleys in the matter, or that Mrs. Crowley made false answers to the questions propounded to her in her application for the purpose of deceiving the insurance company as to her physical condition and thereby induce it to issue a policy of insurance upon her life. Upon the whole case, we are of the opinion that the chancellor's finding that the plaintiff failed to meet the burden of proof of the falsity of the representations, within the meaning of the law, as above announced, was sustained by the evidence, and for that reason it should not be disturbed on appeal.

Upon the cross-appeal we think the chancellor was wrong in not allowing twelve per cent. damages, together with a reasonable attorney's fee for the prosecution and collection of the loss, as provided in § 6155 of Crawford & Moses' Digest. It is true, as held in *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389, that no recovery could be had under this statute in the application of the general rule that a chancery court will not enforce penalties except under very peculiar circumstances, which were not presented in that case. There a suit was instituted in behalf of policyholders for the appointment of an ancillary receiver to take charge of the assets of an insurance company in this State, on the ground that

a general receiver had been appointed in the State of Nebraska to take charge of the assets of the company and to wind up its affairs on the ground of insolvency. All parties having claims voluntarily submitted themselves to the jurisdiction of the chancery court, and the liability of the Federal Union Surety Company as surety on the bond of the insurance company was treated by the parties and by the chancery court as an asset of the insurance company in this State. There the main purpose of the suit was the appointment of the ancillary receiver to aid in winding up the affairs of the insurance company in the chancery court, and the filing of the claims was but an incident to the main suit.

In the case at bar the suit was commenced in equity by the insurance company to cancel a policy of life insurance after the death of the insured on the ground of fraudulent misrepresentation on the part of the insured in the procurement of the insurance, and a cross-bill was filed by the administrator of the estate of the deceased policyholder to recover the amount of the insurance provided in the policy. There was a recovery for the full amount of the policy.

The twelve per cent. allowed by the statute is given as damages for failure to comply with the contract of payment, and the attorney's fee is allowed as compensation for the cost of collecting the debt. *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554.

It is settled by our previous cases that contracts of insurance, from their very nature, are susceptible of classification apart from other contracts, and, under ordinary circumstances, the damages and attorney's fees are as collectible in a chancery court as in any other court. It is only under peculiar circumstances, as in the case under consideration, that a court of chancery will refuse to allow the damages and attorney's fees provided by the statute, as was the case in *Mass. Bond & Ins. Co.* v. *Home L. & A. Co.,* 119 Ark. 102, and cases cited.

The chancellor should have allowed twelve per cent. of the amount of the recovery, as provided by the statute, and a reasonable attorney's fee. We think that $500 for services in the court below and $100 for services in this court would have been a reasonable attorney's fee.

The result of our views is that the decree of the chancellor allowing a recovery for the amount sued for in behalf of the defendant will be affirmed; and that part of the decree refusing to allow the twelve per cent. damages or penalty and a reasonable attorney's fee, as provided in § 6155 of Crawford & Moses' Digest, will be reversed, and judgment will be entered here for the amount indicated in the opinion.

It is so ordered.

ROBERTS v. TATUM.

Opinion delivered May 17, 1926.

1. CONTEMPT—SUFFICIENCY OF CITATION.—A citation for contempt which orders the alleged contemnor to appear in court and show cause why he should not be punished for contempt of court in running off a witness in a certain case, without stating the facts constituting the offense or the court against which the contempt is alleged to have been committed, is insufficient.
2. CONTEMPT—JURISDICTION.—A court of the Fort Smith District of Sebastian County has no jurisdiction to punish a contempt committed against a court of the Greenwood District of the same county.
3. PROHIBITION—SCOPE OF INQUIRY.—On an application for a writ of prohibition, the inquiry is limited to consideration of jurisdiction.
4. PROHIBITION—NECESSITY OF OBJECTION TO JURISDICTION.—Objection in the lower court to its exercise of jurisdiction is not a jurisdictional fact upon which the power to issue a writ of prohibition depends, but is discretionary and unnecessary where it would obviously be futile and would result in unnecessary or hurtful delay.

Prohibition to Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; prohibition granted.

Carmichael & Hendricks and *Evans & Evans,* for appellant.

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

SMITH, J. John P. Roberts has filed a petition for a writ of prohibition, which contains the following recitals and allegations: On March 22, 1926, there was pending in the circuit court for the Greenwood District of Sebastian County an indictment for burglary and grand larceny against one Neal Fuller, but the circuit court for that district of the county was not then in session. The circuit court for the Fort Smith District of Sebastian County was in session on that day. The court for the Greenwood District had been adjourned until March 26, 1926, at which time an adjourned session of the court was to be held, and the indictment against Neal Fuller, charged with burglary and grand larceny, had been set for trial on that day.

On June 29, 1925, one Hubert Smith was convicted in the circuit court for the Fort Smith District of Sebastian County on an indictment charging him with receiving stolen property. An appeal was prosecuted to this court, and on November 23, 1925, the judgment of the lower court was affirmed. Petitioner is a practicing attorney, and in that capacity represented the said Smith, and was one of the sureties on his bond on the appeal to the Supreme Court.

On March 22, 1926, the said Smith came to petitioner, as his attorney and bondsman, and requested petitioner to accompany him to the penitentiary, where he desired to surrender himself, and petitioner accompanied the said Smith to Little Rock, where he was surrendered to the penitentiary authorities. The said Smith was at the time under subpoena as a witness in the case of *State* v. *Neal Fuller,* pending in the circuit court for the Greenwood District of Sebastian County, but was not a witness in any case pending in the Fort Smith District of the county.

On April 1, 1926, the Honorable John E. Tatum, the regular presiding judge of the Twelfth Judicial Circuit, of which Sebastian County is a part, sitting as the presiding judge of the circuit court for the Fort Smith District of Sebastian County, caused the following order to be entered of record:

"In the Sebastian Circuit Court, Fort Smith District.

"State of Arkansas, plaintiff, v. John P. Roberts, defendant.—No. 9070.

CONTEMPT OF COURT.

" '4-1-26. Ordered that a citation issue for John P. Roberts to appear on the 6th day of April, 1926, at 1 P. M., to show cause, if any he has, why he should not be punished for contempt of court, for running the witness Hubert Smith, who had been duly subpoenaed to appear in the case of State of Arkansas v. Neal Fuller.' "

Pursuant to this order, the clerk of the court issued a citation to petitioner to appear in the circuit court for the Fort Smith District of Sebastian County on the 6th day of April, 1926, to answer the charge of contempt alleged to have been committed by him by running off Hubert Smith, a witness for the State in the case of the State of Arkansas v. Neal Fuller.

After denying that he was guilty of running the witness off, petitioner alleged that the circuit court for the Fort Smith District of Sebastian County had no jurisdiction to try the petitioner for said alleged contempt, for the reasons, (a) that no sufficient statement in writing was filed or made against petitioner before the issuance and service of citation, and (b) that the said Hubert Smith was not a witness in any case pending in the circuit court for the Fort Smith District of Sebastian County, out of which the citation issued, but was a witness in a case pending in the circuit court for the Greenwood District. It was therefore alleged that, if any contempt was committed, it was against the circuit court for the Greenwood District, of which the circuit court sitting in the Fort Smith District had no jurisdiction.

It was further alleged by petitioner that, notwithstanding this lack of jurisdiction, the circuit court for the Fort Smith District would, unless restrained, proceed, on the said 6th day of April, 1926, to try and punish petitioner by fine and imprisonment for said alleged contempt.

Pending the hearing of the petition a temporary restraining order was issued suspending the proceedings of the court below.

A response has been filed by the judge of the court, in which the facts just summarized are set out in detail. It appears from this response, in an unmistakable way, that the circuit judge is of the opinion not only that he has jurisdiction to try and punish petitioner, but also that appellant was guilty of contempt of his court.

The case of *CarlLee* v. *State,* 102 Ark. 122, has become the leading case in this State on the practice in contempt cases, and has been followed and quoted from in several decisions since rendered. It was there said: "Under our system of procedure, the accused is entitled to be informed with reasonable certainty of the facts constituting the offense with which he is charged and an opportunity to make defense thereto—his day in court."

We have concluded that the order of the court upon which the citation issued, and which we have set out in full, is insufficient in form to meet this requirement. There is no special form in which an order of citation must appear, but, whatever its form, it must be sufficiently definite to apprise the party accused with reasonable certainty of the nature of the charge against him, so that an opportunity will be afforded to make defense thereto.

The order fails to state the court against which the petitioner was guilty of contempt, and if it be said that the presumption is that it was against the court which issued the citation, it may be answered that this is a jurisdictional requirement, and the accusation should not rest upon a mere presumption. The reason for this requirement is shown by the facts of this case. As a

matter of fact, petitioner is not charged with defying the process of the circuit court for the Fort Smith District—the court which made the order—yet, if a presumption, instead of an affirmative recital, were sufficient, he would be misled in making his defense.

We conclude therefore that the order of citation was insufficient to meet the requirement announced in the CarlLee case, *supra.*

It is quite apparent from the response filed in this cause that the judge of the Twelfth Circuit, who presides in both districts of Sebastian County, is under the misapprehension that he had the jurisdiction to cite appellant to appear in the Fort Smith District, although the alleged contempt was committed against the circuit court of the Greenwood District. We think it therefore not inappropriate to say that the learned judge is mistaken in this. It is true that he is the judge of both courts, but the alleged contempt is the defiance or circumvention of the orders of the court, and the court thus alleged to have been offended against is that of the Greenwood District, and any proceeding to punish for contempt of that court would have to be in that court, and not in another and different court.

The circuit court for the Fort Smith District is one court, and that of the Greenwood District is another. They are separate and distinct. Each has the right to protect its own authority and enforce its own process and to punish contemptuous disobedience thereof; but neither has the jurisdiction to perform that service for the other. Citation for contempt must issue out of the court offended against.

We do not consider whether petitioner is guilty of contempt of either court under the facts alleged in the petition and the response, as this is an application for prohibition, and our inquiry in such a proceeding is limited solely to a consideration of the question of jurisdiction. *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169.

It is insisted that the writ of prohibition should not be awarded, for the reason that petitioner did not first appear in the court below and make formal objection to the jurisdiction of the court. In the case of *Monette Road Imp. Dist.* v. *Dudley, supra,* we recognized the general rule, which imposes the requirement that objection to the jurisdiction of the court against which prohibition is asked should first be made in that court, but it was there decided that this requirement was not without exceptions thereto, in which connection it was said: "This, we think, is the correct view of the matter, and it will necessarily follow, under this rule, that, where it is obvious that an objection made to the court itself would be futile and would result in unnecessary or hurtful delay, this ought to and does form an exception to the general rule of discretion that, before a writ of prohibition can be asked for, objection to the exercise of that jurisdiction must be made to the court. This exception is well sustained by the authorities. (Citing cases)."

At § 320 of Ferris on Extraordinary Legal Remedies it is said: "In some jurisdictions the question is regarded as one of practice, not of jurisdiction, and the enforcement of the rule is declared to be discretionary, and in no sense rigid and arbitrary. * * * It is not the purpose of the rule or practice to require the question to be litigated below and decided for review in the superior court, but only to give the lower court an opportunity to correct its act in excess of jurisdiction, due to misapprehension or oversight, or some adventitious circumstance. Therefore it would seem that its application is clearly unnecessary in any circumstance in which the intention of the inferior court to act beyond its jurisdiction is made apparent in any way, as when it appears in any manner that such court has acted deliberately, or has considered the question of its jurisdiction and intends to proceed, where application to the court below would be a mere formality."

And in the same section it is also said: "Criminal cases, involving personal liberty, sometimes invoke the

discretion of the court. Thus it was held that, notwithstanding the right to an appeal, if the situation disclosed be such that, to take the ordinary course by appeal would of itself subject the complainant to irreparable loss, the writ should issue, notwithstanding no objection was made below; that the matter of judicial courtesy should yield to substantial personal rights of litigants, such as a sacrifice of their liberty."

The instant case is an example of the cases which are exceptions to the general rule. Here the proceeding was initiated by the court itself, and, after the writ of prohibition had been applied for in this court, a response was filed, in which jurisdiction is asserted, and it is therefore morally certain that the court below will proceed to a hearing of the matter unless prohibited by this court.

"The true test is, as stated in the case already cited (*Weaver* v. *Leatherman,* 66 Ark. 211), whether or not the court is proceeding beyond its jurisdiction; and, when that state of facts is shown to exist, the remedy by prohibition is the appropriate one. A litigant is not bound to submit to the exercise of jurisdiction not authorized by law, even though he has the right of appeal after the exercise of the jurisdiction has been consummated, and has resulted in a judgment from which he can appeal. The remedy by appeal is afforded from an unjust judgment, whether it be void or merely erroneous (*Pritchett* v. *Road Improvement District,* 142 Ark. 509); but the remedy by prohibition is afforded as a protection against a wrongful attempt to exercise jurisdiction unauthorized by law." *Monette Road Improvement Dist.* v. *Dudley, supra.*

We conclude therefore that the court below is without jurisdiction to proceed against petitioner, and the writ of prohibition will be awarded.

CAIN v. CARLLEE.

Opinion delivered May 17, 1926.

1. APPEAL AND ERROR—DISMISSAL OF MOOT CASE.—Generally, where there is nothing to be determined upon an appeal to the Supreme Court but the question of liability for the costs of the litigation, the appeal will be dismissed; but, where the case is of practical importance to the public, the court may proceed to determine the questions at issue.
2. ELECTIONS—CONTEST OF PRIMARY NOMINATION—ABATEMENT.—Under the initiated act No. 1, § 12 (Crawford & Moses' Dig., § 3772), conferring on any defeated candidate "a right of action" to contest the certification of a nomination, the right of a contestant to have a final determination of the contest does not become moot nor the action abate upon the contestee resigning from the office to which he had been elected after receiving the certificate of nomination.
3. ELECTIONS—MOOT QUESTION—ABATEMENT OF ACTION.—Where a contest under the primary law (Crawford & Moses' Dig., § 3757 *et seq.*) was resisted by contestee until a large amount of costs had accumulated, which contestant would be required to pay if the judgment appealed from should be affirmed, the defendant cannot, by resigning from the office, secure an abatement of the action.

Appeal from Woodruff Circuit Court, Southern District; *E. D. Robertson,* Judge; motion to abate overruled.

Roy D. Campbell, for appellant.

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

SMITH, J. There is pending in this court the third appeal in a suit involving the nomination of the Democratic Party for the office of county judge of Woodruff County in the primary election held in that county in the year 1924 against the appellee CarlLee, who was declared the nominee, and was elected as such at the ensuing general election held after the primary election. In the first trial of the contest CarlLee was declared the nominee, but, upon the appeal to this court by appellant Cain, the contestant, that judgment was reversed, and the cause remanded for a new trial. *Cain* v. *CarlLee,* 168 Ark. 64. The cause was remanded, and upon the second

trial in the circuit court CarlLee was again declared the nominee, and that judgment was reversed upon the second appeal to this court (*Cain* v. *CarlLee,* 169 Ark. 887), and a third trial was had in the circuit court, when CarlLee was again declared the nominee, and the appeal from that judgment is now pending in this court.

The appellee CarlLee has filed a motion to abate the cause, for the reason that, since this third appeal was lodged in this court, he has tendered his resignation as county judge to the Governor and the same has been accepted, and he insists that the contest has therefore become a moot question.

Appellant resists this motion, and insists that the question involved in the pending appeal should be decided, for the reasons (a), that he is the nominee and is entitled to have that fact judicially determined, and (b), in the attempt to enforce this right a large amount of costs have been incurred which, under the judgment from which this appeal was prosecuted, he will be required to pay, inasmuch as that judgment declared appellee CarlLee the nominee and assessed the cost against appellant. Certain costs of the former appeal were involved in a *per curiam* opinion handed down by this court on April 5, 1926, in which we overruled a motion of appellee to retax costs.

The first question which arises is whether this court will consider an appeal if the subject-matter has become a moot question. The rule in such cases is generally that "where there is nothing to be determined on an appeal to the Supreme Court but the question of liability for the costs of the litigation, the appeal will be dismissed." *Pearson* v. *Quinn,* 113 Ark. 24. In that case we quoted and followed the opinion of Chief Justice COCKRILL in the case of *Wilson* v. *Thompson,* 56 Ark. 110. But the Chief Justice recognized that the rule stated was not without its exceptions. That case involved the construction of the local option three-mile law then in force, and, after stating that the appeal had become fruitless, and that the court would be justified, under the rule

stated, in dismissing the case without going into the merits of it, the court proceeded to determine the questions at issue, for the reason that "the case was of practical importance" to the public, and having for this reason gone into the question, and having found that the judgment rendered was erroneous, the judgment appealed from was reversed, and appellants were awarded costs.

That principle is applicable here. The questions involved on this appeal were and are of practical importance to the public. Questions are involved which relate to the manner of holding primary elections and of the qualifications which must be possessed to participate therein. The law of this subject cannot be said to be so well settled or so certain that litigation was unnecessary to determine it, for the first decision of this court was rendered by a divided court, and we have, since that decision, reversed the judgment of the circuit court on the second appeal.

The two opinions on the former appeals show the practical importance of the questions involved, for it is a matter of common knowledge that the nomination for public office by the majority party in this State is practically equivalent to election, and this is true of all offices where primary elections are held, except in a few of the counties of the State, and there are questions raised in this contest which involve construction of the statutes under which such elections are held.

We do not think, however, that this has become a moot case, and we are also of the opinion that the resignation of appellee does not abate the suit. The decision of that question involves a further consideration of the primary election law under which the election was held which Cain has been contesting.

The history of this act is so well known that courts cannot be ignorant of it. This court had held, in the case of *Walls* v. *Brundidge,* 109 Ark. 250, that the courts were without jurisdiction to entertain a contest for the nomination of a party as a candidate for public office. Thereafter, under the Initiative and Referendum Amendment

to our Constitution, there was initiated and enacted by the people, at the election in 1916, an act which became and is known as initiative act No. 1, and which appears as § 3757 *et seq.*, C. & M. Digest, Acts 1917, vol. 2, p. 2287.

This is a very comprehensive act, and provides that the political parties of the State may hold legalized primary elections to nominate candidates for office, and provides in detail how such elections shall be held and how they may be contested.

By the first paragraph of § 12 of this act it is provided that "a right of action is hereby conferred on any candidate to contest the certification of nomination or the certification of vote as made by the county central committee" of the party holding the election.

A procedure is provided in the act whereby and in accordance with which a contest may be conducted, and the courts are required to hear and dispose of these contests expeditiously, because of the public interest involved, but, to give the courts jurisdiction of a contest, the complaint of a contesting candidate must be supported by the affidavit of at least ten reputable citizens.

By § 15 of the act it is provided that, if the contest is not determined until after the general election, at which the declared nominee has run as the candidate of his party for the office itself and has been elected, and it is thereafter determined that the declared nominee was not legally entitled to the nomination, "such judgment shall operate as an ouster from office, and the vacancy in it shall be filled as provided by law for filling vacancies in such office in case of death or resignation."

Appellant Cain instituted a contest under this act, and his opponent for the nomination, CarlLee, has resisted that claim, and this contest has resulted in the accumulation of a large amount of costs, which appellant Cain will be required to pay if the judgment appealed from is affirmed on the final submission of the cause, or if this appeal must abate because of the resignation of CarlLee.

The first paragraph of § 12 of the initiative act No. 1 conferred upon appellant Cain "a right of action" to contest this nomination. In order that frivolous contests might not be instituted under this section, the requirement was imposed that ten reputable citizens make affidavit supporting the contest, and this was done, and when it had been done a cause of action—a suit at law—was before the court for decision. The law gave this cause of action to Cain after he had met the precedent conditions, and nothing which CarlLee could thereafter do would operate to deprive Cain of this right. He was entitled to prosecute this cause of action so long as CarlLee resisted, or until there had been a final decision determining the case against him. CarlLee elected to resist this cause of action, as he had the right to do, and in so doing large costs have accumulated.

Since the adoption of our Civil Code, remedies in civil cases have been divided into two classes. First, actions; second, special proceedings. Section 1027, C. & M. Digest.

Section 1028, C. & M. Digest, which was also taken from the Civil Code, defines a civil action as "an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right or the redress or prevention of a private wrong. It may also be brought for the recovery of a penalty or forfeiture."

With this definition of an "action" incorporated in the statutes of the State, the initiative act made a contest for a nomination for office a cause of action. This it would not be if the voluntary act of another, and an adversary party, could deprive him of the right.

It is unnecessary for us to consider what value this right may now possess. It suffices for us to decide that there was a cause of action, the prosecution of which cannot be defeated by the act of another party, and this is especially true when the right has been resisted until costs have accumulated, the payment of which by the

judgment appealed from has been imposed upon appellant.

We think there is nothing in the case of *Buchanan* v. *Parham,* 95 Ark. 81, which entitled appellee to abate this suit. In that case the court quoted from the opinion of Mr. Justice RIDDICK in the case of *Wilson* v. *Fussell,* 60 Ark. 194, which was a special proceeding wherein certain taxpayers questioned the sufficiency of a collector's bond, the language quoted being as follows: "The right to recover costs did not exist at common law. It rests upon statute only, and it is to the statute we must look for the authority to recover costs in any given case. * * * There is a general provision in our statute that a plaintiff or defendant recovering judgment at law is entitled to his costs, but this is not an action at law or in equity."

We think the language there quoted supports the view here taken, for there is an express recognition in the language quoted of the right to recover costs in any case where the plaintiff or defendant recovers a judgment at law. This is what appellant Cain is seeking to do, that is, to have a judgment at law pronounced upon his cause of action, and, if he should finally prevail, he will be entitled to have it adjudicated that he was the nominee of his party for the office for which he was a candidate, and he will also be entitled, not only to be relieved of the existing judgment against him, but to have judgment for his own costs. We so interpret the purpose and meaning of the initiative act, and the motion to abate will therefore be overruled.

DISSENTING OPINION.

MCCULLOCH, C. J. A vacancy in the office has occurred by the resignation of appellee, and, as a vacancy would be the only result in the event this contest proceeding should go to final judgment in favor of appellant (Crawford & Moses' Digest, § 3776), the case has become moot, and, in my view, should be abated. This is so for two reasons: In the first place, "where there is nothing to be determined on an appeal to the Supreme

Court but the question of liability for the cost of litigation, the appeal will be dismissed." *Pearson* v. *Quinn,* 113 Ark. 24. The majority rely on the decision of this court in *Wilson* v. *Thompson,* 56 Ark. 110, holding that the fact that a cause is one of "practical importance" makes it an exception to the general rule that litigation will not be continued after it has become moot merely for the purpose of adjudicating the question of liability for costs. The reasoning in that case, as well as the present one, is not convincing. In the next place, there is no liability for costs in an election of this kind, for the reason that the statute contains no authority for awarding judgment for costs. It is well settled that the right to recover costs did not exist at common law and rests on statutes alone (*Wilson* v. *Fussell,* 60 Ark. 194), and, following this theory, we held in *Buchanan* v. *Parham,* 95 Ark. 81, that costs could not be awarded in an election contest in the absence of a statute authorizing it.

The majority hold now that the right to recover costs falls within the general statute allowing recovery for costs in all civil actions; but this court has held that election contests are not "civil actions", within the meaning of the statute. *Davis* v. *Moore,* 70 Ark. 240; *Buchanan* v. *Parham, supra.*

The fact that the primary election statute has created "a right of action" to contest an election does not bring it within the Code provision referred to in regard to costs.

My conclusion is that the action should be abated without recovery of costs—each party left to pay his own costs.

WARREN v. HENSON.

Opinion delivered May 17, 1926.

1. VENDOR AND PURCHASER—RIGHTS OF SURVIVING WIDOW.—Where a vendee of land, holding a bond for title, paid all of the purchase price except $107, and after his death his widow paid the balance and took deed to herself, her payment was in performance of the vendee's contract, and she acquired, in addition to her marital rights, only the right which the vendor had, namely, to enforce payment of such balance from the vendee's estate; and one who purchased from her with knowledge of the facts acquired no more title than she had.
2. HOMESTEAD—LIABILITY OF MINOR HEIRS FOR IMPROVEMENTS.—Minors are not liable for permanent and valuable improvements placed by an occupant on their homestead, since they can not be improved out of their homestead; but, in the absence of contract, the occupant should be allowed a reasonable compensation for necessary repairs, and charged with such rents for the premises as they would have yielded without the improvements.

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

C. T. Bloodworth, for appellant.

Oliver & Oliver, for appellee.

SMITH, J. Appellee brought this suit against appellant to recover a forty-acre tract of land, being in the Western District of Clay County, which he alleged his father, J. E. Henson, contracted to buy from one W. C. Hastey, and from whom he received a bond for title, under which the said J. E. Henson entered into the possession of the land and occupied it until his death in 1907.

After the death of J. E. Henson his widow married Joe Wallace. At the time of J. E. Henson's death there was a balance of $107 principal and $1.78 interest due on the land. This amount was paid to Hastey by Mrs. Wallace, and Hastey executed to her a deed, which was dated December 14, 1908, and on October 29, 1909, Mrs. Henson deeded the land to appellant T. S. Warren, who has held possession of the land since that time. Soon after he attained his majority, appellee brought suit to recover the possession of the land, and prayed that appellant

Warren be declared a trustee for appellee's benefit, and that appellee have an accounting of the rents and profits derived from the use and occupancy of the land by appellant.

The court found the fact to be that the land in controversy was the homestead of J. E. Henson, and that appellant Warren holds the legal title thereto as trustee for the use and benefit of appellee, who had just reached the age of twenty-one before instituting the suit, and it was decreed that the title be divested out of appellant and be vested in appellee.

The decree recited that the parties had stipulated that the stating of the account should be reserved until the title had been adjudicated, and that, as the adjudication of the title had rendered an accounting necessary, a master was appointed to state the account, and directions for so doing were given.

It appears that the original decree in the cause was rendered at the October term, 1924, but at the next term of the court, which was in March, 1925, the first decree was vacated in so far as it related to the instructions given the master in stating the account.

The second decree—the one from which this appeal is prosecuted—contains the following recital: "And it further appearing to the court that what purports to be a decree herein was in vacation entered of record on page 501 of chancery record 'E' of the Western District of Clay County, and that the said purported decree is not the decree rendered in this cause by this court, this decree as above set out, being in matter and form the decree rendered by this court in this cause, is prepared and ordered entered of record now for then."

The point of difference between the two decrees is in the directions given the master in regard to the allowance to appellant for improvements made.

Appellant insists that the testimony does not support the findings of fact on which appellant was decreed to be a trustee, and that the court was without authority to set aside the first decree.

The testimony, very briefly summarized, is as follows: Joe Wallace testified that he married Mrs. Henson December 23, 1908, at which time she was living on the land, and that he and his wife resided on the land after their marriage until 1909, when the land was sold by his wife to appellant. He testified that, when the contract to sell the land to appellant was made, he and his wife went to Paragould, where Hastey resided, and his wife tendered to Hastey the balance of purchase money and requested Hastey to make a deed to Warren, but Hastey declined to do so, for the reason that he had contracted to convey it to J. E. Henson, but that Hastey did execute a deed to Henson's widow when she paid the balance of the purchase money. The witness further testified that the deed from his wife to appellant was prepared by and acknowledged before Henry Brown, a justice of the peace, who, at the time he took the acknowledgment, asked appellant if he were not afraid that Henson's heirs would some time cause him trouble, and appellant answered that he did not expect to keep the land that long. This witness also testified that his wife did not claim to have acquired the title for herself, and that she only claimed a dower interest in the land, and that, before the deed from Hastey was received, appellant attempted to obtain a loan on the land, but, when the abstract was received, the loan was declined, because it appeared that appellee's mother was not able to make a good title, yet the appellant bought the land from her later with knowledge of this fact.

Hastey identified a number of letters which he had written to J. E. Henson in regard to the sale of this land and the subsequent payments made on it. These letters were written in 1904 and 1905, and the originals of several of them, which are more or less illegible, are incorporated in the transcript. Those which were legible were copied. These letters are all addressed to J. E. Henson, and show that the payments which were acknowledged were made by Henson, and the letters all refer to the land as land bought by Henson.

There is nothing in any of the letters to indicate that Mrs. Henson was a party to the transaction. Hastey testified that he had no independent recollection of the transaction except as disclosed by the letters, which he admitted were written by him, and he had no explanation to make of the fact that he had conveyed to Mrs. Henson land which he had contracted to convey to her husband, except the fact that she paid the balance of purchase money due at the time he executed and delivered the deed.

Mrs. Henson's mother—appellee's grandmother—testified that she saw Henson with a paper which she knew at the time related to the land. This writing was evidently the bond for title, which was lost without being placed of record. This writing was never read by or to the witness, but Henson moved on the land shortly after she saw him with the paper, and improved the land, and lived there until his death.

In the answer filed by appellant he alleged the fact to be that he was an innocent purchaser of the land, and that he had no knowledge of the fact that, in paying the balance of purchase money due Hastey, Mrs. Wallace was merely completing the payments due under the contract to convey the land to J. E. Henson, but appellant offered no testimony tending to explain or to contradict the testimony offered on behalf of appellee tending to show that appellant was in fact familiar with the state of the title.

Appellant offered in evidence a quitclaim deed dated December 23, 1914, from H. H. Williams, under which appellant also claims title.

We think this testimony warranted the finding made by the court below that Hastey had contracted to sell the land to J. E. Henson, who, at the time of his death, had paid all the purchase money except $107 and some interest, and was entitled to a deed upon the payment of the balance, and that the payment of this balance by Henson's widow was in performance of that contract, and that appellant bought with knowledge of these facts.

Appellant insists that the testimony of Wallace is unworthy of belief because of certain alleged contradictions in his testimony as to the date of the deed from Hastey to Mrs. Wallace and the date of her deed to appellant; but the chancellor did not so regard this testimony; nor do we. The fact is that the two deeds were filed for record on the same day—October 30, 1909. The testimony of this witness is to the effect that appellant assisted Mrs. Wallace in performing the terms of the bond for title, and he did this with knowledge of the contract between Hastey and J. E. Henson, and he did not take the stand and deny the testimony given by Wallace imputing this knowledge to him.

We think appellant's possession is referable to the deed from Mrs. Wallace, and that appellant acquired no title under the quitclaim deed from Williams. Williams, the grantor in that deed, appears to have obtained a clerk's tax-deed, dated August 31, 1891, but the land again forfeited to the State in 1893, and was later conveyed by a redemption deed from the State to the Arkansas Western Railway in 1897, and, as has been said, the quitclaim deed from Williams to appellant was dated December 23, 1914, which was more than five years after appellant had entered into possession under the deed from Mrs. Wallace.

We think the testimony supports the finding that Hastey's contract was to convey to J. E. Henson, and, when Henson was put in possession of this land under this contract, he became the equitable owner of the land, with the right to acquire the legal title upon the payment of the balance of the purchase money, and that, while these payments were being made, Hastey held the legal title in trust for Henson and his heirs as security for the balance of the purchase money, and no one with knowledge of these facts could acquire from Hastey any greater rights than Hastey had, that is, that of holding the legal title in trust to secure the payment of the unpaid purchase money. Upon completing the purchase money payments Mrs. Wallace acquired, in addition to

her marital rights, only the right which Hastey had, which was to enforce the payment of this balance. *Whittington* v. *Simmons,* 32 Ark. 377; *Davie* v. *Davie,* 154 Ark. 633. The marital rights of Mrs. Wallace as the widow of Henson were not taken into account by the court below, for the reason that she was dead at the time of the institution of this suit.

The decree of the court below recognized and declared the lien which appellant had acquired by his deed from Mrs. Wallace, and the master was directed to allow appellant credit for the balance of purchase money paid by Mrs. Wallace, with the interest thereon. The decree of October 28, 1924, directed that appellant be allowed credit for the value of the improvements made by him, whereas the decree of March, 1925, which vacated the prior decree, directed that appellant be allowed credit for the necessary repairs, which were defined to be "such repairs as were necessary in order to keep the land in the condition it was when defendant obtained possession, and sufficient to render it tillable."

We think no error was shown in the vacation of the first—and the entry of the second—decree. It is recited that the second decree was rendered *nunc pro tunc* to conform to the decree actually rendered by the court. There is no showing upon what testimony this order was made, but it is recited that the second decree was entered to conform to the decree which was actually rendered. Moreover, the question of rents and profits had been expressly reserved until the title was adjudicated. The master had made no report on the question, and the subject remained within the jurisdiction of the court to adjudicate, and the court would have had the right, if it saw proper so to do, to change the basis upon which the account should be stated before approving the master's report, had one been filed, which had not been done.

The second decree—and not the first one—declared the correct rule for charging the value of the improvements. Appellant entered upon the land while appellee was a minor—a small child—and he did not therefore

have the right to be credited with the cost of all the improvements made by him. In the case of *Gatlin* v. *Lafon,* 95 Ark. 256, Mr. Justice BATTLE quoted from the case of *Sparkman* v. *Roberts,* 61 Ark. 27, the following statement of the law: "As to improvements and repairs, this court said in *Sparkman* v. *Roberts,* 61 Ark. 27, 32: 'Minors are not liable for permanent and valuable improvements placed on their homestead. They cannot be improved out of their homesteads; nor can the occupants be lawfully charged an increased rent on account of their improvements. In the absence of a contract, the occupant should be allowed a reasonable compensation for necessary repairs, and charged with such rents for the premises as they would have yielded without the improvements. *McCloy* v. *Arnett,* 47 Ark. 456; *Reynolds* v. *Reynolds,* 55 Ark. 369.' "

The direction of the second decree conformed to the law as thus declared, and was correct.

We find no error in the decree, and it will therefore be affirmed.

DAVIS v. DAVIS.

Opinion delivered May 17, 1926.

1. FRAUDS, STATUTE OF—SUFFICIENCY OF DESCRIPTION OF LAND.—A family settlement dividing the lands of a testator among his devisees is sufficient, within the Statute of Frauds, where the tracts assigned to the several devisees are described in such manner that they may be identified by parol evidence.
2. DESCENT AND DISTRIBUTION—CONSTRUCTION OF FAMILY SETTLEMENT.—Where a family settlement stipulated that each of a testator's devisees should "get" a certain tract of land, the intention was that the party named as getting the land was to take title thereto in severalty.
3. FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM OF SALE OF LAND.—Where a written contract for the sale of land is valid under the Statute of Frauds, its performance will not be defeated because there was another agreement not embraced in the writing.

4. DESCENT AND DISTRIBUTION—ENFORCEMENT OF FAMILY SETTLEMENT.—An agreement whereby the devisees in a will divided the lands which had been devised to them will be enforced, although the children of a deceased brother who had no interest in the lands under the will did not participate in the agreement.

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

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

Brundidge & Neelly, for appellee.

SMITH, J. L. D. Davis died October 19, 1924, leaving two sons and a daughter, the appellant and appellees, and four grandchildren, who are the children of J. M. Davis, a deceased son.

On February 6, 1922, L. D. Davis executed a will, devising to Ada C. Langford, a daughter, and A. S. and H. G. Davis, his sons, all of his personal property and real estate after the payment of his debts. The effect of the will was to exclude the heirs of the deceased son, J. M. Davis, it being recited in the will that the testator had given this son a deed to sixty acres of land and had substantially aided him in purchasing another one hundred and twenty-acre tract, thereby relieving the testator of further duty to the heirs of this son.

On September 5, 1922, the testator added a codicil to the will, by which he bequeathed to his daughter Mrs. Langford the northwest quarter northwest quarter section 19; to his son H. G. Davis the west half southwest quarter section 17 and the west half northwest quarter section 20; and to his son A. S. Davis a part of the northeast quarter section 19, containing fifteen acres, all the land being in township 6 north, range 9 west.

After the death of L. D. Davis there was some negotiation between the daughter and the two sons in an effort to divide their father's land contrary to the will. There was some threat of a contest of the will, on the ground that the testator was lacking in testamentary capacity. Certain neighbors participated in the discussion, and offered suggestions. Finally the parties entered into the following agreement; "We hereby agree satis-

factory between ourselves and is satisfactorily between all parties concerned, H. G. Davis is to get the home place, 80 acres. A. S. Davis is to get lower bottom, 80 acres. Ada Langford is to get upper bottom, 40 acres, and 15 acres known as the Mart Emmons place."

Later H. G. Davis, after considering the matter further, declined to perform the agreement by making the necessary exchange of deeds, and his brother and sister brought suit against him to compel the specific performance of the contract of settlement, and tendered into court deeds conveying to H. G. Davis the land which it was agreed he should have in the settlement contract.

The court found the fact to be that the parties had entered into the written contract to divide their father's land, and decreed a specific performance of the agreement.

For the reversal of this decree it is insisted that the agreement was not sufficiently definite and certain to be the subject of a suit for specific performance, and further, that the contract did not express the entire agreement of the parties.

We have had before us a number of cases wherein it was sought to specifically enforce contracts for the conveyance of land, wherein it was alleged, in opposition to granting that relief, that the written instrument evidencing the agreement to convey was not sufficiently definite to warrant a decree granting the relief prayed. Two of the latest of these cases are reported in 168 Ark., one being the case of *Harper* v. *Thurlow,* found at page 491, the second that of *Richardson* v. *Stuberfield,* reported at page 713. In the last-mentioned case it was said: "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."

The still later case of *Moore* v. *Exelby,* 170 Ark. 908, reviews the earlier cases on the subject, and it would serve no useful purpose to again review them. The contract involved in that case was made and evidenced by letters exchanged between the parties, none of which purported to describe the land involved, but it was said that "the letters indicate that from the beginning both parties definitely understood the tract of land which was the subject of their negotiations."

The plaintiffs in this case and certain neighbors testified that the lands of L. D. Davis were well known by the names which were employed to designate them in the contract of settlement. The contracting parties were well known to be the heirs of L. D. Davis, deceased, who owned a farm known as the home place, another as the lower bottom place, another as the upper bottom place, and a fifteen-acre tract of land known as the Mart Emmons place. We think these designations furnished a key by which the lands there apportioned are made certain, and that the contract meets the requirements of the Statute of Frauds as announced in the case of *Richardson* v. *Stuberfield, supra.*

It is insisted that the contract was indefinite, in that it does not recite what was to be done with these lands, the phrase "to get" being too indefinite for that purpose.

It will be remembered that the contract was made to effect a family settlement, a thing favored by the law, and that it contemplated the subsequent exchange of deeds, wherein more definite descriptions of the land would be employed, and we think there is no difficulty in determining that, in saying each party was "to get" a certain tract of land, it was intended that the party named as getting the land was to have that land, take title thereto in severalty, and we think this conclusion is warranted by the language of the instrument itself without reference to the parol testimony, which very clearly shows that this was in fact the meaning of the language employed.

It is insisted that the writing did not fully express the agreement of the parties. This contention is based upon the testimony of one or more of the neighbors, who testified that it was also agreed that appellant H. G. Davis was to allow his brother A. S. Davis the use of a tenant house for a year, which was on the land assigned to H. G. Davis.

In answer to this contention it may be said that, if the contract is not void under the Statute of Frauds—and we have concluded that it is not void as failing to meet the requirements of that statute—the performance of the contract is not to be defeated because there was another agreement not embraced in the writing. At any rate, A. S. Davis is not asking the enforcement of this additional consideration, if it was in fact a part of the agreement. He has waived any right to ask a reformation of the agreement, and appears to be satisfied with the enforcement of the contract as written.

It is finally insisted that appellees, the plaintiffs below, are not entitled to equitable relief because they have not come into court with clean hands, in that they ask, in effect, that their father's lands be divided as if there were no will, and yet do not take into account the minor children of a deceased brother, who would be entitled to share in the division of the estate if the testator be treated as having died intestate.

In answer to this contention it may be said that the will was duly probated, and no complaint on behalf of the minors has been made; at any rate they are not affected by the settlement. Their right to contest the will, if it were thought proper so to do, was not involved, and they are not parties to this litigation. If the recital of the will is true, that the deceased son had been given property equal in value to what this son's share would have been had there been no will, this son, and his heirs after him, would be charged with the value of that property as an advancement if the will had been set aside. Section 3485, C. & M. Digest.

The parties to the will divided the lands which had been devised to them, and in which the children of the deceased brother had no interest under the will, and we see nothing in this conduct which would warrant a court of equity in denying them the relief prayed if they were otherwise entitled to it.

We think the decree correct, and it is affirmed.

MORGAN v. MORGAN.

Opinion delivered May 17, 1926.

ESTOPPEL—ACCEPTING BENEFIT OF DECREE.—One cannot accept and derive a benefit from a decree without necessarily admitting its legality.

Appeal from Independence Chancery Court; *Lyman F. Reeder,* Chancellor; reversed.

W. K. Ruddell, for appellant.

S. M. Casey, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant on December 1, 1923, in the chancery court of Independence County, to set aside a decree of divorce and an award of their child obtained by appellee on September 3, 1923, under constructive service upon her husband. It was alleged in the bill that the decree was procured through fraud practiced upon the court by falsely representing that appellant did not know the whereabouts of appellee.

Appellant filed an answer denying the allegations, and, by way of further defense, alleging that appellee was estopped by pleading said decree in bar of an action for divorce and alimony, which appellant pleaded against appellee in the chancery court in Memphis, Tennessee.

The cause was submitted upon the pleadings and testimony adduced by the respective parties, which resulted in the cancellation of the decree rendered September 3, 1923, from which is this appeal.

Although the record reflects that appellant knew of appellee's whereabouts when she brought her suit in the chancery court of Independence County, and that she failed to impart this information to the attorney appointed to represent her husband, which suppression amounted to such a fraud as would justify the court in setting aside the decree, yet appellant estopped himself from taking advantage of the fraud by using the decree sought to be canceled in defeating a suit for divorce and alimony brought by appellant against appellee in Tennessee. The record of the suit and proceedings brought in Tennessee was introduced in evidence in the instant case, and the following is an excerpt from appellee's answer filed therein:

"Having heard that his wife had fraudulently obtained a divorce from him, he immediately went to Batesville to verify the report. Upon his arrival there he not only found his wife divorced, but married to one Harris A. Hobbs, who had been employed by this defendant on the farm of this defendant recently purchased for his wife. Defendant would show that he at once had his former wife and Harris A. Hobbs arrested for bigamous conduct, but that the warrants were later withdrawn and a petition drawn up for the annulment of the divorce proceedings, upon which petition, however, absolutely no court proceedings had been had. Defendant would show that he brought his former wife back to Memphis with him, doing everything in his power to forgive and forget her wrongs to him. That while here in Memphis, and presumably on the best terms with him, the complainant filed her bill in this court, which your defendant alleges is a perjurous statement from beginning to end. Therefore this defendant pleads said former suit and proceedings and adjudication in bar of the present bill, and prays that said adjudication is and remains in full force and effect; and prays that complainant's bill be hence dismissed and the injunction dissolved."

The bill in Tennessee was subsequently dismissed and the injunction dissolved. One cannot accept and

derive a benefit from a decree without necessarily admitting its legality. *Butts* v. *Butts,* 152 Ark. 399. The court therefore committed reversible error in setting the decree of date September 3, 1923, aside for fraud.

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.

CORNING CUSTOM GIN COMPANY v. OLIVER.

Opinion delivered May 17, 1926.

1. CORPORATIONS—DISSOLUTION OF GOING CONCERN.—Where a corporation is a going concern, a minority stockholder cannot maintain a bill to have it dissolved or its assets distributed; if stockholders in such case disapprove of the company's management or consider their speculation a bad one, their remedy is to elect new officers or to sell their shares and withdraw.
2. CORPORATIONS—RIGHT OF STOCKHOLDERS TO SUE FOR CORPORATION.—To enable a stockholder in a corporation to sustain in his own name a suit in equity founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit such a fraudulent transaction, completed or contemplated by the acting managers, as will result in serious injury to the corporation or to the interests of the other stockholders.
3. CORPORATIONS—COMPENSATION OF DIRECTOR.—A director of a corporation acting as manager or in any other capacity outside of his duties as director is entitled to receive compensation either by contract or on a *quantum meruit.*

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

C. O. Raley, F. G. Taylor and *Gautney & Dudley,* for appellant.

C. T. Bloodworth and *M. P. Huddleston,* for appellee.

HUMPHREYS, J. Appellee instituted this suit against appellants in the chancery court of Clay County, Western District, to dissolve the corporation and for an injunction to restrain the appellants from dissipating the assets of the corporation, and to recover from the directors and

officers funds alleged to have been wrongfully and unlawfully paid to them, and for the appointment of a master to state an account, and a receiver to take over the corporate property and to wind up the affairs of the corporation.

The right of appellee, a minority stockholder and director in the corporation, to maintain such a suit was put in issue by a denial of the material allegations in the bill.

The cause was submitted to the court upon the issues joined, which resulted in a dismissal of the bill for the want of equity as to all issues except the issue of the alleged wrongful payment of funds of the corporation to F. B. Sprague, C. R. Black, T. W. Wynn, and L. G. Black, in the sum of $350 each for services rendered to the company by them during the year 1922. Upon this issue a judgment was rendered against the four of them for $1,400. A judgment was rendered in favor of appellee against the corporation for $300 with which to pay his attorney, and in favor of R. P. Taylor, special master, for $50. Both appellee and appellants have prosecuted an appeal to this court from the decree in so far as same was adverse to him or it.

As we view the case, only two real issues are involved. One is whether the corporation, under the facts, is subject to dissolution and to have its affairs wound up by a receiver; and the other is whether the directors and officers may be required to return the salaries received by them to the corporation on the application of appellee, who is a minority stockholder in the corporation.

Since the record is voluminous, only such facts will be set out as are necessary to a determination of these issues. The Corning Custom Gin Company was organized with a paid-up capital stock of $13,400 in the spring of 1919. The gin was constructed at a cost of about $25,000.

The corporation made a net profit of $13,178.77 during the first fiscal year of its operation, ending April 30,

1920. It was operated during that time under the successive managements of Ad Newell, Mr. Nettles, and Clayton Sprague, each of whom was paid at the rate of $150 per month. The directors were paid no salaries during that year.

The second year, ending April 30, 1921, T. W. Wynn was manager at a salary of $300; G. B. Oliver, Jr., was secretary-treasurer at a salary of $600; and the directors were paid $100 each for services they rendered the corporation.

The third year, ending April 30, 1922, G. B. Oliver, Jr., received $350 as secretary-treasurer; T. W. Wynn received $5 per day for 289 days as president and manager; and the directors received $250 each for services rendered by them to the corporation.

The fourth year, ending April 30, 1923, L. G. Black was paid $1,100 as manager, and the directors $500 each for services rendered to the corporation.

On June 28, 1920, the stockholders passed a resolution at a regular meeting, authorizing the directors to pay themselves out of the funds of the corporation such sums or salaries as would compensate and be commensurate with their services for the ensuing years.

On the first day of August, 1923, the stockholders adopted a resolution ratifying the payments made to the directors for services, which resolution recited that certain of the directors had given a large portion of their time and attention to managing the affairs of the corporation and making it a success, and that the sums which had been paid them during the years of the corporation's existence were fair and reasonable and commensurate with the services rendered.

Appellee owned $250 in stock at the time the corporation was organized. He afterwards purchased stock to the amount of about $5,000, and paid $1 to $1.50 for the stock thus purchased. His purchases of stock were made subsequent to the passage of the resolution authorizing the directors to pay themselves salaries for such services as they might render the corporation.

At the time appellee instituted this suit, the gin had been paid for, there was a balance of $2,000 cash on hand, equipment was on hand of the value of $1,136.35, all repairs had been made and paid for, the corporation was out of debt, and an average dividend of 10 per cent. had been paid during each year to the stockholders, and the gin was in actual operation and doing a good business.

The parties from whom appellee purchased his stock participated in the adoption of the resolution authorizing the directors to pay themselves for such services as they might render the corporation.

The law applicable, under the facts stated above, to the first issue involved on this appeal is stated as follows in 7 R. C. L., § 292, p. 315:

"Where the corporation is a going concern, it is undoubtedly true that a minority stockholder cannot maintain a bill to have it dissolved or to have its assets distributed. In such case, if the shareholders disapprove of the company's management or consider their speculation a bad one, their remedy is to elect new officers or to sell their shares and withdraw."

Practically the same rule is announced in vol. 4, § 1542, of Pomeroy's Equitable Remedies, 4th ed., and that text is supported by the notes to the section.

The corporation sought to be dissolved and wound up by a receiver in the instant case was not only a going concern, but was very prosperous. Under the management of the directors, elected by a majority of the stockholders, the gin had been paid for, was in good condition, and had earned an average dividend of 10 per cent. annually for its stockholders.

The law applicable, under the facts stated above, to the second issue on this appeal is stated as follows in the case of *Hawes* v. *Oakland,* 104 U. S. 450:

"We understand the doctrine to be that, to enable a stockholder in a corporation to sustain in a court of equity in his own name a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there

must exist as the foundation of the suit * * * such fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders."

In the instant case there was no fraudulent diversion or misappropriation of funds belonging to the corporation. On the contrary, the funds were used to pay for actual and valuable services rendered by the directors and officers of the corporation under authority from the stockholders, by formal resolution passed at a regular stockholders' meeting. The services rendered were of great benefit to the corporation and shareholders, so much so that the stockholders ratified the payment which had been made to the directors and officers for services by resolution also, which recited that the directors had given a large portion of their time toward building up the business of the corporation and making it a success, and that the salaries paid were reasonable and commensurate with the services rendered. We know of no law prohibiting stockholders from employing directors to perform services for the corporation outside of their regular duties, and remunerating them for it. This court is committed to the doctrine that "when a director is acting as manager, or in any other capacity outside of his duties as director, he is entitled to receive a salary either by contract or upon *quantum meruit,* according to the circumstances of the case. *Coal Co.* v. *Martin,* 86 Ark. 608. We think therefore the trial court erred in rendering a decree against F. B. Sprague, C. R. Black, T. W. Wynn and L. G. Black for the $1,400 and against the corporation in favor of appellee for $300 with which to pay his attorney, and against the corporation in favor of the master for $50.

There was an issue joined and some testimony taken pro and con relative to a claim by appellee against the corporation for cottonseed. The matter was not fully developed, and the master was not requested to state an

account between them or the chancellor to make any finding thereon. It seems that the issue was waived in the court below.

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.

LANE v. STATE.

Opinion delivered May 17, 1926.

1. CRIMINAL LAW—ADMISSION OF EVIDENCE—HARMLESS ERROR.—The error of admitting improper testimony was cured by instructing the jury not to regard such testimony for any purpose whatever.
2. WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENT.—On a charge of grand larceny alleged to have been committed in stealing certain bonds, where defendant testified as to what he did with the bonds, it was not error to permit the State, by way of impeachment, to cross-examine him as to an inconsistent statement made by him in a contempt proceeding growing out of the same transaction.
3. WITNESSES—IMPEACHMENT—COLLATERAL MATTER.—Where the prosecuting witness on cross-examination denied that he had been guilty of gambling on another occasion than the one in question, the defendant was bound by his answer and could not impeach him by evidence to the contrary.
4. CRIMINAL LAW—ADMONITORY INSTRUCTION.—It is proper for a trial court to admonish the jurors to give due regard and weight to the opinion of their fellows in an effort to reach a verdict.

Appeal from Greene Circuit Court, Second Division; *W. W. Bandy,* Judge; affirmed.

T. H. Caraway and *Gautney & Dudley,* for appellant.

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

HUMPHREYS, J. This is an appeal by appellant from a conviction in the circuit court of Greene County for the crime of grand larceny, charged to have been committed by stealing United States Government bonds, the property of James Alexander, of the value of $20,000.

The following six alleged assignments of error are insisted upon by appellant for a reversal of the judgment:

"First. The court erred in permitting counsel for the State to cross-examine defendant as to the civil judgment in the case of *Alexander* v. *Lane.*

"Second. The court erred in permitting counsel for the State to cross-examine defendant as to the evidence concerning the preliminary trial of the defendant on the charge of perjury before Hayes, justice of the peace, and also concerning the evidence of other witnesses in that trial.

"Third. The court erred in permitting counsel for the State to cross-examine defendant as to the proceedings in the Greene Circuit Court in June, 1925, wherein defendant attempted to purge himself of a crime of civil contempt.

"Fourth. The court erred in permitting the counsel for State to browbeat the defendant while on the witness stand by entering into a dispute with him of the occurrences after the commission of the alleged offense.

"Fifth. The court erred in excluding the evidence of T. W. Davis, Charles Freeman, and Ed Landers.

"Sixth. The court erred in giving the instructions urging the jury to get together after the cause had been submitted."

(1). In two instructions, "A" and "B," the court called attention to the fact that testimony relative to the civil judgment against Mr. Lane in regard to the bonds had been introduced. He then instructed them not to regard that testimony for any purpose whatever, for the reason that it shed no light on the guilt or innocence of appellant. If any error was committed by the admission of this evidence, it was cured by these instructions. *Holt v. State,* 91 Ark. 576.

(2). We are unable to find any facts in the record justifying the contention that the prosecuting attorney was permitted to cross-examine appellant touching a charge of perjury against him before Hayes, the justice

of the peace. It appears that the court not only excluded a question propounded by the prosecuting attorney to him relative to what a witness testified to concerning the bonds before the justice of the peace, but told the jury, in instruction "C," that the testimony had been ruled out, and not to consider it in reaching their decision as to the guilt or innocence of appellant.

(3). Appellant's defense was that he won the bonds from James Alexander in a crap game. He testified that on October 14, he took the bonds out of the State and placed them in the First National Bank at Cardwell, Missouri, and kept them there until a few days after his arrest; that, after his preliminary trial, he brought the bonds back to his father's farm and buried them, and that was the last he knew of them. On cross-examination the prosecuting attorney asked him if he was not in jail a number of months for contempt, to which he answered, "Yes sir, about eleven." The prosecuting attorney was then permitted, over the objection of appellant, to ask him if he did not swear in June, when attempting to purge himself of contempt, that he did not know what became of the bonds. Appellant insists that reversible error was committed in requiring him to answer the question. He answered in the affirmative. The testimony was admitted as affecting the credibility of the witness, and we think properly so. He had buried the bonds in November, and his failure to make an explanation of what had become of them was a circumstance for the jury to consider in determining what credit they would attach to his testimony.

(4). We are unable to discover in the record where the prosecuting attorney browbeat appellant when examining him. At times the questions as well as the answers were somewhat heated, and at one time the court was compelled to admonish them against argumentation. Such incidents are common when witnesses are being pressed upon some point, and a judgment should not be reversed on account of them, unless it can be seen that the rights of the defendant were really prejudiced in some

way. We do not think the argumentation between counsel for State and the witness assumed proportions sufficient to prejudice the rights of appellant in any way.

(5). Appellant's counsel recalled James Alexander, the chief prosecuting witness, and asked him whether he had not gambled for money on a trip to the Shrine convention at Pine Bluff. He denied having done so. They then offered to prove by T. W. Davis, Charles Freeman, and Ed Landers that he had gambled on that occasion, under the theory that it was essential to their defense to show that James Alexander had gambled on some other occasion than when appellant claimed to have thrown dice with him for the bonds. Appellant was bound by the answers he elicited from James Alexander on cross-examination. *Lewis* v. *State,* 168 Ark. 590.

(6). The court gave an admonitory instruction to the jury in an effort to get them to agree, after they had retired and been out for a considerable length of time considering the case. This court has recognized the right of the trial court to urge a jury to reach a verdict, and, in doing so, to call their attention to the ills attendant upon a failure to agree. If the admonitory instruction accords the jury the right of voluntary action and the exercise of their own conscience in reaching the verdict, it cannot be said to be objectionable. The admonitory instruction in the instant case did not encroach upon these rights of the jury. It is perfectly proper for a trial court to admonish jurors to give due regard and weight to the opinion of their fellows in an effort to reach a verdict, and this advice by the trial court seems to be the chief objection urged against the admonitory instruction given in this case. *St. L. I. M. & S. R. Co.* v. *DeVaney,* 98 Ark. 83. In support of his contention that the court erred in his admonition to the jury, appellant has cited the case of *Simonson* v. *Lovewell,* 118 Ark. 81, which we do not think is in point. In that case the trial court virtually told the minority to yield to the views of the majority, which was an invasion of the jury's right to act voluntarily and according to their conscience.

No error appearing, the judgment is affirmed.

STRIBLING v. STATE.

Opinion delivered May 24, 1926.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—In a proscution for murder, evidence *held* sufficient to sustain finding that accused shot deceased, who died immediately from effect thereof.
2. CRIMINAL LAW—PROOF OF VENUE.—The venue in criminal cases may be proved by a preponderance of the evidence, and may be established by circumstantial evidence.
3. CRIMINAL LAW—JUDICIAL NOTICE.—Courts and juries take cognizance of location of towns, postoffices and navigable streams.
4. CRIMINAL LAW—EVIDENCE.—In a prosecution for murder, where witnesses testified that accused previously attempted to assault deceased, testimony of a witness that, as accused was leaving the scene of such attempt, witness asked him what he was doing there with a gun, and accused raised the gun and ordered him to stop, was admissible as part of the story and as showing accused's state of mind toward deceased.
5. CRIMINAL LAW—ADMISSION OF EVIDENCE IN REBUTTAL.—The admission of testimony in rebuttal is within the court's discretion.

Appeal from Crittenden Circuit Court, Second Division; *G. E. Keck,* Judge; affirmed.

Walter S. Duggar and *R. R. Bond,* 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 Crittenden County for murder in the first degree in the killing of Brady Williams, and on the trial of the cause he was convicted of that offense, and sentenced to death. The principal ground urged here for reversal of the judgment is that the evidence is not sufficient to sustain the verdict.

The killing occurred on October 2, 1925, about eight o'clock in the morning, at or near West Memphis, in Crittenden County. Appellant and Brady Williams both resided at West Memphis, and Williams was working on the bridge, or viaduct, commonly known as the Harrahan viaduct, which forms the approach to one of the bridges across the Mississippi River at Memphis.

Witnesses introduced by the State testified that, on the day before the killing, appellant came to the place

where the workmen, including Williams, were sitting about, eating their noonday meal, that he had a shotgun in his hand, and attempted to assault Williams, declaring, as he approached, that he had come to kill Williams on account of the latter having ravished his (appellant's) daughter. There was testimony introduced by appellant to the effect that, in the latter part of July, deceased had ravished appellant's fifteen-year-old daughter. According to the testimony of the witnesses for the State, appellant's assault on Williams was averted by Williams getting behind other men who were present at the time. One of the witnesses testified that, when appellant made the assault with the gun, he (witness) ran over a short distance and notified a man named Jaco, who was the "boss man," as they called him, and that, as Jaco came forward, appellant turned and walked away, and that, when Jaco accosted him and reprimanded him for interfering with the workmen, appellant raised his gun and compelled Jaco to stop. This ended the occurrence, according to the testimony of the witnesses. The killing occurred early next morning, and the same witnesses, or some of them, testified that they saw appellant in the edge of a thicket, armed with a gun, and that, as Williams entered the thicket to hide himself for the purpose of attending to a call of nature, they heard the sound of a gunshot in that direction, and, looking there, they saw appellant running away with a gun in his hand, and Williams coming back toward the viaduct, calling out in anguish. They testified that Williams made no statement, but ran a short distance and fell dead.

There is some discrepancy in the testimony as to the kind of gun appellant used and also as to the kind of clothing he wore, but three witnesses testified that they saw appellant shoot Williams, or at least they saw him run away when the shot was fired. If the testimony of the witnesses is true, appellant is undoubtedly the man who shot and killed Williams. He denied it, and said that he had no gun and was not there on that occasion. Other witnesses introduced by him supported

his testimony, but that raised a question for the jury, and we are concluded by the verdict of the jury rendered upon conflicting testimony.

It is argued that the testimony does not sufficiently show that deceased died from the effects of the wound, but we think the testimony is abundant to show that Williams was shot, and died immediately from the effect of the wound, and that appellant was the one who did the shooting.

Again, it is contended that the venue is not proved. We have often held that venue in a criminal case may be proved only by a preponderance of the evidence, and may be established by proof of circumstances. The witnesses testified that the killing occurred in sight of the viaduct in West Memphis, and in front of the postoffice. Courts and juries take cognizance of the locations of towns, postoffices and navigable streams, and we know that the places described by the witnesses are situated in Crittenden County.

The State was permitted, over the objection of appellant, to introduce, in rebuttal, Jaco, the individual mentioned above, who testified in substance that, on the day before the killing, about noon, he was called by one of the men to come down to the place near the viaduct where appellant was, armed with a gun, and that, when he came within about one hundred yards of appellant and asked him what he was doing there on the premises with a gun, appellant raised the gun and directed him to stop, which he did. It is contended that this testimony was incompetent, as it tended to prove a distinct offense, that is to say, an assault by appellant on Jaco. The court directed the jury, at the time the testimony was introduced, not to consider it for any purpose except "as it might shed light on the mental condition of defendant with reference to his attitude or feeling towards the deceased." We think the testimony was competent. Jaco was not present when appellant attempted to assault Williams, but other witnesses testified concerning appellant's conduct in that respect, and Jaco's testimony

related to appellant's conduct immediately afterwards, and his testimony tended to show appellant's disposition to prevent any interference with his effort to assault Williams. It is true the attempt was over, and appellant was about to leave the premises, but the tendency of this testimony was to show his state of mind at that time, not towards Jaco but towards Williams. In other words, it was part and parcel of the whole story as to what occurred on this occasion when appellant attempted to assault Williams, and the part related by Jaco was concerning appellant's conduct immediately after the assault. Of course, if there had been no other testimony introduced concerning what occurred on that occasion, Jaco's testimony would not have been competent, as it would have had reference only to appellant's apparent attitude towards Jaco, but, when the testimony is considered in connection with what the other witnesses related, it is plain that the conduct of appellant at that time had some tendency to show his state of mind towards the deceased Williams. This testimony was introduced in rebuttal, but that was a matter which appealed to the discretion of the trial court.

We find no error in the record, and the testimony abundantly justifies the verdict of the jury in finding appellant guilty of murder in the first degree.

Judgment affirmed.

MORNING STAR MINING COMPANY v. WILLIAMS.

Opinion delivered May 24, 1926.

ATTORNEY AND CLIENT—RATIFICATION OF EMPLOYMENT.—Where plaintiff accepted employment as defendant's attorney from defendant's former manager, under reasonable belief that such employment was authorized, evidence that the plaintiff conferred with the officers of defendant concerning the litigation and was encouraged by them to continue in its prosecution, *held* sufficient to show ratification of the employment.

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

J. H. Black and *Coleman, Robinson, House & Riddick,* for appellant.

Floyd & Floyd, for appellee.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover compensation for services rendered in certain litigation in which appellee appeared as attorney for appellant. The litigation in question was a case which came to this court on appeal. *Morning Star Mining Co.* v. *Bennett,* 164 Ark. 244. Appellee alleged in his complaint that he was employed in that litigation by G. W. Chase, purporting to act as general manager of the business and affairs of appellant, and that the officers of appellant, with knowledge of the employment of appellee and of his performance of the services in the litigation, accepted the benefits and ratified such employment. Appellant answered denying that Chase was the manager of the business or affairs of appellant or had any authority to employ appellee as attorney, and also denied that the employment had been ratified or the services accepted by appellant. There was a trial of the issues before a jury, which resulted in a verdict in favor of appellee.

Appellant is a foreign corporation, and owns and operates certain mining property in North Arkansas. For the past twenty-five years, up to the time of the occurrences now under investigation, G. W. Chase was the general manager of appellant's business in Arkansas. In the autumn of 1919 Chase entered into a contract with Miss Roze E. Bennett, authorizing her, for a consideration, to find a purchaser and make a sale of a certain group of mining properties, including the property of appellant. During the summer of 1920 Chase, purporting to act as manager and agent of appellant, employed appellee as an attorney at law to institute an action against Miss Bennett to cancel, as a cloud on the title to the lands owned by Chase and appellant, the aforesaid contract authorizing her to make sale of the

property. It appears that this contract was placed of record, and, upon consultation with attorneys, it was determined that it was, or might become, a cloud on the title of appellant to the property it owned in its mining operations. The action was instituted in September, 1920, and both Chase and appellant were joined as plaintiffs, and Miss Bennett was the sole defendant. The cancellation was sought on the ground that the contract was obtained by fraud. Miss Bennett answered the complaint, denying the allegations of fraud, and she also filed a cross-complaint against appellant and Chase to recover damages for breach of the contract.

The testimony in this case establishes the fact that Chase had in fact ceased to be the manager of appellant, and that on April 12, 1920, there had been a complete change in the officers and management of appellant corporation. Appellee testified, however, that he did not know of this change, that Chase had been the manager for twenty-five years, and appeared to be still in control of the business and affairs of appellant in this State, and that Chase employed him not only for himself but for appellant. Appellee also testified that, as soon as he filed the complaint, he mailed a copy of the pleadings to Mr. Reid, the president of the corporation, who resided at Memphis, and also mailed a copy to a Mr. Straub, of Pittsburgh, who was understood to be negotiating for the purchase of the stock. Reid had been president of the corporation, but ceased to be on April 12, 1920, when new officers were elected. A Mr. Lyons was elected president to succeed Reid, and appellee testified that, after the institution of the suit, Lyons came to appellee's office in Yellville, Marion County, where the suit was pending, and conferred with him about the pendency of the suit. He testified that he went over the matter with Mr. Lyons, fully informing him as to the status of the litigation, and that Lyons made no objection to the inclusion of appellant as plaintiff in the litigation, or to appellee's conducting the litigation as attorney for the plaintiffs. Appellee testified that about that time,

or shortly thereafter, another attorney in Yellville was employed to assist him in the litigation, and that they prepared the case for trial and presented it in the chancery court. There was a decree against appellant, which was appealed to this court and reversed. After the decree was rendered, appellee was informed by appellant that other attorneys in Little Rock would be employed to conduct the case in the Supreme Court, and with that appellee's connection with the litigation ended.

The testimony adduced by appellant shows conclusively that Chase had ceased to be the manager of the business at the time the litigation with Miss Bennett was instituted, and the testimony also tended to show that appellee's employment was never ratified by the proper officers of appellant.

The principal contention in the case is that the evidence is not legally sufficient to sustain the verdict. The case went to the jury upon the sole issue as to whether or not appellant ratified the employment of appellee by Chase, and we consider the testimony for the purpose of determining whether or not it is legally sufficient to sustain the verdict in favor of appellee on that issue. We think that the testimony is sufficient. According to the testimony of appellee, he accepted employment from Chase in good faith for the purpose of instituting an action to remove a cloud upon appellant's title to the property, and he had reason to believe, and did believe, that Chase was authorized to employ him. Chase had previously employed him for appellant, and the fees had been regularly paid. He further testified that, after the suit was commenced, the president of the corporation conferred with him about the litigation, with knowledge that appellant was a party to the suit, and encouraged him to continue in its prosecution.

The facts of the case come within the rule announced by this court in *Davis* v. *Trimble*, 76 Ark. 115, 88 S. W., 920, where we said that, when persons were informed that they were parties to a suit and that an attorney had been employed, even without authority to represent them in the

litigation, if they remained silent and accepted the services of the attorney, "even though employed by another, the law would imply an agreement on their part to pay for the services." The testimony in the present case fully measured up to that rule. Viewing it in the light most favorable to appellee, appellant's officers knew that a suit had been brought by appellee in appellant's name to protect its property, and without objection accepted the services of appellee. It is true that appellant was not a party to the contract between Chase and Miss Bennett, and for this reason the Supreme Court reversed the decree in Miss Bennett's favor. But the suit was instituted in good faith, upon the theory that the contract was, or might be considered, a cloud on appellant's title, it being a contract which related to and specifically described appellant's property. With full knowledge of the pendency of the suit, appellant's authorized officers permitted it to proceed to final decree. If Mr. Lyons, as president of appellant corporation, objected to appellant being made a party to the action, he should have made known the objection at the time it was brought to his attention by appellee in the latter's office. Instead of making objection, he kept silent and permitted the suit to proceed to final decree, and permitted appellee to continue his services in the prosecution of the suit in appellant's name as well as that of Chase.

There were objections to the court's charge, but we are of the opinion that the only issue in the case, that of ratification of appellee's employment by acceptance of his services, was correctly submitted to the jury. The objections made here to those instructions are not well founded.

Finding no error in the record, the judgment must be affirmed, and it is so ordered.

LEWIS v. BUSH.

Opinion delivered May 24, 1926.

1. TRUSTS—CONSTRUCTION OF PLEADING.—In an action to foreclose a vendor's lien, where the land was sold by the commissioner to a subvendee, who had previously sold the land by warranty deed, defendants' exceptions to the commissioner's report of sale, alleging that such purchaser was personally liable to defendants by reason of such warranty, and asking that he be declared liable to them, and that a trust be enforced in their favor, was properly treated as a complaint against such purchaser, and, all parties being before the court, it had complete jurisdiction to determine the rights and equities of the parties.
2. VENDOR AND PURCHASER—AFTER-ACQUIRED TITLE.—Where a purchaser of land conveyed same by warranty deed, without paying the purchase money notes, and subsequently purchased the land on foreclosure of the vendor's lien, he became trustee for those deraigning title under him, under Crawford & Moses' Dig., § 1496.
3. TRUSTS—CONSTRUCTIVE FRAUD.—Unconscientious conduct constituting constructive fraud in equity is a necessary element of a constructive trust, not arising from actual fraud or violation of positive fiduciary obligation.

Appeal from Woodruff Chancery Court, Southern District; *A. L. Hutchins,* Chancellor; reversed.

Wils Davis, for appellant.

Ross Mathis, for appellee.

WOOD, J. W. T. Trice conveyed to W. J. Lovelace and S. M. Bush about four hundred acres of land in Woodruff County, Arkansas, including lot 3, section 7, township 4 north, range 3 east. The purchase price was $7,254.94, $462 of which was paid in cash and the balance was evidenced by purchase money notes with a vendor's lien retained in the deed to secure payment of the same. These notes were sold by the vendor Trice to one James, and payments from time to time were made thereon, reducing the amount to $4,285.30. The grantees, Bush and Lovelace, conveyed lot 3, section 7, to C. C. Hawkins and M. A. Cheshire, by warranty deed, and they in turn conveyed the lot by warranty deed to A. C. and Ruth H. Lewis for a consideration of $3,096 in cash. James instituted this action to foreclose the vendor's lien on

the notes he had purchased from Trice, and all the parties to the conveyances above mentioned were made parties defendant. A. C. and Ruth H. Lewis answered the foreclosure suit, denying all the allegations of the complaint. There was a decree of foreclosure, and all the lands originally sold, including lot 3 above described, upon which the vendor's lien was retained, were ordered to be sold to satisfy the notes. A commissioner was appointed to make the sale and directed to sell, first, all the property except lot 3, and then to sell lot 3. The commissioner duly advertised the land and made the sale as directed in the decree. Bush purchased all of the land at the sale. For lot 3 he paid the sum of $750, as shown in the report of the commissioner.

When the commissioner's report came in, A. C. and Ruth H. Lewis filed their exceptions thereto, setting up substantially the above facts, and alleging that Bush was personally liable on the notes, and that he became by warranty deed one of the remote grantors of A. C. and Ruth H. Lewis, and, notwithstanding that fact, he procured a release of certain parts of the land on which the original vendor's lien was retained to secure the notes, and permitted a judgment to be taken against himself and A. C. and Ruth H. Lewis on the notes, and permitted the sale of the lands, including lot 3, which had been conveyed by warranty deed to A. C. and Ruth H. Lewis; that he appeared at the sale and purchased the lot for the sum of $750, as above stated. They concluded their pleadings, designated "exceptions to the commissioner's report," with the following prayer:

"Your exceptors pray that this honorable court enter a decree declaring the same S. M. Bush to be primarily liable for the payment of said notes; that he became the purchaser of said property absolutely when he made the bid; that any title which he obtained be declared to be held in trust by him for the use and benefit of these defendants (A. C. and Ruth H. Lewis); that this honorable court further by decree declare that said title was an afterwards-acquired title and flows into these defend-

ants by reason of the warranty deed above set out, and for such other equitable relief as the court may deem proper in the premises."

The cause was heard upon an agreed statement setting forth the facts substantially as above, in which it is recited: "It is agreed and stipulated that the following agreed statement of fact shall be used as evidence in this cause on the exceptions filed by A. C. and Ruth H. Lewis to the report of the commissioners regarding the sale of land under the decree entered herein. It being further agreed that said exceptions may also be treated as a motion for equitable relief prayed for therein." The decree of the court recites in part as follows: "This cause came on to be heard on this the 14th day of November, 1924, upon the exceptions of A. C. and Ruth H. Lewis, and all parties being present, the cause was submitted to the court upon the agreed statement of facts, the report of the commissioner, and on motion the exceptions of the report of the commissioner were treated also as a prayer to declare a resulting trust. * * * And the court, being well and sufficiently advised, doth find that there was no trust created in favor of the defendants A. C. and Ruth H. Lewis by reason of the purchase of said lands by defendant S. M. Bush. It is therefore considered, ordered and decreed that the exceptions and petition filed by the defendants A. C. and Ruth H. Lewis be and the same are hereby dismissed for want of equity." From that decree is this appeal.

The agreed statement of facts and the recitals of the decree show that all the parties in interest were before the court, and that, as between the appellants and the appellee Bush, the court treated the cause as if it were an action by the appellants against the appellee Bush to have him declared a trustee and as holding title to the lot in controversy for the benefit of the appellants, and as if he had denied that the facts were sufficient to entitle the appellants to the relief prayed. The court ruled correctly in so treating the cause, but erred in ren-

dering a decree in favor of the appellee upon the issues and facts presented. Bush, as one of the original purchasers and makers of the notes secured by the vendor's lien foreclosed in this action, was primarily liable on these notes which he failed to pay. He and Lovelace, the original purchasers, had sold the lot in controversy by warranty deed to Hawkins and Cheshire, and they in turn by warranty deed had sold the lot to the appellants. All these parties were before the court. Bush was liable on his warranty to Hawkins and Cheshire, and they in turn were liable on their warranty to the appellants. The appellants' exceptions, as already stated, were and should have been treated as a complaint against Bush and Lovelace and appellants' immediate grantors, to establish a trust and to hold Bush and Lovelace and appellants' immediate grantors liable on their warranty. Under the issues and facts thus presented, the chancery court had complete jurisdiction to determine the cause with respect to the rights and equities of all the parties in interest. When Bush sold the land by warranty deed, he became liable to those who deraigned title from him to make his title good. Therefore, when he failed to pay the notes on which he was liable for the original purchase money, and thus permitted the land to be sold, and acquired title to the same by purchasing at the foreclosure sale, he became in reality a trustee to those who deraigned title under him. To hold otherwise would enable him to perpetrate a fraud upon them. Section 1498 of C. & M. Digest provides: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

In *Haskell* v. *Patterson,* 165 Ark. 65, 262 S. W. 1002, we quote from Mr. Pomeroy as follows: "Constructive

trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and, in most cases, contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed trusts *in invitum.*" Continuing, the learned author further says: "An exhaustive analysis would show, I think, that all instances of constructive trusts, properly so called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. Even in that single class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, the notion of fraud is not invoked, simply because it is not absolutely necessary under the circumstances; the existence of the trust in all cases of this class might be referred to constructive fraud. * * * Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud." *Pharr* v. *Fink,* 151 Ark. 305, 237 S. W. 728; *Bragg* v. *Hartney,* 92 Ark. 55-59; 26 R. C. L., p. 1232.

Under the above statute and the doctrine of constructive trusts announced by Mr. Pomeroy, the purchase by Bush of the lot in controversy should be treated by him as a redemption of the land from the foreclosure

sale for the benefit of those who deraigned title under him, and he should be declared a trustee of such title, holding the same for their benefit. The decree is therefore reversed, and the cause is remanded with directions to the chancery court to require the appellee Bush to make good his warranty by conveying the lot in controversy to the appellants, and, if not, by such other appropriate orders as may be necessary for that purpose.

STEWART-MCGEHEE CONSTRUCTION COMPANY *v.* BREWSTER AND RILEY FEED MANUFACTURING COMPANY (2 CASES).

Opinion delivered May 24, 1926.

1. MECHANICS' LIENS—RIGHT TO RECOVER ON CONTRACTOR'S BOND.—Materialmen are entitled to recover on a contractor's bond executed under Crawford & Moses' Dig., § 6912, without filing liens within 90 days after materials were furnished, provided suits were brought before time has expired for establishing their liens.
2. MECHANICS' LIENS—CONTRACTOR'S BOND—PRIVITY.—Where a contractor's bond given to the owners for the faithful performance of the contract provides that it shall be for the benefit of those furnishing labor or materials, they may maintain an action thereon, though they are not directly parties to the bond.

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

Abner McGehee, for appellant.

Rowell & Alexander and *Harry T. Wooldridge,* for appellee.

WOOD, J. These were separate actions filed in the Jefferson Circuit Court by the appellees, material furnishers, against the appellants. The complaints alleged, in substance, that the respective plaintiffs had furnished material to one J. C. Shepherd, which material was used in the Hippodrome Theater building in the city of Pine Bluff, and which material had not been paid for; that Shepherd was a subcontractor of the Stewart-McGehee Construction Company, hereafter called company, and

had a contract for building the theater; that the company was liable to the appellees under a bond containing the following provisions, to-wit: "That we, Stewart-McGehee Construction Company, a corporation, as principal, and the Fidelity and Deposit Company of Maryland, Baltimore, Md., as surety, are held and firmly bound unto the State of Arkansas, for the use of the Hippodrome Theater Company, a corporation incorporated under the laws of the State of Louisiana, its successors and assigns, and all persons in whose favor liens might accrue, under chapter 110 of Crawford & Moses' Digest of the Statutes of Arkansas, including all subcontractors, laborers, workmen, mechanics and material furnishers, and other persons having claims which might be the basis of liens, both jointly and severally, as their interests may appear, in the full sum of three hundred and twenty-four thousand dollars ($324,000) lawful money of the United States of America, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, administrators, executors, assigns and successors."

The company demurred and answered. It denied liability, and set up that the appellees had failed to file with the clerk of Jefferson County an itemized statement of account for the material alleged to have been furnished by them, duly verified. The causes were by consent consolidated for trial and tried by the court sitting as a jury. After hearing the testimony, the court rendered judgments in favor of the appellees.

1. The only question presented by this appeal is whether or not the company is liable under the provisions of its bond. No issue is raised as to the amounts of the judgments. The company contends that it is not liable because the appellees failed to comply with the provisions of § 6922 of C. & M. Digest, requiring them to establish their liens by filing with the circuit clerk of the county in which the building is situated, within ninety days after the material was furnished, a just and true account of the demand due and owing them, etc. Section

6912 of C. & M. Digest is as follows: "The principal contractor may execute a bond to the State of Arkansas, for the use of all persons in whose favor liens might accrue, under § 6906 *et seq.*, conditioned for the payment of all claims which might be the basis of liens; which bond shall be in a sum of not less than double the amount of the contract price, with good and sufficient sureties, whose qualifications shall be verified, and such sureties shall be approved by the clerk of the circuit court in the county in which the property is situated, and may file such bond in the office of said clerk; provided, that if such bond is not filed, all laborers, mechanics, and material furnishers, except the principal contractor, shall have a lien for the unpaid amount of their claims against the building erected and improved and against the lot of ground upon which the same is situated, and provided in this chapter. Provided, that if the owner shall require the contractor to execute bond, and the same shall be executed, approved and filed, as herein provided, he shall not be liable, nor shall the building, erection or improvements, nor shall the lot or ground upon which the same is situated, be liable for any sum or sums of money due subcontractor, laborers or materialmen because of any work done, labor performed, or material furnished in the erection of said building erected, or improvements under contract with said principal contractor or subcontractor. Suit may be brought on said bond by any person interested."

Section 6922, *supra,* requiring liens to be established, is § 11 of the comprehensive lien law enacted April 20, 1895. Section 6912, *supra,* permitting the principal contractor to execute a bond for the use of all persons in whose favor liens might accrue, is the first section of act 446 of the Acts of 1911, enacted June 2, 1911. The provisions of the last enactment show that it was an amendment to the prior lien law, related to the same subject-matter, and is *in pari materia.* Therefore, to ascertain its meaning, it must be construed in connection with the provisions of chapter 110 of C. & M. Digest, relating

to mechanics', laborers' and material furnishers' liens. *Pope* v. *Nashville,* 131 Ark. 429-437; *State* v. *Boney,* 156 Ark. 169-174; *McIntosh* v. *Little Rock,* 159 Ark. 607-610. See also *Beloate* v. *Baker & Co.,* 126 Ark. 67-71. Giving due consideration to the above rule for the construction of the statute, we are convinced that it was the intention of the Legislature to provide an entirely different method to be pursued by the owner, the contractor, and the person in whose favor liens might accrue under the provisions of chap. 110, § 6906, C. & M. Digest, for the establishment, security and payment of claims, than that to be pursued under that chapter prior to the enactment of act 446, *supra.*

It will be observed that it is not obligatory upon the owner of the improvement to require the principal contractor to execute a bond. He may do so or not, as he deems to his interest. Likewise, the contractor is not required by virtue of the law to execute a bond. He may refuse to do so. It is entirely a matter between the contractor and the owner as to whether the bond provided by statute shall be executed. But, where such bond is required by the owner and executed by the principal contractor, then the persons for whose use and benefit the bond is executed (§ 6906 *supra*) must look to the bond as their security for the payment of their claims, and not to a lien on the improvement. In other words, where the bond provided for under § 6912 of C. & M. Digest is not executed, those who are given a lien under § 6906, *supra,* must comply with the provisions of § 6922, *supra,* in order to avail themselves of the benefit of such lien; but, if the bond is executed as provided by § 6912, *supra,* then the parties having claims *which might be the basis of liens* do not have to comply with the provisions of § 6922, *supra,* in order that they may establish and obtain the payment of their claims. They must resort to the bond. But unless the beneficiaries under the statute institute suit on the bond before the time has expired for establishing a lien, then they have no claims which might be the basis of liens. *Acme Brick Co.* v. *Swim,*

168 Ark. 185. The language of § 1 of act 446 of the Acts of 1911, § 6912, *supra,* shows that, where the bond is executed pursuant to that section, the persons otherwise entitled to liens would no longer be entitled thereto, and hence would not have to comply with the provisions of § 6922, *supra.* Where the bond is executed *ipso facto,* the provisions relating to liens on the improvement are superseded, and no lien can attach. It occurs to us that no other meaning can be given the language, "provided, that if such bond is not filed, all laborers, mechanics and material furnishers, except the principal contractor, shall have a lien for the unpaid amount of their claim," etc. This language necessarily implies that, if the bond is filed, then the persons named shall have no lien. Likewise such is the only meaning that can be given the language that "if the owner shall require the contractor to execute bond, and the same shall be executed, proved and filed as herein provided, he shall not be liable, nor shall the building, erection or improvements, nor shall the lot of ground upon which the same is situated be liable," etc. Since therefore no lien can be established and declared if the bond is filed, it necessarily follows—where the bond is filed—that the parties having claims do not have to comply with the requirements of § 6922, *supra.*

We have already in effect given the statute the above construction in the case of *Beloate* v. *Baker & Co., supra,* where we said: "Section 1 (§ 6912 of C. & M. Digest), as quoted above, was only intended to give the owner the privilege of requiring a bond so as to obviate liens of laborers and mechanics and material furnishers, and to give a lien on a building or other improvement in favor of subcontractors, laborers or materialmen for the full amount of their respective claims in the event the bond be not given." See also *Acme Brick Co.* v. *Swim supra.* A like construction in other jurisdictions has been given statutes having a similar purport to our statute, as we construe it. See *Bohn* v. *McCarthy,* 11 N. W. 127; *Martin* v. *Swift,* 12 N. E. 201; *Risse* v. *Hopkins,* 40 Pac. 904.

2. Although learned counsel for the company states in his brief that the only issue is as to whether or not the appellees can recover without complying with § 6922 *supra,* nevertheless he contends that the appellees had no right to recover on the bond for the reason that there is no privity of contract between the company and the appellees, inasmuch as the contract was between the appellees and J. C. Shepherd, who was a subcontractor of the company. We cannot concur with this view. It is conceded by the company that the bond was executed under the authority of § 6912 *supra,* and by its express terms the company, as principal, and the Fidelity & Deposit Company of Baltimore, Maryland, as its surety, "are held and firmly bound unto the State of Arkansas, for the use of * * * and material furnishers and other persons having claims which might be the basis of liens," etc. This court, in a long line of cases, has ruled that, where a promise is made to one upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor for breach of his promise. *Chamblee* v. *McKinzie,* 31 Ark. 155; *Talbot* v. *Wilkins,* 31 Ark. 411; *Heck* v. *Caughron,* 46 Ark. 132; *Thomas* v. *Prather,* 65 Ark. 27; and several subsequent cases where the doctrine is recognized, among the more recent being *Schmidt* v. *Griffith,* 144 Ark. 28; *Lesser-Goldman Cotton Co.* v. *Fletcher,* 153 Ark. 17-34; *Carolus* v. *Arkansas Light & Power Co.,* 164 Ark. 570.

The terms of the statute under which this bond was executed are written in the bond. See *Brink* v. *Bartlett,* 29 So. 958. The concluding sentence of § 6912, *supra,* is: "Suit may be brought on said bond by any person interested." In 39 Ann. Cases, 757, the editors announce the doctrine as follows: "Where a contractor's bond given to the owner for the faithful performance of the contract contains an express provision that it shall be for the benefit of those furnishing labor and material, it is generally held that they may maintain an action thereon though they are not directly parties to the bond." See also cases there cited. Our own court in

Rieff v. *Redfield School Board,* 126 Ark. 474-479, construing a bond executed pursuant to this statute for the erection of a public school building, which contained a provision that the contractor should pay "for all material and labor for the building," held that the bond inured to the benefit of those furnishing the labor and materials, and that they could maintain an action on the bond executed by the principal contractor and his sureties. It appears that these actions were not instituted within ninety days after the last item of material was furnished. Therefore at the time the actions were instituted appellees did not have claims which might be the basis of liens, and under the doctrine of *Acme Brick Co.* v. *Swim supra,* they have no right of action.

The judgments of the Jefferson Circuit Court are therefore reversed, and the causes are dismissed.

JOHNSON *v.* STATE.

Opinion delivered May 24, 1926.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of voluntary manslaughter.
2. HOMICIDE—INSTRUCTIONS AS TO SELF-DEFENSE.—An instruction as to self-defense is not open to a general objection that it fails to state that accused had the right to act upon the appearance of danger to herself and not as it appeared to the jurors, especially where another instruction contained such a statement.
3. WITNESS—EXAMINATION.—It was within the court's discretion to refuse to permit counsel for accused to repeat, on redirect examination, questions in varying form which had been propounded on direct examination.

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

Brundidge & Neelly, for appellant.

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

HART, J. Trudy Johnson prosecutes this appeal to reverse a judgment of conviction against her for manslaughter.

On Sunday evening of the 24th day of January, 1926, Trudy Johnson engaged in a difficulty with Lillie Davis, near the depot at Kensett, in White County, Arkansas, and killed her by cutting her with a knife.

According to the testimony of one of the witnesses for the State, Lillie Davis passed by Trudy Johnson at the station at Kensett, in White County, Arkansas, and Trudy said, "You had just as well come on across; I am going to ask you." The witness did not know what Trudy was talking about, and Lillie did not answer her. Lillie went on into the station, and Trudy walked in behind her. When they got into the station, Trudy said, "I heard some cow was going to pull my hair." Lillie Davis did not reply to this. When the parties first met, Trudy Johnson had an open knife in her hand, and had it hid under her coat.

According to the testimony of another witness for the State, she heard Trudy Johnson say to Lillie Davis, in the waiting-room at the station, that if any one wanted to pull her hair she was there. Lillie Davis did not reply. The parties then left the waiting-room and went out on the station platform. Trudy Johnson and Lillie Davis commenced to strike each other. When the last lick was passed, Trudy backed up and said: "Oh yes, you thought I was by myself." The witness did not see anything in the hand of Lillie Davis. After Trudy struck Lillie the last time, the latter walked four or five steps, and fell. She died soon afterwards. This witness did not know who struck the first lick. Four or five licks passed. Lillie struck Trudy two licks, and Trudy struck Lillie two or three licks.

According to the testimony of another witness for the State, he heard one of the parties ask the other what she was going to do about it, and the latter then asked the former what she was going to do. Lillie Davis was the larger of the two women, and hit Trudy Johnson first.

Trudy Johnson fell back, and then rushed back to Lillie Davis and struck her. She struck her three times. Then Lillie Davis started to walk off. Trudy Johnson ran away after striking Lillie Davis the third time.

On cross-examination this witness said that Lillie Davis struck Trudy Johnson with her fist, and that Trudy staggered back. Trudy Johnson straightened up, and then began to strike at Lillie Davis. She struck her three times. Lillie Davis struck at Trudy the second time, but the witness does not know whether or not she hit her. Trudy Johnson was stabbing Lillie Davis with a knife while she was striking at her. Lillie Davis had one cut on the face, and was stabbed in the left breast. She died in a few minutes after she was stabbed with the knife by Trudy Johnson.

According to the evidence for the defendant, she was a small woman, weighing about 115 pounds, and Lillie Davis was a large woman, weighing about 175 pounds. Both of them were colored, and most of the witnesses are colored people. According to the testimony of Trudy Johnson, Lillie Davis called her a whore, and struck her twice before she struck back. She was staggered by the blow of Lillie Davis, and, happening to remember that she had in her pocket a knife with which she had been picking out nuts, she pulled it out and stabbed Lillie Davis for the purpose of protecting herself. The defendant cut Lillie Davis with a knife because she thought that Lillie Davis had a knife in her hand and was trying to cut her with it.

The jury returned a verdict of guilty of manslaughter, and fixed the punishment of the defendant at five years in the penitentiary.

It is not necessary to discuss or review the evidence. A mere recital of the substance of the evidence for the State shows that it fully warranted the verdict of the jury. It is earnestly insisted, however, by counsel for the defendant that the court erred in giving instruction No. 4, which reads as follows:

"You are instructed that no one resisting an assault made upon her in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat in a sudden quarrel, or from anger suddenly aroused at the time it is made, is justified in taking the life of the assailant, unless she is so endangered by such assault as to make it necessary to kill the assailant to save her own life or to prevent a great bodily injury, and she employed all the means in her power, consistent with her safety, to avoid the danger and avert the necessity of the killing. The danger must apparently be imminent and actual, and she must exhaust all means within her power, consistent with her safety, to protect herself, and the killing must be necessary to avoid the danger. If, however, the assault is so fierce as to make it apparently as dangerous for her to retreat as to stand, it is not her duty to retreat, but she may stand her ground, and, if necessary to save her own life or to prevent a great bodily injury, slay her assailant."

It is insisted that the instruction is erroneous because it does not in any part of it provide that the accused might act upon what might reasonably appear to her, from the circumstances surrounding her, to be her danger at the time she stabbed the deceased with her knife.

It is true that we have many times held that the right of an individual to fight in self-defense arises from his belief for the necessity of it, and not from the belief of the jury as to the necessity for it. *Smith* v. *State,* 59 Ark. 132, and *Scroggin* v. *State,* 109 Ark. 510, and cases cited.

In this connection, however, it may be stated that the court gave instruction No. 3, which reads as follows:

"You are instructed that the right of self-defense is founded solely on the principle of necessity, and before this plea is available in this case it must have appeared to the defendant, acting without fault or carelessness on her part, not only that danger to her at the hands of deceased was imminent, but that it was so pressing and

urgent that, to save herself from immediate death or great bodily harm at the hands of the deceased, the killing of the deceased was necessary."

It will be observed that in this instruction the jury is expressly told that the defendant might act upon the appearance of danger to herself. Instructions Nos. 3 and 4 were given together, and the court is not required to declare the whole law in one instruction. When the two instructions are considered and read together, they bring the case within the rule announced in *George* v. *State,* 148 Ark. 638, and other decisions of this court on the question.

In this connection it may be stated that a general objection was made to the instruction, and, if counsel for the defendant thought that it would tend to confuse or mislead the jury in the respect now complained of, they should have made a specific objection to the instruction, and doubtless the court would have inserted a clause in it that the defendant had a right to act upon the appearance of danger to herself, and not as it appeared to the jury. See *Youngblood* v. *State,* 161 Ark. 144.

What we have said with regard to instruction No. 4 applies with equal force to the objection made to instruction No. 5 given on behalf of the State, and we do not deem it necessary to set out instruction No. 5 in the opinion.

A reversal of the judgment is also asked upon the failure of the court to give three instructions requested by the defendant. We do not deem it necessary to set out these instructions. They are either argumentative in form, or were fully covered by the instructions given by the court.

In this connection it may be stated that the defendant was indicted for murder in the first degree, and the court expressly told the jury that the evidence was not sufficient to sustain either murder in the first degree or murder in the second degree. The court then proceeded to read the statute defining manslaughter, and fully and

fairly covered the respective theories of the State and of the defendant upon this phase of the case.

The jury was also fully instructed upon the subject of self-defense and of reasonable doubt. In our opinion no prejudice could have resulted to the defendant from the instructions given by the court, or in refusing those asked by the defendant.

It is next insisted that the court erred in the exclusion of testimony. This assignment of error is predicated upon a colloquy between the court and one of the counsel for the defendant during the examination of a witness for the defendant. After the witness had been examined by counsel for the defendant and cross-examined by the prosecuting attorney, the witness was again subjected to a redirect examination by counsel for the defendant. We copy from the examination of the witness by counsel for the defendant the following:

"Q. Do I understand you to tell the jury that when Lillie Davis hit Trudy, Trudy staggered back—is that right? A. Yes sir. Q. And that Lillie Davis followed her up? Mr. Yingling: That is not what she says now. Court: The objection is sustained. Q. State what Lillie Davis did after she hit Trudy? A. When she hit Trudy the first time and Trudy staggered back? Q. Yes, what did Lillie Davis do then? A. Lillie Davis went up on her. Q. Now, that is what I said. Court: You put it in her mouth. Mr. Brundidge: I didn't put it in her mouth, if the court please. The Court: The court heard the suggestion put in the witness' mouth, and the jury will disregard that answer. Mr. Brundidge: Save my exceptions, if the court please. I want to say this to the court: I have never put anything in that witness' mouth. Court: Sit down, sit down; don't say any more. Mr. Brundidge: I want to be respectful to the court, but I want the court at the same time to be respectful to me. Court (vigorously pounding with gavel): I asked you respectfully to please sit down. Mr. Brundidge: I want the court to treat me properly. I except."

On re-cross examination the witness again stated that Lillie ran into Trudy and struck her, and that she did not know whether Lillie had a knife or not. She had already been permitted to testify, in direct examination and upon cross-examination, the details of the difficulty as she saw them. She was permitted to state that Lillie Davis hit Trudy Johnson first, and then that they both began to strike each other. The witness stated several times that Lillie Davis hit Trudy Johnson first.

The jury could not have been misled by the action of the court, and the ruling of the court simply means that an objection was sustained to the form in which the question was being asked the witness after she had already stated in detail just how the difficulty began and ended. It was a matter within the sound discretion of the court not to allow counsel for the defendant to repeat the same questions in varying form. In other words, it was within the discretion of the court to refuse to permit questions of the same purport as those already asked to be repeated. *Greathouse* v. *State,* 166 Ark. 206.

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

STATE EX REL. ATTORNEY GENERAL *v.* LION OIL REFINING COMPANY.

Opinion delivered May 24, 1926.

1. TAXATION—UNIT SYSTEM.—The unit system of taxation can be applied only to public carriers and similar public corporations.
2. TAXATION—OIL COMPANY.—There is no organic relation between the plants in different States of a corporation engaged in drilling for oil and refining it and no such connected use of such plants as authorizes a tax on its capital stock or justifies the application of the unit system of taxation.
3. TAXATION—CAPITAL STOCK OF FOREIGN CORPORATION.—Under the due process clause of the Fourteenth Amendment, the State is prohibited from taxing the capital stock of foreign corporations which is neither located nor used within the boundaries of the State.

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

STATEMENT BY THE COURT.

Pursuant to the authority given him by § 10204 of Crawford & Moses' Digest, the Attorney General instituted this action in the chancery court against the Lion Oil Refining Company to recover taxes for the years 1922 to 1924, both inclusive, which he alleges escaped taxation.

According to the allegations of the complaint, the Lion Oil Refining Company is a private corporation organized under the laws of the State of Delaware for the purpose of engaging in the production, refining and marketing of oil, gas, and their products. On November 19, 1923, the Lion Oil Refining Company complied with the laws of the State of Arkansas and was duly authorized to do business in this State. It has since been engaged in refining and marketing oil and gas and their products in this State. The corporation has paid the taxes assessed on its tangible property in this State, but has failed to assess or pay the taxes on that proportion of its capital stock which is represented by its tangible property in this State.

The complaint alleges that the tangible property of said corporation represents a large percentage of the market value of its capital stock, which has escaped taxation in the State of Arkansas during said years.

The chancery court sustained a demurrer to the complaint, and, upon the plaintiff's declining to plead further, it was decreed that the complaint should be dismissed for want of equity.

The case is here on appeal.

H. W. Applegate, Attorney General, *R. E. L. Johnson, J. E. Harris* and *Robert A. Kitchen,* special counsel, for appellant.

Mahony, Yocum & Saye, for appellee.

Bryan, Williams & Cave and *Patterson & Rector, amici curiae,* on behalf of appellee.

HART, J., (after stating the facts). The Attorney General claims the right to levy and collect the tax under the provisions of §§ 9965 and 9966 of Crawford & Moses' Digest. The act was passed by the Legislature of 1917, and among other things the title provides that it is an act assessing for taxation the tangible property of all corporations.

Section 9965 reads as follows: "All corporations doing business in this State, except corporations whose property is assessed by the Arkansas Tax Commission and the corporations required to make and file the special returns provided for in § 9904, shall, in addition to the list prescribed by § 9904, make and file with the assessor of the county wherein its principal office is situated a statement wherein shall be distinctly set forth:

"(1). The name of the corporation and the location of its principal office.

"(2). The number of shares of stock of said corporation outstanding and the face value of each share.

"(3). The market value of each share, and, if no market value, the actual value of each share of stock, and the net income of the corporation shall be considered in determining the actual value of the shares of stock, if they have no market value.

"(4). The aggregate market value, or actual value as the case may be, of all outstanding stock.

"(5). The total bonds of the corporation secured by mortgage or deed of trust on property belonging to the company, and the aggregate market value, or actual value, of such bonds.

"(6). The assessed value of all real estate owned by the corporation.

"(7). The assessed value of all tangible personal property owned by the company and assessed under § 9904.

"The sum of items four and five, less the sum of items six and seven, shall be held to be the value of the intangible property of the corporation, and shall be listed

and assessed by the corporation, as agent for its shareholders, under the heading, 'Intangible Property.'

"The return prescribed by this section is required in addition to that required by § 9904, and its purpose is to secure the assessment of the intangible property belonging to the corporation.

To sustain his right to collect the tax, the Attorney General relies upon our decisions construing the act under consideration and our earlier acts providing for the assessment of the intangible property of corporations. *State ex rel.* v. *Bodcaw Lumber Co.*, 128 Ark. 505; *State ex rel.* v. *Ft. Smith Lumber Co.*, 131 Ark. 40; *Crossett Lumber Co.* v. *State*, 139 Ark. 397; and *State* v. *Gloster Lumber Co.*, 147 Ark. 461.

These decisions were dealing with the power of the State to tax the intangible property of domestic corporations. It is contended, however, by the Attorney General that the act is sufficiently broad and comprehensive to include foreign corporations, and that foreign corporations authorized to do business in this State fall under the provisions of the statute and must comply with its terms.

If the provisions of the statute are to be extended to apply to foreign corporations, it is apparent that the statute would be unconstitutional, at least so far as it applies to foreign corporations.

The Supreme Court of the United States has uniformly held that a State may not, consistently with the due process provision of the Fourteenth Amendment, include, at least as against any foreign corporation, any part of its tangible property lying without the State for purposes of taxation. *Louisville & Nashville Rd. Co.* v. *Greene*, 244 U. S. 522; *Looney* v. *Crane Co.*, 245 U. S. 178; and *Union Tank Line Co.* v. *Wright*, 249 U. S. 275.

In the case last cited it was expressly held that a State cannot tax the property of a foreign corporation which has never come within its borders.

Again, in *Wallace* v. *Hines*, 253 U. S. 66, it was said that the only reason for allowing a State to look beyond

its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. In that case the court was considering the unit system of taxation as applied to railroad companies carrying on business in two or more States.

It has also been held that a State cannot tax the property of a foreign corporation outside the State, regardless of whether the corporation is a carrier or trading company. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; and *American Bauxite Co.* v. *Board of Equalization,* 119 Ark. 362.

The Attorney General seeks to uphold the validity of the statute on the ground that the general rule of the unit system of taxation in cases of railroads and other public service corporations carrying on business in two or more States should be applied to oil companies organized in another State and doing business in this State.

In Cooley on Taxation, 4 ed., vol. 2, § 811, it is said that it is properly held that the unit rule should not be applied to mining companies, oil companies, or the like. Continuing, the author said that this doctrine never has been applied, nor can it justly be applied to manufacturing or other similar plants or industries which are under common ownership but used or operated in different States. Our case of *American Bauxite Co.* v. *Board of Equalization,* 119 Ark. 362, is first cited. That case in principle sustains the text.

In discussing the method of arriving at the value of property for taxation under our Constitution, it was said that property is assessed in this State whether it produces income or not, and property is not taxed according to its income, and indeed the question of income is of importance only as it relates to and affects the value.

In discussing the uses made of the ore after it was shipped out of the State, for any purposes other than to determine the value of the land from which it was

mined, the court said: "After property is taken out of this State it ceases to be subject to taxation within this State, and no attempt is made by the Constitution or laws of this State to impose upon such property any of the burdens of taxation."

In *Standard Oil Co.* v. *Howe,* 257 Fed. 481, it was held that the Civil Code of Arizona providing for the unit rule of value in the taxation of private car lines, railroad property, and telegraph and telephone lines, does not authorize the unit rule valuation for taxation of the property of a foreign oil company.

Again, in *Utah-Idaho Sugar Co.* v. *Salt Lake County* (Utah), 210 Pac. 106, 27 A. L. R. 874, it was held that a lump assessment upon a corporation for intangible property arising out of tangible property located in several States, must fail *in toto* if there is no method of separating the assessments arising out of the extraterritorial property from that arising out of the property within the State.

In discussing the right of an assessing officer to take into consideration the value of tangible property situate in one State to enhance the value of property in another State, the court quoted with approval from the United States Supreme Court in *Delaware, Lackawanna & West. Rd. Co.* v. *Pennsylvania,* 198 U. S. 343, the following: "So, if the State cannot tax tangible property permanently outside of the State and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State."

Continuing the discussion, the Supreme Court of Utah further said: "While it is quite true that, in taxing the property of a foreign corporation which is in the taxing State, the latter State may 'look beyond its borders * * * that it may get the true value of the things within' the State, yet the 'only reason' why that may be done is to obtain the true value of the property in the

taxing State. *Wallace* v. *Hines,* 253 U. S. 69, 64 L. ed. 786, 40 Sup. Ct. Rep. 435."

It is apparent from the reasoning of the Supreme Court of the United States that the unit system of taxation can only be applied to public carriers and other like public corporations, and that the rule is not applicable to corporations like the oil refining company.

In discussing the reasons for the rule, in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Backus,* 154 U. S. 439, the court said: "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another."

In *Adams Express Co.* v. *Ohio,* 165 U. S. 194, the difference between a unity of use and management and the unity of ownership of property is clearly expressed by Mr. Chief Justice Fuller as follows: "We repeat that, while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business."

"The same party may own a manufacturing establishment in one State, and a store in another, and may make profit by operating the two, but the work of each is

separate. The value of the factory in itself is not conditioned on that of the store, or *vice versa,* nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through the different States is an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessity of the business."

Again, in *Fargo* v. *Hart,* 193 U. S. 490, the court said: "A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction, although belonging to persons domiciled elsewhere and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State in taxing, even though the other parts of the system are outside of the State."

In the case of a corporation engaged in drilling for oil and refining it, it is manifest that there can be no organic relation between its plants situated in different States, and there can be no connected use of these plants within the rule laid down above.

The corporation in the case at bar was organized in the State of Delaware, and was engaged in drilling for oil and refining it in the State of Arkansas. It might have had similar plants in the States of Texas and Louisiana. If so, its various plants would not be operated as a unit. Each one would be separately operated, and might be shut down without any impairment of the operating power of its plants in the other two States.

It seems clear from the reasoning in the cases above cited, and others which might be cited, that the unit system of taxation cannot be applied to corporations like

the one in the case at bar engaged in drilling for oil and refining it.

Moreover, the State was assuming to exercise its power of taxation over the intangible property of corporations in the act under consideration. It is in no sense an excise tax, such as was under consideration in *Alpha Portland Cement Co.* v. *Massachusetts,* 265 U. S. 203, and cases cited. The tax levied under the statute is a tax on property, and was intended to reach the intangible value of the capital stock of a corporation. This is clearly shown by the language of the statute. It is expressly provided that the sums of items four and five, less the sums of items six and seven, shall be held to be the value of the intangible property of the corporation, and shall be assessed by the corporation as agent for its shareholders under the heading, "Intangible Property."

Item four is a statement of the aggregate market value of all outstanding stock.

Item five is the aggregate market value of all the bonds of the corporation secured by a mortgage on its property.

Items six and seven are statements of the assessed value of all real estate and all tangible personal property of the corporation.

Thus it will be seen that the Legislature provided that the aggregate market value of all outstanding stock and the total bonds of the corporation, less the assessed value of all real estate and all tangible personal property belonging to the corporation, should be assessed as the intangible property of the corporation.

The statute therefore could in no sense apply to the taxation of foreign corporations without violating the holding of the Supreme Court of the United States and of our own court to the effect that a tax on property wholly beyond the confines of the State constitutes the taking thereof without due process of law.

The capital stock of a foreign corporation is property permanently beyond the borders of this State, and, under the authorities cited above, the due process clause

would preclude the State from taxing the capital stock of foreign corporations which is neither located nor used within the boundaries of the State.

The provisions of the statute do not fit in with any constitutional power of the State over the taxation of the property of foreign corporations, and we do not think that it was the intention of the Legislature that the statute should be applicable to foreign corporations.

It follows that the decree of the chancellor must be affirmed.

MUTUAL LIFE INSURANCE COMPANY v. HYNSON.

Opinion delivered May 24, 1926.

1. INSURANCE—IMPOSING CONDITION TO REINSTATEMENT.—Where a life insurance policy contained no condition to reinstatement, the company could impose any condition not contrary to public policy on which reinstatement might be had.
2. INSURANCE—REINSTATEMENT—AUTHORITY OF LOCAL AGENCY.—Where a life insurance policy contained no provision for reinstatement, and the application for reinstatement recited that reinstatement should not take effect until approved by the home office, a local agency had no authority to reinstate the policy, and its acceptance of a check did not constitute a reinstatement; and it was immaterial that insured died before the check was returned by the home office after refusing to reinstate the policy.

Appeal from Fulton Circuit Court; *John C. Ashley*, Judge; reversed and dismissed.

Frederick L. Allen, Oscar E. Ellis, Rose, Hemingway, Cantrell & Loughborough, for appellant.

H. A. Northcutt, Geo. T. Humphries and *Thos. T. Dickinson,* for appellee.

HART, J. This is an appeal from a judgment in favor of Carrie E. Hynson against the Mutual Life Insurance Company of New York, which was entered on the verdict of a jury on a life insurance policy.

Counsel for appellant seek to reverse the judgment on the ground that the undisputed evidence shows that

the policy sued on had been forfeited and had not been reinstated.

In March, 1905, the Mutual Life Insurance Company of New York issued a policy in the sum of $1,000 upon the life of L. M. Hynson in which his wife, Carrie E. Hynson, was named as the beneficiary. The policy was a twenty-year deferred dividend policy, and no dividend would be accumulated or accredited to the policy unless the insured was alive and the policy in force on March 16, 1925.

In June, 1921, L. M. Hynson applied for and received a loan on the policy for the amount of $378. A note was given for this amount to the company, which was not paid at maturity. On April 17, 1922, the policy was canceled for the nonpayment of the loan due on March 16, 1922, and for the nonpayment of the annual premium due on the same day. At the time the policy was canceled it was of the value of $378, and the entire cash surrender value was applied in liquidation of the loan.

The records of the company show a cancellation of the policy on April 17, 1922, and the reason is that the company gives to each policy-holder thirty-one days time after due within which to pay or renew the loan. The policy contained no provision for reinstatement, and on the contrary contained a provision as follows: "Notice—No person, except an executive officer of the company or its secretary at its head office in New York, has power on behalf of the company to make, modify or alter this contract, to extend the time for paying a premium, to bind the company by making any promise or by accepting any representation or information not contained in the application for this contract."

On March 16, 1924, L. M. Hynson wrote to the Mutual Life Insurance Company of New York at its home office to advise him of the status of his policy. On March 24, 1924, the company advised him that his policy had lapsed for nonpayment of the premium and interest on the loan due March 16, 1922.

This letter was written by the manager of the Memphis agency of the insurance company, and informed Hynson that it had written the home office to quote the cost of reinstating the policy, and that as soon as the information was received he would be notified. On April 7, 1924, the manager of the Memphis agency wrote L. M. Hynson at Mammoth Spring, Arkansas, that he was advised by the home office that it would consider the restoration of the policy upon receipt of satisfactory certificate of health, restoration of the loan agreement, and the payment of $149.34, made up of certain items which are set out. The letter inclosed a health certificate form and a restoration note. The letter concludes as follows: "If health certificate is furnished and approved and the $149.34 paid, your policy will be fully reinstated."

R. T. Hynson, a brother of L. M. Hynson, went to the Memphis agency of the insurance company to see about getting the policy of his brother reinstated. The manager of the office told him that there was a further loan value on the policy, and that by the execution of a new note for the amount of the old loan and the additional loan value with a payment of $50.34 in cash the policy would be reinstated. R. T. Hynson took the application for reinstatement to Mammoth Spring, Arkansas, and procured his brother's signature to it.

The application contained the following: "It being understood and agreed that such placing in force shall not take effect until this application shall have been finally aproved at the said company's home office in New York City, nor until the said premium and interest have been paid." R. T. Hynson also procured the signature to a note for $477 as required by the manager of the Memphis agency. He delivered this note, together with the health certificate and a check for $50.34, to the manager of the Memphis agency of the company, and said that he considered the transaction closed.

On this point we quote from his testimony on direct examination as follows: "Q. Did he tell you that this policy was reinstated when you delivered this note for

$477 and the check for $50.34? A. Yes sir. Q. What did he say about the policy being reinstated? A. I asked him what it would take to reinstate the policy, and he gave me these papers, and when they were executed the policy was to be reinstated, and when I gave him the note and check there was no further conversation after that."

On the same point we quote from his cross-examination as follows:

"Q. You took the papers and delivered them, with your check for $50.34, at Memphis? A. Yes sir, those papers and my check for $50.34. Q. On your second visit did you talk to the same man? A. Yes sir. Q. You had no further conversation about the matter? A. No sir, no further conversation, except to hand him the papers, and he looked them over and said they were all right."

On May 29, 1924, the manager of the Memphis agency wrote to L. M. Hynson at Mammoth Spring, Arkansas, the following:

"We regret to advise you that the company has declined to reinstate your policy. We will return the loan agreement recently executed as soon as it can be sent to us from the home office."

On June 1, 1924, L. M. Hynson wrote to the manager of the Memphis agency to advise him the reason why the company would not reinstate the policy, and also to inform him if he was entitled to any surrender value, as the policy lapsed for nonpayment on March 16, 1922.

On June 4, 1924, the manager wrote to L. M. Hynson as follows: "Referring to your letter of the 1st, we do not know why the home office declined to reinstate this policy, but are today writing them, stating that you would like to know why, and will write to you farther upon receipt of their reply.

"The full cash value of this policy on March 16, 1922, was $378, which amount you had previously drawn as a loan. There was therefore no reserve left to be applied to the purchase of paid-up insurance."

On June 16, 1924, the manager of the Memphis branch office wrote to L. M. Hynson at Mammoth Spring, Arkansas, inclosing a copy of the letter from the home office telling why it would not restore the policy in question. On June 27, 1924, the manager of the Memphis agency wrote to R. T. Hynson in Memphis the following:

"Policy Number 1574519—L. M. Hynson.

"Dear sir: We are returning herewith loan note executed by L. M. Hynson under this policy, which the company has declined to reinstate.

"If you will have him sign and return the inclosed voucher, we will send our check for $50.34 covering refund of amount paid as balance required to complete the loan."

L. M. Hynson was suddenly killed in Fulton County, Arkansas, on June 22, 1924. The home office had a committee which alone was authorized to pass on applications to restore policies which had lapsed for the nonpayment of premiums, or which had been canceled for the nonpayment of loans. The application of L. M. Hynson for the restoration of his policy was submitted to this committee, and it reached a decision on May 22, 1924, and at once caused the applicant to be notified that his application to restore his policy had been denied. This was the usual method of procedure in such cases.

This is the substance of the evidence, presented in the light most favorable to the plaintiff. It will be noted from our statement of facts that the policy itself did not contain any provision for its reinstatement after forfeiture. On the contrary, it contained a clause notifying the insured that no person except an executive officer of the company, or its secretary at its head office in New York, had the power to modify any offer of contract of insurance or to bind the company by making any promise, or by accepting any representations or information not contained in the application for insurance.

The insured was advised by a letter which he received from the manager of the Memphis agency that it

would be necessary to apply to the home office. In the written application which he signed to procure the reinstatement of the policy there was a clause that the policy would not be reinstated until the application had been finally approved at the company's home office in New York City.

Thus it will be seen that it was expressly stipulated that the reinstatement should not take effect until it was approved at the home office. Inasmuch as the provisions of the contract did not provide for the reinstatement of the policy, it was optional with the company to impose any condition which it pleased, not contrary to public policy, on which reinstatement might be had.

It is conceded that the undisputed evidence shows that the policy had been forfeited, and that the home office in New York City had refused to reinstate the policy. But it is sought to uphold the judgment upon the ground that the Memphis office had at least the apparent authority to represent the company in reinstating the policy, and that its action in the premises bound the company.

The Memphis agency had no real or implied authority to reinstate a policy. There was no actual reinstatement. Hence the plaintiff must establish the doing of something that was indispensable to the right to reinstate. This he has wholly failed to prove. It is true that his brother testified that, when he returned the application, the manager of the Memphis agency accepted it, together with a check for the balance necessary for a reinstatement of the policy, and that he considered the matter closed. This is not sufficient. It is apparent from his direct examination and from his cross-examination, which is explanatory, that he merely handed in the application and other papers accompanying it to the manager of the Memphis agency. The act of the manager, under the circumstances, could in no sense be said to be an agreement by the company to reinstate the policy.

The application on its face stated that the reinstatement should not take place until it was finally approved at the company's home office in New York City. All the

correspondence between the parties showed that the manager was sending all communications relative to the matter to the home office in New York City, and that the reinstatement would be passed on there.

The case is entirely unlike that of *Ætna Life Ins. Co.* v. *Duncan,* 165 Ark. 395, where the reinstatement was upheld. In that case the policy itself contained a clause for reinstatement, and the testimony of the general agents of the company showed that they were authorized to solicit the reinstatement of policies and to reinstate the same when the company had sent down the reinstatement receipts showing that the application for reinstatement had been approved by the company.

The cancellation of the policy resulted from the insured's own acts in failing to comply with its provisions, and, as has been pointed out, the policy containing no provision on the subject, the company might impose such conditions for reinstatement as seemed to be advisable to it.

It is true that the insured died before the check for the $50.34 was returned; but the manager of the Memphis agency had written to the insured that the amount of the check would be sent to him as soon as it obtained authority from the home office. This was according to their usual method of procedure in cases of this sort. The insured has recognized that the company might impose any terms that it saw fit as a condition to restoring the policy. This is shown by his letter of June 1, 1924, in which he asks the manager of the Memphis agency to advise him the reason why the company would not reinstate the policy, and also to inform him if he had any surrender value under it.

It appears from the record that the $50.34 is held by the company to be refunded to the duly qualified administrator of the estate of L. M. Hynson, deceased, when said administrator will accept the same.

The result of our views is that the undisputed evidence shows that the policy was not reinstated, and that

the court erred in refusing to direct a verdict for the defendant company.

For this error the judgment will be reversed, and, inasmuch as the case appears to have been fully developed, the cause of action will be ordered dismissed here.

DYKE v. MAGDALENA.

Opinion delivered May 24, 1926.

1. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION.—Though a writing evidencing the sale of a butcher's refrigerator did not contain an express warranty of its fitness as such, an instruction submitting to the jury the question of an express warranty, if erroneous, was not prejudicial, where there was an implied warranty.
2. SALES—IMPLIED WARRANTY OF MANUFACTURED ARTICLE.—The sale of a butcher's refrigerator to be manufactured for preserving meats carries an implied warranty that it is reasonably fit for that purpose.
3. SALES—BREACH OF WARRANTY—RECOVERY OF PAYMENT.—One who purchased a refrigerator for the purpose of preserving meats is entitled to recover a cash payment on the refrigerator proving worthless, though he had agreed that such payment should be retained for rent and wear and tear in case of default in further payments.

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

Warner, Hardin & Warner, for appellant.

Holland, Holland & Holland, for appellee.

SMITH, J. Appellants manufactured and sold to appellee a butcher's refrigerator for the contract price of $300, of which $100 was paid in cash and the balance was evidenced by the following written instrument:

"Fort Smith, Ark., Sept. 10, 1924.

"$200.00 No.....

Due.....

"In monthly installments after date, without grace, we, or either of us promise to pay to the order of Dyke Bros.

of Fort Smith, Arkansas, two hundred and no/100 dollars, in installments as follows:

"Twenty and no/100 dollars on the tenth day of each and every month, commencing the 10th day of October, 1924, with interest from date upon the several sums from maturity only, at the rate of ten per cent. per annum, said installments to be applied first upon the interest, and the balance upon the principal.

"This note given for purchase price of the following personal property:

"1 butcher's display refrigerator counter, 4.0 high, 3.0 deep, 10.0 long, style No. 200-A, stained dark oak—glass top and front, center icer.

"The title and ownership of the above described personal property shall remain in the said Dyke Bros. until this note and the interest thereon is paid in full. The makers hereby agree to fully insure said property from loss by fire, said loss, if any, to be payable to Dyke Bros. as their interest may appear. No extension of the time of payment, whether given with or without our knowledge, shall release us or either of us from the obligation of payment. The makers and indorsers of this note hereby waive demand, notice and protest. If this note is not paid in full, all payments made hereon shall be appropriated by the said Dyke Bros. for wear and rent of said property. In the event that the maker of this note shall sell or shall attempt to sell or dispose of said above-described personal property, or any equity he may have therein, or in the event he shall deliver possession of same to any other party, or if said personal property shall be removed from the county of Sebastian, State of Arkansas, or if the maker fails to maintain said insurance, then, at the option of Dyke Bros., this note shall become immediately due and payable, and said Dyke Bros. may, at its election, sue on said note or immediately retake possession of said property. This note is an installment note, and if any of said installments be not paid at maturity, all of said principal and interest shall, at the option of Dyke Bros., become immediately due and pay-

able, and the holder thereof may proceed to sue for and collect the same.

(Signed) "L. P. Magdalena."

P. O. Midland, Ark.

"State of Arkansas, County of Sebastian, ss.

"Subscribed and sworn to before me this 11th day of September, 1924. (Signed) Sophie Hennig, Notary Public.

"My commission expires Nov. 16, 1926."

The refrigerator was installed, and was properly iced, but it was found that it would not preserve meats, and notice of that fact was given appellants a few days after the refrigerator was put in use. We so state the fact, because the testimony of appellee was to this effect, and the verdict could not have been returned in his favor unless the jury had found the fact so to be. A mechanic was sent to examine the refrigerator, who did some work on the doors to make them close more tightly. The refrigerator was again iced, and it was again found that it would not preserve meats placed therein, because the temperature could not be sufficiently reduced. Notice was again given of this fact, and a second attempt was made to adjust and repair the defects, but without success. This procedure was repeated at intervals of several days, and at last the mechanic said, "This beats me, I have done all I can do. It is no good." Appellee thereupon abandoned the use of the refrigerator, and declined to make the payment which about that time had fallen due. Thereupon appellant brought suit in replevin to recover possession of the refrigerator and damages in the sum of $100 for the detention thereof. The $100 asked as damages was the amount of the cash payment, and it is appellant's theory of the case that this payment should be credited against the wear and rent of the refrigerator, under the provisions of the contract that, "if this note is not paid in full, all payments made thereon shall be appropriated by the said Dyke Bros. for wear and rent of said property." Appellee, the defendant below, alleged that the refrigerator was bought and sold

with knowledge on the part of both parties that the refrigerator was to be used for a definite purpose, that of keeping meats, and that it was worthless for that purpose. The answer prayed judgment for the return of the $100 paid and for the value of the meat which had spoiled because of the failure of the refrigerator to preserve it. There was a verdict and judgment in appellee's favor for the sum of $127, from which is this appeal.

Appellee alleged in his answer that there was an express warranty of the refrigerator, and offered testimony tending to support that allegation, and that issue was submitted to the jury, over the objection and exception of appellants, who sought to exclude this testimony by requesting an instruction—which the court refused to give—that the jury should not consider any testimony tending to show that there was an express warranty.

It will be observed that the writing evidencing the sale of the refrigerator does not contain an express warranty of the fitness of the refrigerator for use for the purpose for which it was sold, and appellants have cited cases holding that a warranty is so clearly a part of a sale that, where the sale is evidenced by a written instrument, it is incompetent to engraft upon it a warranty proved by parol. *Lower* v. *Hickman,* 80 Ark. 505; *Federal Truck & Motors Co.* v. *Tompkins,* 149 Ark. 664.

Appellee insists that this rule is not applicable here, for the reason that the writing does not set out, and does not purport to set out, the entire contract, as it is shown by the allegations of the complaint and by testimony on behalf of the appellants that a payment of $100 was made, concerning which the contract is silent.

Assuming that it was error to submit the question of an express warranty, for the reason that the writing evidenced the entire contract, we think no prejudicial error was committed in submitting the question of an express warranty, for the reason that there was in fact an implied warranty.

The testimony is that the refrigerator was sold to be used for a known purpose, that of preserving meats. It

was not a known defined article of commerce. It was a manufactured article, sold to be used for a particular purpose, and the vendee had no opportunity to make any inspection which would have determined its usefulness for the intended purpose. The agent of appellants who made the sale, when testifying concerning the thickness of the walls of the refrigerator, the dead-air spaces, and the cork insulation between the walls, admitted that none of these things could be seen or their condition discovered by any ordinary inspection, and that all a person looking over the refrigerator could see would be a nicely finished piece of furniture. Neither the refrigerator bought, nor any other one like it, was in use when the sale was made, and no test of it was made by icing it until the refrigerator had been delivered and placed in position for use. We think there was therefore an implied warranty that the article sold was reasonably adapted to the purpose for which it was intended.

In the case of *Western Cabinet & Fixture Mfg. Co.* v. *Davis,* 121 Ark. 370, a case in which the issues were very similar to those of the instant case, we quoted from the case of *Curtis & Co.* v. *Williams,* 48 Ark. 325, the following statement of the law: "Proof of an express warranty by the defendant of the quality of this machinery was not essential to a recovery. Ordinarily, upon sale of a chattel, the law implies no warranty of quality. But there are exceptions to the rule, as well established as the rule itself. One of these exceptions is where a manufacturer undertakes to supply goods manufactured by himself to be used for a particular purpose, and the vendee has not had the opportunity to inspect the goods. In that case the vendee necessarily trusts to the judgment and skill of the manufacturer, and it is an implied term in the contract that he shall furnish a merchantable article, reasonably fit for the purpose for which it is intended" (Citing other cases).

In the case of *S. F. Bowser & Co.* v. *Kilgore,* 100 Ark. 17, this court quoted with approval from the case of *Kellogg Bridge Co.* v. *Hamilton,* 110 U. S. 108, the

following statement of the law: "When therefore the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

The serviceability and usefulness of the refrigerator was submitted to the jury as a question of fact, and the verdict of the jury is conclusive of the fact that the refrigerator was valueless as such. Indeed, the undisputed testimony appears to establish that fact, and no inspection which appellee could have made at the time of the purchase would have disclosed this fact, so that the principle announced in the cases quoted from is applicable here.

It is earnestly insisted by appellants that the court was in error in rendering judgment for the $100 purchase money which had been paid. But it will be remembered that this suit was based upon a note which reserved the title to the refrigerator in appellants until the purchase money was fully paid, and the suit was not brought to recover the balance of the purchase money but to recover the refrigerator itself under the reservation of title. Nor is the case one where the breach of the implied warranty was waived. Appellants did not give appellee the option of waiving the breach of warranty. On the contrary, there was an election on appellant's part to assert title and to sue for possession. Appellee was not in default in failing to sue for breach of warranty. The testimony shows that the entire time which elapsed between the sale of the refrigerator in Fort Smith, which is appellant's place of business, to the date of the institu-

tion of the suit was only thirty-seven days, and within that time the refrigerator was shipped to Midland, appellee's place of business, the refrigerator was installed, and four attempts, at intervals of several days, were made to remedy the defects which made it useless as a refrigerator.

It could not therefore be said—and certainly not as a matter of law—that appellee had kept the refrigerator for such a length of time that he had waived the right to sue for breach of warranty. Indeed, the testimony on appellee's part was to the effect that he did not accept the refrigerator after testing it. Besides, as we have said, appellants gave him no option so to do, when it brought suit to recover possession of the article sold. *Courtesy Flour Co.* v. *Westbrook,* 146 Ark. 17. If the jury, in making up the amount of the verdict, allowed appellee the $100 paid on the refrigerator, and we must assume that this was done, as the right to recover that sum was submitted to the jury, then the remainder of the verdict, $27, was much less than the loss which appellee's testimony shows was sustained through the spoiling of meat and expenses in attempting to repair and use the refrigerator.

In opposition to appellee's right to recover the $100 paid, appellants cite the case of *B. A. Stevens Co.* v. *Whalen,* 95 Ark. 488. In that case it was held that, where there was a breach of warranty of the soundness or fitness of an article which the vendee had no opportunity to inspect before delivery, he may elect to rescind the contract or affirm by keeping the property, and, when sued for the price, set up the false warranty by way of recoupment, but that he must exercise his right of election within a reasonable time after he discovers the defect, and if he fails so to elect, and thereby waives his right of rescission, he will only be entitled, in a suit for the purchase money, to recoup the cost of correcting the defect, if it could be corrected at a reasonable cost, or the difference between the value of the defective article and one free of such defect.

We think, however, that, if that measure of damages were applied here, appellee would be entitled, under the verdict of the jury, to recover the $100, for the jury has found that there was a breach of the implied warranty and that the refrigerator was not adapted to the use for which it was sold. If the article sold could not be used as a refrigerator, then it was practically without value, as there was no attempt to show that it could be used for any other purpose, and the difference between its purchase price and its actual value was therefore more than $100.

We are of the opinion therefore that no error prejudicial to appellants appears, and the judgment will be affirmed.

DUNBAR v. STATE BUILDING & LOAN ASSOCIATION.

Opinion delivered May 24, 1926.

1. USURY—PROMISE TO PAY UPON CONTINGENCY.—Where a promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious.
2. BUILDING AND LOAN ASSOCIATION—USURY.—Where a borrower from a building and loan association was required to subscribe to stock, for which he paid in monthly installments, together with interest on the loan, the paid-up stock to be surrendered for the loan, and the borrower was entitled to the profits on the stock while it was maturing, the contract was not usurious, though the interest exceeded 10 per cent., since there was a hazard or contingency in the contract.

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

George M. Heard, James E. Hogue and *Minor Wallace,* for appellant.

Gray, Burrow & McDonnell, for appellee.

HUMPHREYS, J. Appellee instituted this suit against appellants in the chancery court of Pulaski County to foreclose the mortgage on property described therein for $1,962.95, which, together with a bond or note, was executed to it by Annie Spears Dunbar, one of appellants,

on the 10th day of November, 1922. It was alleged in the bill that said appellant had made default in her payment, and that, under the terms of the bond and mortgage, the total amount aforesaid had become due and payable and subject to judgment and foreclosure.

Appellants filed an answer denying the material allegations in the bill, and, by way of further defense, pleading that the contract was usurious and void, and praying for a cancellation and annulment thereof, and for the dismissal of appellee's bill for the want of equity.

The cause was submitted to the court upon the pleadings and an agreed statement of facts, which resulted in a personal judgment against Annie Spears Dunbar for $1,951.83, with interest at the rate of 10 per cent. per annum from May 10, 1923, until paid on $1,921.90; with interest at the rate of 6 per cent. per annum from said date until paid on $29.63; and a decree of foreclosure against said property, and an order of sale thereof to apply on said judgment, from which judgment an appeal has been duly prosecuted to this court.

The agreed statement of facts upon which the judgment and decree was rendered is as follows:

"The plaintiff, State Building & Loan Association, is a corporation organized under and by virtue of the laws of the State of Arkansas, and is engaged in what is generally known as 'building and loan' business, which is to accumulate funds upon the sales of its building and loan stock and lend them to its stockholders at interest to be repaid by the borrowers in monthly installments, along the usual and customary lines of such associations. That its interest earnings on loans, after the payment of overhead and operating expenses, is prorated among its borrowing and non-borrowing stockholders alike and in equal proportions. That it maintains an office in the city of Little Rock, in the State of Arkansas, with a manager in charge. That it keeps stenographers, bookkeepers and other clerical help and assistants in its employ, all at the expense of the corporation, and that its

officers and members of its board of directors are paid for their services out of the earnings of the corporation.

"That the defendant, Annie Spears Dunbar, some time prior to November 10, 1922, applied to the plaintiff for a loan of two thousand dollars ($2,000), and that the plaintiff agreed to make said loan of $2,000 to the defendant on condition that the defendant would take and subscribe to stock in the plaintiff's corporation of the face value of $2,000, and carry said stock to maturity by paying ten dollars on said stock each month until it should mature, and then surrender the matured stock to the plaintiff in payment and satisfaction of the loan. That these terms were accepted by the defendant, and she received a loan of $2,000 from the plaintiff, and executed and delivered to the plaintiff on that date her note and bond, a copy of which note and bond is attached to the plaintiff's complaint and marked Exhibit 'A' thereto, and is by reference made a part of this statement of facts the same as if set out in full herein.

"That said defendant Annie Spears Dunbar, for the purpose of securing said loan, also executed and delivered to the plaintiff a mortgage upon the following described property situated in Pulaski County, Arkansas, to-wit: Lot ten (10), block nine (9), R. C. Butler's Addition to Little Rock. The original of said mortgage is attached to and made a part of the complaint which the plaintiff has filed in this case, and is incorporated as a part of the statement of facts by reference; it was filed and recorded in the Pulaski County recorder's office on November 13, 1922, in record book 178, page 467.

"That at the time of making the loan, as stated in the foregoing copy of bond, defendant Annie Spears Dunbar subscribed for twenty shares of stock in Class 'C', totaling the sum of $2,000 of said State Building & Loan Association, the subscription for said stock being a condition upon which the plaintiff agreed to make the loan, pledging the stock as collateral for said sum of money borrowed. That the plaintiff estimated but did

not guarantee that said stock would mature said sum in 123 months from October 1, 1922.

"That it was agreed between the plaintiff and the defendant that monthly payments would be made by the defendant at the rate of twenty-six and 70/100 dollars ($26.70) per month, of which ten dollars ($10) should be applied as principal on the purchase price of the stock, and sixteen and 70/100 dollars ($16.70) as interest on the loan until her monthly payments of ten dollars ($10) each on her stock, augmented by such portion of the interest and profits as she was entitled to receive as a stockholder in said corporation, should equal the sum of $2,000, at which time said stock was to be considered as having matured. It was also agreed that the defendant should pay the past dues on the stock purchased by her as of the time when the series was started by said plaintiff, which, in this instance, was October, 1922.

"That the plaintiff gave to the defendant a pass book in which was receipted such payments as she made to the association. That on November 10, 1922, there was deducted from the amount paid to her on the loan, the sum of $36.70; that on May 1, 1923, she paid to the plaintiff the sum of $20 dues, $33.50 interest, and $2.65 fines; that on September 10, 1923, she paid $30 dues, $50.10 interest, and $4.80 fines. Said defendant's pass book is credited with payments of principal of $10 for the month of October, 1922, and principal of $10 and interest $16.70 for the months of November, December, 1922, and January, February, March, and April, 1923. Said defendant was not charged a fine for the months of October or November, 1922, and only paid the fines as hereinbefore set out for the nonpayment of dues at the time specified in the by-laws, which fines are authorized under the by-laws.

"At the time of receiving the loan, defendant was charged with the following items of expense, which were deducted from the amount of the loan: cost of bringing abstract down to date, $2.70; attorney's fees, $10; for

appraisal of value of property mortgaged, $3; recording of mortgage, $1.75; notary fee, 25 cents.

"That the by-laws of the plaintiff under article VI contain the following provisions:

" 'Section 1. The funds of the association shall be loaned to its members on real estate security, or on its stock, and the association shall have the first lien thereon.

" 'Section 2. A member desiring a loan shall file a written application with the secretary, which applications shall be numbered in the order of their receipt, and they shall take precedence in such order, other things being equal. He shall also furnish an abstract of title, pay for the examination of the same and all other expenses thereof, which, unless otherwise provided for, may be deducted from the amount of the loan.

" 'Section 3. Loans on real estate may be repaid as a whole or in part at any time on thirty days' notice, but in no case can a partial payment be made for less than one or more full shares; also the stock for the original amount of the loan shall be kept in force until all the loan is repaid.'

"That after the time set forth above said defendant made no other payments, and after demand for payment plaintiff filed this suit on March 27, 1924. Prior thereto plaintiff, on December 11, 1923, paid improvement district taxes assessed against said above-described property, in the sum of $7.68; on December 1, 1924, $18; on March 26, 1924, for bringing abstract of title on said property down to date, abstracter's fee, $4.25; and charged these items against the said defendant.

"That any rights, titles, or interests which any of the other defendants may have in and to said above described property were acquired subsequent to November 13, 1922, and the date of the recording of the mortgage.

"That at the time of making the loan plaintiff advised said defendant, Annie Spears Dunbar, that it estimated that the stock for which she subscribed would mature the sum of $2,000 in 123 months, if she continued

to pay the monthly payments of $10 on principal and $16.70 as interest."

The test laid down by this court to determine whether a loan of money by a building and loan association to a stockholder therein is usurious and void is to ascertain whether the contract is an unconditional agreement to pay more than 10 per cent. per annum for the use of money or whether an agreement to pay more is dependent upon a contingency. Before the agreement can be characterized as usurious, a contract to pay more than 10 per cent. per annum for the use of money by a stockholder therein must depend upon the happening of a certain event. If dependent upon a contingency, the agreement is not such a usurious contract as is inhibited by our Constitution and laws. If there is an element of uncertainty and hazard in the contract relative to the amount of interest to be paid, this contingency excludes the idea of usury in the agreement. In giving expression to the rule applicable to this class of contracts in the case of *Reeves* v. *Building & Loan Assn.*, 56 Ark. 316, this court quoted from the syllabus in the case of *Spain* v. *Hamilton's Admr.*, 1 Wall. 604, as follows:

"Where the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious."

In the contract before us it is clearly provided that Annie Spears Dunbar should receive, in the settlement of her loan, her full share of the profits which the association might earn during the period her stock was maturing. Although she was required to pay a small amount as interest in excess of 10 per cent. per annum, the interest payments, had she made them, would have automatically been reduced by earnings of the association upon her monthly payments in case of a full performance of the contract on her part. Just what interest she might have paid under the contract had she matured her stock and liquidated her loan by a surrender thereof cannot be computed, as the time her monthly payments were to continue was dependent upon the maturity of her

stock through the payment of dues and the net amount earned on her monthly payments. If loaned out immediately and continuously, the monthly interest payments might have been compounded for her benefit many times. This element of hazard or contingency in the contract eliminated any usury from the agreement.

We think the instant case is ruled by the principles announced in the case of *Reeves* v. *Building and Loan Association, supra.*

No error appearing, the decree is affirmed.

McGuire v. State.

Opinion delivered May 31, 1926.

1. Perjury—sufficiency of evidence.—A conviction of perjury cannot be had merely upon the contradictory statements of the accused, even though made under oath.
2. Perjury—sufficiency of evidence.—In a prosecution for perjury in testifying on the trial of another that liquor was not sold to accused by defendant therein, it being shown that accused testified that the wife of such defendant had delivered liquor to him and that accused had previously sworn that defendant sold him the liquor, testimony of the wife that she had not done so *held* not a corroboration of alleged perjury in stating that defendant had not sold liquor.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; reversed.

W. A. Boyd, for appellant.

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

McCulloch, C. J. Appellant was tried below on an indictment charging him with the crime of perjury, in giving false testimony in the trial of Will Moore on the charge of selling intoxicating liquor. The false testimony set forth in the indictment was that appellant went to the home of Will Moore, in the city of North Little Rock, to obtain a half-pint of liquor, but that "the said Will Moore did not at any time hand or deliver to him any

liquor for himself or any one else." On the trial of the case the State, after proving by the court stenographer the testimony of appellant in the trial of Will Moore, introduced the reporter, or stenographer, of the grand jury which investigated the charge against Will Moore and returned the indictment, and the reporter testified from his notes concerning the statements of appellant before the grand jury, and it was thus shown that appellant testified before the grand jury that, at the request of one Arnold, he went to the home of Will Moore, in North Little Rock, to obtain one pint of whiskey, and that Moore sold him the whiskey and delivered it to him at the latter's home. The State also introduced a police officer who arrested appellant on the street and took from him a bottle of whiskey, and the officer testified that appellant stated that he had purchased it from Will Moore at the latter's home. Another witness also testified that appellant stated that he had purchased liquor from Will Moore at the latter's home. In the stenographer's transcript of the testimony of appellant in the Will Moore trial there appears a statement of appellant to the effect that the whiskey was delivered to him at Will Moore's home by the latter's wife. On the trial of this case the State introduced Moore's wife, who testified that appellant had not been to her home that day, and that she had not had any conversation with him. This was all the testimony introduced in the case.

It is insisted by counsel for appellant that the evidence is not sufficient to sustain the conviction, for the reason that there is no testimony except the contradictory statements of appellant. This contention is sound, and calls for a reversal of the judgment. There were two contradictory sworn statements made by appellant—one before the grand jury and the other before the trial jury in the case of *State* v. *Moore*, the last mentioned testimony being that charged in the indictment to be false. There was also proof of two other contradictory statements of appellant not made under oath.

This court announced the rule in *State* v. *Binkley,* 123 Ark. 240, that in a prosecution for perjury the falsity of the testimony cannot be established by contradictory statements alone or by admissions of the defendant, but that his statements were competent to be considered by the jury in passing upon the issue as to the truth or falsity of the testimony alleged in the indictment to be false. The rule seems to be firmly established that a conviction cannot be had merely upon contradictory statements of the accused, even though such statements were under oath. 3 Bishop's New Crim. Procedure, § 931; 2 McClain on Criminal Law, § 891; 21 R. C. L., 271; *People* v. *McClintock,* 193 Mich. 589. In Bishop's Criminal Procedure (§ 931) the rule is stated as follows: "Where, on different occasions, the defendant has sworn both in affirmation and denial of the same thing, oath nullifies oath; and the rule that the testimony of one witness will not authorize a conviction does not apply. The further doctrine as to the effect of his contradictory statements, whether made on oath or not, is that in neither case are they alone a sufficient foundation for a conviction for perjury." The doctrine is stated in McClain on Criminal Law (§ 891) as follows: "Proof that accused has given contradictory testimony under oath at a different times will not be sufficient to establish the falsity of the testimony charged as perjury, for this would leave simply one oath of the defendant as against another, and it would not appear that the testimony charged was false rather than the testimony contradictory thereof. The two statements will simply neutralize each other; there must be some corroboration of the contradictory testimony. Such corroboration, however, may be furnished by evidence *aliunde* tending to show the perjury independently of the declarations or testimony of the accused."

There is no corroboration of the testimony concerning appellant's contradictory statements. Moore's wife testified that appellant did not come to her home and that she did not see him on the day the liquor was said to have been purchased, but this testimony merely served

as a contradiction of appellant's testimony in the trial of Will Moore to the effect that he had bought the liquor from Moore's wife, and it did not constitute substantive proof that appellant bought liquor from Will Moore, hence it did not tend to show the falsity of appellant's testimony with regard to the particular statement charged in the indictment. The charge in the indictment is that the testimony is false in stating that appellant did not purchase the liquor from Will Moore. The testimony of Moore's wife shows that appellant did not purchase the liquor from her, but it does not tend to show that appellant purchased the liquor from her husband, Will Moore.

The testimony being insufficient, the judgment must be reversed, and it is so ordered, and the case will be remanded for a new trial.

ALLEN v. ALLEN.

Opinion delivered May 31, 1926.

1. DIVORCE—ALLOWANCES OF TEMPORARY ALIMONY AND SUIT MONEY.—In making allowances for temporary alimony and suit money in a divorce case before trial of the suit, the court should not consider property conveyed to the husband's mother before marriage which the mother reconveyed to him with reservation of the right to control the property and receive the rents and profits, where there was no proof that the conveyance was fraudulent or that the husband was receiving the rents and profits.
2. DIVORCE—ALLOWANCE OF ATTORNEY'S FEE.—Allowance of an attorney's fee of $500 in a divorce suit before trial of the issues *held* excessive and reduced to $250, since it cannot be determined in advance what fee will be earned.
3. DIVORCE—FRAUDULENT CONVEYANCE BY HUSBAND.—Whether a conveyance by a husband to his mother shortly before his marriage was in fraud of the wife's marital rights cannot be adjudged in a divorce suit before trial of the issues in the suit.

Appeal from Independence Chancery Court; *Lyman F. Reeder,* Chancellor; modified and affirmed.

I. J. Matheny and *S. M. Casey,* for appellant.

T. A. Gray and *McCaleb & McCaleb,* for appellee.

McCULLOCH, C. J. Appellee, Imogene Brown Allen, instituted this action against her husband, the appellant, Ralph Allen, in the chancery court in Independence County, for divorce. The parties intermarried on August 4, 1923, and separated during the month of November, 1924. The grounds for divorce set forth in the complaint are that appellant was guilty of such cruel treatment of appellee as to render her condition intolerable. In addition to the prayer for divorce, appellee alleged that, prior to the intermarriage, appellant was the owner of real estate of the aggregate value of at least $200,000, and that shortly before the marriage he had conveyed said property to his mother, Maggie L. Mayhue, for the fraudulent purpose of depriving appellee of her property rights to result from the then approaching intermarriage. Appellant answered, denying the charges of misconduct on his part, and denying that he conveyed his property to his mother to deprive appellee of any of her rights. He stated in his answer that he and appellee were not engaged to be married prior to the day on which the marriage occurred; that the marriage relation was entered into at the solicitation of appellee on that day, and that he had previously conveyed his property to his mother in good faith and without any fraudulent intention with respect to appellee or any one else. Appellee's prayer also embraced cancellation of the deed from appellant to his mother. Mrs. Mayhue was made a party-defendant, and filed an answer denying the charges of fraudulent intent in the execution of appellant's conveyance to her.

There has not yet been a trial of the issues in the case, but appellee asked for an allowance of attorney's fees, temporary alimony and suit money, and, upon hearing of the motion, the court entered a decree allowing her $100 a month temporary alimony, $100 as suit money, and $500 as attorney's fees. Both parties have appealed from that decree.

The court heard the motion upon *ex parte* affidavits introduced by the respective parties. The testimony embraced in those affidavits tended, on the part of appellee, to show that appellant had been guilty of cruel and inhuman treatment of appellee, and that she was forced to leave him on that account. The testimony adduced by appellant tended to contradict this and to show that he was not guilty of any misconduct towards appellee, and that she left him without cause.

There appears in the record a deed, dated July 10, 1923, executed by appellant to his mother, Maggie L. Mayhue, conveying numerous tracts of land for the nominal consideration of one dollar. This deed was placed of record on July 12, 1923. There is also in the record a deed executed by Mrs. Mayhue to appellant reconveying the lands to him "and unto his bodily heirs." The deed contains a recital in the granting clause that the grantor, "being the mother of the said Ralph Allen, and realizing his limited business experience, do hereby in all things retain and reserve absolute right to rent, lease, let and control said lands above described, and further reserve the right to receive and collect any and all rents or profits accruing therefrom and during the rest of my natural life."

One of the questions debated in the brief of counsel is whether or not the court, in making the allowances, should have taken into consideration appellant's rights in the real estate and the rents and profits therefrom. We are of the opinion that the court should not have taken into consideration those alleged rights, for the reason that there was no proof introduced tending to show that the conveyance by appellant to his mother was fraudulent, or that he was in fact accorded by his mother the present right to use the rents and profits of the lands. There was no proof on this issue introduced, and the extent of the proof was merely that the conveyance was executed a short time before the intermarriage of the parties. Nor was it shown that appellant was enjoying any considerable income from any other source. The

appeal of Mrs. Allen is therefore unfounded, for no reason is shown why the allowances should have been made in larger sums than that made by the chancellor in his decree. Nor do we find any cause for reducing the amount of the temporary alimony of $100 per month, or of the $100 allowance for suit money. We are of the opinion, however, that the allowance of $500 attorney's fees in advance of the trial of the cause was excessive. It cannot be determined in advance what amount of fee will be earned, and it must be left to a decision at the end of the litigation, when the extent of the services will be known and the result of the recovery and appellant's ability to pay. It is true that we have in some cases approved an allowance in advance for the total fee to be earned in litigation, but that is a matter of discretion in each case, and we do not think that in this case it can be determined in advance just what the full amount of the fee in the case should be. Our conclusion is that an allowance of $250 as attorney's fees is, under the circumstances shown in the case, sufficient, and the allowance will be reduced to that amount.

Counsel for appellee also insist that the court should have rendered a decree concerning the validity and good faith of the conveyance by appellant to his mother, but the answer to that contention is that the litigation had not reached the stage for a final decree on that issue; there was no trial of the issues demanded, and all of the issues in the case remain to be determined. The correctness of the court's decree with respect to the prayer for divorce and the cancellation of the deed must be determined after the final decree on those issues is rendered by the trial court.

The allowance of attorney's fees will be modified so as to reduce the fee to $250, and in all other respects the decree will be affirmed. It is so ordered.

LITTLE ROCK *v.* BOULLIOUN.

Opinion delivered May 31, 1926.

1. MUNICIPAL CORPORATIONS—ANNEX TO IMPROVEMENT DISTRICT—MANDAMUS.—Under Crawford & Moses' Dig., § 5733, providing for annexation of territory to an improvement district in a city or town, which provides that the city or town council shall hear protests and make a finding on the question whether a majority in value of the owners of real property in the territory sought to be annexed have signed such petition, and that their findings "shall have all the force and effect of a judgment, and shall be conclusive" unless suit is brought to review it, and that, in case the finding is in favor of the petitioners, the territory sought to be annexed shall become a part of the improvement district, *held* that the council has no discretion to go behind the face of the petition and determine whether or not the annexation is appropriate, and may be compelled to pass the ordinance of annexation unless it is shown that a majority in value did not sign the petition or there was an obvious mistake in the inclusion or exclusion of property.
2. MUNICIPAL CORPORATIONS—ANNEX TO STREET IMPROVEMENT DISTRICT.—Although it is customary, in creating street improvement districts in cities and towns, to extend the bounds of the districts 150 feet from the street line, the fact that a petition for annexing territory to an improvement district in one place included more than 150 feet and in another place 12 feet less than 150 feet from such street does not indicate such a demonstrable mistake as would render the annexation proceedings void.
3. MUNICIPAL CORPORATIONS—ANNEX TO IMPROVEMENT DISTRICT—LIMIT OF COST.—The fact that the maximum cost of a street improvement, expressed in a petition for annexation of territory to a street improvement district, exceeds the maximum expressed in the petition for the original district, does not render the proceedings void, as the statute (Crawford & Moses' Dig., § 5733) which requires the added improvement to be made "on the same basis as if said territory was included in the original district" is also a limitation on the cost of the added improvement, and is controlling.

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

J. C. Marshall, for appellant.

Melbourne M. Martin, for appellee.

E. G. Shoffner, amicus curiae.

McCULLOCH, C. J. A local improvement district, designated as Street Improvement District No. 349 of the city of Little Rock, was regularly organized for the purpose of paving portions of Summit Avenue and Ninth Street adjoining the intersection of those streets, and on August 29, 1925, there was filed with the city council a petition purporting to be signed by a majority of the owners of real property in the locality to be affected, praying for the annexation of adjoining territory (describing it) to District No. 349 for the purpose of paving Schiller Avenue from Ninth to Twelfth, Eleventh Street from Schiller to Marshall, and Marshall Street from Seventh to Wright Avenue. Notice of the proceedings was given in accordance with the statute (Crawford & Moses' Digest, § 5733), and, after hearing protests, the city council refused to pass an ordinance for the annexation of territory as requested in the petition. The present action was instituted by appellee, who is the owner of property and one of the commissioners of the district, to compel the city council to pass the ordinance in accordance with the prayer of the petition. On hearing the cause the chancery court rendered a decree in accordance with the prayer of appellee's complaint, and an appeal has been duly prosecuted to this court.

It is the contention of counsel for appellants that the statute authorizing the organization of original districts by ordinance of a city or town council, and likewise the statute authorizing the annexation of territory, vests in the city council judgment and discretion to determine whether or not such organization or addition thereto is just and appropriate, and that the discretion of the council cannot be controlled by mandamus. In other words, the contention is, as we understand it, that the action of a municipal council in refusing to create a district or to annex territory thereto cannot be controlled, unless such action is fraudulent or arbitrary.

It will be seen, as we proceed with the discussion of this question, that there is a marked difference between the language of the statute authorizing the crea-

tion of an original district and the one authorizing annexation of property thereto for additional improvement. The only constitutional provision in regard to local improvements in municipalities is § 27, art. 19, which reads as follows:

"Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities, under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property-holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform."

Pursuant to this constitutional provision, the General Assembly enacted an appropriate statute for the organization of improvement districts and proceedings thereunder. The section of the statute which authorizes the organization of such districts appears now, with slight amendment to the original statute, as § 5649, Crawford & Moses' Digest, and reads as follows:

"When any ten owners of real property in any such city, or incorporated town, or any portion thereof, shall petition the city or town council to take steps toward making of any such local improvements, it shall be the duty of the council to at once lay off the whole city or town, if the whole of the desired improvement be general and local in its nature to said city or town, or the portion thereof mentioned in the petition, if it be limited to a part of said city or town only, into one or more improvement districts, designating the boundaries of such district so that it may be easily distinguished; and each district, if more than one, shall be designated by number and by the object of the proposed improvement."

It will be observed that the Constitution places no restriction upon the method of imposing taxes for local improvements, except that a majority in value of the property holders must consent and that the assessments "shall be *ad valorem* and uniform." The silence of the Constitution in other respects left the Legislature in

possession of complete power to provide for the organization of such districts and the proceedings thereunder, hence the court has only had to deal with the interpretation of the legislative enactments on that subject.

In construing the above-quoted section of the statute as originally enacted, this court, in the case of *Little Rock* v. *Katzenstein,* 52 Ark. 107, said: "The General Assembly, in the exercise of a well-recognized constitutional power, imposed the duty of forming improvement districts and defining their boundaries upon the various city councils. The city council is invested with discretion, in this behalf, necessary to a just performance of the duty, and, when it has acted, the property included by it in any district is *prima facie* adjoining the locality to be affected. * * * That the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake." That interpretation has frequently been approved in later decisions of this court. *Matthews* v. *Kimball,* 70 Ark. 451; *Lenon* v. *Brodie,* 81 Ark. 208; *Ferguson* v. *McClain,* 113 Ark. 193; *Freeze* v. *Improvement District,* 126 Ark. 172.

The validity of the organization of the original district (Street Improvement District No. 349) and the proceedings thereunder is not involved in the present litigation, and the only controversy arises as to the present attempt to make an annexation thereto. It is unnecessary therefore to determine in this case the extent and full effect of the discretion of a city council in creating or refusing to create an original district, and to what extent, if any, the courts will disturb that discretion. What we have to deal with now is the effect of the action of the city council in refusing to proceed with the annexation. The statute on that subject reads as follows:

"Section 5733. When persons claiming to be a majority in value of the owners of real property in any territory contiguous to any improvement district

organized in any city or town desire that said territory shall be annexed to such improvement district, they may present their petition in writing to the city or town council, describing the territory to be annexed and the character of the improvement desired. Thereupon the city or town council shall direct the clerk or recorder to publish for two weeks, in some newspaper issued and having a general circulation in the county where such city or town is situated, a notice calling upon the property owners to appear before said council on a day named, and show cause for or against such annexation. On the day named in said notice, the city or town council shall hear all persons who desire to be heard on the question whether a majority in value of the owners of real property in the territory sought to be annexed have signed such petition, and its finding shall have all the force and effect of a judgment, and shall be conclusive, unless, within thirty days thereafter, suit is brought in the chancery court to review it. The finding of the council shall be expressed in an ordinance in case it is in favor of the petitioners, and in that event the territory sought to be annexed shall become a part of the improvement district, and the improvements petitioned for shall be made by the commissioners. The commissioners shall make the assessment for said improvement on the territory annexed under the provision of this act on the same basis as if said territory was included in the original district. If petitioned for, the improvement in the territory annexed may be of different material or of a different method of construction from that in the original district." Crawford & Moses' Digest.

The distinction between this statute and the one already quoted authorizing the organization of the district is noticeable, for, in the first statute, the district is created upon the petition of ten owners of real property situated in the territory to be affected, whereas the annexation is made upon the petition of a majority of the owners of property. The annexation statute in express terms authorizes the city council to hear protests and to

make a finding "on the question whether a majority in value of the owners of real property in the territory sought to be annexed have signed such petition," and provides that the findings of the council "shall have all the force and effect of a judgment, and shall be conclusive, unless, within thirty days thereafter, suit is brought in the chancery court to review it." There is no authority expressly conferred upon the council to determine any other question, except whether the majority of the owners of property has signed the petition, and the language does not warrant the implication of any further power, for the statute reads that the findings of the council "shall be expressed in an ordinance in case it is in favor of the petitioners, and in that event the territory sought to be annexed shall become a part of the improvement district." In dealing with a petition for annexation, the city council is confronted with the expressed will of the majority of the owners of property in the affected territory, acting within their constitutional rights in consenting to the improvement. It was the manifest design of the lawmakers, in providing for an annexation to be made only on the petition of a majority of the property owners, to leave no discretion in the city council other than to ascertain whether or not the petition had been signed by a majority. The statute contains a direct command that, when it is ascertained that a majority has signed, a finding to that effect "shall be expressed in an ordinance * * * and in that event the territory sought to be annexed shall become a part of the improvement district." If the petition is defective on its face, so that it does not comply with the statute, the city council is not bound to do a vain and useless thing by passing an ordinance which is void, but the council has no discretion which permits them to go behind the face of the petition to determine whether or not the annexation is appropriate. The property owners themselves are authorized to select the territory to be annexed and to decide the question whether or not the annexation shall be accomplished, and the wishes of

the majority as expressed in the petition are conclusive, except for fraud or demonstrable mistake in the selection of the territory to be annexed. Our conclusion therefore on this feature of the case is that the city council had no right to refuse to pass the ordinance, unless it is shown that a majority in value did not sign the petition or that there was an obvious mistake in the inclusion or exclusion of property.

It is contended that there was such an obvious mistake in the inclusion of parts of certain lots and in the exclusion of others.

The general plan fixing the boundaries was to follow what was said to be the prevailing custom of extending the bounds of the district to the middle line of the blocks, in other words, a distance of one hundred fifty feet from the street line. In several respects this general plan or custom was departed from. In two instances one block occupied as a hospital and another as a school—more than one hundred fifty feet next to the street to be improved—were included, so as to include in the district the whole of the lots covered by the building, whereas in another instance and in another place a strip twelve feet wide, within one hundred fifty feet of the street to be improved, was omitted. It is contended that this presents an obvious instance of discrimination between property similarly situated, in that a part of the school and hospital property is included while other property under similar circumstances is excluded, and also that the exclusion of the twelve-foot strip mentioned above is discriminatory and prevents uniformity in the special taxes to be levied to construct the improvement. Counsel rely upon *Heinemann* v. *Sweatt,* 130 Ark. 70, and *Sanders* v. *Wilman,* 160 Ark. 133, and other decisions where we held that the organization of a district was rendered void by the exclusion of property which would be obviously and necessarily benefited. Those cases, however, and all of our cases under similar circumstances, presented facts where outlying tracts or lots were included in the district, but other tracts lying between them and the improvement,

which would necessarily be benefited, were omitted. There is no such question involved in the present case. There is no statute or rule of law requiring that in street improvement districts the property to be assessed shall be within a given distance of the improvement. It seems to be merely a custom to include property within one hundred fifty feet of the improvement, and it cannot be said that the variation of this rule necessarily presents a case of discrimination. In other words, there is no demonstrable mistake involved which renders the annexation proceedings void.

It is next contended that the annexation proceeding is void, and that the city council should not be compelled to pass the ordinance for the reason that the petition specified a maximum cost of the improvement in excess of the maximum expressed in the original petition for the organization of District No. 349. The petition for the annexation specifies a maximum cost of fifty per cent. of the value of the real property in the territory as shown by the last county assessment, and in the petition of property owners for the improvement in District No. 349 there was a specification that the cost of the improvement should not exceed sixty per cent. of the value of the real property in the district as shown by the last preceding assessment. The specification in the petition for annexation related to the assessment of 1925, and the specification in the original petition related to the assessment of 1922. Oral and documentary testimony was introduced to prove that the maximum cost expressed in the annexation petition was in excess of that expressed in the original petition, and the contention is that this invalidated the proceedings and absolved the council from passing the ordinance. A review of the law on this subject therefore becomes unnecessary.

The statute in force at the time of the organization of District No. 349 (Acts 1921, p. 416) provided that the petition of property owners for the improvement should specify the maximum percentage of cost of the improvement with reference to the value of the real estate in

the district as shown by the last preceding county assessment. The statute governing the annexation proceedings contains no such requirement, but it provides that the assessments on the annexed territory to pay for the cost of the added improvement shall be made "on the same basis as if said territory was included in the original district." This court decided in *Pledger* v. *Soltz,* 169 Ark. 1125, that the percentage of cost of the added improvement must be the same as that of the original improvement, otherwise the assessments would not be on the same basis as required by the statute. Now, it is seen that this statute governing annexation, as interpreted by this court in the case just referred to, limits the maximum cost of the improvement, and of course that limit cannot be exceeded. But we do not think that the cost expressed in the petition for annexation, even though shown to exceed the maximum expressed in the original petition, necessarily renders the petition void, for such a specification is not a requirement that the cost shall reach the maximum, hence it is not in conflict with the statute, which, of course, must control. In other words, the maximum expressed in the petition for annexation is necessarily subordinate to the maximum expressed in the statute itself, and the commissioners, in attempting to make the improvement, must be controlled by the statute, and, if the maximum expressed in the petition exceeds that of the maximum allowed by law, then it must be disregarded. There are two limitations placed upon the commissioners, one the maximum expressed in the petition and the other in the law itself, and the commissioners are required to keep themselves within both limitations, whichever should turn out to be the lowest or most restrictive. Therefore the variance between the two maximums was not fatal to the validity of the proceedings. Before any expense is incurred in the construction of the added improvement, the commissioners must form plans and ascertain the cost and assess the benefits on the basis prescribed by the statute, and, if

there is an attempt on the part of the commissioners to construct the improvement in excess of the maximum specified in the statute itself, then the property owners have the right to prevent such violation by resort to an action in a court of chancery for that purpose. The effort to determine the actual cost of the improvement now is premature, for the petition itself does not require the commissioners to violate the statute, and objection cannot be made to the proceedings until it develops that the cost will exceed the limitation fixed by law.

It is also contended that the signature covering the property of the Baptist Hospital and the Junior High School of Little Rock School District were not authorized and should be stricken from the petition, thus reducing it below the majority. Without going into the details of this matter, we think that the proof shows that the signatures were authorized. The petition was signed in behalf of the Baptist State Hospital by Dr. C. E. Witt, a member of the committee or board of control, and there was a resolution passed authorizing Dr. Witt and another member, Mr. Pugh, to "take such steps as seemed best and necessary to get our property in above mentioned district." The minutes were thereafter amended to as to show that "Dr. Witt had full authority to sign the petition in matter of getting streets adjacent to hospital paved." We think that this was sufficient to show Dr. Witt's authority to sign the petition. *Lewis* v. *Forrest City Dist.*, 156 Ark. 356. It is undisputed that the petition for the school property was signed by the directors in full meeting. There is proof of some misunderstanding about the facts on which the signature was obtained, but the proof shows clearly that it was the intention of the directors to sign the petition, if already signed by a majority, and it is shown that there was in fact a majority at that time, when the petition was signed by the school directors.

Our conclusion upon the whole case is that the lower court was correct in holding that the proceedings were

regular and in compelling the city council to pass the ordinance in accordance with the prayer of the petition. The decree is therefore affirmed.

HART and HUMPHREYS, JJ., dissent.

CHRISWELL v. STATE.

Opinion delivered May 31, 1926.

1. HOMICIDE—INSANITY—INSTRUCTION.—An instruction, in a prosecution for murder, to acquit if the jury believed from evidence beyond a reasonable doubt that defendant was so mentally deficient that he could not discern right from wrong and could not control his actions because of his mentally deficient condition, *held* erroneous.
2. CRIMINAL LAW—SUFFICIENCY OF GENERAL OBJECTION.—Where an instruction on insanity in a prosecution for murder is inherently defective, a general objection is sufficient to draw the attention of the court to its defects.
3. CRIMINAL LAW—PROOF OF INSANITY.—Proof that an adult defendant had the intelligence of a child from 7 to 9 years old is insufficient to show that he was insane and therefore incapable of committing a crime.
4. HOMICIDE—CONVICTION OF MURDER—EVIDENCE.—Evidence *held* sufficient to sustain a conviction of murder in the second degree.
5. CRIMINAL LAW—HARMLESS ERROR.—Giving an erroneous instruction on insanity was harmless error in a prosecution for murder where there was no competent evidence tending to establish that defense.

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

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

WOOD, J. William Chriswell was indicted by the grand jury of Scott County, charged with the crime of murder in the second degree in the killing of one Virgil Isom. The indictment was in proper form. The testimony for the State tended to prove that Chriswell was jealous of Isom because the latter went with a young lady by the name of Zelma Shelton, to whom Chriswell

was engaged to be married. There was testimony to the effect that Chriswell had requested Zelma Shelton to permit him to accompany her to a dance at Harley Harper's on Monday night, the night of the killing. Zelma refused, and he said to her at the time that if she did not go with him she would not go with any one else. She did attend the dance that night with Virgil Isom. Chriswell attended the dance, and one of the witnesses stated that Chriswell asked if Virgil Isom was much of a scrapper, and said that if things didn't go right after the dance he (Chriswell) would find out. A witness, at whose house the dance took place, testified that he heard Chriswell say that night that he would whip Virgil Isom after the dance, or get whipped. After the dance Virgil Isom and his companion took the two Shelton girls back home, and, as the young gentlemen were returning, they passed a stack of lumber on the road, near which Chriswell was standing. As Virgil Isom passed by, Chriswell knocked him down with a club, hitting three or four licks after he fell, then jumped on him and began hitting him with his fist. Chriswell desisted when Buck Shelton told him to quit. Chriswell then left. Isom was carried to a neighbor's house, where he died within a few hours, without regaining consciousness, as the result of the blows he had received at the hands of Chriswell. The testimony on behalf of the State tended to prove that the motive of Chriswell for striking Isom was jealousy. One of the witnesses for the State, the officer who arrested Chriswell, testified that he informed Chriswell that Isom was dead—that he (Chriswell) had killed him—and Chriswell stated that he guessed he was in for it; that he hit Isom with a club because he was mad at him for taking his girl to the dance; that he didn't intend to kill him—only to knock him down and whip him; that he hit him three or four times with his fist after Isom fell. He further asked witness if witness thought he could get it reduced to manslaughter, and stated that if he could it would not be so bad. These statements of Chriswell were free and voluntary.

Miss Zelma Shelton testified, on behalf of the defendant, that she was engaged to Chriswell. She attended the dance, and went with Virgil Isom. She had also been walking with Isom the afternoon of that day, and had told Chriswell about it. She saw Chriswell at the dance, but didn't talk with him. After the dance she also saw him and her brother coming on behind her and Isom. She stated that, after the boys had returned to her home with witness and her sister, she heard Virgil say, when he went to leave, that he was going back where Chriswell was at the lumber stack. She denied that she and Chriswell had had any words in regard to Isom on the Sunday afternoon before the Monday night of the killing.

Chriswell himself testified, and denied that he and Zelma Shelton had any disagreement about Isom, and denied that he had any conversation on the night of the killing to the effect that he was going to assault Isom. He stated that he and Buck Shelton, Zelma's brother, stopped at a lumber pile, waiting for Virgil to leave the Shelton house so that he could go down and get a suitcase he had left there. When Isom left the Shelton house and came back, he passed near the lumber stack where witness was standing, and as he passed he hit witness on the shoulder with his left hand, at the same time having his right hand in his pocket. Witness first hit Isom two or three licks with his fist, and stumbled and fell on a stick, which he picked up, and with this stick he hit Isom three or four times. He had no intention of killing Isom. He had no ill-will or malice toward Isom. He left Isom lying on the ground and went to Shelton's and got his suitcase and left. Witness stated that he went to school about eight years, and was in the third grade when he stopped; that when he was ten or twelve years old he was kicked in the forehead by a horse, leaving a scar.

Chriswell's mother, brother and sister testified to the effect that Chriswell was kicked in the forehead by a horse when he was ten or eleven years old, leaving a long deep scar; that he remained in bed from the injury for a considerable time, and after he recovered he

attended school five or six years, but never advanced from the fourth grade. Chriswell's mother testified that his actions were sometimes peculiar; that they endeavored to assist him in his studies, but without results. After the horse kicked him, at times he showed an almost complete lack of intelligence both in actions and looks. He was morose, irritable and ill-tempered, and never exhibited intelligence greater than that possessed by a child eight or nine years of age. Up until he was eighteen or nineteen years old his mother watched over him and cared for him just as if he were a child. About that time he became unruly and refused to obey her, and frequently left and was gone for weeks at a time, when she didn't know where he was. His mental condition was embarrassing to her and the family, and he did many things witness didn't think a sane person would do. He told witness, when he came home on Monday night of the killing, that he had a fight with Isom, but he didn't appear to believe that the result of the fight was anything at all serious. He stated to witness that he might have to pay a fine, and wanted to get work at the mill so that he could earn money enough to pay the same. Witness further testified that, at times, her son would forget the names of his brothers and sisters, and would ask witness what their names were. From her observation of his conduct since the injury caused by the kick on his forehead she was of the opinion that her son was insane. On cross-examination she testified that her son had been in the penitentiary, where he was sent for three or four years on the charge of carnal abuse, and after serving two years he was paroled. The testimony of Chriswell's sister and brother was substantially the same as that of his mother.

The instructions of the court on murder in the second degree and manslaughter, the offenses included in the indictment, and likewise the instructions on self-defense, reasonable doubt, presumption of innocence and credibility of witnesses, were all free from error, and conformed to the law on these familiar subjects, as it has been often

announced by this court. Hence we find it unnecessary to set them out and comment upon them. Among the instructions given by the court was the following:

"No. 21. The court instructs the jury as a matter of law that an insane person is not amenable to the law for their acts. So in this case, if you believe from the evidence beyond a reasonable doubt that the defendant was so mentally deficient that he could not discern right from wrong and could not control his actions because of his mentally deficient condition, if he was deficient, then you should acquit the defendant."

The defendant objected and duly excepted to the giving of this instruction.

This instruction was contrary to the law on the subject of insanity as announced in numerous decisions of this court. *Woodall* v. *State,* 149 Ark. 33; *Kelly* v. *State,* 146 Ark. 509; *Hankins* v. *State,* 133 Ark. 38; *Bell* v. *State,* 120 Ark. 530, and cases there cited. The instruction was inherently defective, and a general objection would be sufficient to draw the attention of the court to the defects therein. But, after a careful examination of the testimony, we have reached the conclusion that the instruction, although erroneous, was not prejudicial, for the reason that there was no testimony to warrant the court in submitting the issue of insanity to the jury. The testimony of the witnesses on this issue tended to prove that the appellant, after he arrived at the years of maturity, possessed only the intelligence of a child from seven to nine years of age. But an adult with the intelligence of a child from seven to nine years of age would be mentally capable of committing a crime, unless it were shown by a preponderance of the evidence that such person was insane, under the tests laid down by the court in the above cases. In other words, where an adult person has the intelligence of a child from seven to nine years of age, that fact alone cannot be made the test as to whether he is insane, and therefore not capable of committing a crime under the rules and tests announced by the court in the above cases.

The testimony adduced by the appellant, given its strongest probative force in his favor, does not tend to prove that, at the time of the commission of the crime charged, the appellant was insane. The appellant's own testimony, if believed by the jury, would have justified them in acquitting the appellant, or at least in finding that he was guilty of no higher offense than that of manslaughter. There was nothing in his testimony to indicate that his conduct in slaying Isom was the result of a diseased mind, nor was there anything in the testimony of appellant's mother, brother and sister, tending to prove that, at the time of the killing, the appellant was insane. The facts stated by them did not warrant their opinion that the appellant was crazy, in the sense that he was not responsible under the law for the crime charged.

We conclude therefore that the giving of the instruction No. 21, although erroneous, could not have been prejudicial to the appellant, but, on the contrary, the submission of the issue of insanity to the jury, under the undisputed testimony, allowed the jury to consider a defense to which appellant was not entitled, and hence was in appellant's favor rather than prejudicial to him. The judgment is therefore correct, and it is affirmed.

McCown v. Nicks.

Opinion delivered May 31, 1926.

1. Appeal and error—acceptance of benefit under decree appealed from.—A party may appeal from the unfavorable portion of a decree, though he accepted the benefit of the favorable portion, if a reversal cannot affect his right to the favorable portion.
2. Appeal and error—appeal from part of decree.—A mortgagee may appeal from that part of a foreclosure decree which denies him a personal deficiency judgment against certain defendants, though he proceeded with the sale under the decree and became a purchaser thereat.

3. MORTGAGES—ASSUMPTION OF DEBT BY GRANTEE.—Acceptance of a deed containing a stipulation for payment by the grantee of a mortgage on the property implies a promise to perform it, on which assumpsit will lie.

4. MORTGAGES—ASSUMPTION OF DEBT—RESCISSION.—An agreement by the purchaser of mortgaged land with the mortgagor to pay the mortgagor's debt to the mortgagee may be rescinded without the latter's knowledge or consent, where no privity of contract has been established by the latter's acceptance of the purchaser as debtor.

5. MORTGAGES—ASSUMPTION OF DEBT—RESCISSION.—An agreement by a purchaser to pay off a mortgage debt could not be rescinded by a reconveyance to the mortgagor without the consent of the mortgagee after the latter had been notified of such assumption and had extended the time of making the payment to the purchaser and the property in the meantime had decreased in value.

6. MORTGAGES—RESCISSION OF ASSUMPTION OF DEBT—BURDEN OF PROOF.—One who, by purchase of mortgaged property, assumed and became liable to the mortgagee for payment of the debt secured, has the burden of proving that the mortgagee consented to release him on reconveying the property to the mortgagor.

Appeal from Jefferson Chancery Court; *H. R. Lucas*, Chancellor; reversed.

Rowell & Alexander and *Church & Gannaway*, for appellant.

Danaher & Danaher, for appellee.

WOOD, J. On December 1, 1918, O. S. McCown, individually and as trustee, Moore Moore, W. B. Sivley, H. Gannaway, R. M. Hammond and B. F. Hammond Sr., sold a tract of land owned by them in Jefferson County, consisting of 227 acres, to one W. R. Willis for a consideration of $11,400, evidenced by promissory notes secured by vendor's lien reserved in the deed. The Hammonds later assigned their interest in the purchase money notes to the other owners. On the 29th of November, 1919, Willis and wife conveyed this land to one Dan W. Nicks for a consideration of $155.23 in cash and the assumption by Nicks of the payment of the deferred purchase money notes. The first purchase money note for $1,500 was due December 1, 1919, which note Nicks paid. The second note for $1,100 was due December 1,

1920, and five days before the maturity of this note Nicks requested an extension of time for the payment thereof, which was granted, and the time extended until January 1, 1921. Nicks failed to pay this note on the day it was due, and on January 12, 1921, reconveyed the land to his vendor, Willis, for a consideration recited in the deed of $100 cash and the assumption by Willis of the payment of the unpaid purchase money notes executed by him for the purchase of the land. No further payments were made by Willis or Nicks on these notes. On June 2, 1922, this action was instituted in the Jefferson Chancery Court by O. S. McCown individually, and as trustee, and by Moore Moore, W. B. Sivley and H. Gannaway, against Willis and wife and Nicks and wife, to recover judgment on the unpaid purchase money notes and certain taxes. They set up the vendors' lien, and asked that the same be foreclosed, and for judgment on the notes, and that, unless the same be paid, the lands be sold to satisfy the judgment. A *lis pendens* was filed June 2, 1922. Willis died during the pendency of the action, and the cause was revived in the name of his heirs. A guardian *ad litem* was appointed for the minor heirs of Willis, and he answered for them, denying all the material allegations of the complaint. Nicks and wife answered on June 9, 1922. They denied personal liability on the notes, and alleged that, after purchase of the land by Nicks from Willis, he and his wife resold the property to Willis, and by such sale were absolved from liability to the plaintiffs; that they were never indebted directly to the plaintiffs for the unpaid purchase money on the lands, and denied all other allegations of the complaint.

McCown testified, and, after identifying the notes and the original deed, the same were introduced in evidence. In addition to the above facts, he testified that he had correspondence with Nicks concerning the lands sold to Willis and the indebtedness therefor. He exhibited the correspondence between himself and Nicks, which was introduced in evidence. These exhibits establish the facts as above set forth. He further testified

that, at the time he received the letter from Nicks asking for an extension of time for the payment of the second purchase money note and stating that Nicks had assumed the payment of these notes, the price of the land was at its peak, and that the land could have been sold at that time for the amount of the balance of the purchase money due thereon. But that at the time witness was testifying it could not be so sold, as the market value of such lands had greatly depreciated. He testified that, when Nicks notified him that he had resold the property to Willis, witness notified Nicks that the plaintiffs would expect him to pay the notes. Witness never had any agreement with Nicks that the plaintiffs would look solely to Willis or relieve him (Nicks) from liability on the notes.

In addition to the above, there was other testimony on behalf of the plaintiffs to the effect that, at the time the payment of the second purchase money note was extended by the plaintiffs at the request of Nicks, Nicks was in good financial standing, and the extension was based upon knowledge of that fact.

Nicks testified, over the objections of the plaintiffs, that, before he reconveyed the property purchased by him from Willis back to Willis, he had a conversation with McCown over the telephone, and notified him of what they were doing; that Willis was not able to make the payments of more than forty-odd hundred dollars, and that witness was taking over Willis' interest in the property owned jointly with Willis and letting Willis have the property that witness purchased from Willis the year before. McCown said that would be all right. They would look to Mr. Willis for payment on the 227 acres and look to him (Nicks) for the payment on the 480 acres (another tract not involved), and that McCown asked for some definite time when the payment on the 480-acre tract would be expected, and that witness replied, "Not later than January 25," to which McCown agreed. Witness stated that he and Willis then consummated the deal by which he reconveyed to Willis the 227-acre tract; that he never heard anything more about

the 227-acre tract until something more than a year thereafter, when the plaintiffs notified witness that they were expecting him to pay the balance of the purchase money on this tract.

McCown testified in rebuttal that he never agreed to release Nicks from personal liability, and could not recall that Nicks had ever made such request. Witness only owned an interest of eleven thirty-fourths in the purchase money notes, and could not have made a release without the consent of the other owners. He denied that in a telephone conversation with Nicks he made any statements to the effect that Nicks would be relieved from liability on the notes for the 227-acre tract; that he would not have relieved him from liability on the notes without consideration. He had no authority from the other parties interested to relieve any one from liability, and did not agree with Nicks to relieve him from liability on said notes.

Upon the above facts the court found that Nicks was relieved from any personal liability to the plaintiffs for the purchase price of the lands being foreclosed by the acceptance by W. R. Willis of the deed from Dan W. Nicks reconveying said land executed on January 12, 1921, and entered a decree dismissing the complaint against Nicks and wife for want of equity, from which is this appeal.

The court further found that there was a balance due on the unpaid purchase money notes of $13,983.47, and entered a decree for that sum, and directed that the 227 acres be sold to satisfy such decree. There is no appeal from this part of the decree. The concluding paragraph of the decree is as follows: "It is further ordered that the report of the commissioner be made a part of the record in this cause and be included in any transcript of the record of this cause for the purpose of showing any deficiency, if any, which may exist between the sale price of said lands and the judgment herein rendered."

1. The appellee moves to dismiss the appeal on the ground that "the appellants had enforced the decree appealed from by causing the property to be sold under the decree, at which sale McCown and the other appellants purchased the property for the sum of $5,000, which sale was duly confirmed by the court." The appellee contends that this procedure on the part of the appellants is a waiver of their right to appeal from the decree, and that they are estopped thereby from prosecuting this appeal. As we construe the record from which this appeal comes, there is no appeal from that part of the decree fixing the amount of the decree in favor of the appellants and directing the lands to be sold in satisfaction of such decree. The appellants do not contend here that there was any error in that part of the court's decree. The appellants only appeal from that portion of the decree which dismisses their complaint against the appellee and results in denying the appellants any judgment against the appellee for the balance due them on the purchase money notes. Learned counsel for the appellee contend that, as the court below had held appellee free from liability, he was not bound to protect himself from loss by purchasing the land at foreclosure sale. They argued that, after a judgment had been rendered in the trial court in favor of the appellee, "Nicks had no interest in the property or in his codefendants, and no reason to think that it was to his interest to procure bidders or to bid for the property on his own account." This argument is unsound, for the reason that Nicks knew that the appellants had prayed an appeal to this court from the judgment in his favor. While the appeal was pending Nicks was bound to know that the judgment of the trial court in his favor was not final, and he could not assume that such judgment relieved him from any personal liability for the amount of the decree that had been rendered in appellant's favor against his codefendants. Nicks was bound to know that the judgment of the trial court in his favor might be reversed by this court on appeal, and that he might finally be held liable personally for

the balance of the unpaid purchase money on the notes. So long as Nicks' personal liability was thus undetermined, it is not correct to say that he had no interest in the property pledged to secure the purchase money notes and that it was wholly immaterial to him whether the land under the decree was sold for enough to satisfy the judgment. So long as the issue was unsettled as to his personal liability, Nicks was bound to know that it was to his interest to have the property at the foreclosure sale sell for enough, if possible, to liquidate the amount of the decree.

"It is quite generally conceded," says Ruling Case Law, "that one cannot ordinarily accept or secure a benefit under a judgment or decree and then appeal from it or sue out a writ of error, when the effect of his appeal or writ of error may be to annul the judgment. * * * The rule just stated is subject to the exception that, where the reversal of a judgment cannot possibly affect an appellant's right to the benefit secured under a judgment, then an appeal may be taken, and will be sustained despite the fact that the appellant has sought and secured such benefit. * * * If it is possible for the appellant to obtain a more favorable judgment in the appellate court without the risk of a less favorable judgment from a new trial of the whole case there, or in the lower court, then the acceptance of what the judgment gives him is not inconsistent with an appeal for the sole purpose of securing, without retrial of the whole case, a decision more advantageous to him." 2 R. C. L., p. 61, § 44, and cases cited in note. The exception to the rule is quite as well established as the rule. Since the appellants have not appealed from the amount of the decree in their favor and directing a sale of the land to satisfy the same, there is no possibility that their appeal from the judgment against them in favor of the appellee may lead to a result showing that they were not entitled to what they have already received. Appellants received, as a result of the decree in their favor, only the sum of $5,000, leaving a balance due them on such judgment in the sum of

$8,983.47. There is no inconsistency whatever in appellants' accepting the proceeds of the sale of the property under the decree as a payment on such judgment, and then seeking by their appeal to have appellee held personally liable for the balance due on such decree. To be sure, the appellants would only be entitled to one satisfaction of their judgment, but, since the proceeds of the foreclosure sale did not pay the amount of the judgment, if the appellee be personally liable therefor, the appellants had the right to appeal from the judgment of the trial court holding to the contrary. In *Goodlet* v. *St. Elmo Investment Co.,* 94 Cal. 297, 29 Pac. 505, it is held, quoting syllabus 3: "A plaintiff in a foreclosure suit does not, by causing a sale under the decree of foreclosure before taking an appeal, thereby waive his right to appeal from that part of the decree fixing personal liability for a deficiency of proceeds of such sale." In *Bolen* v. *Cumby,* 53 Ark. 514, we held that "a party may prosecute his appeal from a judgment, partly in his favor and partly against him, even after accepting the benefit awarded him by the judgment, provided the record discloses that what he recovers is his in any event—that is, whether the judgment be reversed or affirmed. But he waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal." See also *Mathis* v. *Litteral,* 117 Ark. 481; *Jones* v. *Hall,* 136 Ark. 348. The above doctrine clearly applies to the facts of this record. The decree, as we have seen, was divisible—partly in appellants' favor and partly against them—and the benefit accepted by appellants was not inconsistent with the claim which they seek to establish by the appeal. The appeal by the appellants, as already stated, was only from that part of the decree dismissing their complaint against the appellee. It follows that the appellee's motion to dismiss the appeal must be overruled.

2. This brings us to the consideration of the issue on the merits as to whether or not the appellee is liable personally to the appellants for the unpaid purchase

money notes executed by Willis. By the deed from Willis to Nicks the latter "agrees to pay when due and save harmless against the notes given by W. R. Willis to O. S. McCown, trustee, which are described in the deed from O. S. McCown to Willis." The doctrine of this court is that the "acceptance of a deed containing a stipulation whereby the grantee agrees to pay a mortgage on the land implies a promise to perform it; on which promise, in case of failure, assumpsit will lie." *Patton* v. *Adkins*, 42 Ark. 197; *Benjamin* v. *Birmingham*, 50 Ark. 433; *Felker* v. *Rice*, 110 Ark. 70; *Walker* v. *Mathis*, 128 Ark. 317; *Kirby* v. *Young*, 145 Ark. 507; *Beard* v. *Beard*, 148 Ark. 29; *Wallace* v. *Hammond*, 170 Ark. 952, 281 S. W. 902.

Since the appellee, under these authorities, became liable to the appellants for the debt of Willis, the issue, in the last analysis, is whether the appellee was released from his liability. On the 12th of January, 1921, the appellee and wife executed to Willis a deed reconveying to Willis the 227 acres, and in this deed Willis "agrees to pay when due and save the grantors harmless against the notes heretofore assumed by Dan W. Nicks"—the notes in controversy. Long before this deed was executed Nicks, under his assumption of the debt of Willis, paid off the first of the purchase money notes on December 2, 1919, in the sum of $1,500. McCown not only received and accepted this payment, but also notified Nicks on November 29, 1920, of the amount of the balance due on the second note, and agreed with Nicks to extend the time of payment from December 1, 1920, to January 1, 1921. There seems to be a contrariety of view in this country as to whether one who sells property upon which there is an incumbrance and procures from his grantee as a consideration, or part consideration, of the purchase price a promise to pay off the debt or incumbrance, can afterwards release his grantee from the obligation or liability to pay the debt to the creditor holding the lien. In a few jurisdictions, and by some authorities, it is held that, where the conveyance is absolute, the assumption of

the debt by the grantee is an absolute obligation in favor of the creditor holding the debt or incumbrance, and, without his consent, the grantor has no power to release his grantee from his obligation to pay the debt. *Dean* v. *Walker,* 107 Ill. 540; *Bay* v. *Williams,* 121 Ill. 91; *Ingram* v. *Ingram,* 72 Ill. 287; *Douglass* v. *Wells,* 18 Hun (N. Y.) 88; *Starbird* v. *Cranston,* 24 Colo. 20; 2 Jones on Mortgages, § 764; Devlin on Deeds, § 1093.

The question is one of first impression in our State. We think the better reason and the weight of authority is to the effect that such contract may be rescinded. There is no privity of contract with the third party holding the mortgage lien or incumbrance, and, unless he has in some manner become a privy to the contract of sale, there is no reason why the parties to the contract may not rescind the same without his knowledge or consent. Under the equitable doctrine of subrogation, the mortgagee would only be entitled to such remedy as the debtor—the mortgagor or vendor himself—has against his vendee. If these immediate parties to the contract have rescinded the same before any privity has been established between the mortgagee or lien-holder and the vendee who has assumed to pay the debt, then the mortgagee or lien-holder has no right to complain. He must stand in the shoes of the mortgagor, so far as the enforcement of any rights under the contract is concerned. But, where the mortgagee or lien-holder has accepted the contract, or asserted rights thereunder, denoting acceptance, and a privity has thus been established between him and the vendee who has assumed the debt, then the parties to the contract cannot rescind the same without the knowledge, consent or acquiescence of the lien-holder. *Thacker* v. *Hubbard,* 21 A. L. R. 414; *Crowell* v. *Surrier,* 27 N. J. Eq. 152, 156; *Whiting* v. *Gearty,* 14 Hun (N. Y.) 498, and numerous cases cited by the editors in 21 A. L. R. *supra,* at pages 462, 466. This doctrine is clearly recognized by implication in the recent case of *Wallace* v. *Hammonds supra.*

Applying the above doctrine to the facts of this record, the appellee was not released from liability by reason of his conveyance of the land to Willis and the assumption by the latter of his original indebtedness, because, long before such conveyance from the appellee to Willis, the appellants had accepted the appellee's covenant to assume the debt of Willis, and appellee had made a payment on such debt. The appellants, moreover, had changed their position by extending, at the request of the appellee, the time for the payment of the second purchase money note. By that extension, as the proof shows, the appellants were placed in a more unfavorable position, because the lands from that time began to decrease in value, and their security for the payment of the debt of Willis was thereby greatly lessened.

3. We find it unnecessary to decide, and do not decide, the issue as to whether or not McCown had authority to, and could, release the appellee orally from liability for the mortgage debt, for the reason that, even if this could be done, the testimony, as we view it, is not sufficient to show that it was done. The burden of proof as to this issue was on the appellee, and he has not met the requirements of the law in this respect. The most that could be said of the testimony on this issue in favor of the appellee is that the testimony is conflicting. The appellee testified positively that he called McCown over the phone, and that McCown consented to release appellee on the 227 acres. McCown, on the other hand, positively asserted that he never agreed to release the appellee from personal liability, and never said anything in a conversation with appellee over the phone which could possibly be construed by him as an agreement to release him from liability on the notes on the 227-acre tract. He testified that he only owned an 11/34 interest in the notes, and held the balance as a trustee for other parties, from whom he had no authority to make such release, and he did not in any conversation agree to release the appellee. Dr. Moore testified to the effect that, in the summer of 1922, he had a conversation

with the appellee, in which he told appellee that appellants had both a moral and legal right to expect him to pay for the 227 acres, and appellee said in substance that Willis had assumed the notes. Appellee "seemed very much depressed, and claimed to be sick also, and would only say that he just didn't see how he could make the payments—how he could do it." Appellant did not deny that the conversation with Dr. Moore occurred as Dr. Moore stated above. The testimony of McCown and Dr. Moore on this issue is far more reasonable and believable than the testimony of the appellee; and it cannot be said therefore that appellee has proved a parol release by a preponderance of the evidence. On the contrary, we are convinced that the finding of the trial court on this issue is clearly against the preponderance of the evidence.

The court therefore erred in entering a decree dismissing the appellants' complaint for want of equity. For this error the decree is reversed, and the cause is remanded with directions to enter a decree in favor of the appellants against the appellee for the balance found to be due on the purchase money notes, after deducting the amount of the proceeds of the foreclosure sale, and for such other and further proceedings as may be necessary according to law and not inconsistent with this opinion.

STEPHENS v. STATE.

Opinion delivered May 31, 1926.

1. WITNESSES—EXAMINATION AS TO BIAS.—Where defendant on cross-examination of a State's witness sought to show that animosity existed between the witness and defendant, which actuated the witness to appear before the grand jury, it was competent for the State, on redirect examination, to show that his testimony was not voluntary but in response to process of the court.
2. CRIMINAL LAW—ADMISSION OF EVIDENCE—HARMLESS ERROR.—Where, on cross-examination, the State's witness was shown to have been brought back from another State on a charge of wife

desertion, though he had been living with his wife in the other State, testimony of the prosecuting attorney that the charge of wife desertion had been filed at the wife's instance, though improper as introducing a collateral issue, was not prejudicial, where the same fact was elicited on examination of the witness.

3. CRIMINAL LAW—INSTRUCTION AS TO REASONABLE DOUBT.—An instruction defining reasonable doubt as "a doubt that is reasonable and one upon which you would be willing to act in any matter of highest concern to you with which you might be confronted in your everyday walks of life" *held* not erroneous.

4. INTOXICATING LIQUORS—INSTRUCTION AS TO OTHER SALES.—In a prosecution for selling liquor, an instruction that the jury could consider testimony of other sales by defendant only for the purpose of shedding light, if any, on the kind and character of business the defendant might have been engaged in, was not erroneous where the testimony tended to prove that defendant was engaged in selling liquor.

5. CRIMINAL LAW—INVITED ERROR.—Where, in the argument, counsel for the accused criticised the prosecution for bringing a State's witness from another State on a charge of wife desertion when he was living with his wife, remarks of the prosecuting attorney that the witness had run off to keep from testifying against the accused were invited and were not prejudicial.

Appeal from Clay Circuit Court, Western District; *G. E. Keck,* Judge; affirmed.

W. E. Spence and *F. G. Taylor,* for appellant.

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

WOOD, J. On the tenth day of June, 1925, the grand jury of Clay County returned into court an indictment against Ed Stephens in two counts, the first count charging him with selling liquor and the second with the crime of procuring liquor. He was placed on trial on both counts.

Witness Crow testified on direct examination in substance that he was a traveling salesman in 1923, and lived in Missouri. He traveled in Missouri and Arkansas. Some time in October, 1923, he stopped at the St. James Hotel in Corning, Arkansas. He was in a room with another party, and they sent out and got a quart of whiskey. The appellant brought the whiskey to the room

and received pay for it, and then went away. On cross-examination witness was asked when he first told of the occurrence, and stated that it was last summer before the grand jury—at the last June term of the grand jury. He hadn't thought of it or mentioned it since it occurred until then. There was nothing to draw witness' particular attention to it, and he hadn't discussed it with anybody. Witness was then asked: "Q. In other words, it was nearly two years after it occurred before you ever said anything to anybody about it? A. I don't remember having mentioned that incident to any one. I don't know whether it was two years or not." The witness was further asked if there was not some little bad feeling or something of a misunderstanding between witness and Stephens at the time he appeared before the grand jury, and he replied, "Well, you can't hardly call it bad feeling. I felt like I was mistreated by Mr. Bill Stephens." He was further asked if he had had any misunderstanding or any hard feeling toward any of the Stephens family, and he answered, "Well, really, no hard feelings." He never had any trouble with the appellant.

On redirect examination the witness, over the objection of the appellant, was asked by the prosecuting attorney the following questions: "Mr. Crow, did you go voluntarily before the grand jury?" He answered, "No sir." The witness stated that he was sick one time, and the court didn't understand it, and fined witness for contempt of court because witness wasn't there. He further stated that he was subpoenaed to appear before the grand jury. The appellant moved to strike all the testimony with reference to his appearance before the grand jury. The court overruled the motion and announced in doing so that "the jury will consider that as going to the interest of the witness only." The appellant duly excepted to the ruling of the court.

On further re-cross examination the appellant, among other questions, asked the witness if he was not present

here under bond, if he hadn't been attached, and the witness answered these questions in the affirmative.

Everett Powers, another witness for the State, testified that he now lived in St. Louis but had formerly lived in Corning, Arkansas; that he had lived there practically all of his life and had known the appellant all of that time. He was friendly with the appellant—never had any falling out with him. He bought whiskey from appellant in 1924 in Corning and paid him $1.25 for a pint. This witness, on cross-examination, among other questions, was asked, "When did you come back as a witness here to this court, to attend this term? A. Well—you mean when they brought me back? Q. Did some one bring you back? A. Yes sir." Witness was asked where he was at the time they brought him back, and stated that he lived in St. Louis, and was there with his wife keeping house when the officer came for him and brought him back here and placed him in jail on a charge of wife desertion. On redirect examination the witness was asked if he knew when the charge of wife desertion was lodged against him, and he answered that he did not. He further stated that, when he went to St. Louis about a year before, he left his wife in Corning, and witness didn't know who preferred the charge of wife desertion against him. On re-cross examination he was asked if they served a writ on him for wife desertion, and he stated that was what they brought him back for. He further stated on redirect examination that he waived extradition and volunteered to come back.

The bill of exceptions shows that the appellant objected to all of his testimony, and that the objection was overruled, and the appellant duly excepted to the ruling of the court.

Witness Holloway was called as a witness for the State and testified that he was the deputy prosecuting attorney of the county; that he filed information against Everett Powers charging him with wife abandonment on February 21, 1925, at the instance of his wife, and that Powers was brought back on that charge. The appellant

objected to the testimony and asked that the same be stricken from the record. The court overruled the objection and motion, stating, "Well, there is some testimony brought in here as to why he came back. It may shed some light on that, and the jury will consider it only for that purpose, if they find it does shed any light on it." To this ruling the appellant duly excepted.

Among instructions given by the court were the following: "No. 7. The phrase 'beyond a reasonable doubt' should be defined to you, and it means that, after a full and fair consideration of all of the facts and circumstances introduced in evidence before you, there naturally arises in your mind, either out of the evidence, by reason thereof or on account of a lack of it, a substantial doubt of the defendant's guilt. That is what is meant by a reasonable doubt. It does not mean an imaginary or far-fetched doubt to be conjured up by you in order to enable some guilty man to escape just punishment, but is intended as a shield to protect the innocent from unjust conviction. It is a doubt that is reasonable and one upon which you would be willing to act in any matter of highest concern to you with which you might be confronted in your every day walks of life."

The bill of exceptions recites the following: "Everett Powers had testified that he lived in St. Louis, Missouri, and had regular employment there, and that his wife was living with him and even keeping house, and that they had been living there one year when the deputy sheriff of Clay County came after him on Saturday morning before the present term of court convened on the following Monday. The attorneys for the defendant in their argument referred to this testimony and criticised the procedure on the part of the State. The prosecuting attorney, in answer to the argument of the attorneys for the defendant, stated, 'C. Everett Powers, after he was a witness, had run off to keep from testifying against the defendant.' The defendant objected to this statement of the prosecuting attorney, and the court said to the jury that they were the sole judges of the evidence, and the defendant

excepted to the ruling of the court." The jury returned a verdict finding the defendant guilty of selling liquor and fixing his punishment at imprisonment in the State Penitentiary for a period of one year. The court pronounced judgment of sentence in accordance with the verdict, from which judgment is this appeal.

1. There was no prejudicial error in the ruling of the trial court in permitting the witness Crow to testify in substance that he did not voluntarily appear before the grand jury, but was subpoenaed as a witness. Nor was there any error prejudicial to the appellant in permitting the witness Crow to testify that he was arrested on a charge of contempt of court for failure to appear before the grand jury to testify against the appellant and fined for contempt and placed under bond to appear before the circuit court. Learned counsel for appellant, on cross-examination of the witness Crow, had endeavored to show that animosity existed between the witness and the appellant which actuated the witness to appear before the grand jury and thus to establish the fact that the witness was biased and had a prejudice against the appellant. This cross-examination was legitimate, but, since appellant's counsel elected to thus cross-examine the witness, it was likewise permissible for the counsel for the State, by redirect examination on the same subject, to endeavor to prove by the witness that he was not biased, and that his testimony was not voluntary but in response to a subpoena issued out of the circuit court. The court, in ruling upon this testimony, announced that it was admitted only for the purpose of showing the interest of the witness, and the jury could only consider it for that purpose.

2. On cross-examination of the witness Everett Powers by counsel for the appellant, the fact was elicited that he had been brought back from St. Louis on a charge of wife desertion and had been put in jail and was in jail in Corning at the time he was brought before the court to testify in this cause; that he had as yet not been tried on the charge of wife desertion; that he and his wife were living together in St. Louis, keeping house,

when the deputy sheriff arrested him and brought him back to Corning. On redirect examination by the attorney for the State, the witness stated that he had waived extradition and had volunteered to come back before the sheriff had come to St. Louis for him. The court, over the objection of the appellant, permitted the deputy prosecuting attorney, Holloway, to testify that he had filed information against Powers, charging him with wife desertion, on February 21, 1925, at the instance of his wife, and that he was brought back to Corning on that charge. This testimony of Holloway was improper because it introduced a collateral issue which the court should not have permitted. But, since the same facts in substance had been elicited by proper cross-examination and redirect examination of the witness Powers himself on the witness stand, it occurs to us that it is thus affirmatively shown that the testimony of the witness Holloway, though improper, was not prejudicial. It was, of course, legitimate to prove by cross-examination and redirect examination of witness Powers himself what bias or prejudice, if any, he had as a witness in the cause, as affecting his credibility.

3. The court did not err in giving instruction No. 7 on reasonable doubt. It differs radically from the instruction on that subject which was condemned by this court in *Robinson* v. *State,* 149 Ark. 1. This court, in *Carpenter* v. *State,* 62 Ark. 286, held that it was not error to charge the jury that "a reasonable doubt is not a captious, imaginary or possible doubt, but must be such a doubt as a reasonable man would have in matters of deepest concern to himself, and must arise out of the evidence in the case."

4. We find no reversible error in the ruling of the court in the giving of instruction No. 11. In this instruction the court told the jury that they could not consider any testimony as to sales of liquor other than to witness Crow, except for the purpose of shedding light, if it did shed light, on the kind and character of business the defendant might have been engaged in. The instruction

was in harmony with an instruction of similar purport approved by us in *Nelson* v. *State,* 165 Ark. 448. The testimony as to other sales is competent where it tends to prove that the accused is engaged in the business of selling intoxicating liquor. The testimony here tended to prove that the appellant was engaged in the business of selling intoxicating liquor at the St. James Hotel in Corning, Arkansas. This brings the case well within the doctrine announced in *Nelson* v. *State,* above, and cases there cited. Counsel for the appellant complain here that the testimony with reference to other sales was not stricken out. As we interpret instruction No. 11, it does withdraw from the consideration of the jury the testimony concerning all other sales except in so far as it might shed light on the kind of business that appellant might have been engaged in. Only a general objection was made to the above instruction, and we find no inherent defect in it.

5. The remarks of the prosecuting attorney to which objection is urged were invited by the remarks of the attorneys for the appellant in commenting upon the testimony of Powers. Besides, these remarks, as we view them, were not calculated to create any prejudice in the mind of the jury against the appellant. Powers was a witness for the State, and the remarks of the prosecuting attorney tended to reflect on his credibility and reliability as a witness, which could not have been prejudicial to the appellant. There is no error in the judgment, and the same is therefore affirmed.

HOLT v. STATE.

Opinion delivered May 31, 1926.

1. GRAND JURY—IRREGULARITIES IN FORMATION—WAIVER OF OBJECTION.—Objections for irregularities in the formation of the grand jury are waived by pleading to the indictment.
2. CRIMINAL LAW—ADMISSION OF EVIDENCE—NECESSITY OF OBJECTION.—Where no objection was made to the introduction of a photograph in evidence, or to the examination of a witness, the objections will not be considered on appeal.
3. LARCENY—LIABILITY OF PARTICIPANT.—One who participated in the original asportation of property stolen by her confederate was guilty of the larceny.
4. CRIMINAL LAW—ARGUMENTATIVE INSTRUCTION.—An instruction in a prosecution of a wife for larceny alleged to have been committed with her husband, that "flight cannot be considered forceful resistance, and the fact that the defendant left in flight with her husband, standing alone, raises no presumption of her guilt, and it is insufficient to sustain a conviction," was properly refused as being argumentative and giving undue prominence to a single fact.

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

C. Floyd Huff and *Jay M. Rowland,* for appellant.

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

HART, J. This is a companion case to the one of *Bob Holt* v. *State, ante,* p. 40. Hazel Holt is the wife of Bob Holt, and was convicted of the same larceny and has duly prosecuted an appeal to this court.

The first assignment of error is as to the formation of the grand jury at the time of the return of the indictment in this case. The record shows that the defendant pleaded not guilty to the indictment, and went to trial. Objections for irregularities in the formation of the grand jury were waived by pleading to the indictment. Hence, if there had been any error in impaneling the grand jury, the defendant was too late in taking advantage of it. *Carpenter* v. *State,* 62 Ark. 286, and *Latourette* v. *State,* 91 Ark. 65.

The next assignment of error relates to the introduction of a photograph of the defendant taken by the police in Memphis. No objection was made to the introduction of the photograph in evidence, and, under our rules of practice, we cannot consider this alleged assignment of error. *Brown* v. *State,* 169 Ark. 324.

The third contention of counsel for the defendant is that the court erred in permitting the State to interrogate the defendant with reference to a passport obtained by her after the commission of the alleged offense. No objection was made, and no exceptions were saved on this point. Hence, under our rules of practice, this alleged assignment of error cannot be considered by us.

The principal ground relied upon for a reversal of the judgment is that the court refused to give the following instruction: "The jury are instructed that, the evidence in this case having failed to show the presence of the defendant at the time the larceny charged in the indictment was alleged to have been committed, you will find the defendant not guilty on the first count in the indictment."

There was no error in refusing to give this instruction. The defendant was indicted for the crime of grand larceny for stealing $55,000, the property of Pete Sirbu and his wife. It was the theory of the State that Bob Holt and Hazel Holt, his wife, entered into a conspiracy to steal $55,000 from Pete Sirbu and his wife by the use of a trick or device, within the principles announced in *Arkansas National Bank* v. *Johnson,* 122 Ark. 1, and cases cited.

According to the evidence for the State, Bob Holt, the husband of Hazel Holt, by a trick or device obtained from Pete Sirbu, in the city of Hot Springs, Garland County, Arkansas, $55,000 belonging to Sirbu and $5,000 belonging to Sirbu's wife. The money was wrapped up in paper, and was delivered to Bob Holt on the steps of a hotel. Bob Holt took the money and walked down the porch of the hotel, where Hazel Holt was sitting. As soon as she saw her husband, she stood up and talked to

him for a few minutes. Bob Holt delivered the package of money to his wife, and they sat down for a minute or two. Then Hazel Holt got up and walked down the porch to a garage, with the money, and got in a taxicab and drove away.

This testimony brings the case squarely within the principles of law decided in *Monk* v. *State,* 130 Ark. 358, and *Davidson* v. *State,* 132 Ark. 116.

The evidence just detailed shows that there was a continuation of the asportation of the money, and that Hazel Holt participated in the larceny of the money, because the original asportation was still in progress when she received the money from her husband and carried it away in the taxicab.

It will be noted that the instruction was peremptory in its nature. It assumed that the original theft of the money had been ended when Hazel Holt received the package of money from her husband. As we have just seen, such was not the case, and the original asportation of the money was continued when the defendant received the package from her husband and carried it away with her.

Finally, it is insisted that the court erred in refusing to instruct the jury as follows: "Flight cannot be considered forceful resistance, and the fact that the defendant left in flight with her husband, standing alone, raises no presumption of her guilt, and it is insufficient to sustain a conviction."

The court properly refused to give this instruction. The instruction is argumentative, and singled out a single fact and gave it undue prominence to the jury. This the court is never required to do, because such action would have a tendency to confuse and mislead the jury as to the weight it should give to the evidence as a whole. *Fisher* v. *State,* 161 Ark. 586.

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

BROCK v. STATE.

Opinion delivered May 31, 1926.

1. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—Testimony of an accomplice *held* sufficiently corroborated to sustain a conviction of larceny and burglary.
2. CRIMINAL LAW—SUFFICIENCY OF PROOF OF VENUE.—Evidence in a prosecution for larceny *held* to establish the venue.
3. CRIMINAL LAW—ADMISSION OF ACCOMPLICE.—Admission in evidence of the statement of an accomplice that accused, with himself and others, had stolen the cotton alleged to have been stolen, made after the cotton had been sold and the proceeds divided, *held* erroneous.
4. CRIMINAL LAW—ADMISSION OF EVIDENCE—PREJUDICE.—In a prosecution for larceny of cotton, the erroneous admission of the declaration of an accomplice that accused with himself and others stole the cotton was prejudicial where the jury might have considered it as corroborative of the accomplice's testimony.
5. CRIMINAL LAW—GENERAL OBJECTION TO INSTRUCTION.—A general objection to an instruction given in two paragraphs, one of which properly declared the law, was insufficient.

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

Walter A. Isgrig and *Thos. C. Claiborne,* for appellant.

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

HART, J. Pete Brock prosecutes this appeal to reverse a judgment of conviction against him for the crime of grand larceny and burglary.

The first assignment of error is that the evidence is not legally sufficient to sustain the verdict.

McKinley Pitts, an accomplice of the defendant, was a witness for the State. According to his testimony, Pete Brock, Lewis Stewart, Fred Stewart, and himself stole 900 pounds of seed-cotton and sold it for $27, and divided the proceeds of the sale.

It is contended by counsel for the defendant that the testimony of Pitts is not sufficiently corroborated to warrant the jury in convicting the defendant. We do not

agree with counsel in this contention. The State showed by other witnesses that the cotton was stolen from the Walt farm, and that the defendant was seen on the farm two days before the cotton was stolen. On the night the cotton was stolen, two automobiles came by the house of Alf Cunningham on the farm between eleven and twelve o'clock, and he could tell from the tracks around the cotton-pen that two cars had been there. One of the cars had a peculiar track, which was followed and led to the defendant's house. An examination of a car found in the defendant's garage showed that it made the same peculiar track as that which had been followed from the cotton-pen from which the cotton was stolen to the defendant's house.

It was shown by another witness, who lived about a mile from the Walt place, that, on the night the cotton was stolen, the defendant, McKinley Pitts, and Stewart came to his house about nine or ten o'clock at night, and stayed for an hour. The parties came in two cars, and did not give any reason for coming. McKinley Pitts was a stranger to those living in the house.

The testimony of these witnesses was sufficient to corroborate the testimony of McKinley Pitts and Lewis Stewart, who also testified that he assisted the defendant and McKinley Pitts in stealing 900 pounds of seed-cotton from the Walt place. Then, too, a cotton sack belonging to Alf Cunningham, one of the owners of the cotton, was found in the possession of McKinley Pitts the next day after the cotton was stolen. *Brewer* v. *State,* 137 Ark. 243, and *Middleton* v. *State,* 162 Ark. 530.

It was also shown by other witnesses for the State that 900 pounds of seed-cotton belonging to Alf Cunningham and D. C. Walt was stolen from the farm of the latter on the night of December 10, 1925. The cotton was worth about $45.

It is also insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict, because the venue was not proved.

The evidence for the State shows that the cotton in question was stolen from the farm of D. C. Walt. It was grown by Alf Cunningham, who lived on the Walt farm, and who testified that he lived in Lonoke County. The distance of the Walt farm from the city of North Little Rock, Pulaski County, Arkansas, was also shown, and from these facts the jury might have legally inferred that the cotton was stolen in Lonoke County, Arkansas.

It is earnestly insisted that the court erred in permitting J. W. Cox to testify that McKinley Pitts had told him that he and the defendant and two other negroes had stolen the cotton in question from the Walt farm. This statement of McKinley Pitts to Cox was made after the stolen cotton had been sold and the proceeds divided between McKinley Pitts, the Stewarts, and the defendants.

This statement of McKinley Pitts to Cox, under these circumstances, was merely a narrative of a past occurrence, and it is well settled that declarations made by one conspirator after the conspiracy has ended is not admissible against those who were not present when the admission was made. The undisputed evidence showed that the conspiracy to steal the cotton had ended by the consummation of the crime, and that the defendant was not present when McKinley Pitts told Cox what had taken place in connection with stealing the cotton. *Gill* v. *State,* 59 Ark. 422, and *W. D. Stroud* v. *State,* 167 Ark. 502.

The rule is that evidence improperly admitted must be treated as prejudicial unless there be something to show that it was not. *Elder* v. *State,* 69 Ark. 648, and *Moon* v. *State,* 161 Ark. 234. The jury might have considered the incompetent evidence of J. W. Cox as corroborative of the testimony of Pitts and Stewart.

Another assignment of error is that the court erred in giving instruction No. 4. This instruction need not be set out, for the reason that it contains two paragraphs, and counsel for the defendant admit that the instruction is not objectionable as to one paragraph, and that the court properly declared the law in that paragraph.

This court has held that, where an instruction given by the court consists of two or more paragraphs, one of which has properly declared the law, a general objection to the instruction is insufficient. *Bruder* v. *State,* 110 Ark. 402.

In this connection it may be stated that that portion of the instruction upon which a reversal is sought is covered by the principles of law declared in this opinion with reference to the testimony of the witness Cox as to the statement made to him by McKinley Pitts, an accomplice of the defendant.

We call attention to this phase of the case in order that the court may properly instruct the jury upon a retrial of the case, although we would not reverse the judgment for the alleged error in giving the instruction because only a general objection was made to it.

For the error in admitting the testimony of J. W. Cox, as stated in the opinion, the judgment must be reversed, and the cause will be remanded for a new trial.

TAYLOR *v.* BAY ST. FRANCIS DRAINAGE DISTRICT.

Opinion delivered May 31, 1926.

1. APPEAL AND ERROR—VOID JUDGMENT.—An appeal from a void judgment will not be dismissed, but the judgment will be reversed, as otherwise it might seriously embarrass the person against whom it is rendered, though it can be of no benefit to the person who has secured it.
2. JUDGMENT—EFFECT OF VOID JUDGMENT.—In theory of law, a void judgment is no judgment, and can therefore have no effect.
3. DRAINS—PENDENCY OF APPEAL.—The county court has no authority to make a second order establishing a drainage district while an appeal from the void original order was pending in the Supreme Court, though the proceeding was *in rem,* since the appeal was a continuation of the action, and not a new action.
4. APPEAL AND ERROR—EFFECT OF PENDENCY OF APPEAL.—After a cause has been removed from the county court to the circuit court by appeal, the circuit court has no jurisdiction to make an order in the proceeding until the cause is again sent down.

5. DRAINS—VOID ORDER—CERTIORARI.—Certiorari lies to quash a second order of the county court establishing a drainage district, made while an appeal from a void original order attempting to establish the same district was pending, since the county court had no jurisdiction to make such order.

6. CERTIORARI—PRACTICE ON REVIEW.—On certiorari to review an order of the county court establishing a drainage district, made while an appeal from an earlier order was pending, the circuit court could do nothing but quash the judgment, and hence, on reversal of its order dismissing the petition, a remand is unnecessary.

Appeal from Craighead Circuit Court, Jonesboro District; *W. W. Bandy,* Judge; reversed.

STATEMENT BY THE COURT.

A. F. Taylor and other landowners have prosecuted an appeal from a judgment of the circuit court dismissing their complaint for a writ of certiorari to quash a judgment of the county court establishing Bay St. Francis Drainage District.

On the 8th day of July, 1924, certain landowners in Craighead County filed a petition in the county court under the statute for the establishment of a drainage district embracing certain territory therein described. An engineer was appointed, as required by statute, to make a preliminary survey of the district, and he filed his report on July 16, 1924.

On the 30th day of August, 1924, the report of the engineer was approved by the county court, and September 17, 1924, was fixed for the time of hearing the petition for the establishment of the drainage district. The county clerk was directed to give notice fixing said day for the hearing and calling upon all landowners in the proposed district to show cause why said district should not be established. Notice was duly published by the clerk, and on September 17, 1924, the court continued the proceedings until the 11th day of October, 1924.

A. F. Taylor and other landowners in the proposed district appeared in the county court and filed objections to the establishment of the district. After hearing

the evidence introduced, the county court made an order establishing the district. A. F. Taylor and others, who had become remonstrants to the petition, duly prayed an appeal to the circuit court, which was granted. The cause came on for hearing in the circuit court on March 25, 1925, which was an adjourned day of the circuit court.

Upon a hearing anew in the circuit court, the action of the county court establishing the district was affirmed. A. F. Taylor and others filed a motion for a new trial, which was overruled by the circuit court. They then prayed and perfected an appeal to the Supreme Court. Bay St. Francis Drainage District and the commissioners thereof filed a motion in the Supreme Court to dismiss the appeal of A. F. Taylor and other landowners, and they filed a response to the motion to dismiss.

On the 19th day of October, 1925, the Supreme Court took under consideration the motion of the Bay St. Francis Drainage District to dismiss the appeal and the confession of error on the part of the drainage district which had been subsequently filed.

The motion to dismiss the appeal was overruled, and the record of the Supreme Court in the proceedings is as follows:

"And this cause coming on now to be heard upon the transcript of the record of the circuit court of Craighead County, Jonesboro District, and on the confession of error aforesaid, viz.: That the circuit court erred in not declaring the order creating the district void, on the ground that certain tracts of land described in the petition and engineers' plans were omitted from the published notice.

"It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside, with costs, and that this cause be remanded to said circuit court with directions to set aside the order aforesaid, and to certify its judgment down to the county court.

"It is further considered that said appellants recover of said appellee all their costs in this court in this cause expended, and have execution thereof.

"Ordered further that the clerk issue a mandate to the lower court in this cause forthwith."

On May 4, 1925, the engineer filed his report as prescribed in the statute relating to the creation of drainage districts, and on May 29, 1925, the drainage district was duly ordered established by the county court and commissioners were appointed to construct the proposed drainage ditch.

On the 28th day of August, 1925, the commissioners filed an assessment of benefits of the real property within the boundaries of the district, and the county court made an order fixing October 22, 1925, as the day for hearing said assessment of benefits, and calling upon the landowners to show cause why said assessment of benefits should not be confirmed.

On October 21, 1925, A. F. Taylor and other landowners in the district filed a complaint in the circuit court against the Bay St. Francis Drainage District and the commissioners thereof for a writ of certiorari to quash the judgment of the county court of May 29, 1925.

On the 5th day of February, 1926, there was a judgment of the circuit court dismissing the petition of A. F. Taylor and other property owners for a writ of certiorari to quash the judgment of the county court establishing Bay St. Francis Drainage District.

The case is here on appeal.

Eugene Sloan and *Gautney & Dudley,* for appellant.

Basil Baker and *Chas. D. Frierson,* for appellee.

HART, J., (after stating the facts). The original order of the county court establishing the drainage district was made on the 11th day of October, 1924. A. F. Taylor and other landowners prosecuted an appeal from this order to the circuit court. The cause or proceeding was heard in the circuit court on the 25th day of March, 1925, and the judgment of the county court establishing the district was affirmed. The landowners then prosecuted

an appeal to the Supreme Court, and the commissioners of the drainage district made a motion to dismiss the appeal. It was then discovered that the original order of the county court establishing the district was void because of the misdescription of an 80-acre tract of land, which was wholly at variance with the description of the same tract in the notice required under the statute as a prerequisite to the establishment of the district. It was conceded that this rendered the order establishing the district void, and the Supreme Court reversed the judgment expressly on the ground that this tract of land was misdescribed in the notice, and it was therefore ordered that the judgment of the circuit court should be reversed and the cause remanded to the circuit court with directions to set aside its order and to certify its judgment down to the county court.

During the pendency of the appeal in the Supreme Court, counsel for the drainage district treated the original order establishing the district as void, and obtained another order of the county court on May 29, 1925, establishing the district. The provisions of the statute were in all respects complied with in obtaining this order, and the order is valid on its face, unless it can be said that it is void because rendered during the pendency of a former appeal in this court.

In *Bailey* v. *Gibson,* 29 Ark. 472, the court said that it is well settled that chancery causes will be reviewed on appeal, whether the court below had jurisdiction or not. In that case, and in *Brumley* v. *State,* 20 Ark. 77, it was said that no appeal will lie from a void judgment at law, and the proper remedy would be to dismiss the appeal. It will be observed, however, that on the first appeal in this case the court refused to dismiss the appeal, but reversed the judgment. It is now well settled that a void judgment or order is appealable. In *Alexander* v. *Crollott,* 199 U. S. 580, it was said that the fact that the judgment may have been void will not prevent its reversal upon appeal. In a case-note to 33 L. R. A. (N. S.) 733, it is said that the prevailing

opinion, as attested by the collated cases, is clearly to the effect that the appellate court will so far take cognizance of the void entry as to reverse it and restore the parties to the position they originally occupied.

To the same effect see note to 20 Ann. Cas., p. 277, Hayne on New Trial and Appeal, vol. 2, pp. 950, 979, and 1069, and Elliott on Appellate Procedure, § 110. On this question Elliott says:

"There is solid reason for this rule, inasmuch as it enables a party injured by such a judgment to remove it from the record without injury to the rights of adverse parties, for they can have no rights under a judgment which has no force. It is a sacrifice of substance to a barren technicality to hold, as some of the courts do, that no relief can be had against a void judgment."

It is true that, in the theory of law, a void judgment is no judgment at all and can therefore have no effect. In this view of the matter the landowners would have had a right to treat the original order of establishing the drainage ditch as a nullity; but if they did so it would have been at their peril. The better practice and a juster rule seems to be that the parties affected should have the right to have the matter judicially determined on appeal. Of course, in theory of law, a void judgment is harmless because it is a nullity; but as a practical fact a void judgment, especially where it creates a lien on land, or is used as a basis for the creation of a lien on land, is not harmless. To illustrate: in a proceeding like this, the commissioners of the district, representing a majority of the landowners, were contending that the judgment was valid. As a practical matter, this fact and the fact that the judgment had been entered of record would serve to create a cloud on the title of the landowners. The judgment would have a tendency to affect a sale of the property, and, even if the landowners had assured prospective purchasers that the judgment was void, they might be reluctant to purchase the land at its full value. The fact that the commissioners were proceeding under the judgment as if it were valid would tend to create a cloud

on the title of the lands. It has been well said that a judgment unreversed, though void upon its face, may seriously embarrass the person against whom it is in form rendered, though it can of course be of no benefit to the person who has secured it. *Stewart* v. *Lohr,* 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

It is said that, as appellate courts have the power to clear their own records of objectionable entries, even though as standing thereon they are absolutely void, they have like power to set aside void entries in the inferior courts when the forms of reviewing such void entries to such appellate courts have been complied with.

This court has held that, where an appeal is granted and an authenticated copy of the record is filed in the appellate court, the court or action is thereby removed to the appellate court. *Robinson* v. *Arkansas Loan & Trust Co.,* 72 Ark. 475, 81 S. W. 609.

In *McKenzie* v. *Engelhard Co.,* 266 U. S. 131, it is said that an appeal is a proceeding in the original cause, and that the suit is pending until the appeal is disposed of.

In this view of the matter, the county court would have no right to make another order establishing the drainage district while the appeal from the original order creating the district was still pending on appeal. If the appeal is a proceeding in the original cause, until the appeal is disposed of the county court would have no jurisdiction to make an order after the cause had been removed to another court by appeal. The better procedure, and the ordinary procedure in such cases, is that the suit should be treated as pending in the appellate court until, by appropriate orders, it is again sent down to the county court.

But it is insisted that a statutory proceeding for the establishment of a drainage district is a proceeding *in rem,* and that the ordinary rules of practice relative to adversary causes should not be applied.

A majority of the court fails to see any distinction in the matter. Our statute expressly provides that the

landowners in a proposed drainage district may become parties to the proceeding and file a remonstrance to the petition asking for the establishment of the district. The statute also provides that the landowners may appeal, if their remonstrance is overruled and the drainage district is established. The statute also expressly provides that, where an appeal is taken to the circuit court, the original papers in the case shall be deposited there, together with a transcript of the record in the county court. Presumably these original papers would remain in the circuit court until the case was finally disposed of. The record in this case shows that the order attacked was made by the county court while the case was pending on appeal. If, under the express provisions of the statute, the proceeding may become an adversary one by the landowners filing a remonstrance to the petition seeking the establishment of the drainage district, and if they are allowed to appeal from an adverse judgment, it would seem that the better practice would be that the incidents and methods of procedure usual in cases where there are adversary parties should obtain. This course would prevent confusion and might prevent fraud. To illustrate: Take a case like the present one, where the judgment is void. As we have already seen, it is now settled that an appeal from a void judgment will not be dismissed, but the judgment will be reversed. The landowners feeling aggrieved and appealing from an order of the court establishing a drainage district are required to follow the case through the appellate court and take notice of the proceedings there. They should not be required, however, to watch the proceedings in the county court, to see if that court was taking jurisdiction of the case while it was pending on appeal to this court, or in the circuit court. Suppose the circuit court should be trying the appeal and using the original papers in some stage of the trial; or suppose, for good reasons, upon appeal to this court we should permit one of the original papers to be sent here for our inspection, then suppose, while the papers were here or in the circuit court, the county court

should undertake to exercise jurisdiction in the premises, this would bring about a conflict of jurisdiction as to which court would be entitled to the original papers. It is no answer to say that the presumption is that the county court would not undertake to act unless it could in some way get the original papers. The test of jurisdiction would not be what it would do, but what it could do.

If, as we have already seen, the appeal is a continuation of the action and not a new action, it seems to a majority of us that the better practice is to hold that the county court had no jurisdiction to establish the drainage district during the pendency of an appeal from its original order establishing the district, even though the original judgment was void.

Moreover, it is claimed that the landowners should have appealed from the judgment of the county court of May 29, 1925, instead of applying for a writ of certiorari to quash it.

In *Browning* v. *Waldrip,* 169 Ark. 261, it was held that certiorari lies to quash a judgment of the county court which was void because that court had no jurisdiction, even though such void judgment might have been vacated and set aside on appeal.

But it is insisted that the judgment of the county court of May 29, 1925, establishing the district, is valid on its face. The records of the county court show that an appeal had been granted from the original judgment of the county court establishing the district, and that the original cause was pending on appeal. When an appeal is taken from an order of the county court establishing or refusing to establish a drainage district, the statute requires the original papers to be sent to the circuit court. If the appeal is a continuation of the original cause or proceeding, the case would remain in the appellate court until it had been sent back to the county court by some appropriate order in the regular course of procedure. To illustrate, when the judgment in the cause was reversed in this court, it was ordered that the cause

be remanded to the circuit court with directions to set aside its order and certify its judgment down to the county court. When this was done, the county court would again acquire jurisdiction of the cause, and the certification of the circuit court would be notice to the county court, as well as all interested parties, that the cause had been sent back to the county court for further proceedings in accordance with the statute. Until this certification was made, the records of the county court would show that the cause was pending on appeal, and consequently the county court has no jurisdiction to make any order whatever while the cause or proceeding is pending on appeal.

The result of our views is that the judgment of the county court was void; and the landowner might have ignored it or he might have gotten rid of it by appeal. The reason is that it was in form a judgment entered upon the records of the county court, which, although void, might through judicial process cast a cloud upon the title of the landowners in the district. All the circuit court could have done on certiorari was to have quashed the judgment of the county court and thereby have eliminated it from the record. Because the circuit court erred in not following this course, its judgment is reversed, and, inasmuch as no further proceedings in the matter can be taken in the circuit court, it is not necessary to remand the case.

The reversal of the judgment of the circuit court in effect declares the judgment of the county court to be void. This leaves the proceedings in the county court, and it may take such further steps as it deems to be advisable in the establishment of the drainage district which are according to law.

McCULLOCH, C. J., (dissenting). I would not ignore the settled rule that an appeal from a judgment, whether it be a valid or void judgment, removes the cause to the appellate court, but that removal is only for the purpose of a review; and the rule should be considered in harmony with another well-settled one that a

judgment void on its face is a complete nullity, neither binds nor bars any one, may be altogether disregarded, and no rights can be built up under it. *Townsly-Myrick Dry Goods Co.* v. *Fuller,* 58 Ark. 181. It is conceded that the judgment originally appealed from was void—both the judgment of the county court and that of the circuit court. A learned text-writer, speaking of such a judgment, says: "It does not terminate or discontinue the action in which it is entered, nor merge the cause of action, and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which void judgment was entered or in some other action. * * * Such a judgment has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff but constituting a constant menace to defendant." 1 Freeman on Judgments, p. 644. In another text-book on the same subject it is said: "Now, a 'void' judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral." 1 Black on Judgments, § 170. The appeal by the defendant in a void judgment being merely to get rid of it as a menace to his rights, it does not

hinder or postpone the right of the plaintiff to secure a valid judgment. Such is the effect of the authorities cited above.

There was no error in the initial proceeding in the county court, but the error crept into the publication of the notice, and that rendered the judgment void. All proceedings thereafter, in either the county court or circuit court, were void, and the original petitioners had the right at any time to disregard the void proceedings and proceed from the point where the proceedings were regular. Now, the fact that the original petition had been carried to the circuit court on appeal and was lodged in the office of the clerk of that court constituted no obstacle in the way of the county court exercising its jurisdiction. The record of the county court on the last proceeding was regular and valid on its face, showing that the county court was in possession of all of the original papers when it rendered its last order creating the district. The proceedings in the county court were brought up to the circuit court on certiorari and not by appeal. We must assume, on this attack, that the county court acquired possession of the original papers so as to confer jurisdiction on it to proceed. I am therefore unable to discover any reason why the judgment of the county court is open to such attack, and my conclusion is that the circuit court was correct in refusing to entertain the petition for certiorari or to quash the judgment of the county court.

Mr. Justice SMITH entertains the same views as herein expressed.

GARRETT v. STATE.

Opinion delivered May 31, 1926.

1. HOMICIDE—SELF-DEFENSE—JURY QUESTION.—Testimony *held* to make a question for the jury whether a killing was done in self-defense.
2. HOMICIDE—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.—Evidence in a murder case *held* sufficient to support a conviction for involuntary manslaughter.
3. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—Though defendant's evidence that he shot in necessary self-defense was uncontradicted, it was nevertheless proper to instruct that the mere fear by defendant that deceased might attack him would afford no justification to the shooting of deceased if at the time deceased was making no hostile demonstration toward defendant.
4. CRIMINAL LAW—INSTRUCTION INVADING JURY'S PROVINCE.—An instruction in a murder case that if there are two equally reasonable views of the evidence, one of which leads to the conclusion of guilt and the other to the conclusion of innocence, the latter conclusion should be adopted, *held* properly refused, as instructing on the inferences to be drawn from the evidence, and because the jury must not only ascertain the reasonableness of the testimony but also its truth.
5. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—In a prosecution for murder, a requested instruction to acquit if there is a reasonable doubt whether defendant honestly believed that he was in danger of losing his life or receiving great bodily harm from the assault then being made upon him, *held* properly refused as assuming that an assault was then being made upon him.
6. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—An instruction that, in determining whether defendant shot deceased in self-defense, the jury should place themselves in the position of defendant at the time of shooting, and that defendant should not be held to the same deliberate care in ascertaining the danger and force necessary to repel it as would be used by a person in afterwards viewing the situation, *held* correct.
7. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE—MODIFICATION.—A requested instruction that a person attacked by another who manifestly intends to take his life or do him great bodily harm, he may pursue his adversary until he has secured himself from all damages, and, if he kills him in so doing, it is justifiable self-defense, *held* properly modified to give the person attacked the right to stand his ground and repel force with force, as the right to pursue the adversary is given only where the

adversary is apparently withdrawing merely for the purpose of seeking a better position to renew the combat.

8. CRIMINAL LAW—ADMISSIBILITY OF PHOTOGRAPHS.—Introduction of photographs of deceased after he was shot by defendant, accurately taken and clearly indicating the number and location of his wounds, though not necessary, was not prejudicial where they were not of a character to inflame the passions of the jury.

9. CRIMINAL LAW—ADMONITION TO JURY.—Where a jury, in a prosecution for murder, informed the judge twice that they could not agree, sending them back with the admonition that it was their duty to use every reasonable effort to return a verdict, *held* not an abuse of discretion.

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

Wilson & Martin, for appellant.

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

SMITH, J. Appellant was indicted for the crime of murder in the first degree, alleged to have been committed by shooting and killing one Henry V. Browne, and, upon his trial, was convicted of involuntary manslaughter and given a sentence of one year in the penitentiary.

It is insisted that the verdict is contrary to the undisputed evidence, and that there was no testimony warranting the submission of the question of involuntary manslaughter.

Upon the question of the sufficiency of the testimony to support the verdict returned, it may be said that the following is a brief summary of the testimony: The deceased operated a ferry at Moro Bay, and appellant, who was a fisherman, had a fish-dock near the ferry, from which he loaded his fish to carry them to market. Deceased objected to appellant keeping his fish-dock near the ferry, and the men had quarreled about the matter. Deceased habitually went armed, and, on the morning when he was killed, was armed with a 45-caliber pistol. Appellant and two companions were at the fish-dock early in the morning on the day the killing occurred, and deceased, having heard them, went down to the ferry. When he came to the ferry, he inquired if any one wanted

to be ferried across the bay, and when the men who were there answered they did not, he told them to get away from the ferry. Appellant, who was armed with a shotgun, inquired if deceased owned the road. Deceased then told appellant that he would give him a minute to get away, and that if he did not leave he would kill him. Appellant testified that, when deceased made this remark, he reached into his automobile, which was standing in the road, and got his gun, and when he did so he said to deceased, "Damn you, drop it," referring to the pistol which deceased had in his hand. He saw deceased raise the pistol as if he were going to rest it on his arm to improve his aim, when he fired, and the deceased fell.

The two eye-witnesses besides appellant himself were his friends and associates in the fishing business, and their testimony substantially corroborated that of appellant. The truth of their testimony was, of course, a question of fact for the jury. Appellant was armed with a shotgun with which he killed deceased, and, upon the whole case, we think the question was presented whether the accused was justified or excused in committing the homicide (§ 2342, C. & M. Digest), and we have concluded that the testimony was legally sufficient to support the verdict returned.

It is insisted for the reversal of the judgment of the court below that the court erred in giving and in refusing to give certain instructions; that error was committed in admitting certain testimony; and that the court erred in keeping the jury together for such length of time as to practically coerce the jury to return a verdict.

Exceptions were saved to nineteen of the instructions given by the court, but we will discuss only certain objections of a specific character, as the law of the case was declared in a general way under instructions which have often been approved by this court.

An instruction numbered 8 declared the law to be that "the mere fear on the part of appellant that the deceased might attack him would afford no justification to appellant to shoot deceased if deceased at the time

was making no demonstration of a hostile nature towards or against the defendant and was making no attempt to inflict upon him any great bodily harm," the objection being that there was no testimony from which the jury could have found that deceased was not making a demonstration of a hostile nature; and a similar objection was made to an instruction numbered 14, which told the jury that appellant would have had no right to fire the fatal shot if he had no reasonable apprehension of immediate and impending injury to himself.

It is not questioned that these instructions are correct declarations of law; the insistence is that there was no testimony upon which to base them, as the undisputed testimony shows the fatal shot was fired in appellant's necessary self-defense. As we have said, the jury had the right to consider and determine the truth of the testimony offered by appellant and his associates, and we do not think the testimony and the inference legally deducible therefrom are so undisputed that there was no question for the jury, and there was therefore no error in giving instructions 8 and 14.

Appellant requested an instruction numbered 2, reading as follows: "You are instructed that the jury would not be warranted in indulging in any suppositions that would lead to the conclusion of the defendant's guilt; it would not be sufficient if there were grave suspicions or strong probabilities that he might be guilty; moreover, it would not be sufficient if the evidence in the case should strongly preponderate against the defendant and tend to show his guilt; but the evidence must be of such a nature and so conclusive as to impress upon the minds of the jury the fact that he is guilty and beyond a reasonable doubt; (and if there are two equally reasonable views of the evidence which can be adopted, one of which leads to the conclusion of guilt and one of which leads to the conclusion of innocence, it is the duty of the jury to adopt that view of the evidence that leads to the conclusion of innocence and acquit him); *and* (or) if there should arise in the minds of the jury on the whole case,

a *reasonable* doubt as to whether the defendant be guilty or innocent, the jury should give him the benefit of the doubt, and acquit him."

The court struck out the sentence inclosed in the parentheses, beginning with the word "and" and concluding with the word "him," and struck out the word "or" included in the parentheses and inserted in lieu thereof the word "and." Exceptions were saved to the modification of the instruction.

We think no error was committed in thus modifying the instruction. The instruction as given was a correct declaration of the law. It is not proper for the court to tell the jury what inferences should be drawn or deduced from the testimony, as this is the province of the jury. The portion of the instruction which was stricken out was calculated to mislead the jury. The jury might find that a certain view of the testimony was reasonable, but was not true. The duty of the jury is to ascertain, not merely whether certain testimony is reasonable, but whether it is true. The jury should determine what the facts are—what the truth is—and the facts thus found should be the basis of the verdict. If the jury were unable to say that the testimony established beyond a reasonable doubt the truth of certain facts which were essential to support the finding of guilty, the defendant would be entitled to an acquittal, but, if this finding were made, then a verdict of guilty should be returned. The instruction as given conformed to this statement of the law, and was correct.

In the case of *Cooper* v. *State*, 145 Ark. 403, the accused requested an instruction which, if given, would have told the jury that, if there were two reasonable constructions which might be placed on the testimony, one tending to establish the defendant's guilt and the other his innocence, the jury should adopt the construction tending to establish innocence. This instruction was refused, and we held that no error was committed in doing so, for the reason, as was there said, that the question was which witnesses should be believed, and, as the

court had given appropriate instructions on weighing testimony, and also on the question of reasonable doubt, the instruction was properly refused. See also *Cummins* v. *State,* 163 Ark. 24; *Baker* v. *State,* 135 Ark. 404.

Appellant requested an instruction numbered 6, which reads as follows: "The jury are instructed that, in passing upon the question of whether the defendant, at the time of firing the shot that killed the deceased, acted in self-defense, as defined by other instructions given by the court, it is your duty to place yourselves as nearly as possible in the position of the defendant at the time of the shooting, taking into consideration all the facts and circumstances that then and there surrounded the defendant, and, when so considered, if there arises a reasonable doubt in your minds as to whether the defendant honestly believed, without fault or carelessness on his part, that he was then in danger of losing his life, or of receiving great bodily harm at the hands of deceased from the assault then being made upon him, then in that event you will find the defendant not guilty."

The court refused to give the instruction as requested, and appellant saved exception to that action.

The court then modified the instruction and gave it as modified. The modified instruction reads as follows: "The jury are instructed that, in passing upon the question of whether the defendant, at the time of firing the shot that killed the deceased, acted in self-defense, as defined by other instructions given by the court, it is your duty to place yourselves as nearly as possible in the position of the defendant at the time of the shooting, taking into consideration all the facts and circumstances that then and there surrounded the defendant, taking into consideration the excitement and confusion surrounding the situation, and the defendant should not be held to the same deliberate care in ascertaining the danger and the force necessary to repel it as would be used by a person in afterward viewing the situation from a place of safety uninfluenced by excitement or danger."

The instruction as given declared the law correctly, and was as favorable to appellant as he had the right to ask it to be. Besides, the instruction as requested was erroneous, in that it appears to assume as a fact that an assault was being made upon appellant when he fired the fatal shot.

Appellant requested an instruction numbered 8, which reads as follows: "The court instructs the jury that, when a person is attacked by another who manifestly intends to take his life, or to do him great bodily harm, the person attacked is not obliged to retire, but may pursue his adversary until he has secured himself from all danger, and, if he kills him in so doing, it is justifiable self-defense."

The court refused to give the instruction as requested, but modified it so that it read as follows: "The court instructs the jury that, when one person is attacked by another who manifestly intends to take his life, or to do him great bodily harm, the person attacked is not obliged to retire, but may stand his ground and repel force with force, and, if he kill him, his adversary, in so doing it is justifiable self-defense."

As thus modified the instruction was given, and appellant excepted both to the refusal of the court to give the instruction as requested and to the action of the court in giving it as modified.

In the case of *Carpenter* v. *State,* 62 Ark. 286, the court considered thoroughly the right of one who was murderously assaulted to slay his adversary. There was a review of the statute declaring this right and of the common law of which the statute was declaratory, and it would serve no useful purpose to review a subject which was there so well considered. In that case Mr. Justice BATTLE said: "But the rule is different where a man is assaulted with a murderous intent. He is then under no obligation to retreat, but may stand his ground, and, if need be, kill his adversary."

In that case Mr. Justice BATTLE quoted from East's Pleas of the Crown, page 271, the statement that one

who has been murderously assaulted "is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is called justifiable self-defense; as, on the other hand, the killing by such felon of any person so lawfully defending himself will be murder."

The circumstances under which one may pursue an adversary are explained in the case of *McDonald* v. *State,* 104 Ark. 317, in which case it was said that, where a person makes a violent and felonious assault on another, the latter, if free from fault, need not retreat, but may stand his ground, and may even pursue his assailant if the appellant is apparently withdrawing merely for the purpose of seeking a better position to renew the combat.

The original instruction numbered 8 took no account of the question whether deceased was retreating in order to renew the combat more advantageously; indeed, the testimony presents no such issue, and the instruction was therefore properly modified to conform to the issues presented by the testimony, and, as modified, it correctly declared the law.

Other instructions were asked which were refused, but it may be said that, in so far as the refused instructions correctly declared the law, they were covered by other instructions which were given.

The court permitted the introduction of certain photographs taken of the body of deceased after he had been killed, which showed the character and number of gunshot wounds on the body. The undisputed testimony showed that appellant shot the deceased with a shotgun, loaded with squirrel shot, and, as the shooting occurred at close range, many of the shot found lodgment in deceased's body.

In the case of *Sellers* v. *State,* 91 Ark. 175, the court, quoting from 1 Wigmore on Evidence, §§ 790-792, said that, "as a general rule, photographs are admissible in evidence when they are shown to have been accurately taken and to be correct representations of the subject in controversy, and are of such a nature as to throw light

upon it," and it was further said that "photographs are admissible as primary evidence upon the same grounds and for the same purposes as diagrams, maps and plats."

But it does not appear that there was any necessity for the introduction of the photographs in question, as there was nothing about the location or character of the wounds which was difficult to understand or which the photographs tended to elucidate. We think, however, there was no prejudicial error in admitting them in evidence, for they were shown to have been accurately taken and to have correctly indicated the number and location of the wounds. There was nothing about the photographs of a nature so gruesome as to inflame the passions of the jury, this being shown by the fact that appellant was convicted of the lowest degree of homicide. Besides, no proper objection appears to have been made to the introduction of the photographs.

It is finally insisted that the jury was kept together for such a length of time, and under such circumstances, after it had been announced to the court that they were unable to agree, as to coerce the verdict which was returned. We do not think this assignment of error is well taken. It is recited in the transcript that the case was given to the jury on the night of the 13th of January, and that "the jury retired to consider further of their verdict, and after awhile returned into court." The judge inquired if the jury had arrived at a verdict, and the foreman answered that "We are unable to reach a verdict, judge." Thereupon the court adjourned until the following morning, and upon reconvening the court gave to the jury the following instruction: "Gentlemen of the jury, I would not have any body on that jury to violate his conscience, but some jury must decide this case, and you are just as good men as there are in Bradley County. The majority ought to listen carefully to the minority to see if perchance they might not be right, and the minority ought to listen carefully to the majority to see if perchance they are not right. Now, gentlemen,

you have had a good night's sleep, and your minds are in better condition than they were last night when I sent you out, and I hope you will be able to return a verdict in a short time. You may retire now to consider of your verdict, under the charge of the sheriff."

Later in the morning the jury again returned into court and reported that they had been unable to arrive at a verdict, whereupon the court further charged the jury as follows: "I hate though, gentlemen, in a case of this gravity, I hate to discharge the jury without giving them every reasonable chance for them to agree. I have seen cases where the jury appeared to be hopelessly divided and yet, after awhile, they would come in and bring a verdict, and a verdict that seemed to satisfy them all. We have spoiled the day any way, and I feel like I ought to give you another opportunity, I just hate to discharge you until I have done that. I am going to say to you that I will excuse you until one o'clock, and then I will hold you a reasonable time this afternoon to see if you can't get together. Now, gentlemen, remember the admonition that I gave you when I first allowed you to separate; don't talk about this case to each other or suffer any one to speak of it in your presence or hearing. There is only one lawful way that you can discuss this case, and that is in your jury room and when you are all in there together; so, gentlemen, remember that, and return at one o'clock. I will excuse you now until one o'clock." The verdict was returned about 3 o'clock that afternoon.

We do not think there was anything in the language quoted which indicated any intention on the part of the court to keep the jury together until a verdict had been returned. In fact, we think the contrary appears. We have held that it is within the province of the trial judge to admonish the jurors as to their duty to make every reasonable effort to agree upon a verdict, and we think no abuse of the discretion of the court was shown in this respect. *Evans* v. *State*, 165 Ark. 424; *Benson* v. *State*,

149 Ark. 633; *Murchison* v. *State,* 153 Ark. 300; *Franklin* v. *State,* 153 Ark. 536; *Outler* v. *State,* 154 Ark. 598.

Upon a consideration of the whole case we find no prejudicial error, and the judgment of the court below is affirmed.

BLACK v. STATE.

Opinion delivered May 31, 1926.

1. HOMICIDE—SELF-DEFENSE—INSTRUCTION AS TO BURDEN OF PROOF.—In a prosecution for murder, where the killing by defendant was admitted, a charge to the jury that the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon the accused, "unless the proof on the part of the State shows that the offense committed only amounted to manslaughter," was defective in omitting the further qualification, "or that the accused was justified or excused in committing the homicide," contained in Crawford & Moses' Dig., § 2342.
2. HOMICIDE—INSTRUCTIONS AS TO SELF-DEFENSE.—In a murder case where the court instructed that, when the killing is proved, the burden of showing justification is on the defendant unless the State's proof shows that the killing was manslaughter, the error of omitting to state the other qualification as to self-defense was not prejudicial where other instructions covered the doctrine of self-defense and the verdict was merely voluntary manslaughter.
3. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—It was not error to refuse instructions covered by others given by the court.
4. CRIMINAL LAW—INSTRUCTION—PRESUMPTION OF INNOCENCE.—An instruction that the presumption of innocence attends the accused throughout the trial until overcome by evidence establishing his guilt beyond a reasonable doubt *held* not erroneous.
5. HOMICIDE—INSTRUCTIONS AS TO INVOLUNTARY MANSLAUGHTER.—Where, in a murder case, the defense was based upon the theory that accused was defending himself against a murderous assault, and proper instructions were given as to the law of self-defense, it was not error to refuse to give an instruction as to involuntary manslaughter, as the jury would have acquitted him, had they believed his testimony, instead of convicting him of voluntary manslaughter.

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

Botts & O'Daniel, for appellant.

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

SMITH, J. Appellant was tried under an indictment which charged him with the crime of murder in the first degree, alleged to have been committed by slashing, stabbing, striking and cutting one Frank Jenkins with a knife. He was found guilty of voluntary manslaughter and given a sentence of two years in the penitentiary.

It is insisted for the reversal of the judgment of the court below that the undisputed testimony shows that appellant killed the deceased in necessary self-defense, and it may be said that the testimony of the persons present when the killing occurred and who saw the killing does tend strongly to show that the killing was done in self-defense, but there were contradictions in the testimony of these witnesses which warranted the jury in disregarding much of it.

The testimony on the part of the State showed the killing of deceased by appellant and the condition of deceased's body after he was killed. There were knife wounds in deceased's neck, breast, right leg, three in the back, two in the neck, and knife cuts inside of both hands, and a bruise on the left side of the head, which indicated that deceased had been hit with a club of some kind. A doctor who examined the body testified that at least two of the wounds were mortal. Other testimony on the part of the State would indicate that both appellant and deceased and the other persons present were all more or less intoxicated when the killing occurred.

On the part of appellant testimony to the following effect was offered: Jenkins, the deceased, had been drinking, and became angry with appellant, and said he was going to kill appellant, who was a much smaller man than Jenkins. Jenkins picked up a piece of post and struck appellant with it, and ran appellant under a ladder which was leaning against a house near which the parties were standing when the quarrel began. When appellant ran under the ladder, Jenkins threw down the

post and picked up a piece of 1 x 4 slab, which was of oak, and ran around the ladder after appellant, and then turned and ran the other way, and grabbed appellant's right hand and pulled him from under the ladder, and struck him with the slab, and knocked appellant to his knees, whereupon appellant opened his knife with his teeth and commenced cutting Jenkins, and continued cutting him until he fell.

The court gave, over appellant's objection, instruction numbered 2, which reads as follows:

"The killing being proved, the burden of proving justification or excusable homicide shall devolve upon the accused, unless the proof upon the part of the State shows that the killing only amounted to manslaughter. If the evidence shows that the killing only amounted to manslaughter, which I will more fully explain to you later on, then the burden continues upon the State during the entire investigation, but, if the evidence shows that the killing was unlawful, willful, and done with malice on the part of the party doing the killing, then the burden shifts from the State to the defendant, and the burden is upon him to show that it was done justifiably or excusably.

"The killing being proved and done with a deadly or dangerous weapon, the law implies malice, and the State is not required to establish the crime of murder in the second degree. If the killing was unlawful and done with malice, then there can be no conviction in this case for less than murder in the second degree.

"Malice shall be implied when no considerable provocation appears, or when all of the circumstances of the killing imply an abandoned and wicked disposition upon the part of the slayer. Express malice is that deliberate intention of mind unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

"I have previously told you that manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation. Man-

slaughter must be voluntary upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible.

"The killing of a human being in the heat of passion by or with a deadly or dangerous weapon in any case except where the killing is herein declared to be excusable or justifiable, shall be adjudged manslaughter."

It is very earnestly insisted that this instruction was erroneous and prejudicial in that it placed upon appellant the burden of proving his innocence, inasmuch as it was admitted that appellant had killed the deceased. The case of *Cogburn* v. *State,* 76 Ark. 110, is cited in support of this insistence.

Section 2342, C. & M. Digest, reads as follows: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless, by the proof on the part of the prosecution, it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."

Cogburn v. *State, supra,* is one of the first cases to construe this section of the statute. Mr. Justice RIDDICK, speaking for the court, there said that it was a rule of law to be applied when the killing had been proved and there is nothing shown to justify or excuse said act, as in such case it may well be presumed that there was no justification or the accused would have shown it. But it was there also pointed out that, while the burden of showing circumstances that mitigate or excuse the killing devolves upon defendant, if there is nothing in the evidence on the part of the State which tends to mitigate, justify or excuse it, still the burden on the whole case is on the State, and where evidence is introduced, either on the part of the State or that of the accused, which tends to justify or excuse the killing, the jury must acquit if, upon the whole case, they had a reasonable doubt as to the accused's guilt.

In giving the instruction numbered 2 the court no doubt had in mind the statute quoted above, and, after telling the jury that the burden of proving mitigating circumstances was on the defendant, unless, by the proof on the part of the prosecution, it was manifest that the offense committed amounted only to manslaughter, omitted to add the additional qualification found in the statute, "or that the accused was justified or excused in committing the homicide."

The court should have given the entire section after giving a part of it; but we think no prejudicial error was committed in giving the instruction as set out above, for the following reasons:

(a). The instruction as given did contain the qualification that the burden of proving mitigating circumstances was not on the defendant when the proof on the part of the State showed that the killing amounted only to manslaughter, and this is the offense of which appellant was convicted, and he was given the lowest sentence fixed by law as punishment for that crime—that of two years in the penitentiary—so that the jury must have applied the exception found in the statute and in the charge of the court in fixing appellant's punishment.

(b). Another reason for holding the instruction was not prejudicial is that, in other instructions, the court correctly declared the law upon the subject of the burden of proof. The jury was told that all the instructions should be read together, and in other instructions the jury was fully charged that if, upon a consideration of all the testimony in the case, there was a reasonable doubt of the guilt of the accused, he should be acquitted.

In the case of *Williams* v. *State,* 149 Ark. 601, the court gave § 2342, C. & M. Digest, as an instruction in the case, but, after doing so, the jury was instructed to acquit the accused "if the circumstances of mitigation or justification are such as would raise in your minds a reasonable doubt as to the defendant's guilt." After calling attention to the instruction containing this decla-

ration, it was said that the instructions, when read together, did not conflict, but conformed to the law as announced in the Cogburn case and the later cases there cited.

So here, when all the instructions are read together, we do not think the instruction is open to the objection that it permitted the jury to convict appellant without finding beyond a reasonable doubt that he was guilty of some degree of homicide. Only a general objection was made to the instruction, and we think, in view of all the instructions given in the case, that a specific objection should have been made, if counsel thought at the time that the instruction relieved the State of the burden of showing beyond a reasonable doubt that appellant was guilty of committing an unjustifiable homicide.

Appellant requested a number of instructions on the right of one assaulted with a weapon or instrument capable of inflicting "great bodily harm" to slay his assailant, all of which were refused by the court. We do not set out these instructions because they deal with a subject which has been thoroughly settled by numerous decisions of this court. It suffices to say that the court gave on its own motion instructions correctly declaring the law as to when and the circumstances under which one assaulted may slay his assailant, and no useful purpose would be subserved by reviewing the numerous cases on this subject.

Appellant also requested instructions upon the question of one's right to slay his assailant when a murderous assault was made upon him; but this question appears to have been fully covered by other instructions which were given.

It is insisted that the court erred in giving an instruction on the presumption of innocence which attends one accused of crime, the objection being that "the instruction told the jury that this presumption followed to a certain period of the trial, and from that time on there was no presumption in favor of the accused." The relevant portion of the instruction objected to reads as

follows: "The return of the indictment, gentlemen of the jury, raises no presumption of guilt against the accused. In other words, you are not authorized, when you reach your jury room, that because men composing the grand jury of the Southern District of this county have indicted the accused, that that constitutes guilt or any evidence of guilt. That is not the rule of the law in this State. Every man is presumed to be innocent until the State proves him guilty. This is a humane principle of the law that is intended to shield and protect the innocent from unmerited, unwarranted and unjustifiable punishment at the hands of courts and juries. This presumption of innocence goes with and attends him throughout the entire trial until overcome by evidence establishing his guilt beyond a reasonable doubt, but, where guilt is established, such presumption of innocence by the establishment of guilt beyond a reasonable doubt is eliminated, and, if the evidence does establish guilt, such presumption of innocence cannot be used or urged as a means by which guilty men can escape the just consequences of their own unlawful acts."

We think there was no error in this instruction. If the testimony showed that the accused was in fact guilty, he would not then be protected from punishment by the presumption of innocence, for the reason that the presumption had been overcome. In other words, there would be no presumption of innocence when the testimony showed the guilt of the accused beyond a reasonable doubt. The instruction told the jury that the presumption of innocence "goes with and attends him (appellant) throughout the entire trial, until overcome by evidence establishing his guilt beyond a reasonable doubt", and if this were done there could then be no presumption to the contrary.

It is finally insisted that the court erred in refusing to give instructions defining the offense of involuntary manslaughter, it being insisted that the undisputed testimony shows that appellant, in cutting deceased, was exercising the legal right of defending himself from a

murderous assault, and the jury might have found that, in exercising this legal right, appellant had only acted hastily or without due caution or circumspection, and had therefore committed no greater offense than that of involuntary manslaughter.

We think no error was committed in refusing to submit the question of appellant's guilt of the crime of involuntary manslaughter. As we regard the testimony, it is not an undisputed fact that appellant inflicted the fatal wounds while repelling a murderous assault in his necessary self-defense. As we have said, there were such contradictions in the testimony of the eye-witnesses that it would not have been arbitrary, had the jury disregarded that testimony. In addition to the contradictory statements which these witnesses were shown to have made in regard to the circumstances of the killing, the number and character of the wounds found on the body of the deceased tend strongly to contradict the testimony of these witnesses. There were cuts in the hands of the deceased which indicated that he was trying to seize and hold the knife with which he was being stabbed and with which he was killed.

Moreover, the instructions given directed the jury to acquit appellant if the jury found that a murderous assault had been made on him, and that he struck deceased in his necessary self-defense, under the circumstances as they appeared to him, so that there could have been no error in refusing to submit the question whether he had acted hastily or without due caution or circumspection, as the jury would have acquitted him, had the testimony in his behalf been accepted as true.

Upon the whole case we find no error prejudicial to appellant, and, as we think the testimony is legally sufficient to support the verdict returned, the judgment will be affirmed, and it is so ordered.

J. T. FARGASON COMPANY v. DRIVER.

Opinion delivered May 31, 1926.

1. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.—The admission of improper evidence is not ground for reversal where the verdict of the jury shows that they disregarded it.
2. FACTORS—EVIDENCE AS TO QUALITY OF CONSIGNMENT.—Where a factor sued his shipper of cotton for the difference between the amount advanced and the sale price of the cotton, and the shipper filed a cross-complaint to recover damages caused by the broker's failure to sell the cotton advantageously, there being a dispute as to the quality of the cotton, it was admissible for the shipper to prove that it was dry, clean and white.
3. APPEAL AND ERROR—REMARK OF COURT—CURE BY INSTRUCTION.—In an action involving the loss to a shipper by his factor's failure to sell cotton, a remark of the court during the shipper's examination that the market value of the cotton at the point of shipment and place of sale was immaterial, if prejudicial, was cured by an instruction that the measure of the shipper's damages is the difference between the market price of the cotton at the place of sale within a reasonable time after its arrival and the price for which it was sold.
4. APPEAL AND ERROR—REMARK OF COURT—WHO MAY COMPLAIN.—In an action involving loss incurred by a shipper through the failure of a factor to sell cotton, remarks of the court that testimony as to what was paid for other cotton at the point of shipment, based on the market value at the point of sale of the cotton in question, does not show what the latter market price was, was prejudicial to the shipper, but not to the factor.
5. TRIAL—INSTRUCTION SINGLING OUT PARTICULAR CIRCUMSTANCES.—In an action involving the loss incurred by a shipper through failure of a factor to sell his cotton for the best price, a requested instruction that evidence of the effect of excessive rains, winds and cold weather may be considered in determining the quality of the cotton was properly refused as singling out particular circumstances to the exclusion of other circumstances.

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

A. F. Barham, for appellant.

J. T. Coston, for appellee.

HUMPHREYS, J. This suit was instituted on April 21, 1924, in the circuit court of Mississippi County, Osceola District, by appellant against appellee, to recover

an alleged balance of $1,956.28 due for money advanced by appellant, a cotton factor, to appellee on 29 bales of cotton of the 1919 crop, shipped by appellee to appellant to be sold on commission. It was alleged that the advances, including interest, to the 22d day of February, 1924, amounted to $5,340.70, and that the total amount received from the sales of cotton and credited upon the account amounted to $3,384.40, leaving an indebtedness of $1,956.28 as of said date.

On April 26, 1924, appellee filed an answer and cross-bill, admitting in the answer that appellant advanced him at divers times moneys, goods, and merchandise amounting to $5,340.70, but alleging in the cross-bill that appellant failed to use sufficient care, skill and diligence in the sale of the cotton, and that it disregarded his instruction to sell same, to his damage in the sum of $5,000.

On the same date appellant filed an answer to the cross-bill, denying that it received instructions from appellee to sell the cotton, or that it waited an unreasonable time to make disposition of same, to appellee's damage in the sum of $5,000 or any other sum.

The cause was submitted to a jury upon the pleadings, testimony introduced by the respective parties, and the instructions of the court, which resulted in a verdict and judgment in favor of appellee on the cross-bill in the sum of $1,209, including interest, from which is this appeal.

In the year 1919 appellee cultivated between 85 and 100 acres of land and produced 41 bales of cotton thereon. He sold the first eight bales he picked at Osceola. He then picked and shipped the next 29 bales to appellant, 24 bales being shipped in November, 1919, and the remainder in December, 1919, and perhaps one bale as late as March, 1920. Appellant sold one bale of the cotton on January 12, 1920, for 60 cents a pound; one bale February 3, 1920, for 70 cents, one bale March 11, 1920, for 60 cents; five bales June 15, 1920, for 65 cents; and the remainder between March 30, 1921, and September 2,

1924, at a price ranging from 3 cents to 10 cents per pound. The testimony is conflicting as to the grade of the cotton. Appellee J. T. McGarrity, the man who ginned it, and J. H. Hook, who examined a part of the cotton while lying on the platform awaiting shipment to appellant, and who offered 40 cents a pound for what he examined, all testified that the cotton was clean and white. Appellee also testified that it was dry. Appellant testified that nearly all of the 29 bales were of a very inferior quality, wet, and discolored. Appellee testified that he sold the last four bales he picked in 1920, which was not so good as the cotton he shipped to appellant, to ————Bragg in Osceola, for 40 cents a pound early in the year 1920. J. H. Hook testified that he bought three bales of cotton from Sam Ware on January 3, 1920, for 37½ cents a pound, and that Meyers Bros. sold him two bales for 42 cents a pound on the 25th day of November, 1919. Appellee and W. P. Hale testified that, some time in February, 1920, appellee called on appellant in Memphis and asked what it could get for his cotton, and was informed that it could be sold for 50 cents a pound; whereupon appellee instructed appellant to sell it at once. Dave Fargason, to whom appellee claimed to have given this instruction, denied that he was requested to sell it, and stated that he made every effort to sell it after receiving it, but could not do so on account of the congested market and the inferior quality of the cotton. He also stated that it was sold as rapidly as the market would absorb it and at the best price obtainable when sold. Appellant introduced testimony tending to show that weather conditions in the fall of 1919 damaged a great deal of the cotton, and that only about one-fourth of the cotton brought to the Memphis market was of a high grade, and that 75 per cent. was of a very low grade, some being even below government classification. Henry Hotter, secretary of the Memphis Cotton Exchange, filed a statement showing how many bales of cotton were sold in Memphis each month from October 1, 1919, to December 21, 1921, with the average price of

various grades of cotton that were sold. This statement disclosed that, on or about June 12, 1920, various grades of white cotton sold from 26 cents to 45 cents per pound, and disclosed also what the lower grades sold for per pound.

During the cross-examination of appellee the question arose between the counsel for the respective parties relative to the character of evidence admissible to establish appellee's damage by reason of a failure to sell his cotton, and the court remarked, over the objection and exception of appellant, that it made no difference as to the market value of the cotton in Memphis or Osceola, for, if the jury found that the cotton was worth 50 cents per pound, that would be evidence for them to consider in arriving at the amount of damages, and in explanation said, "Here is the theory this case will be tried on. If the court finds that these people told this man, when he was talking to them about this cotton, that it was worth 50 cents a pound, this is evidence they may consider in reaching a conclusion as to what was the market value of the cotton in Memphis at that time." In the course of the examination of J. H. Hook the court, over the objection and exception of appellant, said, "The witness has testified that what he paid here was based on the Memphis market. It was introduced on the theory that it was based on the Memphis market. But it doesn't show what the Memphis market was, and can be used for that purpose only."

The main contention made by appellant for a reversal of the judgment is that the court erred in permitting appellee to testify to the offer that he received for the cotton at Osceola before he shipped same to appellant and the price he had received for the balance of the cotton before he made the shipment to appellant, and in permitting J. H. Hook to testify that he had offered appellee 40 cents a pound for a portion of the cotton which he examined on the platform in Osceola the latter part of November, and his testimony to the effect that, on January 3, 1920, he paid Sam Ware 37½ cents a pound

for three bales of cotton and Meyers Bros. 42 cents a pound for two bales of cotton on November 25, 1919. We do not think any prejudice resulted to appellant on account of this testimony, for the reason that it is apparent from the amount of the verdict that the jury did not consider their testimony in this particular in determining the case. The verdict is as follows: "We, the jury, find in favor of H. L. Driver against J. T. Fargason Company for the sum of $944.76, with interest thereon at the rate of 6 per cent. per annum from June 15, 1920, down to this date. L. D. Fast, foreman."

The verdict points unerringly to the fact that the jury determined that the cotton could have been sold by appellant in the exercise of proper care and diligence on the 15th day of June, 1920. The amount of the verdict also points unerringly to the fact that it figured the amount of damages sustained by appellee upon the basis of about 26 cents a pound for the cotton which was sold subsequent to June 15, 1920. The evidence objected to tended to show that the cotton was worth about 40 cents or 50 cents a pound, so the jury must have reached its conclusion from the testimony of Henry Hotter, as he was the only witness who testified that the average price of white cotton ranged from 26 cents to 40 cents a pound on and about that date. It seems that the jury took the lowest price fixed by him for that character of cotton in arriving at the verdict. *St. L. I. M. & S. R. Co.* v. *Brady,* 83 Ark. 489; *St. L. I. M. & S. R. Co.* v. *Caldwell,* 89 Ark. 218; *St. L. I. M. & S. R. Co.* v. *Lamb,* 95 Ark. 209. We think the testimony of appellee J. H. Hook and J. T. McGarrity was clearly admissible in so far as it reflected the kind and character of cotton which was shipped to appellant.

Appellant also contends that the judgment should be reversed on account of the remarks made by the court during the cross-examination of appellee. These remarks are set out in the statement of facts herein. If they were prejudicial to appellant, the prejudice was entirely

removed by instruction No. 2-A given at the request of counsel for appellant, which is as follows:

"The measure of defendant's damages, if you find that he is entitled to any, would be the difference between the fair market price of his cotton at Memphis, Tennessee, within a reasonable time after its arrival there, and the actual price for which it was sold."

This instruction was followed by two other instructions, Nos. 5 and 6, which clearly indicated to the jury that it must not render a verdict for damages in favor of appellee on any other basis than under the rule announced in instruction No. 2-A aforesaid.

Appellant also contends for a reversal of the judgment on account of the remark made by the court during the examination of J. H. Hook. The remark of the court called in question is set out *verbatim* in the statement of facts. The testimony which elicited this statement was introduced by appellee, and the statement of the court to the effect that "it does not show what the Memphis market was," was detrimental to appellee, and could not have prejudiced the cause of appellant.

The last contention of appellant for a reversal of the judgment is the refusal of the trial court to give appellant's requested instruction No. 9, which is as follows:

"In determining the grade and character of defendant's cotton you may consider the evidence, if any, as to weather conditions during the picking season of defendant's crop, and the probable effect of excessive rains, winds and cold weather upon such parts of defendant's cotton as you may believe, from the evidence, was exposed to such weather."

This instruction ignores the testimony of appellee J. H. Hook and J. T. McGarrity as to the character of cotton which was shipped to appellant. It singles out the weather conditions as the sole criterion to guide the jury in arriving at the grade and character of the cotton. While such an instruction would not have constituted prejudicial error if given, yet this court has condemned

the practice of singling out and emphasizing any particular circumstance in a case and directing the jury's attention thereon, to the exclusion of other facts and circumstances therein. *Railway Co.* v. *Lyman,* 57 Ark. 520; *Carpenter* v. *State,* 62 Ark. 312; *Hogue* v. *State,* 93 Ark. 316; *Quertermous* v. *State,* 95 Ark. 48.

No error appearing, the judgment is affirmed.

WALDRUM v. WILBANKS.

Opinion delivered May 31, 1926.

MUNICIPAL CORPORATIONS—INQUISITORIAL ORDINANCE.—A city has no authority to adopt an ordinance providing that the mayor or chief of police may summon any person before such officer to answer whether he knows of any violations of the criminal laws of the city and to impose a fine for refusal to answer the question.

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

Jeff Bratton, for appellant.

HUMPHREYS, J. Appellee filed a petition in the circuit court of Greene County for a writ of habeas corpus to obtain his liberty, alleging that he was unlawfully detained by appellant, the chief of police of the city of Paragould, under a judgment for contempt predicated upon §§ 283, 284 and 285 of Bandy's Digest of the Ordinances of the city of Paragould, which were unconstitutional and void. The ordinance referred to provided that the mayor or chief of police of said city might summon any person before such officer or court to answer whether he knew of any violations of the criminal laws of the city and to impose a fine upon him for a refusal to answer the question.

The response admitted that appellee was being held in custody by appellant pending the payment of a $25 fine imposed by the police judge of said city for a refusal to answer questions propounded to him by said officer as

to whether he knew of any violations of the ordinance of said city against gambling, but denied the invalidity of §§ 283, 284 and 285 of said digest, under which the fine was imposed.

The cause was submitted upon the pleadings and an agreed statement of facts, which resulted in a finding that the ordinance under which appellant had been fined was void, and a consequent judgment dismissing him from custody.

The agreed statement of facts showed that the city of Paragould had passed ordinances for the purpose of suppressing gambling, drunkenness, breaches of peace, and divers other misdemeanors, in accordance with authority vested in it by the Legislature, and also that appellant was summoned before the police judge to answer whether he knew of any violations of the ordinance of said city against gambling, and, upon his refusal to answer, was fined $25 and committed to the custody of the chief of police, to be confined in the county jail, which was also used as a city jail, until the fine was paid.

The sole question therefore presented by this appeal for determination is whether the city of Paragould had authority to pass an inquisitorial ordinance in aid of the enforcement of its ordinances against crime. We have examined the sections of Crawford & Moses' Digest conferring authority upon municipal corporations to adopt ordinances of various kinds, and find nothing in any of them conferring power to adopt ordinances of an inquisitorial nature, and nothing in the statutes from which such authority might be inferred. It is unnecessary to determine whether such power could be delegated to municipal corporations by the Legislature. That question is not before us, so we refrain from expressing any opinion upon that point.

No error appearing, the judgment is affirmed.

CLARK v. WILSON.

Opinion delivered June 7, 1926.

1. LOGS AND LOGGING—LABORER'S LIEN—WAIVER.—A lien for wages on lumber, under Crawford & Moses' Dig., § 6848 *et seq.*, may be waived by consent to or acquiescence in the sale of the lumber.
2. LOGS AND LOGGING—WAIVER OF LIEN.—In an action to enforce a laborer's lien on lumber under Crawford & Moses' Dig., § 6848 *et seq.*, where there was evidence to warrant a finding that plaintiffs knew that the lumber was being hauled away and sold, it was error to refuse to submit the issue as to whether plaintiffs waived the lien.
3. LOGS AND LOGGING—NOTICE OF LIEN.—One who purchases lumber for a valuable consideration in good faith and without knowledge of liens existing thereon for wages under Crawford & Moses' Dig., § 6848, will be protected.

Appeal from Clark Circuit Court; *James H. McCollum*, Judge; reversed.

McMillan & McMillan, for appellant.

McCULLOCH, C. J. Appellees worked at a country sawmill in Clark County, operated by H. A. Freeman, and they instituted this action against Freeman, claiming a lien on a small amount of lumber manufactured at the mill and sold by Freeman to appellant. An attachment was duly issued in accordance with the statute (Crawford & Moses' Digest, § 6848 *et seq.*), and levied on the lumber at appellant's yard in Arkadelphia. Appellant intervened, claiming the lumber free from the lien asserted by appellees. The cause was begun before a justice of the peace, and was tried on appeal in the circuit court, resulting in a verdict for each of the appellees for a small amount. Judgment was rendered declaring a lien on the attached lumber.

On the trial of the cause, appellees testified that they worked at Freeman's mill, and that their labor contributed to the production of lumber which Freeman hauled to Arkadelphia and sold to appellant. The testimony was sufficient to warrant the conclusion that appellees knew that Freeman was hauling the lumber to Arkadelphia and selling it to appellant. Mr. Ross, appellant's

agent at Arkadelphia, testified that he bought the lumber in controversy from Freeman, and had been regularly buying lumber from Freeman in small lots, and had no knowledge of there being a laborer's lien on the lumber.

The court submitted the cause to the jury on the sole questions whether or not appellees performed labor in the production of the lumber in controversy and whether they had been paid for that particular labor. The court refused to submit to the jury, on appellant's request, the issue whether appellees waived their lien by consenting for Freeman to sell the lumber in the market, and whether appellant bought and paid for the lumber without notice of the lien. We are of the opinion that the court erred in refusing to submit those issues to the jury, for there was sufficient evidence to warrant a finding that appellees knew that Freeman was hauling the lumber to Arkadelphia and selling it, and this constituted a waiver of the lien.

With respect to the question of waiver, the lien was the same as that of a landlord, and we have held that it may be waived by the lienor consenting to, or acquiescing in, a sale to a third person. *May* v. *McCaughey,* 60 Ark. 357.

The evidence was also sufficient to warrant a finding that appellant bought the lumber from Freeman without any notice of the existence of a lien or without information as to facts which, if inquired about, would lead to knowledge of the lien. The statutory lien is absolute, as declared in express terms, but a purchaser for a valuable consideration, in good faith, without any knowledge of a lien, will be protected. *Harkrider* v. *Howard,* 134 Ark. 575.

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

WESTERN UNION TELEGRAPH COMPANY v. POPE.

Opinion delivered June 7, 1926.

1. TELEGRAPHS AND TELEPHONES—NEGLIGENCE—JURY QUESTION.—In an action for damages for failing to deliver a telegram promptly, it was *held* a jury question, under the evidence, whether defendant accepted the message with agreement to deliver it outside of the free delivery limits, and whether defendant was negligent in failing to notify the sender of nondelivery.
2. TELEGRAPHS AND TELEPHONES—DELIVERY OUTSIDE OF FREE LIMITS.—A telegraph company's acceptance of a telegram without notice that the addressee is outside of the free delivery limits does not constitute an agreement to deliver outside of such limits.
3. TELEGRAPHS AND TELEPHONES—MENTAL ANGUISH—DAMAGES.—An award of $1,500 for negligence in delivery of a telegram whereby plaintiff was deprived of the privilege of being with his wife a short time before her death *held* excessive to the extent of $500.

Appeal from Clark Circuit Court; *James H. McCollum*, Judge; modified and affirmed.

Francis R. Stark, J. H. & D. H. Crawford, and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

J. O. A. Bush, for appellee.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover compensation for damages sustained by reason of alleged negligence in failing to promptly deliver a telegraphic message informing appellee of the serious illness of his wife. There was a former appeal of the case to this court (166 Ark. 122), and the judgment was reversed, and the cause remanded for a new trial. The facts are set forth with accuracy and in detail in the former opinion, and it is unnecessary to narrate them again. The court, in the last trial, gave the particular instruction to the jury that was refused on the former trial, and for which refusal the judgment was reversed.

Appellant requested twenty-seven separate instructions, most of which were given as requested, and assignments of error are made with respect to each of the refused instructions. We find, however, that in the instructions given every phase of the case was covered,

and it is unnecessary to discuss the assignments in detail.

The court, in an instruction given at the instance of appellee, submitted two phases of the alleged failure to deliver the message: whether or not appellant accepted the message with an agreement to deliver it outside of the free delivery limits, and whether or not appellant was guilty of negligence in failing to notify the sender of nondelivery. It is insisted that the instruction was erroneous for the reason that there was no evidence tending to show that appellant's agent accepted the message with the agreement to deliver outside of the free delivery limits. It will be seen from a perusal of the narrative of facts in the case, as set forth in the original opinion, that there were two messages, one sent on December 7 by Dr. Alford, and the other by Jesse Pope, appellee's son, on December 9. There was direct evidence in the testimony of Jesse Pope that, when he sent the message, he informed appellant's agent that his father, the addressee, lived outside of the free delivery limits at Smackover, and that there was an agreement to deliver the message outside of those limits. Appellant's objection to this feature of the instruction was general, and the instruction related to the two messages and not to any particular one. If counsel desired to raise the question as to one of the messages, it should have done so by pointing out the distinction in a specific objection. The direct testimony as to the agreement concerning the message sent by Jesse Pope was sufficient to warrant a submission of that issue to the jury. We are also of the opinion that the evidence warranted a submission of that issue concerning the message sent by Dr. Alford. It is true that Dr. Alford did not testify to any specific agreement in regard to the delivery of the message outside of the free delivery limits, but his testimony shows that the agent knew, at the time of the conversation, that Smackover was in an extensive oil field, that Pope was working somewhere in the field, either inside or outside of the free delivery

limits, and, with knowledge that the message might have to be delivered outside of the free delivery limits, the agent agreed to make the delivery. If appellant had not been advised that the sendee was outside of the free delivery limits, the acceptance of the message would not have constituted an agreement to deliver outside of those limits, but here the facts warranted the belief on the part of appellant's agent that the sendee could only be found outside of the limits, and an express and unqualified agreement to deliver under those circumstances was tantamount to an agreement to deliver outside of the free delivery limits, if necessary.

Our conclusion is that the issues in the case were properly submitted to the jury, and that there was no error. It is contended that the instructions were conflicting, but, after careful consideration, we do not think so. The instructions could be harmonized, and we must assume that the jury understood them.

The jury awarded damages in the sum of $1,500, and we are of the opinion that this amount is an excessive award. It is a matter of great difficulty and one of extreme delicacy to attempt to measure an award for damages resulting from mental anguish and no other element, and yet it is the duty of courts and juries to discharge that duty the best they can. Appellee was, on account of the negligence of appellant, deprived of the privilege of being with his wife only for a short time before her death. If the first message had been delivered promptly, he could have reached her bedside probably twenty-four hours before her death, but a prompt delivery of the second message would only have given him an opportunity, with the most strenuous effort, to reach his wife's bedside an hour or two before her death. We have no means of knowing on which alleged act of negligence the jury based the verdict. The jury may have found that appellant made diligent effort, and was guilty of no negligence in regard to the first message, but was negligent in regard to the second one; but we must assume, for the purpose of testing the sufficiency of

the verdict, that the negligence occurred in regard to the nondelivery of the first message. We are convinced that the verdict is excessive, but it can be cured by allowing the judgment to stand for an amount which we would have affirmed if the jury had limited the award to that amount. The case of *Western Union Telegraph Co.* v. *Bickerstaff,* 100 Ark. 1, is quite similar to the one now before us, and in that case we reduced the verdict for $2,000 down to the sum of $1,000, and affirmed the judgment for that amount. Of course, each case, with respect to the amount of damages, must stand upon its own peculiar facts, but the similarity of the two cases inclines us to accept the Bickerstaff case as a guide in awarding the damages in the present case.

The judgment of the circuit court will therefore be modified by reducing the amount of the recovery to the sum of one thousand dollars, as of the date of the judgment below. It is so ordered.

BONDS v. WILSON.

Opinion delivered June 7, 1926.

1. HIGHWAYS—VARIATION FROM ROUTE OF STATE HIGHWAY.—A variation of eight or ten miles from the original route of a State highway, as shown on the map referred to in Acts of Extraordinary Session of 1923, No. 5, § 3, *held* a material variation.
2. HIGHWAYS—AUTHORITY TO DEPART FROM ORIGINAL ROUTE.—Under Acts Ex. Ses. 1923, No. 5, §§ 3, 20, the State Highway Commission is authorized to depart materially from the original route of a highway between towns designated on the map referred to in such act, so long as the towns are not eliminated from the route so changed.

Appeal from Van Buren Chancery Court; *Sam Williams,* Chancellor; affirmed.

Opie Rogers and *Strait & Strait,* for appellant.

H. W. Applegate, Attorney General, and *J. S. Abercrombie,* Assistant, *J. F. Koone, W. H. Cooper,* and *Garner Fraser,* for appellee.

McCULLOCH, C. J. Section 3 of act No. 5 of the Extraordinary Session of the General Assembly, approved October 10, 1923, outlines the system of State highways, and reads as follows:

"The State highways are hereby declared to be those primary roads and secondary roads connecting State roads heretofore designated by the Highway Commission, approved by the Governor, and tentatively approved by the Federal authorities, as shown by a map on file in the office of the State Highway Commission, entitled, 'Map of the State of Arkansas Showing Proposed System of Primary and Secondary Federal Aid Roads and Connecting State Roads,' and marked 'Revised December 1, 1922,' except that portion of said roads traversing incorporated towns of twenty-five hundred and over inhabitants. The State Highway Commission is hereby required to preserve said map as a permanent record.

"The State Highway Commission is hereby empowered, with any necessary consent of the proper Federal authorities, to make, from time to time, such necessary changes and additions to the roads designated as State highways as it may deem proper, and such changes or additions shall become effective immediately upon the filing of a new map, as a permanent and official record in the office of the State Highway Commission. Provided, however, the State Highway Commission shall not have the authority to eliminate any part of contemplated highway system as shown on map now filed with the Highway Department."

Section 20 of the same statute declares it to be the duty of the State Highway Commission to maintain and keep in repair the State highways, and to pay for same out of the public funds accruing from the gasoline, oil and automobile tax. That section reads, in part, as follows:

"It shall be the duty of the State Highway Commission to begin as soon as practicable and continue the maintenance of all roads that are now or hereafter may

be properly designated as State highways, to the end that every part of the State highways shall be properly, fairly and equitably maintained and kept in repair."

Other sections of the statute provide for the collection of the gasoline, oil and automobile taxes and for the distribution and application thereof in the improvement and maintenance of highways.

There is brought to our attention in the present record the highway map referred to in § 3 of the statute, and one of the primary roads designated on that map runs from Little Rock in a northwesterly direction to the Missouri line, running through Conway, Clinton, Leslie, Marshall, Harrison, Berryville and Eureka Springs. No other towns or villages are indicated on the original map of that route. County lines are designated on the map, and the contour and direction of the roads are indicated, without specifying the distances or objects, except the municipalities mentioned above and the county lines. It appears from this map that there is a detour of the route eastward from the town of Clinton, which turns westward again to the direct line south of the town of Leslie, in Searcy County. It is shown in the present record that the distance around this detour is about twenty-one miles, and that the adoption of the direct route along the highway from Clinton to Leslie would shorten the road a little over seven miles. The State Highway Commission is about to change the route from the detour indicated on the original map to the direct route mentioned above, and this action was instituted by appellants, who are citizens and owners of property along the original route, to restrain the Commission from making this change. The contention of appellants is that the change in the route is a material one, and that the Commission has no authority under the statute to make the change. The chancery court decided the question against appellants, and dismissed their complaint, from which decree an appeal has been prosecuted to this court.

The question of authority of the State Highway Commission to lay out and establish public roads is not involved in this case. The Legislature has not attempted to confer such authority upon the State Highway Commission, and could not do so, for that would constitute an invasion of the constitutional jurisdiction of the county court. All that the statute attempts to do is to authorize the State Highway Commission to adopt routes for what are termed "State highways"—routes along roads which are already public highways or which may be thereafter laid out under proper authority. It is assumed that the change about to be made by the State Highway Commission is along an established highway. There is no allegation or proof to the contrary in this record, hence we determine the only question presented—whether or not the State Highway Commission is authorized to make this change.

It is conceded that the change is material, and that is necessarily true from the distance which the original route is departed from. The exact distance is not proved, but an inspection of the map indicates that there is a variation of about eight or ten miles.

The language of § 3 is to some extent conflicting, and it becomes our duty in interpreting the statute to reconcile this apparent conflict, if possible, so as to give effect to the legislative will. The Commission is, in express terms, empowered to "make, from time to time, such necessary changes and additions to the roads designated as State highways as it may deem proper." It is evident that this language means to confer authority to make substantial changes, for slight and immaterial changes could be made even without express authority. The difficulty in interpreting the statute arises entirely from the language used in the last sentence, which declares that the Commission "shall not have authority to eliminate any part of contemplated highway system as shown on map now filed with the Highway Department." We interpret this language to mean, not that the route may not be changed by the Commission, but

that no part of the system shall be eliminated. The system is made up of different roads between termini, and the prohibition is against the elimination of any of those units of the system. There might be such a complete and radical change in the route of a road from one terminus to another as to amount to a complete elimination of that unit, but a change of route, however substantial, would not be an elimination of the unit if it ran from one of the specified termini to the other and ran in the same general direction as the route specified on the map.

It is significant that the original map, as adopted in the statute, did not specify all the towns along the indicated route, nor did it specify any objects which marked the points where county lines were crossed. Only important towns are indicated on the map. If we give any effect at all to the preceding language of the statute with reference to the authority of the Commission to make changes, it must be held that changes, however substantial, may be made if they do not constitute an elimination of the unit as a whole.

It is also contended that the language of § 30 has some bearing and leads to the conclusion that substantial variations of a route are not authorized. That section reads as follows:

"The State Highway Commission is hereby authorized to construct, reconstruct and improve every link in the State highways for which road improvement district funds have not been furnished, where the Commission finds that such project is of sufficient importance as a State highway as to demand it. The expense of such work shall be paid for out of the State highway fund and Federal aid, where Federal aid has been or may be allotted to such improvement, and may be paid in part or all out of funds appropriated for maintenance, if, in the opinion of the Commission, such amounts may be spared from the maintenance appropriation without impairing the patrol system of maintenance of State highways that

is hereby declared to be one of the principal features of this act."

We do not think that § 30 has any bearing on the question of change of route. This section was enacted for another purpose, namely, to give authority to the Commission to construct and improve links in State highways in cases where improvement district funds are not available. The general purpose of the whole statute was to furnish aid from State taxation for the construction of roads improved by counties or by improvement districts, but this section is, as before stated, intended to authorize the use of State funds in the matter of links in the State highway system which are not otherwise improved by the use of other funds. It will be observed that in the State highway system there are three kinds of routes designated—primary and secondary Federal aid roads, and connecting roads. To illustrate the purpose of § 30, there may be instances of disconnected improvement by local districts along the route of a State highway, leaving unimproved links between the separate improvements. This section of the statute provides for such instances and gives authority to the Highway Commission to improve those omitted links and afford a continuous improvement along the route. It has no bearing, however, on the question of authority to change routes.

Our conclusion upon the whole case is that the chancery court was correct in upholding the authority of the Commission to make the contemplated change of route.

Decree affirmed.

HART, J., dissents.

CAIN v. CARLLEE.

Opinion delivered June 7, 1926.

ELECTIONS—PAYMENT OF POLL-TAX.—Where voters, in good faith and for their own convenience, requested a mercantile company, by which they were employed or with which they regularly did business, to pay their poll-tax, and they reimbursed the company therefor, exclusion of their votes was error.

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

Roy D. Campbell, for appellant.

McCULLOCH, C. J. This appeal involves a contest between appellant and appellee over the nomination of the Democratic Party for the office of county judge of Woodruff County at the election held in August, 1924. The official returns showed that appellee received the nomination, and appellant instituted a contest. The case has been here on two former appeals from judgments in favor of appellee. 168 Ark. 64; 169 Ark. 887. On each appeal the judgment of the circuit court was reversed, and the cause remanded for a new trial.

According to the original returns of the election officers, appellee received 925 votes and appellant 910—a majority of 15 for appellee. On a recount of the ballots by the canvassing board, on demand of appellant, it was found that the ballots showed 847 for appellee and 815 for appellant—a majority of 32 for appellee.

On the second trial of the cause the principal questions of fact related to the number of votes cast for the respective parties by persons who had not been legally assessed for the payment of poll-tax, and during the progress of the trial the attorneys, by agreement, made a canvass of the ballots and reached an agreement as to most of the alleged illegal ballots. They reported to the court an agreement that, after deducting certain ballots, there were left 676 for appellant and 638 for appellee. A certain number of ballots about which there was no agreement was left to a decision of the court, upon hearing the facts and all other disputed issues, which

were to be left to the court, and on final hearing the judgment was, as before stated, in favor of appellee, which judgment was reversed on the last appeal. 169 Ark. 887.

In the last trial below, the court, after hearing the evidence, made a finding that appellee received 613 legal votes and appellant 612—a majority of one vote in favor of appellee, and judgment was rendered accordingly. The court in making its findings excluded from the count 32 ballots cast in favor of appellant by voters whose poll-tax had been paid by Planters' Mercantile Company, a corporation engaged in business at McCrory. It is undisputed that all of those ballots were in favor of appellant, and if the trial court was in error in excluding them, a reversal of the judgment must necessarily follow.

The evidence shows that the officers and manager of the Planters' Mercantile Company were partisans of appellant in the election, and that, some time prior to the election, a printed card was circulated in the following form:

"Order to pay poll-tax. Date.....1924.

"To Planters' Mercantile Co.:

"Please pay my poll-tax and charge same to me. It is understood and agreed that for you to do so shall in no way have any bearing or influence on my voting for or against any question submitted to the people, or any candidate for any office.

"Signed.....

"Postoffice address..... Township.....

"School district..... Voting Precinct."

Some of these cards were signed by voters and handed in or sent to the Planters' Mercantile Company, and poll-taxes were paid by the company pursuant to the request expressed on the card. It does not appear from the testimony how many of these were signed and handed in. It does appear, however, that the Planters' Mercantile Company paid poll taxes on request of voters expressed in the card. The company paid in all 89 poll taxes and was reimbursed—in some instances by the voters themselves and the remainder from the treasury

of the incorporated town of McCrory. The proof tended to show that appellant was a party to the circulation of these cards among voters and also in the distribution of tax receipts paid in that way. It is undisputed, however, that 17 of the voters whose poll taxes were paid by the Planters' Mercantile Company and whose ballots, in favor of appellant, were excluded by the court, procured the Planters' Mercantile Company, in good faith, to pay the poll taxes for them, without solicitation on the part of the agents of the company, or other inducement. Some of these persons were employees of the Planters' Mercantile Company, and many others were regular customers for whom the company had paid taxes in previous years, and in all of these instances the amount paid was refunded to the company. In many instances the money was paid to the company in advance. In other words, the undisputed proof is that in each of the 17 instances mentioned the payment of poll taxes by the Planters' Mercantile Company was made at the request of the voter and merely as a matter of convenience, without any regard to any influence upon the then approaching election. This being true, it was error for the court to exclude them from the count. The learned trial judge based his conclusion upon the decision of this court in *Whittaker* v. *Watson*, 68 Ark. 555, but we are of the opinion that he placed the wrong interpretation upon the effect of that decision in holding that the payment of poll taxes by the Planters' Mercantile Company invalidated all of the ballots cast by persons whose poll taxes were paid under any circumstances by the company. In the case cited the court said:

"He (the voter), however, need not pay the tax in person, but may in good faith authorize another to pay it for him, or, if another has done so without having been previously authorized, he may adopt or ratify the act, but he must do so with a *bona fide* intent and promise to reimburse him. In this way only can the voter be secured in the free and untrammeled exercise of his

right of suffrage. The acceptance of the payment of a poll tax as a gift tends to induce him to so vote as to please the partisan, candidate or other person, who paid the same for him. This is contrary to the spirit of the requirements of the Constitution."

The evidence in this case shows affirmatively and beyond dispute that there was no element of gift involved in the payment of the poll taxes of the seventeen persons hereinbefore referred to; therefore the payment made for them does not fall within the condemnation expressed in *Whittaker* v. *Watson, supra.* The fact that other voters may have been induced by this procedure to accept a gratuity, or the fact that the circulation of the printed card couched in carefully selected language was intended as an improper inducement to voters cannot invalidate the ballot of a voter who in good faith procured the payment of his poll tax by the Planters' Mercantile Company. The court should therefore have excluded from the count only those who accepted payment as a gift, either expressly or impliedly.

The judgment must be reversed, as the inclusion of these 17 votes gives appellant a majority of 16, which entitled him to the nomination.

There are a few other excluded ballots which appellant contends should have been counted for him, but it is unnecessary to discuss them.

Every issue of fact in the case has been settled in the trials, and no useful purpose would be served in remanding the cause for another trial. Appellee was elected county judge as the Democratic nominee at the ensuing election, but, since the transcript on the present appeal was lodged in this court, it has been brought to our attention by counsel for appellee, on motion to abate the contest, that appellee had resigned the office. The court overruled the motion to abate, but nothing remains of the contest, according to that decision, except the costs of the proceedings.

The judgment of the circuit court is therefore reversed, and judgment will be entered here in favor of

appellant for all of the costs of the proceedings, including the costs in each trial in the court below and the costs of the appeal. It is so ordered.

STROUD v. HENDERSON.

Opinion delivered June 7, 1926.

1. APPEAL AND ERROR—WEIGHT OF TESTIMONY.—It is not the province of the Supreme Court to pass on the weight of testimony or on disputed issues of fact.
2. APPEAL AND ERROR—PROVINCE OF JURY.—Where there is legally sufficient testimony to sustain a verdict, the Supreme Court will not invade the province of the jurors, who are triers of the facts.
3. FRAUD—RELIANCE ON REPRESENTATION—EVIDENCE.—The facts that one suing for false representations in the sale of stock was a stockholder at the time of purchase of the stock and that he renewed a note to a bank for the purchase money were relevant on the issue whether or not he relied, or had a right to rely, on the alleged false representations.
4. FRAUD—WAIVER AND ESTOPPEL.—The fact that a purchaser of stock suing for alleged false representations renewed a note at the bank for money borrowed to pay for the stock is not available as a defense by way of estoppel or waiver.
5. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Where defendant did not demur to the complaint, nor move to make it more specific, nor object to plaintiff's testimony, he cannot, on appeal, object to a variance between the allegations of the complaint and the proof.
6. FRAUD IN SALE OF STOCK—EVIDENCE.—In an action by the purchaser of stock against the seller, who was officer and director of the corporation, evidence of the financial condition of the corporation at the time of the purchase of the stock and as to its value was relevant upon the issue whether the seller made false representations as to the solvency of the corporation and the value of its stock.
7. APPEAL AND ERROR—INSTRUCTION—HARMLESS ERROR.—In an action by a purchaser of corporate stock for false representations, failure of an instruction to submit as to whether plaintiff had a right to rely upon defendant's alleged representations was not prejudicial, where it was shown that defendant, at the time

of making the representations, was an officer and director of the corporation, since plaintiff had a right to rely upon the representations, if made by defendant.

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

W. N. Ivie, for appellant.

John W. Nance, for appellee.

WOOD, J. This action was instituted in the Benton Circuit Court by J. M. Henderson against H. L. Stroud. Henderson alleged in substance that Stroud, on or about December 1, 1920, sold him stock in the O. K. Truck Company, hereafter called O. K. Company, for which he paid Stroud the sum of $5,575.50; that in conducting the negotiations Stroud represented that he was a director and officer of the O. K. Company, that the company was solvent and doing a large volume of business, and that the purchase of the stock by Henderson would be a good investment; that these representations made by Stroud were false and fraudulent; that Stroud knew that said statements were false; that the representations were made for he purpose of cheating and defrauding the defendant, and had that effect. Henderson prayed for judgment against Stroud in the sum of $5,575.50, with interest from December 31, 1920, until paid.

In his answer Stroud denied all the material allegations of the complaint, and made his answer a cross-complaint against Henderson, and set up that judgment had been rendered against him and Henderson in favor of the bank for the balance due on a note bearing interest at the rate of eight per cent., which judgment he had paid. He asked that he have judgment against Henderson for the amount which he had paid to satisfy the judgment of the bank in the sum of $4,074.80, with interest.

Henderson testified substantially as follows: He had been acquainted with Stroud for some fifteen years. Stroud had a wholesale grocery store in Rogers, and used to be in the banking business. He was also engaged in the O. K. Company plow works and other Oklahoma enterprises. Witness also owned some stock in the O. K.

Company. Witness purchased some stock in this company in 1919. He didn't remember whether Stroud was connected with the company at that time or not. The certificates of stock then purchased were signed by C. E. Harris, president, and H. L. Stroud, secretary. The par value of a share of stock was $10. In January, 1920, witness purchased from H. L. Stroud 413 shares of stock for which he paid $13.50 per share. Stroud represented at the time of witness' purchase that the stock was worth $15 per share. At the time Stroud was an officer of the O. K. Company. He had been secretary, or treasurer, or director, or receiver, or had some inside office in the company, where he had been "strictly on to the running of the business." Witness did not have any money, and paid for the stock in the following manner: During the negotiations, in a conversation with Stroud, Stroud pointed over to his wholesale grocery business and told witness what a success he had made of his business around there, and said that he would help witness out, after witness had paid what he could on it through the earnings of the company. Witness thought in that way he could soon get the stock paid for. Witness later found out that Stroud had previously made arrangements for some kind of a loan. Witness gave his check for $75.50—all the money he had at the time—to Stroud as part payment on the stock. Stroud at the same time stated to witness that he would indorse the witness' note for the balance of the purchase money, and he did indorse witness' note to the American National Bank for the sum of $5,500. Witness made some payments on the note and renewed the same at the bank. A little later on witness heard unfavorable reports concerning the solvency of the O. K. Company, and spoke of it to Mr. Stroud. Stroud reassured the witness that everything was all right with the O. K. Company, and told witness to go ahead and finish paying his note at the bank. After being thus reassured, witness paid $1,000 more on the note to the bank, making in all the sum of $1,575.50 with the accrued interest. The stock purchased

by witness had been placed in the bank as a collateral security on the note. Afterwards witness learned that the O. K. Company was not worth anything, and was not what it had been represented to him by Stroud, who had dumped the stock on him, and witness quit paying. The O. K. Company went into the hands of a receiver. This was not long after witness purchased the stock from Stroud. Witness wrote a letter to Stroud after witness had purchased the stock, stating that he had written a party with reference to the sale of his 413 shares of O. K. Company stock, and asking Stroud whether it could be transferred right away if witness sold the same. To this letter Stroud answered: "You can have stock transferred any time. I have been over at the plant since I saw you, and it looks very good. I expect they will declare a twenty per cent. dividend. That is the way they talked. That will not be decided until June 14. I have lots of faith in the business properly managed. Get all the proxies you can—we will need them. I expect to be in Rogers about June 1." Witness stated that he never received any dividends on his stock, and no one else did. The O. K. Company declared twenty per cent. dividends in stock. They never sent out any money. Issued certificates of stock and increased the liability of the company, but never paid any cash dividends. Witness had tried to sell his stock before the company went into the hands of the receiver, but could not do so. Witness didn't know what was the actual value of the stock at the time he bought the same. It didn't prove to be of any worth to witness, but was a clear loss. Witness first purchased stock in the O. K. Company in December, 1919, and witness purchased stock from Stroud in January, 1920. Witness' testimony on cross-examination showed that he and Stroud were afterwards sued by the bank for the balance due on the note executed to the bank for the purchase money which witness had borrowed from the bank to pay Stroud on the stock. There was a lengthy cross-examination of the witness, which we deem it unnecessary to set forth. Witness was later recalled,

and, on direct examination, testified that Stroud represented to him at the time he purchased the stock that it was worth fifty cents above par, and witness at that time believed that Stroud was telling the truth as to the value of the stock, and relied on his statements, and bought the same. The witness stated that, before he purchased the stock from Stroud, he had purchased other stock in the company, and had paid at the rate of $15 per share, purchasing 225 shares. He also testified that he had attended a meeting of the stockholders of the O. K. Company at Muskogee, Oklahoma, in June, 1920, after the purchase of his stock. At that time they were making very favorable reports of the condition of the company. Everything was looking prosperous. Stroud was either boss or assistant boss, and whatever information witness obtained came through him or the officers of the company. Witness, being a mere minority stockholder, didn't have any way of getting inside. Witness didn't examine the books of the company. He took the word of the officers, including that of Stroud, as to the condition of the company.

There was other testimony on behalf of the plaintiff which tended to prove that, as late as June, 1920, the O. K. Company was recommended as being in a good financial condition. One of the witnesses stated that there was no question about it at that time, but after it went into the hands of a receiver and the witness made an investigation of the company's affairs from the beginning, witness concluded that the company had never been solvent. Witness never thought that the stock was ever worth as much as fifty cents on the dollar. Witness made the investigation quite a long time after the company had gone into the hands of a receiver.

The testimony of Stroud was to the effect that he said nothing to Henderson as to the value of the stock he was selling or as to the financial condition of the O. K. Company or the value of any of its property. He testified to the effect that he told Henderson, who was anxious for stock in the O. K. Company, that witness knew of a

block of stock of the company which was held by a certain bank in Muskogee that could be purchased at $1.35, or $13.50 per share, and that Henderson insisted that Stroud sell him some of his stock, and that he (Stroud) could later buy the block of stock held by the Muskogee bank to replace the stock he sold. Stroud testified that he later purchased the stock from the bank in Muskogee for which he paid the sum of $4,500 at the rate of 25c or 35c over the par value.

Both the testimony on behalf of the appellee and the appellant is exceedingly voluminous, and we deem it unnecessary to further set it out. The court instructed the jury defining the issues raised by the pleadings of the respective parties, and told the jury that the burden of proof was on Henderson to show by a preponderance of the evidence his right to recover against Stroud and the extent thereof, and that the burden was upon Stroud to show by a preponderance of the evidence his right to recover and the extent thereof against Henderson. The court further instructed the jury in substance that, if they found from a preponderance of the evidence that Henderson purchased from Stroud stock in the O. K. Company, and that Stroud represented that the stock at that time was worth $13.50 per share, and that Henderson relied upon such representation, believing it to be true, and that the representation was material, and induced Henderson to purchase the stock at that price, and if the jury found that the said representation was false, or that Stroud, not knowing it to be true, made such representation with the fraudulent intent to have Henderson believe and act upon it, and that Henderson was thereby injured, then they should find in favor of Henderson. If they failed to so find, their verdict should be in favor of Stroud. The court further, in effect, told the jury that, if they found for Henderson, the measure of his damages would be the difference between the value of the stock at the time of the sale and purchase and the price paid therefor; that, if the O. K. Company was solvent at the time of the alleged purchase and sale and

its stock worth $13.50 per share, then their verdict should be in favor of Stroud on Henderson's complaint, although the O. K. Company afterwards failed.

The court further instructed the jury as follows: "No. 7. It is admitted that judgment was rendered against Henderson and Stroud in this court on the note executed by them to American National Bank for the stock in question for $4,466.94, and that the judgment has been paid by Stroud. (Unless you find for Henderson on his cause of action for alleged deceit in the sale of the stock as explained in these instructions) then you should find for Stroud on his counter or cross suit for the amount Stroud paid to the bank, with interest." Stroud registered a general objection to all the instructions except No. 7, set out above, and to that he specifically objected to the clause included in the parentheses. The jury returned separate verdicts as follows: "We, the jury, find for Henderson in the sum of $1,575.50 on the suit against Stroud; and we, the jury, find for Henderson on the suit of Stroud against Henderson."

After the jury had been discharged, Stroud objected to the return of the separate verdicts. Judgment was entered in favor of Henderson against Stroud in the sum of $1,575.50 and for costs, from which is this appeal.

1. The appellant contends that there is no testimony to support the verdict. It will be observed that the complaint as above set forth alleged that the appellant approached the appellee to sell him stock in the O. K. Company, and represented that he was a director and officer in the company; that the company was solvent, doing a large volume of business, and that the purchase of the stock would be a good investment; that the representations thus made were false; that the appellant knew they were false and made them for the purpose of cheating and defrauding the appellee; that the appellee believed them to be true, and relied upon the same, and had a right to do so, and purchased the stock from the appellant. The uncontroverted testimony shows that the par value of the stock was $10 per share. The appel-

lee testified in substance that the appellant represented to him at the time of the sale and purchase of the stock that it was worth $15 per share, and that he would sell it for $13.50 per share; that, while they were negotiating and before the sale was consummated, the appellant pointed to his wholesale business house across the street, referred to the success he had made out of his business at Rogers, and offered to assist the appellee in the payment for his stock through the earnings of the company; that the appellee thereupon paid the appellant the sum of $75.50 as a cash payment on the stock, and borrowed the balance from the American National Bank and executed his note therefor, which the appellant indorsed. It was shown that, at the time of these negotiations, the appellant was secretary and a director of the company, and that the appellee knew this fact. Appellee further testified that he relied on the statements of the appellant and believed that he was telling the truth; and, further, that he made payments on, and renewed, his note at the bank for the balance of the purchase money from time to time until he ascertained that the corporation was defunct. His testimony was to the effect that, after he heard "the thing was getting shaky," he went to the appellant about it, whereupon the appellant reassured him, and the appellee then went and made another payment, but didn't make any more after the corporation went to pieces. The appellee made payments to the amount of $1,575.50 on the principal with interest, upon being reassured by the appellant that the company was all right and on being urged by him to go ahead and finish paying the note at the bank. A letter was introduced from the appellant in which he stated that, since seeing the appellee, he had been over to the plant, and that it looked good; that he expected from what they stated they would declare a twenty per cent. dividend. There was other testimony to the effect that, some time after the sale and purchase of the stock by the appellee from the appellant, one of the stockholders, who had purchased stock about the time the appellee purchased his

stock, was made a director, and at that time the appellant was also a director and secretary and treasurer of the company. This witness, upon investigation, ascertained that the stock was worthless, and a short time after it went into the hands of a receiver.

On the other hand, the testimony of the appellant tended strongly to prove that he made no false representations to the appellee; that the appellee approached the appellant anxious to purchase stock in the company, and that both the appellant and appellee were stockholders in the company; that he made no representations as to the financial condition of the company or the value of its stock; that the appellee knew as much about that as did the appellant, and that the appellant sold the appellee a block of appellant's stock at the market price of the stock at that time, and that the appellant himself, after selling this stock to the appellee, purchased $25,000 worth of the O. K. Company stock for which he paid in cash at the rate of $1.25 or $1.35 on the dollar.

Now, it is not the province of this court to pass upon the weight of the testimony and the disputed issues of fact. Where there is legally sufficient testimony to sustain the verdict, it is the unvarying rule of this court not to invade the province of juries, who are triers of fact. Without pursuing the subject further, we are convinced that it was an issue for the jury as to whether the appellant made false representations in regard to the value of the stock, which he knew to be false, for the purpose of inducing the appellee to purchase the same. The position appellant occupied with the O. K. Company placed him in a situation where he knew, or could and should have known, of its financial affairs. And because of this official relation to the company, if he made false representations as to the value of its stock for the purpose of selling his own stock to the appellee, which representations he knew to be false, upon which the purchaser relied and had the right to rely, he would be liable to such purchaser. The testimony brings the case well within the doctrine announced by this court in

the recent case of *Myers* v. *Martin,* 168 Ark. 1028, where we said, speaking of a contention similar to that of the appellant in the case at bar: "The 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. 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." See also *Bell* v. *Fritts,* 161 Ark. 371.

The appellant contends that, on the undisputed facts, the appellee is estopped as a matter of law by his renewal of the notes given to the bank for money loaned the appellee to pay for the stock. Appellant cites and relies upon *Sebastian County Bank* v. *Gann,* 121 Ark. 115, and cases there cited. But the facts of those cases clearly differentiate them from the facts of the case at bar, and the doctrine there announced has no application here.

This is an action by the appellee against the appellant for false representations. Therefore the fact that the appellee made payments on and renewed his notes to the bank from time to time for money which the bank loaned him to pay for the stock purchased of appellant certainly does not tend to prove that the appellant had waived his alleged cause of action against the appellee for false representations. Such payments and renewals cannot avail appellant as a defense to the action under the doctrine of estoppel. The fact that the appellee was a stockholder at the time he purchased the stock in controversy from the appellant, and the fact that he renewed the notes to the bank for the purchase money, was relevant testimony on the issue as to whether or not the appellee relied, and had a right to rely, upon the alleged false representations on which he bottomed his alleged action against the appellant. But certainly the payments and renewals to the bank which appellee owed

cannot avail the appellant as a defense to this action under the doctrine of waiver or estoppel. These renewals and payments to the bank did not injure appellant.

2. This brings us to the question as to whether the court erred in its instructions to the jury.

The complaint alleged that the appellant "represented to the defendant (appellee) that he was a director and officer in said company, and that said company was solvent and doing a large volume of business, and represented the same as a good investment." Learned counsel for the appellant argue that there is a fatal variance between the above allegations of the complaint and the proof, inasmuch as the appellee "did not testify that Stroud made either of these representations in fact or in substance." Counsel further contend therefore that the court erred for that reason in not directing the jury, at the close of the testimony, to return a verdict in favor of the appellant. We do not concur in these views of counsel for appellant. Counsel did not demur to the complaint, nor was there any motion to make the same more specific, nor any objection in the court below to the testimony of the appellee, who testified that appellant said the stock was worth $15 a share, and that he could let the appellee have the same for $13.50 per share. The appellant is therefore not in an attitude to complain here that there was a variance between the allegations in the complaint and the proof. Moreover, the above testimony and other testimony adduced by the appellant, tending to show the financial condition of the O. K. Company at the time of the purchase of the stock, was relevant to the issue as to whether or not the alleged representations were false. If, indeed, the stock of the company at the time of the purchase was not worth $15 per share, nor $13.50 per share, but was worthless, then this testimony was relevant to the issue as to solvency of the company and as to whether or not the alleged representations were false and fraudulent and made for the purpose of inducing the appellee to purchase the stock. The court in its instructions confined the issue to the precise

testimony of the appellee to the effect that the appellant represented the stock was worth $13.50 per share, and told the jury that, if such representations were made, and if same were false and relied on by the appellee, and were made with the fraudulent intent of having the appellee act upon them, and appellee did act upon them, then the appellant was liable. No specific objection was made to this instruction. While the instruction does not submit to the jury the issue as to whether or not the appellee had the right to rely upon such alleged representations, it occurs to us that the failure to submit this issue is not prejudicial for the reason that the uncontroverted proof is that Stroud at the time was the secretary and treasurer and a director of the company. Therefore, if appellant made such representations, it would follow as a matter of law, under the doctrine of *Myers* v. *Martin, supra,* that the appellee would have the right to rely thereon; and if he did rely thereon, and if they were false and fraudulent, and injured the appellee, appellant would be liable in damages for such injury. We find no conflict in the instructions, and no error in the instructions submitting the issues of fact to the jury; nor was there any inconsistency or defect in the separate verdicts returned by the jury. Since there was legally sufficient evidence to support the verdict in favor of the appellee, the same is conclusive here. Upon the whole case we are convinced that no reversible error is presented by the record, and the judgment must therefore be affirmed.

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

Opinion delivered June 7, 1926.

1. MALICIOUS PROSECUTION—NATURE OF ACTION.—To justify an action for malicious prosecution, both want of probable cause and malice must be shown.
2. MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF COUNSEL.—The rule that it is conclusive evidence of probable cause and a good defense to an action for malicious prosecution that, in instituting the prosecution, defendant acted upon the advice of counsel learned in the law, after placing before him all the facts in defendant's possession, *held* applicable to an action for maliciously bringing a civil suit, as well as to an action for instituting a criminal prosecution.
3. MALICIOUS PROSECUTION—PROBABLE CAUSE.—Generally, the want of probable cause in an action for malicious prosecution is a mixed question of law and fact to be submitted to the jury; but, in the absence of a dispute as to the facts, the court should declare their legal effect, without the intervention of a jury.
4. MALICIOUS PROSECUTION—PROVINCE OF COURT.—Where there was no testimony in an action for malicious prosecution to prove malice or want of probable cause, it was error to refuse a peremptory instruction for defendant.

Appeal from Crittenden Circuit Court; *G. E. Keck*, Judge; reversed.

STATEMENT BY THE COURT.

This is an action by appellee against appellant to recover damages for having maliciously and without probable cause instituted an action in the Crittenden Chancery Court to have set aside as fraudulent a deed executed to appellee to certain lands in Crittenden County, Arkansas.

The appellant answered and admitted that it instituted a suit against appellee to set aside as fraudulent a deed to the lands described in the complaint in that action, but denied that it was brought with malice and without probable cause.

The record shows that on the 12th day of July, 1922, the Wm. R. Moore Dry Goods Company, the appellant herein, brought a suit in equity against R. T. H. Cham-

bers and appellee, Marie Chambers Mann, to cancel and set aside a deed to certain lands executed by R. T. H. Chambers to Marie Chambers Mann as being executed in fraud of their rights as a creditor of the former.

The complaint alleges that R. T. H. Chambers was indebted to the Wm. R. Moore Dry Goods Company in the sum of $678.53 for merchandise. A judgment for said amount rendered in the chancery court of Shelby County, Tenn., was exhibited with the complaint.

On the same day Wm. R. Moore Dry Goods Company filed a *lis pendens* notice in the Crittenden Chancery Court. The complaint of the Wm. R. Moore Dry Goods Company in that action was dismissed for want of equity.

On April 4, 1921, Robert Mann and his wife, Marie Chambers Mann, executed a deed to said lands to R. T. H. Chambers for a consideration which is recited in the deed. These were the same lands that are described in the *lis pendens* notice, and the deed was filed for record June 25, 1921.

On June 22, 1921, R. T. H. Chambers executed to Marie Chambers Mann a deed to the same lands for the same consideration as that recited in the deed from Robert Mann and wife to Chambers. This deed was duly filed for record on January 18, 1922.

On July 5, 1922, E. C. Connor made a contract with Robert Mann, as agent for his wife, Marie Chambers Mann, to purchase the lands in question. After the filing of the *lis pendens* notice in the chancery suit above referred to, Connor declined to purchase the lands, and appellee lost the sale of the lands. According to the testimony of E. C. Connor, he was able to pay for the lands, and failed to complete his purchase for the sole reason that the *lis pendens* notice had been filed.

The chancery suit of appellant against Chambers and appellee was brought upon the advice of counsel. The testimony on this branch of the case will be stated and discussed in the opinion.

The jury returned a verdict for the appellee, and appellant has duly prosecuted an appeal to this court.

Canada & Williams and *R. V. Wheeler,* for appellant.

Rudolph Isom and *T. H. Caraway,* for appellee.

HART, J., (after stating the facts). It is earnestly insisted by counsel for appellant that the evidence is not legally sufficient to support the verdict.

At the outset it may be stated that, to justify an action for malicious prosecution, both want of probable cause and malice must be shown. *Keebey* v. *Stifft,* 145 Ark. 8, and cases cited.

It is well settled in this State that proof that the defendant in an action for malicious prosecution acted upon the advice of counsel learned in the law, or upon the advice of the public prosecutor, given after a full and fair statement of all the known facts, will be a complete defense to an action for malicious prosecution, because it is conclusive evidence of the existence of probable cause. *Kansas & Texas Coal Co.* v. *Galloway,* 71 Ark. 351; *L. B. Price Mercantile Co.* v. *Cuilla,* 100 Ark. 316; *Laster* v. *Bragg,* 107 Ark. 74; *Price* v. *Morris,* 122 Ark. 382; and *Redman* v. *Hudson,* 124 Ark. 26.

There has been some confusion in this State as to whether the rule with regard to the advice of counsel as a defense to an action for instituting a criminal prosecution is applicable to an action for maliciously bringing a civil suit.

In the early case of *Lemay* v. *Williams,* 32 Ark. 166, it was held that, if a party makes a full statement of the facts to his counsel and acts under his advice in the prosecution of an attachment against the property of his debtor, this would be strong, but not conclusive, evidence of the want of malice.

In the subsequent case of *Kansas & Texas Coal Co.* v. *Galloway,* 71 Ark. 351, the holding in this case was overruled. It is true that the Galloway case was a suit for damages for malicious prosecution in instituting a proceeding for a criminal contempt; but no stress seems to have been laid upon this fact, and the holding in the *Lemay* v. *Williams* case was overruled.

It also appears from the later case of *Harr* v. *Ward*, 73 Ark. 437, that the same rule applies with regard to the advice of counsel as a defense to suits for malicious prosecution, whether based upon the institution of criminal prosecutions or civil actions, and that the rule is that, where one fairly and fully communicates to his counsel all the facts within his knowledge and uses reasonable diligence to ascertain the truth, and acts in good faith upon advice received from counsel, this will constitute an absolute defense to an action for malicious prosecution.

In *Stewart* v. *Sonneborn*, 98 U. S. 187, in discussing the question, the court said: "It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the circuit court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution for a criminal proceeding."

Indeed, there is more reason for the rule in suits for malicious prosecution based upon civil actions than in those predicated upon criminal prosecutions. Under our system of laws, the advice of the prosecuting attorney might be sought before an arrest was made, but where a civil action was to be commenced the party originating it must act upon his own advice, or upon the advice of private counsel. When a person resorts to the advice of reputable counsel learned in the law and makes a full and fair disclosure of the facts in his possession, and in good faith acts upon the advice of counsel, this ought to protect him from a suit for damages for malicious prosecution. The reason is that the party

acting has done all that he could be expected to do to enable him to act safely. If this course of conduct did not protect him, no one would feel safe in seeking redress for his civil wrongs in the courts.

Generally, "want of probable cause" is a mixed question of law and fact, and should be submitted to the jury under proper instructions; but, where there is no dispute about the facts, it is the duty of the court to apply the law to them and declare their legal effect without the intervention of a jury.

There is no dispute about the facts in this case, and nothing from which a jury might legally infer that appellant was actuated by malice, express or implied, or that there was want of probable cause in bringing the chancery suit to set aside the deed from Chambers to Mrs. Mann. Appellant had obtained judgment against Chambers for $678.53 for merchandise sold by it to him. Chambers had a tract of land of several hundred acres near Cotton Plant, Woodruff County, Arkansas; but an investigation by appellant showed that this was incumbered for about all that it was worth. Chambers had about 500 acres of land there, and it was incumbered for something between $25,000 and $50,000. Chambers also had a contract for construction work at Helena, and a large payroll. Appellant sent its claim to a firm of attorneys at Helena, and the claim was returned with a report that he was hopelessly insolvent. Later on Chambers was adjudged a bankrupt.

On May 2, 1922, appellant wrote Berry & Wheeler, a firm of reputable attorneys at Marion, in Crittenden County, Ark., to collect their account against Chambers. They informed appellant that Chambers owned about 600 acres of land in Crittenden County, Ark., and that he was trying to dispose of it. His residence was given as Memphis, Tenn., and the attorneys were asked to attach the real estate, on the ground that Chambers was a nonresident. The letter concludes as follows:

"This account represents goods shipped this debtor in 1920. We are given no consideration whatever, we

consider it a dangerous account, and we ask therefore that you will immediately look up the records on the real estate and attach the same. The writer will appreciate highly your writing us immediately, whether or not you will be able to subject this real estate to our debts."

On May 5, 1922, Berry & Wheeler replied as follows:

"On April 4, 1921, he received a deed from Robert Mann and wife, Marie C. Mann, for 580 acres of land. Then on June 22, 1921 (three days before the deed to him was filed for record), he deeded this property to Marie Chambers Mann, which deed was not filed for record until January 18, 1922. The two deeds show exactly the same consideration. It appears suspicious to us that this occurred in this way, but we have no knowledge of any other facts constituting fraud. If Chambers has no other property, it would probably be advisable to institute suit in chancery to set aside the deed to Mrs. Mann for fraud, and advise that the suit, if one is to be started, be brought at once."

Again, on May 18, 1922, Berry & Wheeler wrote to appellant, stating that it would be hard to get any other evidence of fraud except such as might be elicited on cross-examination of the interested parties. Appellant was advised that attorneys could not assure it of any success in the handling of the suit, but advised the bringing of the suit if it turned out that Chambers had no other property out of which to make the debt. Appellant was advised that there was no possibility of damages against it for bringing the suit.

Subsequently Berry & Wheeler brought suit in the chancery court against appellee and Chambers to set aside the deed from the latter to the former. The suit was not successful, because appellant was not able to secure any other evidence of fraud than that above stated.

It is not contended that appellant was actuated by express malice in bringing the suit in chancery to set aside the deed, and we do not think implied malice can be legally inferred from the circumstances recited.

Appellant stated all the facts within its knowledge to a firm of reputable attorneys, and acted upon their advice in bringing the suit. It is true that they were not able to obtain sufficient testimony to warrant the chancellor in setting aside the deed as having been executed in fraud of the rights of appellant as a creditor of Chambers. Chambers and Mrs. Mann were brother and sister, and this fact, coupled with the fact that the deed in question was withheld from the record for about six months, and that Chambers, although a man of large affairs, was failing and refusing to pay a debt of between $600 and $700, show that there was no want of probable cause, and that appellant acted in good faith in bringing the suit in chancery to set aside the deed from Chambers to Mrs. Mann. An investigation had shown that there was no other property subject to the judgment of appellant, and its purpose seems to have been to collect its debts in the only way available to it.

It is shown in this case that Chambers had an automobile in Memphis at this time, but it is not shown that appellant knew of this fact. In any event, the automobile was only worth about $600, and this would not have satisfied the debt and costs of appellant against Chambers. It is not shown that appellant had any ill feeling whatever against Chambers, or that it was actuated by any other motive than that of collecting its debt in the manner advised by a firm of reputable attorneys.

If every man who brings a suit against another upon the advice of reputable attorneys, after having acted upon all the available information given them, is responsible in damages for the consequence of this action, if he fails in his suit, then no one would dare resort to the courts to redress his wrongs, and the result would be to encourage fraud and concealment of their affairs by debtors. The successful prosecution of civil actions may fail from many causes independent of the right or wrong of the matter. Hence, in order to maintain a suit for damages for malicious prosecution, it is necessary for the

plaintiff to prove malice, express or implied, and the defendant may justify by showing that he has acted upon the advice of counsel in good faith after making a full and fair disclosure to him of all the facts in the premises.

This court has held that it is not error to give a peremptory instruction for the defendant in an action for malicious prosecution where there was no testimony tending to prove malice or want of probable cause. *Price* v. *Morris,* 122 Ark. 382; *Scott* v. *Pennington,* 151 Ark. 26; and *Keebey* v. *Stifft,* 145 Ark. 8.

The request of the defendant for a peremptory instruction should have been granted; and, for the error in refusing to give it, the judgment is reversed, and, inasmuch as the facts seem to have been fully developed, the cause of action will be dismissed here.

WASHINGTON v. STATE.

Opinion delivered June 7, 1926.

1. BASTARDS—CONCEALMENT OF DEATH.—The gist of the offense of concealing the death of a bastard child, in violation of Crawford & Moses' Dig., § 2365, is the concealment of the death, and not the causing of it.
2. BASTARDS—EVIDENCE OF CONCEALMENT OF DEATH.—In a prosecution under Crawford & Moses' Dig., § 2365, for concealing the death of defendant's bastard child, evidence that defendant had appeared pregnant and defendant's confession out of court that her baby was born dead, but she did not know what became of it, were insufficient to sustain a conviction; there being no evidence to establish the *corpus delicti.*

Appeal from Lafayette Circuit Court; *James H. McCollum,* Judge; reversed.

Allen H. Hamiter and *Tom W. Campbell,* for appellant.

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

HART, J. Sook Washington prosecutes this appeal to reverse a judgment of conviction against her for the statutory crime of concealing the death of her bastard child.

The Attorney General confessed error.

The indictment was returned under § 2365 of Crawford & Moses' Digest, which, when construed in connection with the section following it, provides in effect that, if any woman conceals the death of her bastard child, she shall suffer the same punishment as for manslaughter.

The gist of the offense is the concealment of the death of the bastard child, and not the causing it; and the purpose of the statute is to make such concealment a crime, so that it may come to light whether or not the infant was born alive. *Sullivan* v. *State,* 36 Ark. 64; *State* v. *Ellis,* 43 Ark. 93; and *Dunn* v. *State,* 57 Ark. 560.

According to the evidence for the State, the defendant is an unmarried woman, and lived with her mother and father in Lafayette County, Arkansas, during the year 1925 and up to the time of the trial in February, 1926. She appeared to the witnesses to be pregnant, and was taken by one of them to be examined by a physician to ascertain whether or not she had been pregnant and had given birth to a child. The defendant told the physician that her baby was born dead, but she did not know what became of it. She said the child had been born two weeks before, at her mother's house in Lafayette County, Arkansas.

This evidence is not legally sufficient to support the verdict under the statute. It is necessary to show that the defendant gave birth to a bastard child, whether alive or dead at the time of its birth, and that she concealed its death.

The evidence for the State showed that the defendant was an unmarried woman, and her admission at the doctor's office, where she was taken for examination, was in the nature of a confession out of court. This testimony was not sufficient to convict the defendant, unless

it had been shown by other evidence that she had given birth to a child.

Hence there is no evidence in the record legally sufficient to establish the *corpus delicti.* In *Reg* v. *Williams,* 11 Cox's Crim. Cases, it is said that the dead body must be found and identified. The reason is that the bastard child of which the defendant is charged to have been delivered may be somewhere alive.

It follows that the judgment must be reversed, because the evidence is not legally sufficient to sustain the verdict, and the cause will be remanded for a new trial.

BALD KNOB STATE BANK *v.* BELLVILLE.

Opinion delivered June 7, 1926.

1. BILLS AND NOTES—FORGERY OF INDORSEMENT.—Forgery of the payee's indorsement of a check carries no title.
2. PRINCIPAL AND AGENT—LIABILITY OF AGENT.—Where a contract provided that an agent to procure a loan on plaintiff's land was authorized to pay off an existing mortgage on the land and pay the balance to another agent, delivery to the latter of a check payable to plaintiff and the latter, *held* to be at the risk of the agent securing the loan.
3. PRINCIPAL AND AGENT—RIGHT OF AGENT TO COMMISSION.—Where an agent procured a loan for his principal, and delivered a check for the amount of the loan, payable to plaintiff and another agent, to the latter agent, instead of first paying off a mortgage which he was authorized to do before turning over the balance to the other agent, the fact that the other agent forged the plaintiff's indorsement to the check will not deprive the first agent of his right to his commission for procuring the loan, where he had no reason to suspect that the other would forge plaintiff's name to the check.

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

STATEMENT BY THE COURT.

Clint Bellville and E. A. Bellville, his wife, brought this suit in equity against J. W. Halliburton, trustee, and

Fred and C. S. Perkins of Oswego, Kansas, to cancel a certain mortgage executed by them and delivered to the defendants on account of failure of consideration.

The defendants filed an answer and cross-complaint. They denied the allegations of the complaint, and in their cross-complaint asked for judgment against Eugene Moseley and the Bald Knob State Bank in the event of a recovery against them by the plaintiffs. The Bald Knob State Bank entered its appearance and filed an answer to the cross-complaint, denying all its material allegations.

J. A. Roetzel was allowed to intervene, and asked to be subrogated to all the rights of the plaintiffs. The various interests of these parties will appear in our statement of facts.

The record shows that Clint Bellville and E. A. Bellville signed a written application on the 21st day of November, 1922, for a loan on their farm of 280 acres in White County, Arkansas. The application recites that Eugene Moseley is appointed agent to procure for the applicants from the Fred Perkins Investment Company of Oswego, Kansas, a loan for $3,000, for the term of seven years at seven per cent. per annum.

On the 21st day of November, 1922, Clint Bellville and wife entered into a written contract with the Fred Perkins Investment Company to secure for them a loan of $3,000 for ten years at eight per cent. per annum, payable semi-annually at the office of Fred and C. S. Perkins of Oswego, Kansas, which was to be secured by a first mortgage on their farm of 280 acres of land in White County, Arkansas. There is a clause in the contract which authorizes the Fred Perkins Investment Company to pay off and discharge all existing liens on said lands out of the proceeds of the loan. The contract also contains a clause as follows:

"After deducting expenses and paying existing liens, my said agent is authorized to pay the balance of proceeds of this loan to Eugene Moseley of Judsonia, Arkansas, and the said Eugene Moseley is hereby authorized to receipt for same for me."

Pursuant to the terms of the contract, Clint Bellville and wife executed a deed of trust to said lands and delivered the same to the Fred Perkins Investment Company of Oswego, Kansas. J. W. Halliburton was designated as trustee in the deed of trust.

J. A. Roetzel had a mortgage on the lands in the sum of $3,600 at the time Clint Bellville applied for the loan in question. On the 26th day of June, 1923, J. A. Roetzel executed a deed of release in which he acknowledged full payment and satisfaction of his indebtedness, and released the lands in question from any lien. This instrument was duly acknowledged and filed for record on the 26th day of July, 1923, and delivered to the said Fred Perkins Investment Company.

Pursuant to the terms of his contract, Clint Bellville filed a suit in the chancery court for the purpose of clearing the title to said lands, and obtained a decree in the chancery court in June, 1923. The Fred Perkins Investment Company was duly notified of this fact, and it then sent to the Bald Knob State Bank in White County, Arkansas, a check which, together with the indorsements on it, reads as follows:

"OSWEGO STATE BANK

"Oswego, Kansas, August 8, 1923.

"Pay to the order of Eugene Moseley & Clint Bellville, $3,000, three thousand dollars, Bellville avails.

(Signed) "FRED PERKINS."

(Indorsed) "Eugene Moseley and Clint Bellville."

This check was duly collected by the Bald Knob State Bank, and a part of its proceeds was used in paying an overdraft of Eugene Moseley, and the rest of it was deposited to his credit in the bank and subsequently checked out by him. No part of the proceeds of said check was ever received by Clint Bellville or by J. A. Roetzel.

According to the testimony of Clint Bellville, he had been doing business with the Bald Knob State Bank for seventeen or eighteen years, and his signature was well known to the officials of the bank. He never

indorsed the check in question nor authorized Eugene Moseley or any one else to indorse it for him. His signature to the indorsement on the check is a forgery. Bellville made inquiries at the bank from time to time to ascertain why the money which he had borrowed had not come. The officials of the bank understood that he had executed a mortgage on his farm to secure a loan of $3,000, and that the money was to be sent to the bank for him by the Fred Perkins Investment Company.

E. R. Wynn, the cashier of the Bald Knob State Bank, was a witness for it. According to his testimony, Eugene Moseley handled quite a number of farm loans through the bank in the latter part of 1922 and 1923. The checks for these loans were deposited to his personal account. This was the way the Bellville check was handled. A part of the check was used in paying a debt of Moseley to the bank of about $1,300, and the balance was credited to his account. Wynn also admitted that the check was for a loan in favor of Clint Bellville, and that Bellville had been in the bank several times looking for it before the check came.

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

The chancellor found that J. A. Roetzel had not been paid the consideration for the deed of release executed by him whereby he released his mortgage lien on the land of Clint Bellville; that the defendants, Fred and C. S. Perkins, mailed the check for $3,000 payable to Clint Bellville and Eugene Moseley, to Eugene Moseley on August 8, 1923, and that said Eugene Moseley forged the indorsement of Clint Bellville to said check, and that the same was paid by the Bald Knob State Bank to Eugene Moseley on August 13, 1923, by depositing said sum of $3,000 to the individual account of said Moseley.

The court found that Clint Bellville should recover from the Bald Knob State Bank and from the defendants, Fred and C. S. Perkins, said amount of money, and that the intervener, J. A. Roetzel, should be subrogated to the rights of the plaintiffs in said judgment.

The court further found that the Bald Knob State Bank was primarily liable for the payment of said $3,000 and the accrued interest, and that, if Fred and C. S. Perkins should be required to pay any part of it, they would be entitled to recover it from the Bald Knob State Bank.

The chancellor also found that Fred and C. S. Perkins should recover from Clint Bellville the amount of commissions due them according to the terms of the contract for procuring the loan of the date of November 21, 1922.

A decree was duly entered of record in accordance with the findings of the chancellor. To reverse that decree, the Bald Knob State Bank and Fred and C. S. Perkins have duly prosecuted an appeal, and Clint Bellville has prosecuted a cross-appeal.

Brundidge & Neelly, for appellants.

John E. Miller, Culbert L. Pearce and *Avery M. Blount,* for appellee.

HART, J., (after stating the facts). The judgment against the Bald Knob State Bank was correct. The undisputed evidence shows that the signature of Clint Bellville to the check for $3,000 was forged, and that the Bald Knob State Bank collected said check and credited the account of Eugene Moseley with the amount thereof.

Under § 7789 of Crawford & Moses' Digest, when a signature to a check is forged, it is wholly inoperative, and no right to enforce payment thereof against any party thereto can be acquired under such signature, unless the party against whom it is sought to enforce such a right is precluded from setting up the forgery or want of authority. *Bank of Black Rock* v. *B. Johnson & Son Tie Co.,* 148 Ark. 11. See also *Bank of Hatfield* v. *Chatham,* 160 Ark. 530; and *Polk* v. *Garrison,* 162 Ark. 624, and cases cited. The reason is that forgery can carry no title to the paper, even in the hands of a *bona fide* holder.

This brings us to a consideration of what facts or circumstances will preclude the person whose signature

has been forged from setting up the forgery or want of authority. Certainly, there is no testimony in the case at bar which would prevent Bellville from setting up the fact that Moseley had no authority to indorse the check for him. Bellville testified that he made frequent trips to the bank to see if the check had arrived, and that the officials of the bank knew that the proceeds of the check were to be used in paying off a prior mortgage on his farm. The cashier of the bank expressly admits that he knew that Bellville was securing a loan through the Perkins Investment Company, of Oswego, Kansas, and giving a mortgage on his farm to secure the payment of the money for the express purpose of using the money obtained in paying off a prior mortgage on his farm. Bellville had been doing business with the bank for seventeen or eighteen years, and his signature was known to the cashier. Notwithstanding these facts, the cashier of the bank permitted Moseley to indorse the check in his own name and in the name of Clint Bellville and to credit the proceeds to his own account. A part of the proceeds was used in paying off an overdraft of Moseley to the bank, and he was allowed to check out the balance in due course of business.

Counsel for Fred and C. S. Perkins contend that the decree in favor of Clint Bellville should be reversed in so far as it adversely affects them. In making this contention, they rely upon the fact that Bellville, in his application for the loan, named Eugene Moseley as his agent to procure for him a loan of $3,000 from the Fred Perkins Investment Company, Oswego, Kansas, and that this carried with it at least the apparent authority for Moseley to indorse his name to the check for the loan. Conceding this to be true, the application is not the controlling factor in the case. Bellville made a written contract with the Fred Perkins Investment Company, of Oswego, Kansas, to procure the loan of $3,000 for him. It is true that it was made on the same day as the application, but, in the very nature of things, it was executed after the application had been signed, and its terms must

control the rights of the parties in the present controversy. The contract expressly provides that the Fred Perkins Investment Company is authorized to pay off and discharge all existing liens on said land out of the proceeds of the loan.

Another clause of the contract provides that, after deducting the expenses and paying existing liens, "my said agent is authorized to pay the balance of the proceeds of this loan to Eugene Moseley of Judsonia, Ark., and the said Eugene Moseley is hereby authorized to receipt for same for me." This shows that the words, "my agent," referred to the Fred Perkins Investment Company, and this clause expressly declares that Eugene Moseley is to receive the balance, after deducting expenses and paying the existing liens. The concluding part of the quoted clause shows the Eugene Moseley was not authorized to receipt for anything except the balance of the proceeds after deducting the expenses and paying the existing liens.

J. A. Roetzel, who had a prior mortgage on the land, had executed a deed of release with the expectation of receiving the proceeds of the loan, and all the parties knew that the money was being borrowed for the very purpose of paying off the prior mortgage held by Roetzel. Under these circumstances, the defendants, Fred and C. S. Perkins, who are the Perkins Investment Company, at their peril sent the check to Eugene Moseley and allowed him to cash the proceeds and apply them to his own use. It was their duty, under the contract, to see that the proceeds of the loan were applied to the discharge of the prior mortgage of Roetzel, and they had no authority to turn over any part of the proceeds to Moseley except what remained after deducting the expenses of the loan and paying off the lien of Roetzel.

On the cross-appeal but little need be said. On this branch of the case counsel for Bellville rely upon the well-known rule that, where the agent is guilty of fraud, dishonesty, or unfaithfulness in the transaction of his

agency, such action is a bar to recovery by him of compensation.

We do not think that the facts of this case show that Fred and C. S. Perkins were guilty of bad faith or gross misconduct in the premises. It is true that their contract with Bellville made it their duty to see that the prior liens on the land were paid off. They had, in good faith, secured the deed of release from Roetzel and had obtained a deed of trust from Clint Bellville and his wife to J. W. Halliburton as trustee. They then sold this deed of trust or mortgage to an Eastern client for the purpose of securing the money for Bellville. When Fred and C. S. Perkins received the money, they made the check payable to Eugene Moseley and Clint Bellville. This was done because Moseley was the local agent of Bellville, and there is nothing to show that they were not acting in perfect good faith in the matter. They had no suspicion whatever that Moseley would forge the name of Bellville to the check and thereby convert the proceeds to his own use.

On the other hand, their course of conduct in the matter shows that they intended for the money to be received jointly by Moseley and Bellville and to be applied in paying off the Roetzel mortgage. Under these circumstances, we do not think that they were guilty of such bad faith and fraudulent conduct as would require them to forfeit their right of compensation for their services.

The result of our views is that the decree was correct, and it will therefore be affirmed.

WILLIAMS v. BRENTS.

Opinion delivered June 7, 1926.

1. PARDON—COMMUTATION OF SENTENCE DEFINED.—A commutation of sentence is a change of punishment into one less severe.
2. PARDON—REPRIEVE DEFINED.—The legal meaning of "reprieve" is to suspend the execution of sentence for a definite term.
3. PARDON—EFFECT OF "INDEFINITE FURLOUGH."—An instrument signed by the Governor granting an "indefinite furlough" to defendant convicted of a felony, subject to revocation for satisfactory cause or violation of the conditions therein, is a commutation of sentence conditionally releasing defendant's punishment without removing his guilt.
4. PARDON—CONSTRUCTION OF COMMUTATION.—Commutations, like pardons, must be construed most strictly against the State and most beneficially for the convicted person.
5. PARDON—CONDITIONAL COMMUTATIONS.—Commutations, as well as pardons, may be granted upon conditions.
6. PARDON—CONSTRUCTION OF COMMUTATION.—An instrument signed by the Governor granting an indefinite furlough to a felon, subject to revocation for cause, is to be construed as a whole to carry out the Governor's intention.
7. PARDON—CONSTRUCTION OF COMMUTATION.—An instrument commuting a sentence of three years' imprisonment for voluntary manslaughter, on condition that he violate no law, carry no weapons nor gamble, and that he will report monthly to the warden until the expiration of his sentence, *held* to contemplate that the conditions were to be complied with only during the period of the sentence.
8. PARDON—LANGUAGE USED.—Technical words or terms are not necessary to constitute a pardon or commutation of a sentence.
9. PARDON—CONDITIONAL COMMUTATION—REARREST.—One sentenced to three years' imprisonment whose sentence was commuted upon certain conditions, who has complied therewith during the period of his sentence, cannot be rearrested after his term of imprisonment has expired.

Certiorari to Conway Circuit Court; *J. T. Bullock*, Judge; affirmed.

STATEMENT BY THE COURT.

The Attorney General, on the relation of J. L. Williams as sheriff of Conway County, Arkansas, filed a petition in this court for a writ of certiorari to quash a

judgment of the county court granting a writ of habeas corpus to John Brents and dismissing him from custody on a judgment in a felony case.

According to the allegations of the petition, at the October term, 1922, of the Conway Circuit Court, John Brents was convicted of the crime of voluntary manslaughter and sentenced to three years in the State Penitentiary, and, by due process of law, was committed as a prisoner to the State Penitentiary to serve said sentence.

On the 19th day of April, 1923, the Hon. Thomas C. McRae, as Governor of the State of Arkansas, issued to said John Brents what is termed a "furlough," which by its own terms expired January 3, 1924. On the last-named date, Governor McRae issued a second furlough to the said John Brents, which, by its own terms, would have terminated on the 2d day of January, 1925. On the 29th day of October, 1924, Governor McRae delivered to John Brents an instrument, which reads as follows:

"To the commissioners, superintendent, and wardens of the State Penitentiary:

"An indefinite furlough is hereby granted to John Brents, who was convicted at the October, 1922, term of of the Conway County Circuit Court for the crime of voluntary manslaughter, and sentenced to three years in the penitentiary, which furlough is issued upon the following conditions, agreed to and accepted by said prisoner:

"That he will not engage in the sale, manufacture or transportation of intoxicating liquors of any kind, and that he will cooperate with the officials and law-abiding citizens of the community in the prosecution of those who have or may hereafter do so. He shall refrain from the use of intoxicating liquors as a beverage, and the use of deleterious drugs or dope. He shall not carry any weapons, shall not gamble, nor be in possession of any gambling device. He shall not violate any of the criminal laws of any State, nor of the United States, nor the ordinance of any town or city. He shall, on the first day of each month, until the expiration of his sentence, notify the warden of the penitentiary, Little Rock, where he is

and what he is doing. He shall reside with and support his family. This furlough is subject to be summarily revoked for the violation of any of said conditions, or for any other satisfactory cause, and the time granted in this furlough is not to be counted in computing said prisoner's term of confinement. In testimony whereof, I have hereunto subscribed my name as Governor, at Little Rock, this the 29th day of October, 1924.

"THOMAS C. MCRAE, Governor."

On the 19th day of February, 1926, Governor Terral issued the following warrant:

"To any sheriff, the commissioners and wardens of the State Penitentiary:

"The indefinite furlough which was granted to John Brents, who was convicted at the October term, 1922, of the Conway County Circuit Court, for the crime of voluntary manslaughter and sentenced to three years in the penitentiary, is hereby revoked, for cause satisfactory to me, and it is hereby ordered that he be immediately returned to the penitentiary walls, Little Rock, Arkansas, to complete his sentence.

"Done at my office in Little Rock, Arkansas, this the 19th day of February, 1926. Tom J. Terral, Governor."

J. L. Williams, as sheriff of Conway County, executed said warrant by arresting said John Brents.

On the 26th day of February, 1926, John Brents filed a petition in the Conway Circuit Court for a writ of habeas corpus. In his petition it is alleged that he was convicted of the crime of voluntary manslaughter for killing Leonard Hare, and his punishment fixed at three years in the State Penitentiary, at the October term, 1922, of the Conway Circuit Court. It is further alleged that judgment and sentence was rendered accordingly, and that he, John Brents, in keeping therewith, surrendered himself into custody and in execution of said sentence, and that he was by due process of law committed as a prisoner to the State Penitentiary to serve said sentence. It is also alleged that on the 19th day of April, 1923, while the petitioner was confined as a prisoner in the exe-

cution of the judgment and sentence of the court, the Hon. Thomas C. McRae, as Governor of the State, granted him a commutation under an instrument commonly referred to as a furlough, and that he was permitted to be in part at liberty until the termination of the period of time mentioned therein, which was on the 5th day of January, 1924. It is also alleged that on the 3rd day of January, 1924, the said Governor renewed the extension of clemency until January 2, 1925, by a written instrument similar in form. It is also alleged that on the 29th day of October, 1924, the renewal of said commutation was granted by said Governor for an indefinite length of time, subject to the said conditions therein set out. A copy of this instrument is attached as a part of the petition and made an exhibit to it. The petitioner further alleged that he complied with all the conditions in the commutation, and that, after the expiration of the full term of his sentence, to-wit, on February 19, 1926, the Hon. T. J. Terral, then Governor of the State of Arkansas, delivered a warrant to J. L. Williams, the sheriff of Conway County, and directed that he be immediately taken into custody and returned to the penitentiary walls at Little Rock to complete his sentence. By virtue of said warrant the petitioner was taken into custody and illegally deprived of his liberty.

A demurrer was filed to the petition of John Brents for a writ of habeas corpus, which was overruled by the circuit court.

The defendant, J. L. Williams, as sheriff of Conway County, refused to plead further, and elected to stand upon the demurrer. It was by the circuit court ordered and adjudged that the plaintiff, John Brents, be discharged from custody and granted his freedom. This judgment was rendered by the circuit court of Conway County on March 8, 1926, a day of its March term.

The petition for a writ of certiorari was duly filed in this court on April 5, 1926.

H. W. Applegate, Attorney General, and *Walter J. Terry,* for appellant.

Strait & Strait, for appellee.

HART, J., (after stating the facts). Our Constitution provides that in all criminal cases, except in those of treason and impeachment, the Governor shall have power to grant reprieves, commutations of sentence, and pardons after conviction. Constitution of 1874, art. 6, § 18.

In *Ex parte Garland,* 4 Wall. 333, Mr. Justice Field, who delivered the opinion of the court, said: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of law the offender is as innocent as if he had never committed the offense."

Such is the effect of our own decisions. This court has also held that, where the Governor is authorized to grant pardons, he may do so under such conditions or restrictions as he may think proper. *Ex parte Hunt,* 10 Ark. 284; *Baldwin* v. *Scoggin,* 15 Ark. 427; *Ex parte Hawkins,* 61 Ark. 321; and *Ex parte Brady,* 70 Ark. 376.

A commutation of sentence is a change of punishment into one less severe, substituting a less for a greater punishment by authority of law. *Mullen* v. *United States,* 212 U. S. 516. This is the generally accepted legal definition of commutation of sentence. 29 Cyc. 1561, and cases cited.

The legal meaning of reprieve is to suspend the execution of sentence for a definite time. 34 Cyc., p. 1621, and 20 R. C. L., p. 528.

In the application of these definitions to the instrument under consideration, we all agree that it is not a pardon, conditional or absolute, nor a reprieve. The court, however, is of the opinion that the instrument is a commutation of sentence, and was therefore, under our Constitution, an instrument which the Governor had the power to grant. In this connection it may be said that the statute construed in *Horton* v. *Gillespie,* 170 Ark. 107, applies only to pardons.

It is insisted that the instrument it not a commutation of sentence because, in the beginning of it, it is termed "an indefinite furlough." It is true that the word "furlough" is a military term, and means leave given to a soldier to be absent from service for a certain time, but the name should not control where it is at variance with the substance of the instrument. The rule is that a pardon must be construed most strictly against the State and most beneficially for the convicted person. *Ex parte Hunt,* 10 Ark. 284; and *Redd* v. *State,* 65 Ark. 475.

There seems to be no good reason why this rule of construction should not be applied to commutations of sentence as well as to pardons.

Again, this court has held that the Governor may grant conditional pardons, and for the same reason we think that he may grant conditional commutations of sentence. If commutation of sentence means to change from a higher to a lower or less severe punishment, the instrument in question should be construed as a whole, and that meaning given to it which it was intended by the Governor to have.

As we have already seen, to commute means to change, and, as the Constitution vests this power in the executive as well as the power to grant pardons, the same rule of construction should be applied to both, and the instrument should be read and construed as a whole in order to carry into effect the intention of the Governor.

A judgment of conviction and sentence is the basis upon which the commutation is grounded. The prisoner was sentenced to three years' imprisonment in the penitentiary. The Governor first granted him a commutation which, by its own terms, ended on January 3, 1924, which was before his sentence of three years had expired. Again a commutation was granted to the prisoner, which would have terminated on the second day of January, 1925, which was also before his sentence had expired.

On the 29th day of October, 1924, Governor McRae delivered to Brents the instrument under consideration

in this case. It is true it is termed "an indefinite furlough," but it is coupled with such conditions and restrictions as show that they were only to be complied with during the period of the sentence. When the instrument is considered from its four corners, the terms of the commutation do not indicate that it was contemplated that the conditions should operate beyond the term of the sentence from which the defendant was released.

In the absence of language showing such intention, there seems no good reason for holding that the conditions of the commutation were to be extended beyond the period of his sentence. He was required to refrain from the use of intoxicating liquors as a beverage and the use of deleterious drugs. He was required not to carry a weapon, and not to gamble or be in possession of any gambling device. He was also required, on the first day of each month until the expiration of his sentence, to notify the warden of the penitentiary where he was and what he was doing. This indicates that, if he complied with the conditions of the commutation until the expiration of the period of his sentence, he was to be released and discharged from further punishment.

The provision "that the time granted in this furlough is not to be counted in computing said prisoner's term of confinement," when read in connection with the words preceding it, shows that it was intended that, if Brents should violate any of the conditions of his commutation of sentence and should be rearrested for violating such conditions, the time he had been at liberty under the commutation should not be counted as a part of the term of his sentence. But, if he should not be rearrested during the period of his sentence for a violation of any of the conditions of his commutation, he was entitled to be free at the end of the term of his sentence.

One of the main objects in granting the commutation was to look to the reformation of the defendant, and the special control of the conduct of the defendant ceased when his term expired, and there seems to be no controlling language in the commutation showing an intention on

the part of the Governor to extend the conditions and restrictions beyond the expiration of the sentence, and, under the beneficent rule above announced, all doubts should be construed in favor of the defendant's liberty. This is especially true when we consider that, under our Constitution, the Governor had the power to grant Brents a commutation of sentence, and had none to grant him a "furlough."

It is well settled that no technical words or terms are necessary to constitute a pardon or a commutation of sentence. The instrument in question had the effect of remitting or releasing conditionally the punishment of Brents, without removing his guilt. It is only a full pardon of the offense which can wipe away the infamy of the conviction and restore the convict to his civil rights. *Perkins* v. *Stevens,* 24 Pick. (Mass.) 277, and *Ex parte Garland,* 4 Wall. (U. S.) 333.

It would take a pardon to restore his citizenship, but, having complied with the terms of the commutation of sentence during the period of his sentence, and this being the period of time provided for in the commutation, in the opinion of the court, the Governor had no right to have Brents rearrested after his term of imprisonment had expired, and the circuit court properly released him from custody.

It follows that the petition for a writ of certiorari to quash the judgment of the circuit court will be denied, and the judgment will be affirmed.

WALKER v. STATE.

Opinion delivered June 7, 1926.

1. FORGERY—DESCRIPTION OF PERSON DEFRAUDED.—An indictment for forgery need not state whether the association or company intended to be defrauded was a corporation or a partnership.
2. FORGERY—NAME OR SIGNATURE USED.—To constitute a forgery, the named alleged to be forged need not be that of an existing person but may be that of a fictitious person.
3. FORGERY—VARIANCE.—Where an indictment for forgery of a check alleges that the check was indorsed by the payee, but does not allege that the indorsement was forged, proof that the indorsement was made after the forgery does not constitute a variance.
4. CRIMINAL LAW—PROOF OF OTHER CRIMES.—In a prosecution for forgery of a check, where accused denied having forged or uttered the check, proof that he had uttered other forged checks was admissible as tending to prove a similarity of handwriting and to show a method of procedure or course of conduct.

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

D. L. Ford and *Evans & Evans,* for appellant.

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

SMITH, J. Appellant was tried under an indictment which charged him with forgery, and with uttering a forged instrument. The writing alleged to have been forged and uttered was a check drawn on the People's Bank of Ozark, Arkansas, for $4.50, payable to the order of Mathews Hardware Company and purporting to be signed by T. E. Smith. Each count of the indictment alleged that the check was indorsed on the back thereof "Pay to any bank, Ozark, Arkansas. Chas. E. Mathews Hdw. Co., Chas. E. Mathews, Prop."

Appellant was convicted on the count charging him with forging the check, and was acquitted on the second count, which charged him with uttering it.

A motion in arrest of judgment was filed upon the ground that the indictment did not state facts sufficient to constitute a charge of forgery, in that it did not allege

whether the payee, the Mathews Hardware Company, was a person, a copartnership, or a corporation.

It was shown that the name of the drawer of the check, T. E. Smith, was that of a fictitious person, and instructions were asked which, if given, would have told the jury that, if this were true, appellant would not be guilty of forgery, but would be guilty of the offense of obtaining goods and property under false pretenses, an offense not charged in the indictment, and to acquit the defendant on this account. It is also insisted for the reversal of the judgment of conviction that error was committed in admitting certain testimony, and that there was a variance between the testimony and the allegations of the indictment.

As to the assignment of error that the indictment failed to allege whether the Mathews Hardware Company was an individual, a copartnership, or a corporation, it may be said that this allegation is unnecessary in an indictment for forgery. In the case of *Blais* v. *State,* 94 Ark. 327, it was said: "Moreover, the authorities seem to sustain the view that, in an indictment for forgery, unlike an indictment for larceny or kindred offenses, it is unnecessary to state whether the association or company intended to be defrauded was a corporation or a partnership."

The court did not err in refusing to instruct the jury that, if T. E. Smith were found to be a fictitious person, the crime committed was not forgery, but that of obtaining money under false pretenses. In the case of *Maloney* v. *State,* 91 Ark. 485, it was held that to constitute forgery the name alleged to be forged need not be that of any person in existence.

The assignment of error in regard to the variance between the allegations of the indictment and the testimony is based upon the fact that the indictment alleges that the check was "indorsed on the back thereof: 'Pay to any Bank, Ozark, Arkansas. Chas. E. Mathews Hdw. Co., Chas. E. Mathews, Prop.' ", whereas the proof

shows that the check accepted by the Mathews Hardware Company contained no indorsement whatever.

We think there was no variance. In the case of *Crossland* v. *State,* 77 Ark. 537, it was held that the indorsement on a check does not constitute in law a part of the check, and need not be set out in an indictment for forgery of such check, but that, if the indictment is for the forgery of the indorsement, it should be set out, accompanied with such averments as will make the offense affirmatively appear.

There was no allegation that appellant forged the indorsement. This allegation was not essential to the validity of the indictment, but was placed therein merely for the purpose of more complete identification. No doubt, if it had been omitted, the contention would have been made that there was a variance, as the forged check did not contain the indorsement, but the check introduced at the trial did. The indorsement resulted, of course, from the fact that, upon depositing the check for collection, the payee indorsed it. The testimony on the part of the State shows that the check was delivered to Matt Self, a salesman of the hardware company, in payment of a purchase which appellant had made, being thus accepted as cash. There was therefore no variance.

A more serious question is that the court erred in admitting certain incompetent evidence. The testimony on the part of the State was to the effect that on January 16, 1925, appellant purchased from the Mathews Hardware Company a pair of clippers, the price of which was $4.50, and gave the check in question in payment therefor. In about four days the check was returned by the bank in which it was deposited for collection to the hardware company, with the information that the drawer had no account in the bank on which it was drawn. Appellant denied signing the check, or that he uttered it in payment of the clippers, or for any other purpose.

The prosecuting attorney offered in evidence two checks which appellant had drawn in favor of Mrs. George Hutchens. The first of these checks was dated April 17,

1925, and was signed T. J. Smith. The second was dated July 10, 1925, and was signed T. E. Brown. Mrs. Hutchens testified that she cashed the two checks for appellant.

Mrs. Gussie Haberer testified that she received from appellant a check for $4 dated June 29, 1925, which bore the signature of T. E. Walker, and that this check proved to have been signed by a fictitious person, as were those cashed by Mrs. Hutchens.

Appellant testified as a witness in his own behalf, and, at the request of the prosecuting attorney, wrote the names: T. E. Smith, T. J. Smith, T. E. Brown, and T. E. Walker, and these signatures were submitted to the jury for comparison. Appellant denied having signed any of the checks offered in evidence by Mrs. Hutchens and Mrs. Haberer, and objected to the introduction of these checks in evidence.

We think no error was committed in admitting the checks cashed by Mrs. Hutchens and Mrs. Haberer in evidence. Appellant denied having purchased the clippers from the Mathews Hardware Company, and denied any knowledge of the check which the State's witnesses testified was accepted in payment of the clippers. There was a question therefore of identity in the case. Mrs. Hutchens and Mrs. Haberer testified that appellant signed the checks which they did cash, and appellant wrote, without objection, the names signed to all the checks. The names written by him in the presence of the jury were, of course, in his writing, and the jury had the right to compare these admitted signatures to identify the similarity of the writing of the check alleged to have been forged with the admitted writing done in the presence of the jury. This evidence tended to identify appellant as the man who had purchased the clippers, a fact which he denied.

The testimony tended also to show the system by means of which appellant obtained the goods and property of others. The method employed in all the cases

was the same, and the times of the passing of these checks were in January, April, June and July, of 1925.

In the very recent case of *Duvall and Rice* v. *State, ante,* p. 68, we held that proof of similar crimes was admissible when such proof tended to show a method of procedure or a course of conduct, provided such similar crimes were not remote in point of time from the crime charged. The other crimes here were not so remote as to be without probative value. The evidence of these crimes tended to show the system or method of procedure employed by appellant to defraud, and the comparison of the handwriting on the check here alleged to be forged and the signatures written in the presence of the jury tended to identify him as the author of all the writings, and as being the person who bought the clippers and tendered the forged check in payment thereof.

In the chapter on Forgery in 12 R. C. L., page 168, § 31, it is said: "However, evidence of distinct offenses of the same character committed by the accused is admissible, though not contemporaneous nor a part of the same transaction, if it shows or tends to show that the accused had adopted the same plan to utter forged instruments in other cases as is charged by the prosecution in the case on trial."

Upon a consideration of the whole case we find no prejudicial error, and the judgment is affirmed.

FIRST NATIONAL BANK OF LEPANTO *v.* FIRST NATIONAL BANK OF MONETTE.

Opinion delivered June 7, 1926.

1. BANKS AND BANKING—CONVERSION OF NOTE—VARIANCE.—In an action by a bank against another bank for conversion of its cashier's personal note sent to it for collection, where defendant raised the issue of collusion between the cashiers of the two banks to defraud the banks, admission of correspondence relating to notes and showing the course of dealings between the two banks was not objectionable as changing the action from one for conversion to one on contract.

2. BANKS AND BANKING—LETTER AS EVIDENCE.—In an action by a bank against another bank for conversion of a note sent for collection, a letter of plaintiff's cashier to his brother asking him to secure a renewal of the note in question then in possession of defendant bank, *held* admissible, in view of the brother's testimony that he exhibited the letter to defendant's cashier and that the cashier acknowledged receipt of a copy of the letter.

3. TRIAL—INSTRUCTION—GENERAL OBJECTION.—In an action by a bank against another bank for conversion of a note executed by the latter's cashier and sent to the latter bank for collection, an instruction as to the general scope of authority of a cashier was not objectionable as not taking into consideration whether the latter's cashier was acting for himself or for the bank, in the absence of a specific objection.

Appeal from Poinsett Circuit Court; *G. E. Keck,* Judge; affirmed.

Scobey & Mosby, for appellant.

Horace Sloan, for appellee.

SMITH, J. This is the second appeal in this case, and in the former opinion the facts out of which this litigation arose were fully stated, and it is unnecessary therefore to restate them. *First Nat. Bk. of Monette* v. *First Nat. Bk. of Lepanto,* 159 Ark. 517, 252 S. W. 594.

J. H. Harkins, the cashier of the Lepanto bank, had borrowed $2,000 from the Monette bank, and the note had been indorsed by L. D. Mullins, and a renewal note had also been indorsed by Mullins. This second note was not paid, but was renewed, and the note here sued on is the note which was given in renewal. The last renewal note was sent to the Lepanto bank for renewal or collection, but was never renewed or returned, whereupon the Monette bank sued the Lepanto bank for the conversion of the note. There was a verdict and judgment for the Monette bank, and the Lepanto bank has appealed.

The defenses set up in the trial from which this appeal comes were: (1), that Mullins had not indorsed the renewal note sued on, which was dated June 25, 1920. It is conceded that a note indorsed by Mullins for $2,000 would be good and collectible, but it was insisted that Mullins had not indorsed the note, that the last note

which he did indorse had been paid by the giving of a new note indorsed by a man who had since become insolvent, and that Harkins too had become insolvent, so that the note in suit was without value; (2), that the transaction was a collusive arrangement whereby the cashiers of each of the banks loaned money to the other; that the notes were not handled by either cashier in the usual and ordinary course of the banking business, and that therefore the defendant bank is not responsible for the loss of the note, the same having been received from the plaintiff bank by Harkins, who was the cashier of the defendant bank, in his personal capacity, and not as cashier of the defendant bank.

Mullins testified that the last note which he indorsed was payable to the Lepanto bank, and not to the Monette bank, but the question whether Mullins had indorsed the note alleged to have been converted is concluded by the verdict of the jury, and it is not questioned that a note so indorsed was worth its face value.

For the reversal of the judgment of the court below, it is insisted that the court erred in admitting certain incompetent evidence and in giving conflicting instructions.

It is asserted that the alleged incompetent testimony, which was admitted over the objection and exception of the Lepanto bank, changed the nature of the suit, which was originally for the wrongful conversion of the note, to a suit on a contract wherein the Lepanto bank had agreed to pay the note. This testimony consisted of certain correspondence between the two banks signed by the respective cashiers. In one of the letters from the defendant bank the cashier of that institution had stated that the defendant bank was overloaded with paper which was good, but which the bank was unable to carry, and the plaintiff bank was asked to take certain amounts of this paper, and the letter containing this request guaranteed the payment of the paper which the plaintiff bank was asked to take. Other letters related to paper which was being transmitted between the banks, and several of these

letters referred to paper owned by the defendant bank other than the Harkins note.

We think these letters were competent under the issues joined, and we do not think they tended to change the nature of the cause of action from a suit for a conversion to a suit on a contract, for the reason that one of the principal contentions was that the loan to Harkins was the result of a collusive agreement whereby each cashier loaned money to the other. It was competent for the plaintiff bank therefore to show that there was no collusion between the respective cashiers of the two banks. The purpose of the letters offered in evidence was to show that there was a regular course of dealing between the banks by which plaintiff bank had undertaken to accommodate some of defendant bank's customers, and that the Harkins note, indorsed by Mullins, was one of these notes, and that it was not therefore a collusive affair between the two cashiers for the purpose of defrauding their respective banks or of using the funds of the banks without authority.

According to the testimony offered in appellee's behalf, this arrangment was first an oral one, which had been discussed by the president and cashier of the plaintiff bank with the president and cashier of the defendant bank. These letters, which were admitted over appellant's objection, tended to show that, pursuant to this arrangement, appellee bank had been handling paper of the customers of the appellant bank, including two officers thereof, one a vice president and another a director, and the letters had some probative value to show that there was nothing wrong or collusive between the cashiers of the two banks, but that the loan to Harkins and the renewal thereof were made in due course of business. The verdict of the jury is conclusive of this issue.

Special objections were made to a letter written by Ned Fraser, the cashier of the Monette bank, to his brother, Leving Fraser, who resided in Lepanto, but was not connected with either bank, this letter being made "Exhibit M" to the testimony of Ned Fraser. This

letter inclosed three notes for which the Monette bank was asking either payment or renewals, and also requested Leving Fraser to secure renewals of five other notes which were referred to as being then in the possession of the Lepanto bank. Among these last five notes was one referred to as the Harkins-Mullins note for $2,000, the note alleged to have been wrongfully converted. It is insisted that this letter was self-serving, and was highly incompetent.

The letter made "Exhibit M" was dated October 18, 1920, and was offered in evidence under the following circumstances: Ned Fraser testified that he was unable to get returns from the Lepanto bank on certain notes which had been sent to that bank for payment or renewal, and among these notes was the one in suit, so he wrote his brother, Leving Fraser, to call at the Lepanto bank and make inquiry about them. The objection was made that the letter would be the best evidence of any authority conferred upon Leving Fraser, whereupon the letter was produced and offered in evidence. Objection was then made to the admission of the letter upon the grounds, (a), that the Lepanto bank never came in contact with the letter, and (b), that the letter was a self-serving declaration.

Leving Fraser testified that he received the letter, and, in order to show his authority to act for the Monette bank, he exhibited the letter to Harkins, who was at the cashier's window of the Lepanto bank and in charge of the bank at the time, and he testified that Harkins told him that he had received a copy of the letter, and admitted that the bank then had the Harkins-Mullins note.

We think there was no error in admitting this letter. The testimony of Leving Fraser made it admissible, even though it would appear to have been only a self-serving declaration at the time Ned Fraser offered it in evidence. Leving Fraser testified that he exhibited the letter to Harkins to show his authority for inquiring about the

note, and Harkins admitted having received a copy of it from the Monette bank.

The court gave, over appellant's objection, an instruction numbered 11, reading as follows: "You are further instructed that it is within the general scope of employment of the cashier of a bank to receive and handle notes sent to that bank in due course of trade for collection, and you are told that it needs no special authority given by special or separate resolution of the board of directors of that bank to authorize him to handle said notes so sent for collection. Any note, sent in due course of business from one bank to another, or from individual to a bank, for the purpose of collection, would come under the general scope of authority of the cashier of the bank, and the cashier would have authority to handle that note as the agent of and for the bank."

There was testimony showing what the duties of a bank cashier were, and the objection is not made that the instruction does not correctly declare the law; the objection is that the instruction does not take into consideration the question whether Harkins was acting for himself or the bank of which he was cashier, and is therefore in conflict with other instructions which submitted the question of collusion between the two cashiers.

As has been said, it is not contended that the instruction does not correctly declare the law defining the duty and authority of a bank cashier. The instruction refers only to notes sent in the ordinary course of business from one bank to another, and it was the theory of appellee that the note in suit had been so remitted to appellant bank. The court gave, at appellee's request, three instructions dealing with the question of collusion between the two cashiers. In another instruction the court told the jury that no one instruction was to be taken as the whole law of the case, but that all the instructions were to be considered together. There was no specific objection that the instruction took no account of the question of collusion, and this should have been made if appellant conceived the instruction to be in conflict with the instruc-

tions on that subject. *Alexander* v. *Williams-Echols Dry Goods Co.*, 161 Ark. 363, 256 S. W. 55.

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

DAVIS v. WHITE.

Opinion delivered June 7, 1926.

1. EQUITY—WITHDRAWAL OF REFERENCE TO MASTER.—Under Crawford & Moses' Digest, § 7162, a court of equity has the discretion, after having referred a case to a master, to proceed to a decision before the coming in of the master's report.
2. SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY OF URBAN DISTRICTS TO ISSUE BONDS.—Under Crawford & Moses' Dig., § 8984, giving urban school districts authority to issue bonds, such districts may issue bonds without consent of a majority of the legal voters; and where they have done so, and have received the contract price, they are estopped to question the legality of the transaction.
3. SCHOOLS AND SCHOOL DISTRICTS—ISSUANCE OF BONDS WITHOUT ADVERTISEMENT.—Though any person interested has a right to enforce the provisions of Crawford & Moses' Dig., § 8984, requiring bonds of urban special school districts to be advertised for 20 days, yet where bonds are issued without compliance therewith and the proceeds are received by the district, it will be estopped to assert its own default, as also will be its patrons.
4. SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY OF PATRONS TO SUE.—Patrons of a school district have no greater right to sue to protect the interests of the district than the directors have, since their right to sue arises out of the directors' failure or refusal to act.
5. SCHOOLS AND SCHOOL DISTRICTS—PAYMENT OF PROCEEDS OF BONDS TO TREASURER.—Under Crawford & Moses' Dig., § 8987, directing the proceeds of a bond issue to be deposited with the county treasurer or to the treasurer of the district, payment of such proceeds to a *de facto* treasurer of the district was a payment to the district.
6. SCHOOLS AND SCHOOL DISTRICTS—RATIFICATION OF ORAL CONTRACTS.—Where a school district failed to require written contracts with teachers and where schools were taught without funds and without petition of the patrons authorizing same, but no objection was raised until the contracts were fully performed by the teachers and warrants were issued for their services, the contracts were ratified.

7. SCHOOLS AND SCHOOL DISTRICTS—FAILURE TO PRESENT WARRANTS IN 60 DAYS.—School warrants are not rendered invalid by failure to present them to the county treasurer within 60 days after issuance, as provided by Crawford & Moses' Dig., §§ 8981-2.

8. COSTS.—In an action by patrons of a school district to determine the legality of bonds and warrants issued by a school district, it was not an abuse of the chancellor's discretion to assess the costs against the plaintiffs, though a warrant for interest was held to have been illegally issued; such being a mere incident to the litigation and only a small part of the relief prayed.

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

Geo. T. Humphries, David L. King, John H. Caldwell and *T. H. Caraway*, for appellant.

H. A. Northcutt and *Cole & Poindexter*, for appellee.

SMITH, J. This suit was begun by appellants, who pay taxes and reside in Mammoth Spring Special School District No. 2, against the directors of said district, the treasurer of the county, and the Citizens' Bank of Mammoth Spring, and certain other parties.

After much testimony had been taken, the court made an order, at the joint request of both parties, wherein a master was appointed to continue the taking of testimony and to make findings of fact on the issues raised. Testimony was taken from time to time, and, after the cause had been pending for about a year and a half, the Hanchett Bond Company, hereinafter referred to as the bond company, filed an intervention, in which it alleged that the district had issued certain bonds, which the bond company had purchased, and that the district had defaulted in the payment of both principal and interest. The bond company prayed judgment for the unpaid interest and for the amount of the bonds which had matured and had not been paid. The appellants filed a response to this intervention and a cross-complaint, in which they alleged that the bonds had not been legally issued and were not valid obligations of the district, and it was prayed that these bonds be canceled. The bond company filed a demurrer to this response and cross-complaint, which was sustained by the court, whereupon appellants filed a

substituted response. Thereupon the bond company renewed its demurrer to the substituted response, and this demurrer was also sustained, and a decree was thereupon rendered in favor of the bond company requiring the district to pay the bond company the matured part of the bonds and the interest.

We will not review the immense record in the case, as the court appears to have found in favor of appellants on the disputed questions of fact, but, after doing so, the court rendered a decree dismissing the complaint as being without equity, except that the court found that the district had illegally issued a warrant for $691.36 interest due the Citizens' Bank on warrants of the district which the bank had cashed, and the costs of the entire case were assessed against appellants.

The court made findings of fact which reflect what the issues were upon which the testimony was taken, as follows:

(1). Appellants are citizens and taxpayers, and as such brought this suit on behalf of the school district to protect what they conceived to be the interests of the district, as the directors of the district had refused to bring the suit.

(2). R. L. White is the county treasurer of Fulton County, as alleged in the complaint.

(3). C. W. Dixon was a director of said district and the secretary and acting treasurer of the school board, and the president of the Citizens' Bank at the time said bank cashed the various school warrants which had been issued by the district in paying the salaries of school teachers and for other purposes.

(4). That all the school revenues for the fiscal school year of 1919-1920 were paid out on warrants issued for the maintenance of said school, and, in the absence of sufficient funds on hands, and without a petition signed by a majority of the patrons of said district, the directors issued warrants covering the operating cost of the school for the year 1919-1920.

(5). Warrants bearing date 1920-1921 were also issued by the directors, although the school revenues collected for the maintenance of said school during the fiscal year 1920-1921 would be absorbed by the payment of warrants previously issued for the operation of the school, and in the absence of sufficient revenue for that school year, and without any petition signed by a majority of the patrons of the school district.

(6). That warrants dated during 1921-1922 were issued, although all school revenues collected for the maintenance of the school during said school year would have been absorbed in the payment of warrants previously issued for the maintenance of the school. These warrants had been cashed by the Citizens' Bank for the holders thereof at their face value. (A part of the relief prayed by the appellants was that these unredeemed warrants be canceled).

(7). That in 1922 the county treasurer paid on excessively issued and left-over warrants of 1919-1920 all the school revenues of the district collected and turned into the county treasury during the fiscal school year of 1922-1923, leaving nothing for the maintenance of the school during that year.

(8). That the bonds of the district, which had been issued and used in building an addition to the schoolhouse, were issued and sold without any election being held in said district for such purpose; were sold below par; the sale was not advertised; nor were any of said bonds registered with the county treasurer or indorsed by the State Superintendent of Public Instruction; and the proceeds from the sale of the bonds were never turned over to the county treasurer, but were delivered to and deposited with the Citizens' Bank and paid out in cash for building purposes.

(9). (a) Although said warrants were issued in excess of all available revenues on hand or contemplated for the respective fiscal school years during which same were issued, and (b) in the absence of petitions signed by a majority of the district patrons for the employment of

teachers for which said warrants were given, they are valid evidences of debt against said special school district, and due and payable as funds are collected and turned into the county treasury from year to year until said warrants are paid.

(10). That the school district made oral, instead of written, contracts with the teachers for whose services the warrants were drawn.

(11). And when said teachers were so employed there were no funds on hand with which to pay the teachers, and these contracts of employment were made without any petition signed by a majority of the patrons of the school district.

(12). Said warrants were not registered with the county treasurer within sixty days of their issuance.

(13). The teachers' contracts were not reduced to writing and filed with the county treasurer.

(14). The county treasurer paid out all the school revenues turned into his office from 1919 to 1923 without a copy of any contract of employment of teachers being filed in his office.

Upon these findings of fact, appellants insist that the bonds of the district should be declared void, and canceled; that the warrants anticipating the revenues of the district, which were cashed by the bank, should also be canceled; and judgment was prayed against the county treasurer and the sureties on his bond for the amount of warrants paid to teachers who had no written contracts, etc.

The court denied the relief prayed, except that it decreed the cancellation of the warrant issued by the district in payment of the interest to the bank on warrants which the bank was carrying.

The court found that the failure of the directors of the district to fully comply with the law in the issuance of the warrants, and in the issuance and sale of the bonds, were mere irregularities of procedure, which did not invalidate them; and that the county treasurer was not liable for paying out the revenues of the district to the

teachers; and also found that the directors were not liable for so issuing said bonds and warrants. Upon this finding of law and fact a decree was rendered in favor of the bank for the amount of the warrants held by it, less the one for interest, and, as has been said, a decree was rendered in favor of the bond company awarding it judgment for the amount of the matured unpaid bonds and interest.

It is insisted that the court erred in proceeding to a decision of the case before the coming in of the master's report. But we think it was within the discretion of the court to withdraw the reference to the master. Counsel for appellees say that the master had never qualified and had never entered upon the performance of his duties. But in any event his report, had he made one, would not have been binding on the court. Section 7162, C. & M. Digest. Moreover, it appears that the court found the facts in appellant's favor.

For the reversal of the decree of the court below appellants first insist that the court erred in sustaining the demurrer of the bond company to the answer of the district to the intervention of the bond company, and in not canceling the bonds of the district, for the reason that the provisions of the statute on the subject were not complied with.

Appellants cite the cases of *Robertson* v. *Rural Special School District No. 9,* 155 Ark. 161, and *Rural Special School District No. 30* v. *Pine Bluff,* 142 Ark. 279, in which cases it was held that the school district bonds issued by the rural special school district, without the consent of the majority of the legal voters granted at the annual school meeting, and in accordance with § 8837, C. & M. Digest, are void, even in the hands of an innocent purchaser. It was so held in those cases as to such districts, because, under the statute conferring this authority on rural special school districts, it was provided that the power to issue bonds might be exercised only upon the vote of the legal electors at an annual school meeting. But Mammoth Spring Special School Dist. No 2 is not a rural

special school district, and did not derive its authority to issue bonds from § 8837, C. & M. Digest. Section 8984, C. & M. Digest, is the section of the statute under which appellee school district proceeded, and this section does not require, as a condition precedent to the issuance of bonds, the consent of the electors. *Milwee* v. *Board of Directors of Horatio Special School Dist.*, 105 Ark. 77. In other words, the affirmative vote of the electors is not required to confer this authority on the urban special school districts of the State, which derive their authority to issue bonds under § 8984, C. & M. Digest. Having this power, and having exercised it, and having received from the purchaser of the bonds the contract price therefor, the beneficiaries of the transaction are estopped from questioning the legality of the sale.

It is true, of course, that while § 8984, C. & M. Digest, does not require an election to confer authority or power on urban special school districts to issue bonds, it does prescribe the manner in which such bonds may be sold, and these provisions cannot be treated as being directory. They are in fact mandatory in the sense that any person interested in the issuance of such bonds or affected thereby would have the right, in an appropriate action, to require compliance with the provisions of this section before the district could issue or sell its bonds. This section contains the express limitation that the bonds issued shall not bear interest at a greater rate than six per cent. per annum, and a bond bearing interest greater than six per cent. would, to the extent of such excess, be void because of the lack of power or authority on the part of the board of directors to issue bonds bearing a higher rate of interest. But the bonds here sought to be canceled did not bear a higher rate than six per cent.

It is also provided in § 8984, C. & M. Digest, that the sale of the bonds shall be advertised for twenty days, and that the bonds shall not be sold for less than par, and, as has been said, any person interested would have the right to enforce compliance with these provisions of the statute. But these provisions, although mandatory, do not

relate to the power of the board of directors to issue the bonds, and, if bonds are issued (without collusion or fraud) without compliance with these provisions, the district is estopped, after receiving the proceeds of the bonds and using them, from asserting its own default. So also are the patrons of the district, who have no greater right to sue to protect the interests of the district than the directors have, and whose right to sue to protect the district arises out of the failure or refusal of the directors so to do.

In the case of *Arkansas Foundry Co.* v. *Stanley,* 150 Ark. 127, a taxpayer in an improvement district brought suit to enjoin the commissioners of the district from selling the bonds of the district below par, it being provided in the act creating the district that bonds might be issued, but could not be sold below par. We recognized the right of a taxpayer to bring the suit, and held that he would be entitled to the relief prayed, had the showing been made that the district was in fact about to sell its bonds below par. Relief was denied in that case, however, because it was only shown that the district proposed to pay a reasonable brokerage fee to negotiate the sale, and it was held that the district had this right, although this fee was paid out of the proceeds of the sale of bonds for which the purchaser paid only par.

So here appellants, had they proceeded before the sale was made, would have been entitled to enjoin the sale of the bonds if they were offered for sale without advertisement or at a price less than par and a reasonable brokerage fee. However, they did not do so, and it is now inequitable to grant the relief prayed, that of the cancellation of the bonds, after the district has received and expended their proceeds.

As to the allegation and finding that the proceeds of the sale of the bonds were not paid to the county treasurer, it may be said that the court also found that the district had a treasurer who was, at least, a *de facto* officer, and this officer received the proceeds of the bonds and deposited the money to the credit of the district in a bank

of which he was president, but the court found that this money had been regularly paid out on the warrants of the district, and had been used in the construction of an addition to the district's school building.

By § 8987, C. & M. Digest, it is provided that, where a school district has sold bonds, the proceeds thereof shall be deposited with the county treasurer, but this section has the proviso "that, when any district has a treasurer of its own, all money shall be paid to said treasurer, instead of the county treasurer." As the money was paid to an officer who was at least a *de facto* officer, and as this money was expended by the district in the enlargement of its school building, we do not think it can be said that the district did not receive the proceeds of the bond sale.

As to the warrants issued to the teachers, it may be said that, while the court found the fact to be that the teachers did not have written contracts as required by law, and while these contracts were not filed with the county treasurer, and while the schools were taught at a time when the school district had no funds with which to pay the teachers, and there was no petition on the part of the patrons of the school authorizing the schools to be taught, the fact remains that these questions were not raised until after these contracts had been fully performed on the part of the teachers and warrants had been issued to the teachers for the services performed. These contracts were therefore ratified.

In the very recent case of *Bald Knob Special School District* v. *McDonald, ante,* p. 72, we held that the authority conferred upon school directors in regard to employing teachers is limited to employment by written contract, and that, while an oral contract might be ratified, the ratification extended only to the portion of the contract which had been performed, and not to the entire contract, and that the district was liable only for the services actually performed. Here however the question arose over warrants issued to teachers for services completely performed. The warrants were issued after the schools had been taught, and were cashed without discount by

the bank, and the relief prayed is to cancel these warrants which are now held by the bank. The case cited is against the contention that the warrants are void because there was no written contract between the teachers and the district.

Upon the issue that the schools were taught when the district had no funds to pay the teachers, and this without a petition signed by a majority of the patrons of the school requesting that this be done, it may be said that the case of *Dell Special School District No. 23* v. *Johnson,* 129 Ark. 211, is decisive of the question. Upon this issue, the facts in that case are similar to those of the instant case, except there was a petition in that case to determine which of two teachers should be employed. The directors had agreed to employ the teacher receiving the highest number of favoring signatures. Neither petition circulated among the electors was predicated upon the fact that the district was without funds and that the petitions were intended to confer authority to have a school taught notwithstanding that fact. Johnson received a majority of favoring signatures, and was employed, but it was stated in the opinion "that there was no valid and binding contract made with the school board, but recovery is sought solely on the theory that the informal, verbal contract entered into between Johnson and the school board was subsequently ratified by the conduct of the school board and the patrons of the school in permitting Johnson (and his assistant, who had been paid by him), without objection, to teach the school for the full period of six months (the period of time covered by the verbal contract)." The right of the teacher to recover was upheld, and in affirming the judgment which he had recovered against the district we said: "The ratification in this instance was complete, because the directors had full knowledge of the operation of the school, and by their conduct expressed their acquiescence and favor. We must of course recognize the limitation upon this doctrine that a contract which was void in the beginning for want of power to make it cannot be ratified. (Citing cases)."

What was there said is equally applicable here, and we must therefore hold that by ratification the district has become liable on the warrants drawn in payment of the salaries of the teachers.

It is finally insisted that the warrants are void because they were not registered by the holders thereof within sixty days of the date of their issuance. This contention is based upon § 8981, C. & M. Digest, which reads as follows: "The order of any board of directors, properly drawn, after the passage of this act, shall be presented to the treasurer of the proper county within sixty days after it was drawn by the said board of directors. All such orders shall be paid in the order of their presentation; provided, this act shall not apply to school warrants registered prior to May 1, 1899."

Section 8982, C. & M. Digest, provides the procedure where warrants are not paid for the want of funds. It reads as follows: "If there are no funds with which to pay such order, the treasurer shall indorse the same: 'Not paid for want of funds,' giving the date and signing his name officially. He shall number and record each warrant in the book provided for such purpose, keeping a separate record for each district, and shall pay said warrants in order of their number."

We do not think the purpose or effect of this legislation was to render void the warrant of the district because of the failure to register it with in sixty days from its issuance.

By section 6250, Mansfield's Digest, the county treasurer was required to keep a record in which he registered school warrants presented for payment, and § 6255, Mansfield's Digest, reads as follows: "The order of any board of directors, properly drawn, after the passage of this act, other than those of single school districts in cities and towns, shall be presented to the treasurer of the proper county within sixty days after it was drawn by said board of directors. Provided that, if such order is not presented within the above specified time, it shall be

rejected and become null and void. All such orders shall be paid in the order of their presentation."

This section 6255, Mansfield's Digest, was amended by act No. 70 of the Acts of 1885 (Acts 1885, page 107), and the amendatory act of 1885 was construed in the case of *School District* v. *Reeve,* 56 Ark. 64, in which it was held that the provision contained in § 6255, Mansfield's Digest, that school warrants should be void unless presented to the treasurer within sixty days after their issuance, had been repealed by the act of 1885. It appears therefore that the purpose of the act of 1885 was to repeal the law which rendered a warrant void if it were not presented to the treasurer within sixty days of its issuance, and the existing statute must be interpreted in the light of this prior legislation as construed in the case of *School District* v. *Reeve, supra,* Moreover, the warrants of special school districts in cities and towns were expressly exempted from the provisions of § 6255, Mansfield's Digest, invalidating warrants which were not registered within sixty days of their issuance.

We conclude therefore that the failure to register the warrants within sixty days did not render them invalid, and this failure can be taken into account only in determining the order of their payment, their payment being postponed until those of prior registration have been paid.

It is finally insisted that the court erred in assessing the costs of the case against appellants, plaintiffs below, inasmuch as the court granted relief to the extent of canceling a warrant which had been issued in payment of interest which the district had agreed to pay on other warrants which were outstanding. This was, however, a mere incident to the litigation, and was only a small part of the relief prayed. The chancellor had the discretion to adjudge the costs in the manner which he considered equitable, and we think no abuse of his discretion was shown.

Upon the whole case we find no error in the decree of the court below, and it is therefore affirmed.

DUNCAN LUMBER COMPANY v. BLALOCK.

Opinion delivered June 7, 1926.

1. CORPORATIONS—VENUE OF ACTION.—Under Crawford & Moses' Dig., §§ 1152, 1171, a transitory action against a domestic corporation should be brought in the county where the corporation has its principal place of business or in a county where it has a branch office or other place of business by service upon the agent or employee in charge thereof.
2. CORPORATIONS—VENUE OF ACTION—SERVICE OF PROCESS.—Under Crawford & Moses' Dig., § 1152, 1171, service of process in a transitory action against a domestic corporation, issuing from a court of the county where the corporation had a branch office and served on the manager of the principal office in another county where the corporation had its principal place of business, should have been quashed.
3. APPEARANCE—EFFECT OF TAKING APPEAL.—Though service of process upon a defendant was insufficient, and it entered its appearance specially by motion to quash the service, and preserved the objection throughout the trial, it will be *held* to have entered its appearance generally when it appealed to the Supreme Court.

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

Pipkin & Frederick, for appellant.

A. F. Smith, for appellee.

HUMPHREYS, J. This is an appeal from a judgment in the sum of $255 obtained by appellee against appellant in the circuit court of Scott County upon the service of a summons directed to the sheriff of Polk County by the clerk of the circuit court of Scott County and served by said sheriff in Polk County on Phil T. Stevenson, manager of appellant's lumber plant at Eagleton, in Polk County. Before the rendition of the judgment, appellant appeared specially and filed a motion to quash the service, on the ground that it was a domestic corporation domiciled and with its principal place of business in Polk County.

The court heard testimony in support of and against the motion, and overruled same, over the objection and exception of appellant. The objection and exception was

preserved at each material step throughout the progress of the trial, and the only purpose of this appeal is to determine the correctness of the ruling of the court upon the sufficiency of the service.

The record relative to the issue of service reflects that appellant is a domestic corporation, with its principal place of business at Eagleton, in Polk County; that Phil T. Stevenson, a resident of said town and county, was its general manager, and was served in Polk County with process issued out of the circuit court of Scott County; that it operated several sawmills in Scott County as feeders to its principal mill and business at Eagleton, which were under the immediate control and management of J. B. Johnson; that process was not served or attempted to be served on him; that the action was transitory, being for lumber sold by appellee to appellant on open account; and that the suit was brought against appellant only.

Under our statutes a domestic corporation must be sued in the county in which it is situated or has its principal office or business, or in which its chief officer resides, or in a county where it has a branch office or other place of business, by service of process upon the agent or employee in charge thereof. Sections 1152 and 1171 of Crawford & Moses' Digest; *Beal-Doyle Dry Goods Co.* v. *Odd Fellows' Building Company,* 109 Ark. 77; *Fort Smith Lumber Co.* v. *Shackelford,* 115 Ark. 272.

In the instant case the only remedy was to have brought the suit in Polk County, the action being transitory, or else to have obtained service on the agent or employee in charge of the branch office or place of business conducted by appellant in Scott County, where the suit was brought. Neither course was pursued. The trial court should have sustained appellant's motion to quash the service, and committed reversible error in overruling it.

Appellant requests that the trial court be directed, in case of the reversal of the judgment and remand of the cause, to abate the action, unless and until proper

and legal service has been had upon it. Such direction cannot be given, for the reason that appellant has entered its appearance in the suit by taking an appeal to this court. *Beal-Doyle Dry Goods Co.* v. *Odd Fellows' Building Co., supra.*

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

HARRIS v. ASHDOWN POTATO CURING ASSOCIATION.

Opinion delivered June 14, 1926.

1. ASSOCIATIONS—NOTE—EVIDENCE OF LIABILITY.—In an action against alleged subscribers to an association on a note executed in the name of the association, it was competent to prove anything the parties said or did in formation of the association, in order to determine its nature, and to show that words in the articles of association indicating an attempt to form a corporation were erased and others adopted which could be construed as an intention to form an unincorporated association.
2. ASSOCIATIONS—EVIDENCE—MATTER OF OPINION.—In an action against alleged subscribers to an association on a note executed in the name of the association, statement of a witness that the word "corporation" was stricken out of the articles of association and the word "association" substituted, because they wanted an association in the nature of a partnership, and not a corporation, *held* properly excluded as being the conclusion of the witness as to what the intention of the parties was.
3. ASSOCIATIONS—EVIDENCE—INTENTION OF SUBSCRIBERS.—In an action against subscribers to an association on notes executed in its name, it was error to exclude evidence that, at a meeting of the subscribers, a vote was taken whether a corporation or an unincorporated association should be formed, and that the latter form of organization was adopted.
4. ASSOCIATIONS—EVIDENCE—INTENTION OF SUBSCRIBERS.—In an action on notes of an association against subscribers thereto, every circumstance tending to show that the subscribers intended to form an unincorporated association, and not a corporation, was competent to establish their liability as partners.
5. APPEAL AND ERROR—EXCLUSION OF EVIDENCE—HARMLESS ERROR.—The exclusion of competent evidence was harmless where

admitted evidence established the fact sought to be established by the excluded evidence.

6. APPEAL AND ERROR—REFUSAL OF INSTRUCTION—HARMLESS ERROR. —Refusal to give an instruction as asked by appellant was harmless where other instructions given contained a complete statement of the law and were as favorable to appellant as the instruction asked.

7. ASSOCIATIONS — INSTRUCTION — APPLICABILITY. — In an action against members of an association on notes executed in the name of the association, an instruction that, if the association was conducting business in the name of a proposed corporation and notes were signed in the name of such proposed corporation, and plaintiff transacted business and accepted notes as notes of the corporation, the jury should find for the defendants, *held* erroneous where there was no evidence that the business was conducted as a corporation.

8. ASSOCIATIONS—ESTOPPEL.—Though the payee of notes executed by an association accepted them under the belief that they were executed by a corporation of the same name, it would not estop her to assert liability against members of the association as partners.

9. ASSOCIATIONS—LIABILITY OF SUBSCRIBERS.—Where subscribers to a contract for formation of an association intended to form a corporation, but had no part in the operation of the business as a partnership, or in the selection of agents to do so, they are not liable as partners.

10. ASSOCIATIONS—NATURE OF RELATION.—Where subscribers to a contract to form an association made no attempt to incorporate it, the association was not a *de facto* corporation, but a voluntary unincorporated association, which in effect is a partnership.

11. ASSOCIATIONS—LIABILITY OF SUBSCRIBERS—EVIDENCE.—Where there was evidence that defendants subscribed for stock in an unincorporated association for the purpose of building a potato-curing house, an instruction that purchasers of space in the curing house would not be liable was confusing, since, if their subscription was intended for the purpose of organizing an unincorporated association, those participating would be liable for its obligations.

12. ASSOCIATIONS—LIABILITY OF MEMBERS—JURY QUESTION.—In an action against the members of an unincorporated association on notes executed in the name of the association, where certain defendants, not having signed the subscription list, subsequently attended meetings, paid shares of stock, and executed notes for amounts subscribed, the question whether they participated in

the organization of the association so as to make them liable as members, *held* for the jury.

13. ASSOCIATIONS—LIABILITY FOR OBLIGATIONS.—Persons making mere voluntary donations to an unincorporated association, without participating in its organization or operation, are not liable for obligations incurred by the association.

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

Seth Reynolds, for appellant.

DuLaney & Steel and *Shaver, Shaver & Williams,* for appellee.

McCULLOCH, C. J. Appellant instituted this action against appellees, who are numerous residents of Little River County, Arkansas, to recover on two promissory notes, executed in the name of Ashdown Potato Curing Association, for borrowed money, it being alleged in the complaint that appellees had voluntarily associated themselves together under that name, without forming a corporation, for the purpose of engaging in the business of curing and preserving potatoes; that appellees were copartners in the business, and that the money for which the notes were executed was borrowed for the purpose of operating the business. There were originally about sixty defendants, and some of them defaulted, and judgments against them were rendered in favor of appellant, and the cause was continued as to three of the defendants. The remainder of the defendants filed answers denying the allegations of the complaint with respect to the formation of a partnership and denying that they were in anywise liable on the notes in suit. On the trial of the case the court directed a verdict in favor of two of the appellees, P. S. Davis and J. R. Wood, and the trial jury returned a verdict in favor of the other appellees.

Each of the notes in suit was for the sum of $1,000, signed by the Ashdown Potato Curing Association, by the president and secretary, and were indorsed by four of the defendants against whom judgments by default were taken below. One of the notes was executed to

appellant, and the other to her husband, O. Harris, who assigned it to her. The sum of $200 has been paid on one of the notes, and nothing on the other one.

In the early part of the year 1920 a movement was started, for the purpose of encouraging the growing of sweet potatoes, to form some kind of an association to build and operate a potato-curing house, so that sweet potatoes grown by local farmers could be properly prepared and held for market. Pursuant to this effort there was circulated a subscription list with the following caption:

"Ashdown, Arkansas, March 4, 1920.

"Cooperative Sweet Potato Growing and Curing Association:

"I hereby agree to grow the number of acres of sweet potatoes set opposite my name. I further agree to take stock in a potato-curing house at the rate of one dollar per bushel for the number of bushels I expect to cure out. I further agree to market my potatoes cooperatively."

The list was circulated by George M. Johnson, who was then engaged in farm demonstration work in that county, and he secured a large number of signatures. He testified at the trial of the cause as to the authenticity of those signatures, but there is a conflict in the testimony as to whether some of the signatures were properly authorized. Opposite each name on the list there was a specification of the number of bushels that each signer agreed to put in the house. Each of the subscribers was expected to pay in advance the amount indicated in the subscription list, or to execute a note to the association for the amount. There is testimony that a number of persons who did not sign the list either paid to the association an amount to be applied on stock or gave notes. Several of the appellees who did not sign the subscription list made payments or gave notes.

Appellant introduced testimony tending to establish the fact that there were several meetings of the sub-

scribers for the purpose of organizing the association and providing for the construction of a potato-house and its operation. The first meeting was held on May 22, 1920. A temporary organization was made, and the name of the association was selected. A committee was also appointed to "locate and purchase a site for the building and ascertain the cost of erecting a suitable building." At another meeting, on June 5, no business was transacted except to add another individual to the committee appointed at the former meeting. The meeting to complete the organization was held on August 9, 1920, and at that meeting a certain instrument in writing, designated as "Articles of Association," was formally adopted, and the board of directors and other officers were selected to operate the business. There is a conflict in the testimony as to whether all of the appellees attended this meeting, or rather as to which ones attended. It is undisputed, however, that certain of them attended the meeting, and also that certain of the appellees did not attend. These articles of association were never filed for record, and no steps were taken towards incorporating the association until at least a year thereafter, and after the indebtedness involved in this litigation had been incurred. There is a conflict as to whether these particular articles were ever filed at all, the contention of appellant being that the effort to incorporate a year later related to another association and not to the one formed as indicated above.

The officers selected at the meeting referred to above proceeded to make arrangements to carry out the plan, and they borrowed money and executed the two notes in suit. They built the curing-house, and it was operated for a time, but did not prove a success.

It is undisputed that the association known as Ashdown Potato-Curing Association was not incorporated; that no steps were taken to effect a legal incorporation of the association; that it did not constitute a corporation either *de jure* or *de facto* (*Rainwater* v. *Childress*, 121

Ark. 541), and that money was borrowed from appellant and her husband and the notes in suit executed therefor by those who were selected to manage the business of the association. The notes were executed on the same day, September 20, 1920, and the money borrowed was used in the construction of the curing-house.

The case made in the trial below is thus stated in the light most favorable to appellant for the purpose of determining whether or not there was error in the proceedings below.

The principal issues of fact in the trial below related to the intention of the subscribers, whether it was to form a corporation or a partnership, and whether appellees, or any of them, participated in the operation of the business.

There are several assignments of error in regard to the court's ruling in excluding testimony offered by appellant. The court admitted testimony to the effect that the articles of association adopted at the meeting on August 9, 1920, as originally printed and presented, contained in several places the words "corporation" and "incorporation," and that by consent of all present those words were erased and the word "association" interlined in substitution thereof. Appellant attempted to show by witness Johnson, who testified concerning these erasures and interlineations, that the changes were made for the purpose of showing that a partnership was intended to be formed, and not a corporation. Counsel asked the witness whether he knew why the word "corporation" was stricken out and the word "association" interlined, and the answer of the witness was that they wanted "to have an association in the nature of a partnership and not a corporation." The court excluded this testimony, and exception was duly saved. The same thing substantially occurred in the testimony of other witnesses, and the ruling of the court was the same. It was competent to prove anything that the parties said or did in the formation of the association in order to

determine what the nature of the association was, and it was of course competent to show that the words indicating an attempt to form a corporation were erased from the articles adopted and another word substituted which did not express unmistakably such an intention but could be construed, in the light of all the circumstances, as an intention to form an unincorporated association. It would have been competent also to prove what was said and done in the meeting when these changes were made, but the testimony of the witnesses does not go that far. The statement of the witness Johnson was merely his own conclusion as to what the intention of the parties was, and the court properly excluded that statement. Appellant offered to prove by another witness that a vote was taken at the meeting as to whether they would form a corporation or merely an unincorporated association, and the court excluded that testimony. This was error, for, as before stated, appellant had the right to prove any fact or circumstance tending to show the intention of the parties in the formation of the association.

The defense in this action is that there was never any intention to form a partnership, but that, on the contrary, the intention was to form a corporation, and that appellees, or at least some of them, did not, either directly or indirectly, participate in the operation of the business—that they merely signed subscription lists and took stock in a corporation which was never incorporated, and that they did nothing more. This being true, every circumstance which tended to show that they did not intend to form a corporation, but that an unincorporated association was to be formed, was competent to establish liability on the ground that they formed the association as a copartnership in the name used in borrowing money for which these notes were executed.

It is also contended that the court erred in refusing to permit appellant to prove all that the committee appointed by the shareholders did in putting the business

of the association into operation, and it is particularly pointed out that the court excluded the statement of a witness that the committee was directed to confer with a representative of the railroad company for a location of the potato-house. It was competent to prove that the committee put the business into operation by selection of a site, building the house, borrowing money and operating the business, and so the fact that the business was publicly operated throws light on the question of participation of the shareholders in the operation of the business. We do not think, however, that the ruling of the court in excluding this single instance of the activities of the committee was prejudicial, for abundant testimony was introduced tending to show that the officers and managers selected by the shareholders secured a site, built the house and operated the business, and that many, if not all, of the appellees participated in some way in the operation of the business, either directly or indirectly.

Appellant asked for instructions defining partnership, but the court refused those instructions, and gave its own. We think that the instructions given by the court sufficiently defined a partnership, and that there was no error committed by the court in substituting its own instructions for those proposed by appellant.

Appellant requested the court to give the following instruction:

"3. If you should find from the testimony in this case that all the defendants, or any number of them, associated themselves together for the purpose of forming a partnership, and that, in pursuance of this purpose, the articles of association under date of August 9, 1920, were formed, and also, in order to carry out the purpose of the association, the money represented by the two notes introduced in evidence was borrowed by said Baggarly and Park for said association, you will find for the plaintiff against such defendants so associating themselves together."

The court modified the instruction and gave it in the following form:

"If you should find from the testimony in this case that all the defendants, or any number of them, associated themselves together for the purpose of forming a partnership, and the money represented by the two notes introduced in evidence was borrowed by said Baggarly and Park for said association, you will find for the plaintiff against such defendants so associating themselves together."

The instruction as requested by appellant was a correct statement of the law, but no prejudice could have resulted from the exclusion of the words stricken out by the court. That part of the instruction as given by the court made it a complete statement of the law, and was as favorable to appellant as the original instruction.

The court, over the separate objections of appellant, gave the following two, among other, instructions:

"No. 4. You are instructed that if you find from the evidence that the Ashdown Potato-Curing Association, at the time of the execution of the notes alleged in the complaint, was conducting business in the name of a proposed corporation, and the said notes were signed in the name of such proposed corporation, if any, by its president, secretary, or both, and that said association was held out to the public as a corporation, and that the plaintiff, or the original payee of said notes, transacted business with said association and accepted said notes as the notes of a corporation, then, if you so find, you will find for the defendants.

"6. You are instructed that, if you find from the evidence that the defendants, or any of them, signed the subscription contract with the intention to form a corporation for the purpose of operating a potato-curing plant or house, that they took no further part looking towards the organization of the corporation or the operation of the plant after it was put in operation, that they took no part in the business transacted by the plant as

principals, partners, agents or directors, that they did not sign articles of association, incorporation or partnership, but, in good faith, supposed or believed that the corporation was duly organized by the promoters or those actively engaged in the organization thereof, then you will find for such defendants, if any."

Instruction No. 4 was erroneous, and the court erred in giving it. In the first place, there was no evidence tending to show that the business was being conducted "in the name of a proposed corporation," or that appellant "transacted business with said association and accepted said notes as the notes of a corporation." The notes did not purport on their face to have been executed by a corporation. The fact that they were signed in the name of the association by officers did not indicate that the association was a corporation. It could just as well, under that name, have been a common-law joint stock association. *Doyle-Kidd Dry Goods Co.* v. *Kennedy,* 154 Ark. 573. The promise recited in each of the notes is that "I, we, or either of us promise to pay," etc., and this language refers to one or more individuals as well as to an association, or even a corporation. Certainly the language of the note and the manner of the signature are not sufficient to carry the necessary implication that it was the contract of a corporation acting through its officers. There is no evidence tending to show that appellant or her husband dealt with the association as a corporation and not a voluntary association. The record is entirely silent on that subject, except the contents of the note itself. But, even if there were proof tending to show that appellant accepted the note under the belief that it was executed by a corporation of the name indicated, this would not estop her to assert liability against the members of a copartnership under that name or a common-law joint stock association. The maker of the note, under whatever name employed, was liable thereunder, whether a corporation or individuals doing business under that name, and the fact that the payee of the note was under an erroneous belief as to the identity of

the maker would not absolve the maker or makers from liability. We have held, it is true, that those who hold themselves out as dealing in the name of a corporation are estopped to deny the corporate existence, but that is a different question from holding that a person who, under mistake, deals with an association as a corporate entity, is estopped from denying the corporate existence. In an action to recover on a written obligation the execution of which is denied by the defendant or defendants, the real question under inquiry is the identity of the obligor, whether it be a corporation, or, if not, who the persons are who assumed to obligate themselves under that name, and, as before stated, a mistake on the part of the obligee as to the identity of the obligor does not work an estoppel. The court erred therefore in giving that instruction.

The next instruction quoted above (No. 6) is substantially in the language of our decision in *Rainwater* v. *Childress, supra.* It was a correct declaration of law, and submits the principal defense tendered by appellees, whose contention was that they did not intend to join in a partnership, but, on the contrary, intended to form a corporation, and took no part, either directly or indirectly, in the operation of the business, which was subsequently put into operation without completion of the corporation project. If it was true that they intended to form a corporation and had no part in the operation of the business or the selection of agents to do so, then they would not be liable as partners in an association in whose activities they did not in fact participate.

The law applicable to this case is fully stated in recent decisions of this court. *Rainwater* v. *Childress, supra; Doyle-Kidd Dry Goods Co.* v. *Kennedy, supra; Morse* v. *Burkhart Mfg. Co.,* 154 Ark. 362. The facts of this case are very similar to those developed in *Doyle-Kidd Dry Goods Co.* v. *Kennedy, supra,* so far as they call for an application of the law. In that case it was said:

"But our court has taken a definite stand contrary to the above doctrine as to the stockholders in a *de facto*

corporation and holds that such stockholders are liable as partners. * * * If stockholders in a *de facto* corporation are liable as partners, then it occurs to us, *a fortiori*, that the stockholders in a joint stock company also would be liable as partners to third parties for the debts incurred by such company. Such unquestionably is the effect of our own decisions."

There was no attempt in the present case, as we have already seen, to incorporate, therefore there was no semblance of a *de facto* corporation.

In *Rainwater* v. *Childress, supra,* we said:

"To constitute a corporation *de facto,* there need not be a strict or substantial compliance with the statute, but there must be a colorable compliance with the statute—that is to say, there must be color of legal organization under the statutes and user of the supposed corporate franchise in good faith. Courts differ among themselves as to how much must be done in order to constitute a corporation *de facto.* But all of the courts agree that some of the statutory steps must be taken in an honest attempt to comply with the requirements of the law and exercise by the associates of the corporate powers. * * * Here there was no attempt whatever to comply with the statutes relating to the formation of a corporation. It is not enough that there is a law under which the subscribers might have incorporated and that they agreed to form a corporation. They had not even signed articles of incorporation."

Now, it may be added that a mere signing of articles of incorporation is not a substantive step in the act of incorporation under the statute. The signing of the agreement constitutes merely a joint obligation of the parties to form a corporation, but it is not a step in the formation of it. The court should have instructed the jury that there was no corporate existence of the Ashdown Potato-Curing Association; that it was a voluntary, unincorporated association, in effect a partnership, and that the only question in the case was the identity of the

persons who composed the association at the time the notes in suit were executed.

Error of the court is also assigned in giving instruction No. 11, which reads as follows:

"You are instructed that the defendants or any other person had the right to buy or rent space in the curing-house for curing their potatoes, and the fact that any one of them did so did not of itself create any liability except to pay for space—and this would not make the purchaser of space liable as a partner merely by reason of such purchase. You will find for any and all defendants who just occupied this relation to the association, if any."

This instruction, we think, was confusing and should not have been given. Of course, the mere purchase of space in the curing-house by one who was not otherwise interested in the business would not constitute a membership in the association, but this instruction might have been, and doubtless was, intended as a declaration that a subscription for stock and space in the curing-house would not of itself make the subscriber a member of the association, even though there was no intention to incorporate. We think that is wrong, for, if the subscription list was intended for the purpose of organization of an unincorporated association, or was afterwards converted into such an organization without effecting incorporation, those who participated in or authorized the business of the unincorporated institution were liable for the obligations of the association. The subscription was not merely for space, but was for stock "at the rate of one dollar per bushel" for the number of bushels promised. Hence it necessarily follows that, if there was to be an unincorporated association, the subscription constituted membership, unless subsequently abandoned before the obligations in suit were incurred.

The court also erred in giving a peremptory instruction in favor of appellees Davis and Wood. These parties did not sign the subscription list, but they subsequently attended the meeting, bought shares of stock

and executed notes for the amount subscribed. The question should have been submitted to the jury whether these parties participated in the organization of the voluntary association so as to make themselves members.

There was evidence tending to show that some of the appellees merely made donations with the express understanding that they were not becoming members of the association. The court submitted that issue to the jury. Of course, if it was a mere voluntary donation, without any participation in the organization or the operation of the business of the association, there would be no liability for obligations incurred by the association.

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

CRAWFORD COUNTY LEVEE DISTRICT *v.* ALEXANDER.

Opinion delivered June 14, 1926.

LEVEES—LANDS SUBJECT TO TAX.—Acts 1909, p. 159, creating a levee district and manifesting the intent that lands lying in front of the levee should not be taxed, *held* to exempt lands in front of a new section of the levee, though behind where the original levee stood before it caved in.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

E. L. Matlock, for appellant.

Starbird & Starbird, for appellee.

McCULLOCH, C. J. The Crawford County Levee District was created by special statute enacted by the General Assembly of 1909. Acts 1909, p. 159. The purpose of the organization was to provide for the construction of a levee along the bank of the Arkansas River between two stated points to protect the lands lying in that locality. The board of directors was named in the statute, and there was provision for letting contracts for the construction of the levee and the issuance of bonds and an annual levy of taxes on the lands in the district,

according to valuation, "as it shall appear each year upon the real estate assessment book of Crawford County."

The direction in the statute with reference to the duty and authority of the board of directors was that they should construct a levee along the Arkansas River front "on a line to be indicated and laid out by them so as to afford protection to the lands included in said levee district, and to protect and maintain the same in such effective condition as honest, able and energetic efforts on their part may obtain, by building, renewing, repairing or raising the levee herein provided for. * * *"

Section 5 of the statute contains a provision that if, "in adjusting and preparing a list of lands subject to levee tax, it is found that lands have been listed not subject to levee tax, the board of directors of said levee district shall cause the taxes on such tracts to be refunded, and in no case shall taxes be collected for any land lying between the levee and the river or creeks, not protected from overflow by said levee." Pursuant to this statute, the board of directors of the district caused to be constructed a levee of standard height along the bank of the river, between the points named, and borrowed money to pay for the construction, and issued bonds, and taxes have been annually levied in accordance with the statute. Some of the bonds are still outstanding and unpaid, but the record does not disclose how much of the bonded debt is unpaid.

At the time of the creation of the levee district and the construction of the improvement, appellee was the owner of a tract of land containing one hundred sixty acres fronting on the Arkansas River, and his lands were taxed from year to year as other lands in the district. The levee thus constructed was of the standard height of thirty-eight feet, but the levee along the front of appellee's land has since then caved into the river, and the directors have constructed a levee twenty-seven feet high, back from the river, so as to give partial protection to the lands. This levee is not connected with the broken

ends of the original levee, but is constructed across a depression or swale, and connects at each end with lands on the same level with the top of the levee. There were ninety-five acres of appellee's land left after the levee and part of the adjacent lands caved into the river, and of this acreage there are forty-nine acres between the levee and the river, and forty-six acres lying back of the levee and partly protected by it. The board of directors has continued the levying of taxes upon the whole of the lands of appellee, and the latter objected to paying on any of the lands except that part which is behind the levee and receives protection. That forms the controversy in this case. Appellee offered to pay the taxes on the lands back of the levee, but refused to pay on the lands in front of the levee, and instituted this action to prevent the board of directors from enforcing the payment of taxes. The chancery court granted the relief which appellee prayed for, and an appeal has been prosecuted by the levee district.

Our conclusion is that, upon the peculiar language of this particular statute, the chancery court was correct in its conclusion. This is not a case like *Salmon* v. *Long Prairie Levee District,* 100 Ark. 366, where we held that the destruction of a levee by caving or washing away did not absolve the lands from the lien for the payment of the cost of the construction. Nor is it a case where the assessment is made in advance for the whole cost of the improvement, for the statute now under consideration provides for an annual assessment upon the valuation fixed for State and county taxation in order to pay for the construction of the levee and for renewing, maintaining and repairing it. The statute provides that, whenever deemed advisable, the board of directors "may employ one or more competent surveyors, whose duty it shall be to survey any or all of the lands of the district, as they may be directed by the board, for the purpose of ascertaining the lands subject to taxation hereunder." This provision, when read together with the portion of § 5 quoted above, shows that the statute was intended to

mean that, whenever it was found that lands were lying in front of the levee, they should not be taxed. The board of directors is authorized by statute to protect and maintain the levee by "building, renewing, repairing or raising" it. The new section of levee across the broken space where the levee had caved into the river was constructed by the board pursuant to the authority conferred by the statute, and we think that the exemption of lands in front of the levee applies the same as if the lands had been in front of the original levee. Now, if we had a case where the whole of the levee caved in and it was necessary to rebuild it, none of the lands formerly behind the original levee would be exempt from taxes to pay the cost of the original improvement. But this is a case of renewing or repairing the levee, pursuant to the statute, which, as before stated, manifestly provides that, whenever the lands fall in front of the levee, they shall not be taxed to pay for such renewal or maintenance. Any other view would continue the burden of taxation on lands of appellee which could not receive any benefit.

Decree affirmed.

GILLILAND OIL COMPANY v. STATE EX REL. ATTORNEY GENERAL.

Opinion delivered June 14, 1926.

1. STATUTES—REPEALS.—The presumption is against repeals of statutes by implication.
2. TAXATION—FRANCHISE TAX—REPEAL.—Acts 1923, p. 317, § 1, fixing the value of nonpar stock for taxation of the franchises of foreign corporations, was not repealed by Acts 1925, p. 687.
3. TAXATION—FRANCHISE TAX OF FOREIGN CORPORATION.—Computation of the franchise tax of a foreign corporation, partly of the par value of $100 per share and partly without par or face value, in accordance with Acts 1923, p. 317, by taking the face value of par stock and the value of the nonpar stock at $25, was proper.

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

Carmichael & Hendricks and *Robert N. Maxey,* for appellant.

H. W. Applegate, Attorney General, and *John L. Carter,* Assistant, *Utley & Hammock* and *Sam M. Clark,* for appellee.

McCULLOCH, C. J. This is an action instituted by the State, on the relation of the Attorney General, against the appellant, Gilliland Oil Company, a foreign corporation doing business in this State, to enforce payment of franchise tax and penalty for nonpayment.

Appellant is a Delaware corporation, and is doing business in the State of Arkansas. Its capital stock is partly of par value of $100 per share and partly without par or face value, being what is termed nonpar value stock. Appellant complied with the statutes of the State in order to do business here, and filed its report for the year 1925 with the Railroad Commission. The Commission fixed and certified to the Auditor the franchise tax, in accordance with the statute (Acts 1923, p. 317), which provides, in relation to a corporation having stock without par value, that "for the purpose of the taxes or fees prescribed by law to be paid on the filing of any certificate or other paper relating to corporations and of franchise taxes prescribed by law to be paid by corporations to the State of Arkansas, but for no other purpose, such shares shall be taken to be of the par value of twenty-five dollars each." The statute fixing the amount of the tax (Crawford & Moses' Digest, § 9804, as amended by Act of March 27, 1925, Acts 1925, p. 687) provides that all foreign corporations shall pay "for the privilege of exercising its franchise within this State, a tax of one-tenth of one per cent. each year upon the proportion of the issued and outstanding capital stock of the corporation used in Arkansas, as represented by property owned and business transacted in this State."

Appellant protested the amount of the tax fixed by the Railroad Commission, and offered to pay the tax on

the proportion of the actual market value of its stock. The chancery court decided in favor of the State's contention, and rendered a decree for the amount of the tax certified by the Railroad Commission and the penalty therefor. An appeal has been prosecuted.

The question of the validity of the act of 1923, *supra,* fixing the taxable value of nonpar value stock, and the question of the application of that statute to foreign corporations, must be treated as foreclosed by the decision of this court in *State* v. *Margay Oil Corporation,* 167 Ark. 614. That case is now pending in the Supreme Court of the United States on writ of error, but we adhere to our own decision and find no reason to recede from it, unless a later decision of the Supreme Court of the United States conflicts therewith.

It is also contended that the act of 1923, *supra,* has been repealed by the act of 1925. The contention is that the last-mentioned statute covers the whole subject completely and operates as a repeal by substitution, and that it also works a repeal for the reason that it is in conflict with the prior statute. We do not think that there has been a repeal upon either theory. The well-settled presumption against repeal by implication is not overcome by the substance of the later statute. Section 1 of the act of 1923, *supra,* quoted above, relates solely to the question of fixing, for taxation purposes, the value of nonpar value stock of any corporation, domestic or foreign. It is a separate and distinct subject, which is not covered by any prior statute or by the act of 1925, *supra.* The act of 1925 cannot be treated as a substitution, for it does not cover the whole subject. It merely amends certain specified sections of the Digest and repeals others, and those sections have no reference to the subject contained in the act of 1923. Nor is there any repugnant provision in the act of 1925, *supra,* for the reason that it does not deal with the question of fixing the value of nonpar value stock. Our conclusion is that there has been no repeal of that feature of the act of 1923, *supra,* relating to the value of nonpar stock, and that it is still

in force for the purpose of ascertaining the amount of franchise tax of corporations issuing that kind of stock.

It is finally contended that, even if the statute is constitutional and has not been repealed, the Commission made the computation on the wrong basis. This contention is, we think, unsound. If § 1 of the act of 1923, *supra,* is in force, the computation was correct, for that statute provides in express terms that, for the purpose of "franchise taxes prescribed by law to be paid by corporations to the State of Arkansas, * * * such shares shall be taken to be of the par value of twenty-five dollars each." That was the very point of our decision in the Margay case, *supra,* for the same argument was made in that case as is now made by learned counsel for appellant in this case. The statute then in force requiring foreign corporations to make report to the Commission provided that there should be a report of the market value of stock, and yet we held that the other statute controlled and made the face value of the par stock and the statutory value of nonpar stock the basis for measuring the tax. This is not a property tax. Neither the tangible property in or out of the State, nor any part of the capital stock itself, is taxed. It is a tax on the franchise, and is measured by the proportionate amount of capital stock represented by the property and business of the corporation in this State. The statute does not attempt to deal with the separate ownership of stock or the different kinds of stock, but it deals with the capital stock as a whole, and measures the tax by the proportionate part represented by property and business in the State.

Our conclusion is that this case is controlled by our decision in the Margay case, *supra,* and that if that decision is to be adhered to—and it is—the decree of the chancery court should be affirmed, and it is so ordered.

WOOD, J., dissents.

ADLER v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered June 14, 1926.

1. RAILROADS—FAILURE OF TRAINMEN TO KEEP LOOKOUT.—A railroad is liable for injuries due to a breach of its duty to keep a constant lookout, notwithstanding the contributory negligence of the person injured.
2. RAILROADS—FAILURE TO GIVE WARNING.—Where plaintiff was struck by a train at a station, on his admission that he had seen the train stop at the water tank 246 feet south of the station and knew that it would approach the station in a few minutes, it was not error to fail to submit defendant's negligence in not giving statutory warning by bell or whistle.

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

STATEMENT BY THE COURT.

M. Adler sued the St. Louis Southwestern Railway Company for personal injuries received on account of the alleged negligence of the defendant in operating one of its passenger trains in approaching the station at England, Arkansas.

The defendant denied negligence in operating its train.

According to the testimony of the plaintiff, on the morning of the 10th day of January, 1924, he came from Stuttgart, Arkansas, to England, Arkansas, to meet his intended wife and to accompany her to Little Rock, where they were to be married. His train arrived at England about 8:45 A. M., and he got out on the platform to meet his intended wife and some friends. After conversing with them, he started down the station platform north to where the passenger coach was placed, for the purpose of boarding the train and being carried to Little Rock, when the train from Pine Bluff should come in and the coach should be attached to it. The plaintiff saw a train at the water-tank, taking water, 246 feet south of the station, and knew that this train was coming on up to the station. He did not know, however, which track it would come on, and supposed it would give the statutory

warning by blowing the whistle or ringing the bell after it left the water-tank and approached the station. As he walked up the platform with his intended wife and her friends, he found the platform crowded with persons, and could not make his way along except by pushing through the crowd. There was a small space, probably fifteen inches, between where the mail-bags were placed and the main track. He started to pass between the mail-bags and the track, and was struck by the train. He did not look back after he started walking towards the station to see if the train was coming. He did not know the train was approaching, because he did not hear the bell ringing or the whistle blowing. The train was coming in slowly, and there was nothing to prevent the engineer from seeing the plaintiff and the rest of the crowd. When the pilot-beam of the engine struck the plaintiff, he was knocked over, and both bones in his left leg were broken near his ankle.

According to the testimony of the engineer operating the train that struck the plaintiff, the engine was equipped with a good bell which operates automatically. After leaving the water-tank, he started the bell ringing and kept it ringing until after the plaintiff was struck. The engine had an automatic air-brake, which was in first-class condition, and it was pulling three cars. The engineer saw the crowd of people on the station platform, and for that reason slowed down the train, and was moving into the station about as fast as one could walk. Suddenly and unexpectedly the plaintiff stepped over close to the track, and the pilot-beam pushed him over and caused his leg to catch on the step. As soon as the engineer saw the plaintiff so approaching close to the engine, he slammed the brakes on and stopped the train in about five feet after it struck the plaintiff. He also gave the whistle a short pull as soon as he saw that the plaintiff was in danger of being struck by the engine.

Several witnesses who were on the station platform, and saw the accident, corroborated the testimony of the engineer.

The court, over the objections of the plaintiff, gave to the jury the following instructions:

"No. 5. In this case, as I stated to you a while ago, the plaintiff having admitted that he had knowledge of the existence of train at the water-tank, you cannot predicate a verdict on the alleged failure of defendant to ring the bell or sound the whistle, even though you may find from the evidence in this case that the bell was not ringing as it approached the crossing there and approached the station; that failure, in view of the plaintiff's admission that he saw the train down there, would not authorize you in finding a verdict against the company.

"No. 6. Under the evidence in this case, gentlemen of the jury, the only act of negligence submitted to you as against the defendant in this case is whether or not they kept a lookout required under the statute, after discovering that the plaintiff was at or near their tracks. All other alleged acts of negligence have passed out of the case as not material, and you are to determine the right of the plaintiff to recover here and whether or not the law has been met and complied with upon the part of the engineer in charge of the locomotive in keeping a lookout required under the statute for persons at or near the track of the approaching trains."

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.

Gray & Morris and *Emerson & Donham,* for appellant.

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

HART, J., (after stating the facts). Under our statute it is the duty of the railroad to maintain a constant lookout, and if it appears that those in control of a train, in discharge of their statutory duty to keep a lookout, discovered or should have discovered a person upon or near the track in time to avert an injury to him, and failed to do so, the railroad becomes liable to him in damages, notwithstanding the fact of the contributory negli-

gence of the person walking upon or near the track placed him in peril. *Gregory* v. *Mo. Pac. Rd. Co.,* 168 Ark. 469; *Davis* v. *Scott,* 151 Ark. 34; and *St. Louis S. W. Ry. Co.* v. *Douglas,* 119 Ark. 33.

The instructions copied in our statement of facts show that the court submitted to the jury the doctrine of discovered peril and the statutory duty of the defendant to keep a lookout.

It is contended by counsel for the plaintiff that the circuit court erred in not submitting to the jury the question of the negligence of the defendant in failing to give the statutory warning of the approach of the train by ringing the bell or sounding the whistle.

While several witnesses for the defendant testified that the bell was ringing after the train left the water-tank and while it was approaching the station, still, according to the testimony of the plaintiff, the jury might have found that the bell was not kept ringing after the train left the water-tank.

The plaintiff admitted that he saw the train stop at the water-tank to take water, and that this was 246 feet south of the station. In company with his intended wife and some friends, the plaintiff then started up the platform to get in a coach which was placed on the track to be attached to the train going north to Little Rock. The plaintiff admits that he did not look back as he walked up the platform, but claims that the defendant was negligent in not ringing the bell so as to warn him of the approach of the train.

In this respect the case at bar is different from the Douglas and Davis cases just cited. In each of those cases the plaintiff admitted that he saw the train approaching, and of course had all the warning which could have been given him by ringing the bell or sounding the whistle.

In the present case, while the plaintiff did not look back and see the train approaching, still he had all the warning of its approach that was necessary. He had

formerly lived at England, and was perfectly familiar with the situation there. He knew that the coach in which he had ridden from Stuttgart would be placed on the main track at England and would be taken up by the northbound passenger train from Pine Bluff. He saw a train 246 feet south of the station, taking water. He started up the platform for the purpose of getting in the coach which was to be attached to a train from the south going north. He knew that his train was due, and there is no other reasonable inference but that he must have known that the train which stopped to take water was the train which he was waiting for. He knew that, within a few minutes, the train would approach the station. Thus it will be seen that he had all the warning which could have been given him by ringing the bell or sounding the whistle. There was no evidence from which to predicate negligence on the part of the defendant in failing to give the statutory signals as to the approach of the train as the proximate cause of the injury to the plaintiff.

In this connection it may be stated that the court instructed the jury on the doctrine of comparative negligence under § 8575 of Crawford & Moses' Digest in accordance with its construction in the cases above cited.

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

SELZ v. MCGEHEE EAST AND WEST HIGHWAY DISTRICT.

Opinion delivered June 14, 1926.

1. HIGHWAYS—ZONAL ASSESSMENTS.—Zoning of rural lands for road assessments does not invalidate the assessments, in the absence of proof that it is arbitrary, discriminatory or confiscatory.
2. HIGHWAYS—PERCENTAGE ASSESSMENTS.—Assessment of town lots in a road district at 20 per cent. of the assessed value for State and county taxes is not invalid, in the absence of proof that it is arbitrary, discriminatory or confiscatory.
3. HIGHWAYS—VALIDITY OF ASSESSMENTS.—Assessments by a road district held not arbitrary or discriminatory on its face where

the zone system was adopted as the basis for assessing rural lands and the percentage basis for assessing town property.

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

STATEMENT BY THE COURT.

This is a suit by a landowner in a road improvement district to restrain the commissioners from proceeding with the work of the improvement, and to declare void the assessment of benefits made by them as being arbitrary and discriminatory.

The McGehee East & West Highway District was created by a special act of the General Assembly in 1923, and the validity of the act was upheld in *Rayder* v. *McGehee E. & W. Highway Dist.,* 161 Ark. 269.

The Legislature of 1925 provided for a reassessment of the benefits of the lands in the district, and Joe Selz, a landowner in the district, brought this suit in equity against the district and the commissioners thereof to set aside the assessment of benefits as being void.

It is alleged that the assessment of benefits is discriminatory, arbitrary, and confiscatory. In making the assessment the commissioners divided the rural lands in the district into three zones. All the benefits were assessed against all lands in zone one at $2 per acre; in zone two at $1.50 per acre, and in zone three at $1 per acre. The benefits of the town property situated in the district were assessed at twenty per cent. of their last assessed valuation for general taxation. The chancellor found the issues in favor of the highway district and the commissioners thereof, and that the assessment of benefits was in all thing regular, as required by the statute.

It was therefore decreed that the complaint of the plaintiff, Joe Selz, be dismissed for want of equity, and to reverse that decree the plaintiff has prosecuted this appeal.

P. S. Seamans, for appellant.

I. N. Moore, for appellee.

HART, J., (after stating the facts). The reassessment of benefits attacked in this case was made by the commissioners pursuant to an act amending §§ 2 and 10 of the original act creating the highway district. Acts of 1925, p. 543.

Section 2 of the act of 1925 reads as follows:

"Section 2. That § 10 be amended to read as follows:

" 'Section 10. The commissioners may annually order a reassessment of the benefits; and, in that event, such reassessment shall be filed, advertised, and equalized as in the case of the first assessment; provided, the commissioners, both in making original assessment and any reassessment, shall take into consideration the assessed value of the property within said district, as shown on the assessment books, for State and county taxes, and also the income of said property, and the income derived from said property, to be ascertained by the commissioners by such method as they may deem advisable; but, if the district has borrowed money or incurred indebtedness, the total amount of the assessment of benefits shall never be diminished.'

"Whereas, it is found that the commissioners have heretofore made an assessment which is inequitable, unjust and unfair, the commissioners are directed as soon as practical to proceed to make an assessment as provided for in the original act, and as amended herein."

It will be noted that it is provided that the commissioners, in making the reassessment, shall take into consideration the assessed value of the property within the district, as shown by the assessment books for State and county taxes, and also the income of the property, which is to be ascertained in such method as the commissioners may deem advisable.

It is contended that the rural lands in the district could not be divided into zones for the purpose of assessing the benefits in compliance with the provisions of the statute just referred to, without the assessment of bene-

fits being made in an arbitrary and discriminatory manner.

Now, the words of the statute add no duty to the commissioners. All the matters provided in the amendment were proper elements to be considered by the commissioners in making the original assessment. That is to say, in arriving at the amount of benefits against each tract of land, the commissioners might take into consideration its assessed value and the income from it, as well as other facts and circumstances which would tend to shed light on the amount of benefits to be assessed against the land. This court has expressly held that the adoption of the zone system in assessing benefits in a road improvement district for the construction of roads does not render the assessment invalid, unless it is shown in a direct attack that it is excessive or discriminatory. *Road Imp. Dists. 1, 2, 3* v. *Crary,* 151 Ark. 484, and *Ford* v. *Plum Bayou Road Imp. Dist.,* 162 Ark. 475.

There is no proof whatever in the record tending to show that the act of the commissioners in laying off the rural lands into three zones for the purpose of assessing the benefits was arbitrary or discriminatory, or that it amounted to a confiscation of the lands of the district.

Again, it is insisted that the assessment is arbitrary and discriminatory because the rural lands were divided into zones for the purpose of assessing benefits, and that the benefits to the lots within the incorporated towns in the district were assessed at twenty per cent. of their value according to the last assessment for State and county taxes. There is no proof in the record tending to show that this method of assessing the benefits on town lots was arbitrary or confiscatory. For aught that appears to the contrary in the record, this may have been the fairest way of arriving at the amount of benefits to be assessed against such town lots. See *Watson* v. *Boydstun,* 141 Ark. 184.

Again, it is insisted that the assessment of benefits is arbitrary and discriminatory because the zone system

was adopted as a basis to govern in assessing benefits against the rural lands and a percentage of the assessed valuation as a basis for assessing the benefits to town property. No proof appears in the record to show that this made the action of the commissioners arbitrary or discriminatory, and it cannot be said that this method of assessing the benefits to the property shows on its face that the assessment is arbitrary or discriminatory.

In *Bulloch* v. *Dermott-Collins Road Imp. Dist.*, 155 Ark. 176, it was held that the classification of the property within a road improvement district for the assessment of benefits is not discriminatory against the various property owners in that the commissioners adopted an acreage basis for rural property, a valuation basis for city property, and a mileage basis for railroads, telegraphs, and telephones.

It follows that the decree of the chancery court was correct, and it will therefore be affirmed.

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(1) HILL v. AMERICAN BOOK COMPANY, No. 9598.

(2) AMERICAN BOOK COMPANY v. CHANEY, No. 9600.

Opinion delivered June 14, 1926.

1. STATUTES—PASSAGE OF BILL—SHOWING OF JOURNAL.—The fact that an entry in the Senate journal, showing that a Senate amendment was stricken from a House bill, appears after the recital of the passage of the bill does not show affirmatively that the Senate amendment was stricken from the bill after its passage in the Senate, so as to invalidate Acts 1923, p. 347.
2. EVIDENCE—PAROL EVIDENCE TO CONTRADICT SENATE JOURNAL.—The rule that an act may be held to be invalid when the Senate journal affirmatively shows noncompliance with constitutional requirements in its passage does not authorize parol evidence to contradict the journal, as by showing that a Senate amendment was stricken from a House bill after its passage in the Senate.
3. STATUTES—VALIDITY OF AMENDATORY ACT.—Acts 1925, p. 448, under which members of the State Textbook Commission were appointed, fits into and amends the acts creating the commis-

sion and Acts 1921, p. 326, amending it, and hence is valid, even if Acts 1923, p. 347, which it purports to amend, be invalid.

4. STATES—AUTHORITY OF AGENTS TO MAKE CONTRACTS.—Where, by public law, agents are appointed to enter into a contract for the State, the law under which they act is as much a part of the contract as if transcribed therein.

5. STATUTES—LEGISLATIVE INTENTION.—Crawford & Moses' Dig., §§ 9077, 9080, authorizing the State Textbook Commission to contract for school textbooks, must be construed in the light of the purpose of the Legislature in enacting it.

6. SCHOOL AND SCHOOL DISTRICTS—CONSTRUCTION OF DEPOSITORY ACT. —The object of Crawford & Moses' Dig., §§ 9077, 9080, as amended by Acts 1921, p. 329, being to benefit and protect the people and not the publishers, *held* that the publishers to whom textbook contracts are awarded must establish a central depository at their own cost, and cannot add the cost to their bid in fixing the retail price required to be printed or stamped on the books.

7. CONSTITUTIONAL LAW—LEGISLATIVE QUESTION.—Whether the construction of the textbook law requiring the cost of a central depository to be charged to the publishers, and not added to the bid in fixing the retail price in fixing the retail price of school books, would make it impossible for some publishers to comply with the law without forfeiting their bonds in other States by necessitating the sale of books in Arkansas at a lower price, is not for the courts to consider, being a question of policy for the Legislature.

8. MANDAMUS—COMPELLING SIGNATURE TO VOID CONTRACT.—Mandamus will not lie to compel the secretary of the School Textbook Commission to sign a void school-book contract.

9. MANDAMUS—NATURE OF ACTS TO BE COMMANDED.—Mandamus confers no new authority, but lies merely to compel a party to do that which it is his duty to do without it, and he must have power to perform the act sought to be compelled.

10. SCHOOLS AND SCHOOL DISTRICTS—VALIDITY OF SCHOOL-BOOK CONTRACT.—As the act creating the State Textbook Commission does not require school-book contracts to be let to the lowest bidder, a contract let to a higher bidder is valid and binding, in the absence of fraud or reckless improvidence indicating no intention to protect the public interest.

11. EVIDENCE—PRESUMPTION.—The fact that a company, which was awarded a school-book contract, made its bid on an erroneous interpretation of the statute, as authorizing the addition of the cost of a central depository to the retail price, does not overcome

the presumption that other book companies made bids according to the legal interpretation of the statute.

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

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

STATEMENT BY THE COURT.

The appeals in both of these cases involve the validity of a contract of the State Textbook Commission with the American Book Company for the adoption of Overton's Textbooks on Physiology and Hygiene for use in the public schools for a term of six years from September 1, 1925.

No. 9598 is an appeal by A. B. Hill, as Superintendent of Public Instruction, from a judgment in a mandamus case against him in the Pulaski Circuit Court by the American Book Company, to compel him to sign the contract claimed to have been made by the said book company with the said textbook commission.

No. 9600 is an appeal by the American Book Company from a decree of the Pulaski Chancery Court canceling said contract in a suit brought by certain taxpayers.

The questions presented by the appeal in each case do not require us to do more than to outline the pleadings and to make a general statement of the undisputed facts.

On June 12, 1925, the State Textbook Commission met at the State Capitol and agreed upon a meeting of said commission to be held on July 22, 1925, for the purpose of adopting textbooks on physiology and hygiene and other subjects. Notice of the meeting as required by law was given to the various book companies. The commission met at the State Capitol on July 22, 1925, and, all the members being present, proceeded to open the bids of the various book companies on the subjects to be considered by the commission for adoption. Among the bids submitted were the bids of the American Book Com-

pany and other book publishers on the subjects of physiology and hygiene.

Our statute provides that the textbook commission shall require the publishers to whom contracts are awarded to establish a central depository at Little Rock through which the books, under the provisions of this act, shall be distributed to local dealers in the State. The American Book Company, in making its bid, charged the cost of establishing this central depository in the price of its bid, on the basis that said cost would ultimately be paid by the users of the books in the schools. On the other hand, the other book companies making bids did so in the interpretation of the law that the cost of establishing the central depository should be paid by them and not by the users of the books in the public schools.

The bid of the American Book Company was accepted, and a contract in writing with the bond required by the statute was duly submitted by the American Book Company for the signatures of the various members of the State Textbook Commission.

A. B. Hill, Superintendent of Public Instruction, was a member of the State Textbook Commission, and refused to sign the contract. At a meeting of the State Textbook Commission held on August 1, 1925, said contract and bond of the American Book Company were approved by all of the members of the State Textbook Commission present, except A. B. Hill, Superintendent of Public Instruction, who still refused and declined to execute the contract as secretary of the commission.

The American Book Company filed a petition for mandamus in the Pulaski Circuit Court against the Superintendent of Public Instruction to compel him to sign said contract as secretary of the State Textbook Commission.

The circuit court rendered a judgment requiring A. B. Hill, as State Superintendent of Public Instruction and ex-officio secretary of the State Textbook Com-

mission, to execute and sign the contract of the American Book Company with the said textbook commission for furnishing Overton's Textbooks on Physiology and Hygiene in the public schools of Arkansas for a period of six years beginning September 1, 1925.

Said A. B. Hill has duly prosecuted an appeal to this court.

J. S. Chaney and W. D. Jackson, citizens and taxpayers of the State of Arkansas, brought suit in the Pulaski Chancery Court against the American Book Company and others to cancel said contract as being invalid on account of being made in violation of the provisions of the statute.

The chancellor was of the opinion that the contract was invalid, and the American Book Company and the Arkansas School-book Depository were enjoined from asserting any rights under said contract and from attempting to carry out any of its provisions.

To reverse that decree the American Book Company and the Arkansas School Book Depository have duly prosecuted an appeal to this court.

H. W. Applegate, Attorney General, *John L. Carter*, Assistant, *Ben B. Williamson*, *Utley, Hammock & Clark*, and *Mehaffy & Mehaffy*, for appellant Hill.

J. W. House, Jr., *Murray Seasongood* and *Emerson & Donham*, for appellee American Book Company.

Tom W. Campbell, amicus curiae.

HART, J., (after stating the facts). It is first contended that the contract of the State Textbook Commission with the American Book Company is invalid because it was not made by persons legally constituting the State Textbook Commission.

The members of the commission were duly appointed pursuant to the provisions of act No. 153 of the Legislature of 1925. Acts of 1925, p. 448. This act purports to amend act 379 of the Legislature of 1923. Acts of 1923, p. 347. Act 379 originated in the House, and it is contended that the bill was amended when it reached the

Senate, and that the amendment proposed by the Senate was not stricken from the bill until after its final passage in the Senate. If this was the case, of course, the bill passed by the Senate would not be the bill passed by the House of Representatives, and the act would be invalid. The State journal shows that the bill was amended in the Senate. There is an entry on the Senate journal showing the passage of the bill by the Senate, and immediately following this the same entry shows that the amendments were stricken from the bill. This entry appears on the journal containing a record of the same day's proceedings. The contention here is that, because the part of the entry showing that the amendments were stricken from the bill follows the part showing the passage of the bill, there is an affirmative showing on the journal that the Senate amendment was stricken from the bill after its passage. We do not think so. In *Ewing* v. *McGehee,* 169 Ark. 448, it was held that there is a conclusive presumption of the regularity of the enactment of an enrolled and signed statute, unless the validity is defeated by affirmative recitals in the journal. The entry showing the passage of the bill and that the Senate amendment was stricken from the bill was a part of the proceedings of the same day, and to hold that, because the recital showing that the amendment had been stricken from the bill follows that part of the entry showing the passage of the bill, constitutes an affirmative showing that the proceedings were had in the order in which they appeared on the journal, would be to put form above substance. We do not think that good reason or authority require that the inadvertence or mistake of the journal clerk in making his entries on the journal should control in the matter and thus avoid the proceedings of the Senate. This is especially true when the records show that the bill was duly enrolled and signed as required by law.

Again, it was sought to show by parol evidence that the amendment was stricken from the bill after it had

passed the Senate. As we have already seen, this court has held that an act may be held to be invalid when the journal shows affirmatively that an essential constitutional requirement has not been complied with. That rule does not authorize resort to oral evidence to contradict the journal. A rule of that sort would render legislation uncertain and leave it to the courts to try its validity on questions of constitutional procedure which might vary in different cases according to the proof made. We think that the better view is to hold that act 379 is a valid act.

Moreover, if it should be held invalid, this would not change the result. While act 153 in express language purports to amend act 379, still it is a valid act and capable of enforcement in connection with the original act creating the State Textbook Commission and act 285 of the Acts of 1921 amendatory thereof. Of course, if the constitutional requirements in the passage of act 379 were not complied with, it would be invalid and no part of our laws, and no life could be breathed into it by an act purporting to amend it. Act 153, however, under which the members of the State Textbook Commission were appointed, fits into the original act creating the State Textbook Commission and the act of 1921 amending it, and would amend those acts so far as it is repugnant to them.

This brings us to a consideration of the case on its merits, and the validity or invalidity of the contract in question depends mainly upon the interpretation to be given to §§ 9077 and 9080 of Crawford & Moses' Digest as amended by act 285 of the Legislature of 1921. General Acts of 1921, p. 326. Section 4 of that act amends § 9077 of Crawford & Moses' Digest so as to read as follows:

"The books furnished under any contract shall at all times during the existence of this contract be equal in all respects to the specimen or sample copies furnished with bids; and it shall be the duty of the State Superin-

tendent of Public Instruction to preserve in his office, as the standard of quality and excellence to be maintained in such books during the continuance of said contract, sample copies of all books which have been the basis of any contract, together with the original bid. The retail price and the exchange price of each book adopted shall be printed, labeled, or stamped on the back, or inside cover, of the book. And the commission shall not enter into contract with any person or publisher for any book or books to be used in the public schools of the State, at a retail price above or in excess of the price or prices at which said book or books are furnished by said person or publisher, under contract executed within one (1) year next preceding the making of the contract with the commission, to any State, county, city or other school district in the United States, under similar conditions of distribution and cost of delivery. And it shall be the duty of any contractor to stipulate in his contract that he is not furnishing under contract, executed within one (1) year next preceding, to any State, county, city, or other school district anywhere in the United States at a less retail price than he is furnishing same to the State of Arkansas, under similar conditions of distribution and cost of delivery, and the commission is hereby authorized and directed, at any time it may find any book is being furnished at a lower retail price under contract to any State, county, city, or other school district, as aforesaid, to sue upon the bond of said contractor for the recovery of the difference between the contract retail price and the lower retail price at which they find the book or books to have been sold, and should any contractor fail to execute the terms and provisions of this contract specifically, said commission is hereby authorized, empowered and directed to bring suit in the name of the State of Arkansas upon the bond of such contractor for the recovery of all damages, for the benefit of the public school fund; but nothing herein provided shall be construed so as to prevent said commission and any contractor from

agreeing in any manner to change, alter or amend any contract; provided, a majority of the members of said commission shall agree and think it advisable and for the best interest of the public schools of the State to make such change, alteration or amendment."

Section 5 amends § 9080 of Crawford & Moses' Digest to read as follows:

"The Textbook Commission shall select and appoint at least one responsible dealer in each county to act as agent or depository for the sale and distribution of such textbooks contracted for by such Textbook Commission; provided that, in counties where there are two county sites, there shall be one such dealer at each county site. The said merchants or dealers shall agree with said Textbook Commission to keep a sufficient supply of said books to supply the demands at all times, and agree to furnish each publisher holding a contract with the State of Arkansas under this act an acceptable personal or surety bond covering the estimated amount of sales to be made by him in any one year, provided such publishers or contractors require such bond, whereupon the said contractors or publishers shall sell to said dealer all books ordered by him at a discount of 15 per cent. from the retail price; provided, that said schoolbook dealer shall pay cash to the contractor or publisher for all books received within sixty days of the shipment of said books; provided, that the contractor shall pay all transportation charges on freight shipments of one hundred pounds or more to the nearest railroad or river station to said dealer, or merchant; except that, during the exchange period provided for in this act, the publishers or contractors shall pay all transportation charges to the nearest railroad or river station to such dealers or merchants, also transportation charges on old books returned to the publishers, on freight shipments of one hundred pounds or more, which are received in exchange for the new books adopted by the commission, and the dealers shall receive ten per cent. of the cash proceeds for handling

said books during such exchange period; provided, that the Textbook Commission shall require the publishers to whom contracts are awarded to establish a central depository at Little Rock, through which the books adopted under the provision of this act shall be distributed to local dealers in the State. The Textbook Commission may delegate to such central depository the authority to select the local dealers, as provided for in this act, and said local dealers shall become responsible to such central depository in the manner provided for in this act, instead of individual publishers. All books adopted under the provisions of this act shall be sold to and delivered to the pupils of this State at the retail and exchange prices agreed upon; provided, that parents or pupils desiring to do so may order books direct from the publishers, or from the central depository, same to be sent by mail or otherwise, transportation prepaid, at the retail contract price, provided the cash accompanies the order.

"Nothing in this section shall be so construed as to prohibit any responsible merchant or dealer, not designated by the Textbook Commission, from buying and selling the books on the same terms and conditions as apply to the designated dealers. Any merchant or dealer who shall demand or receive more than the retail contract price for any such textbooks shall be fined not less than twenty-five dollars ($25) nor more than one hundred dollars ($100), the same to be paid to the State Treasurer and credited to the common school fund."

In the early case of *State* v. *Allis,* 18 Ark. 269, it was held that where, by a public law, agents are appointed to enter into a contract on the part of the State, the law under which they act is as much a part of the contract, when made by the agents, as if it were transcribed in the contract.

In *E. O. Barnett Bros.* v. *Western Assur. Co.,* 143 Ark. 358, this was recognized as the established rule in this State, and our earlier cases on the subject are cited.

The reason is that officers as well as all other interested persons are bound to take notice of the public laws of the State.

In the instant case, the State Textbook Commission had to look to the act under consideration for its authority to make the contract. It was the power under which they were to act, and the book publishers were given notice in the public advertisement for bids of that fact. The act must be construed in the light of the purpose of the General Assembly in enacting it. *Giboney* v. *Rogers,* 32 Ark. 462; *Empire Carbon Works* v. *Barker & Co.,* 132 Ark. 1; and *Logan* v. *State,* 150 Ark. 486.

In *Stafford* v. *Wallace,* 258 U. S. 495, the Supreme Court of the United States had under consideration the Packers and Stockyards Act of 1921, seeking to regulate the business of the packers done in interstate commerce and forbidding them to do a number of acts to control the prices or establish a monopoly in the business. Mr. Chief Justice Taft, in recognition of the duty of the court to consider the act whose validity was in question in the light of the environment in which Congress passed it, said: "It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us, in interpreting its validity, to know the conditions under which Congress acted."

In *Bowman* v. *Hamlett,* 166 S. W. 1008, the Court of Appeals of Kentucky had under consideration a suit the purpose of which was to test the constitutionality and to obtain an interpretation of an act commonly known as the School Textbook Commission Law. In considering the rules for the guidance of the court in interpreting the act, it was said:

"The one demand for this legislation, the one purpose sought to be accomplished, the one intent of those favoring the act, was to protect the consumer, to procure

for the users of school textbooks the lowest prices for which such books could be sold anywhere. The object of the Legislature was to benefit the last purchasers—the people. The law was enacted in the interest of this class, and of this class alone. The Legislature fully understood that the publishers and the retail dealers could take care of themselves without any assistance from the lawmaking power, if it should be conceded that the lawmaking power could legally assist them, and that no provision of the act was intended to advance the interests of either."

Bearing in mind that the object of the law creating the State Textbook Commission and authorizing it to provide for the selection of a uniform series of textbooks for the public schools, and to make contracts with book publishers to furnish the same for a term of years, was for the benefit and protection of the people and not of the book publishers, we are of the opinion that it was the intention of the Legislature that the book publishers should establish a central depository at their own cost, and that the cost of its establishment should not be passed on to the people, by an estimate that the cost of the central depository should be added to the cost of the books. It will be noted that the act is specific in its terms. It provides that the retail price of every book should be printed or stamped on the back or inside cover thereof, together with the exchange price between the old and new books of the same grade. It also provides that the exchange price of such books exchanged shall be fixed in the contract, and that such exchange price shall not be above or in excess of the exchange price charged in the contract within a year next preceding upon the same book or books in any other State. The act provides that the Textbook Commission shall select and appoint at least one responsible dealer in each county to act as agent or depository for the sale and distribution of the textbooks contracted for by the Textbook Commission. The publishers or contractors are required to enter into bonds to sell all books ordered by

them at a discount of 15 per cent. The act further provides that the Textbook Commission shall require the publishers to whom contracts are awarded to establish a central depository at Little Rock, through which the books adopted under the provisions of this act shall be distributed to local dealers in the State.

In the interpretation of this clause lies the whole nub of this case. The American Book Company claims that it had a right to estimate the cost of establishing such central depository and add same to its bid in fixing the retail price which should be printed or stamped on the back of the books. The American Book Company estimated that 10 per cent. of the wholesale price of the book would cover this cost, and introduced evidence to show that such estimate was reasonable. In addition, the 15 per cent. allowed by the statute as profit to the county depositories was added. Thus it will be seen that the American Book Company, in making its bid and fixing the retail or contract price which was to be printed or stamped on the back or inside cover of every book sold, took into consideration the wholesale price of the book, the 15 per cent. allowed by the statute to the retailer, and the 10 per cent. which it claims the statute allows for the cost of establishing the central depository. As we have already seen, the statute was passed for the benefit of the people, and its main object was to furnish textbooks at the lowest cost.

In arriving at this result several elements of value would be considered. In the first place would be the initial cost of the book, and its quality as a textbook. In the next place, the contract being for a number of years, frequent changes could not be made in textbooks, and people removing from one part of the State to another part of it would not have to go to the expense of buying additional books. Then, too, the Legislature doubtless had in mind the cost of distributing the books. It recognized that this might vary greatly in different States or even in different sections of the same State. It evidently

had in mind to standardize or to make this cost as uniform as possible. In doing this the cost of transportation and the cost of handling the books would be important factors. The framers of the act had in mind that the publishers of the textbooks on the same subject might, and doubtless would, vary greatly in their estimates of the cost of transportation and of distribution. Hence it was intended to put this matter at rest, so far as the Textbook Commission and the people were concerned, by inserting in the statute the provision requiring the publisher or contractor to establish a central depository at Little Rock through which the books adopted under the provisions of the act should be distributed to the local dealers in the State, and that the cost of the central depository should be paid by the publisher or contractor, and should not be passed on to the users of the books in the public schools.

The decision of the Supreme Court of South Carolina in *Duncan* v. *Heyward,* 54 S. E. 760, by inference supports this construction of the statute. In that case the court had under consideration an act conferring on the State Board of Education the power to prescribe and enforce the use of a uniform series of textbooks and require the publishers, in the discretion of the board, to establish in each county in the State one or more depositories of their books. The court held that, under the general powers conferred upon the State Board of Education to secure uniformity in the use of textbooks, the State Board of Education might provide by contract with publishers of school textbooks that they should maintain at the State Capital a central wholesale depository from which its agents and county depositories might be supplied at a discount of not less than 10 per cent. In discussing the question the court said:

"Unquestionably it is still the duty of the Board of Education to use all reasonable means to secure the lowest possible prices consistent with the successful conduct of the schools; but, as we have seen, there was some

ground for the board to reach the conclusion that, by the use of a central depository, the convenience of patrons might be greatly promoted, with such advantages and savings to the publishers as would enable them to pay 10 per cent. for maintaining it without increasing the price of the books in the hands of the pupil, or 'the first cost' referred to in the act of 1905 (25 St. at Large, p. 877)."

In the case at bar a similar provision was enacted in the law by the Legislature and became a part of the contract. But it is claimed that such a construction would make it impossible for some publishers to comply with our law without forfeiting their bonds in other States, because if the 10 per cent. for the cost of the central depository at Little Rock should be charged to the book publishers or contractors, this would necessarily cause their books to be sold in this State lower than in other States, and thereby cause it to violate its contracts in other States with school textbook commissions. Such considerations can have no place in the courts. They might have been properly addressed to the Legislature as a reason why it would be bad policy to enact a law like the one under consideration, because book publishers would decline to bid with such a provision in force.

In this connection it may be stated that the book publishers were advised of the provisions of the law before they made their bids. Three other book publishers bid on textbooks on the same subjects as those embraced in the contract under consideration in this case, and in making their bids they interpreted the statute just as we have construed it, and made their bids accordingly. The act was the power under which the textbook commissioners were to act. They could make no contract contrary to its provisions, and, having made a contract in violation of the provisions of the statute, it is void and no action can be maintained on it. *Arkansas Foundry Co.* v. *Stanley*, 150 Ark. 127; *Lewelling* v. *St. Francis County Road Improvement District No. 1*, 158 Ark. 91.

If the contract is void, it follows as a necessary consequence that no action can be maintained on the bond given by the American Book Company. The bond was given to secure the faithful performance of the contract, and if the contract is void and of no effect, the bond must fall with it. If the contract was void, mandamus would not lie to compel A. B. Hill, as Superintendent of Public Instruction, to execute it. As said by Mr. Chief Justice Fuller in *Brownsville v. Loague,* 129 U. S. 493, "mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act."

The result of our views is that the circuit court erred in awarding a writ of mandamus to compel A. B. Hill, as Superintendent of Public Instruction and ex-officio secretary of the State Textbook Commission, to execute the contract in question, and for that error the judgment is reversed, and the cause of action is dismissed here.

The decree of the chancellor was correct, and it will therefore be affirmed.

HART, J., (on rehearing). Counsel for appellants assert that "there is not one particle of evidence nor one line of pleading indicating that any other book company, in making up its bid on the textbook in question, interpreted the statute to mean that the book companies should pay the cost of the central depository, and that the same should not be added as a part of the retail price of the book." This makes it necessary for us to state the evidence on this point and give our reasons for so holding.

A. B. Hill was Superintendent of Public Instruction and ex-officio secretary of the State Textbook Commission. Section 9073 of Crawford & Moses' Digest, which is a part of the act creating the State Textbook Commission, provides, in effect, that all bids shall be filed with the State Superintendent of Public Instruction, and that he shall give them to the commission upon their convening.

A. B. Hill was a witness in the case, and the record shows that he had the bids before him while testifying. According to his testimony, the Textbook Commission seriously considered the bids of four book companies on the textbooks under consideration. The Ritchie-Caldwell Company was one of them. Its bid on the first book was 52 cents and on the second 94 cents. That was a total of $1.46 for the two books of the Ritchie-Caldwell Company. The Emerson-Betts Company made a total bid of $1.53 for the two books. The price of the first book was 64 cents and that of the second was 89 cents. The Winslow books were also considered. That company's bid was 64 cents for the first book and 80 cents for the second, making a total of $1.44 for the two books. The bid of the American Book Company was 72 cents for the first and $1 for the second book. This made a total of $1.72 for both books. The witnesses for the American Book Company testified to the effect that the text of its books was superior to that of the other companies submitting bids. On the other hand, the witnesses for appellees testified that the text of the books in question of the other bidders was superior to that of the books of the American Book Company. If this were all the testimony on this branch of the case, the contract of the American Book Company would be a valid and binding contract, in the absence of proof of fraud, or that the contract was so recklessly improvident as to indicate no intention or purpose to protect the public interest within the rule laid down in *McCrory* v. *Richland Township Road Improvement District, post* p. 460, and cases cited. The reason is that the statute creating the State Textbook Commission and regulating its proceedings does not require it to let contracts to the lowest bidder. So, in the absence of a showing to the contrary, the presumption would be that the book companies properly interpreted the law in making their bids and that the Textbook Commission considered the quality of the textbooks in accepting the bid of the American Book Company, although it was higher than the bids of the three other book companies on the same

textbooks which were being considered at the same time. The reason is that every man is presumed to know the statute law of the State and to construe it aright. Broom's Legal Maxims, p. 188.

This testimony, however, does not end the matter. The American Book Company introduced as witnesses several of its principal officers. According to their testimony, the contract of the Arkansas Textbook Commission and the American Book Company provides that the retail price, to the schoolchildren, of Overton's General Physiology shall be $1. Of that amount the American Book Company receives 75 cents, and the other 25 cents goes to pay the local dealer and the central depository and for transportation. According to their testimony, the same contract provides that the price that schoolchildren shall pay for the small physiology (Overton's Personal Hygiene) shall be 72 cents. Of this amount the American Book Company receives 54 cents, and the remaining part of the price goes to the local dealer that sells the books to the children and to the central depository that handles them in wholesale quantities and for transportation.

They further state that they made a contract with Parlette Bros. to handle these books as the central depository in Arkansas. Thus it will be seen that, by their own testimony, they charge the cost of maintaining the central depository to the schoolchildren of the State, and this overcomes the presumption that their bid was made according to a correct interpretation of the law. Of course, the American Book Company had the right to place its own price on its books in making its bid, but it had no right to charge the cost of the central depository to the children of the State, in violation of the provisions of the statute.

The contract which the American Book Company prepared and presented to the State Textbook Commission for the signature of the members thereof contains an express provision that the contract is made under and by virtue of the act of the Legislature creating the State

Textbook Commission and the amendatory acts. It provides that all the provisions of said acts are expressly referred to and made parts of the contract as fully as if the same were set forth at length. Thus it will be seen that the American Book Company placed its own interpretation upon the act in question and is attempting in this case to assert rights based upon that interpretation.

In *Utermehle* v. *Norment,* 197 U. S. 40, the Supreme Court of the United States said that it has been held from the earliest days, in both the Federal and State courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. To the same effect see *State* v. *Paup;* 13 Ark. 129; *Thomas* v. *Sypert,* 61 Ark. 575; and *Holloway* v. *Eagle,* 135 Ark. 206.

As pointed out in our original opinion, the statute in question was enacted for the benefit of the schoolchildren of the State, and, if book companies could build up rights based upon their own interpretation of the statute, it had just as well never have been passed. The fact, however, that the American Book Company, by its own evidence, shows that its bid was based upon what it interpreted the statute to mean, does not overcome the presumption that the other book companies made their bids according to the legal interpretation of the statute.

In short, if a person could deliberately act contrary to that which the law, by his own contract, imposed on him, and could thus build up vested rights, this would be done in almost every case, and statutes for the protection of the public in cases like this would be of no benefit whatever.

Again, it is claimed that the court erred in its construction of the statute because of that clause which provides that it shall be the duty of the contractor to stipulate that he is not furnishing, under contract executed within the preceding year, to any State, county, city or other school district anywhere in the United States, at a

less retail price than he is furnishing the same to the State of Arkansas under similar conditions of distribution and cost of delivery.

Now, as we have already seen, the statute does not provide that the textbook contracts shall be let to the lowest bidder. The reason is manifest. The commission is given the power to take into consideration the quality of the text, the plainness of the print and the texture of the paper out of which the books are made. Nevertheless, in order to protect the people as far as possible, the clause just recited was placed in the statute so that the book companies could not have one cost for the central depository in one State and another estimate of cost for a central depository in an adjoining State. As we have already seen, the cost of transportation and the cost of the distribution of the books is all included in the cost of the central depository, and it was the object of the statute to standardize this cost and make it uniform.

The result of our views is that we adhere to our original opinion, and the motion for a rehearing is denied.

McCULLOCH, C. J., (dissenting). The only prohibition in the statute with reference to the substance of a contract for furnishing schoolbooks is that "the commission shall not enter into contract with any person or publisher for any book or books to be used in the public schools of the State at a retail price above or in excess of the price at which said book or books are furnished by said person or publisher, under contract executed within one year next preceding the making of the contract with the commission, to any State, county, city, or other school district in the United States, under similar conditions of distribution and cost of delivery." There is not a particle of evidence that the contract of American Book Company is in violation of this feature of the statute. There is no evidence that the book company has, within the past year, sold or contracted to sell, books "under similar conditions of distribution and cost of delivery," in any other State of the Union, at prices lower than those stipulated in this contract. The majority of the court do

not, in this opinion, declare the contract void on that ground. But they seem to have found in the statute an implied prohibition against allowing a publisher to include, in his retail price specified in the contract, the expense of maintaining a central depository as a part of the cost of distribution. I am unable to find any such implication in the statute. Neither its language nor the general purpose of the legislation justifies it. The statute does indeed require the contractor to maintain a central depository for the distribution of books, and this means, of course, that the contractor must pay the cost of maintaining the depository, but that is far from prohibiting the contractor from including that expense in the cost of distribution which he adds to his wholesale price in fixing the retail price. The statute also requires the contractor to pay the freight charges on shipments of books from the central depository to the local dealer in each county, but will it be contended that this prohibits the contractor from adding the expense of transportation to his wholesale price in fixing the retail price? Surely not. To do so would be to violate all known customs of trade; in fact, to do violence to essential economic laws. Cost of production, plus reasonable profit and expense of distribution, necessarily fixes the retail price to the consumer. No producer or dealer can survive who omits either of these essentials in fixing his price to the consumer. An intention to violate those rules by prohibiting the inclusion of expense of distribution in fixing the retail price should not be attributed to the lawmakers in the absence of express language to that effect. An analysis of the contract with the book company will, I think, clearly demonstrate the error of the views of the majority in declaring it to be void. There are two books involved in the contract, viz., Overton's Personal Hygiene, and Overton's General Hygiene. The American Book Company is the publisher of each of these books, and the wholesale or publisher's prices are 54 cents and 75 cents, respectively. The publisher has, according to undisputed evidence, only one price on each book—the above whole-

sale prices plus cost of delivery—and the list or retail prices are fixed in accordance with that rule.

The contracts for furnishing books required under our statute are for retail prices at point of delivery to local dealers in each county, with transportation charges prepaid, and the book company in this instance contracted to furnish the books named at 72 cents and $1, respectively, which includes the addition of 25 per cent. of the retail price to the wholesale or factory price to cover the expense of distribution and delivery. This addition of 25 per cent. consists of 15 per cent. allowed by the statute to local dealers and 10 per cent. the estimated expense of transportation charges and maintenance of the central depository. The book company has a contract with the central depository to distribute the books and pay all transportation charges. It is affirmatively proved that this percentage compensation to the central depository is fair and reasonable, and this is undisputed. It is thus seen that, under the contract, the book company receives only its uniform wholesale or factory prices, and that the remainder of the retail prices goes to pay the expense of distribution to purchasers. It would seem very clear that all of the expenses of distribution should be added to the wholesale price, and that the statute does not prohibit it. The fact that some of the bidders did not include the expense of the central depository is of no importance in determining the validity of this contract. Such bidders may have been willing to cheapen the price in order to induce the commission to adopt their books. The price, in comparison with prices of other books on this subject, is not the only consideration, for, in the procedure of adopting schoolbooks, there is no competitive bidding in the ordinary meaning of that term. The bidders are the publishers, and they bid on their own publications—no others. There is no way of comparing bids as to prices. The commission selects the particular book it wants and then makes the best bargain it can as to price. If the price is not satisfactory, another book at a lower price can be selected from some other bidder. The law, speak-

ing through the commission, says to each publisher, if you want to enter into contract for furnishing a book on a given subject, fix a retail price for the book, delivered to all local dealers, pay all distribution charges, including local dealers' compensation fixed by statute, maintenance of central depository, and transportation. The publisher has the right to include in his retail price all of the expenses of distribution, and this does not invalidate the contract unless it is an improvident one.

There is no indication in the opinion of the majority that this contract is an improvident one in fact; it is merely denounced as an unlawful one, in conflict with the statute. I do not think so. No court has ever held that such a contract made under a similar statute is void. The primary purpose of the statute is to secure uniformity of books in use in the schools of the State for a given period of time, so that frequent changes may not be made at the expense or inconvenience of school patrons, and, incidentally, to cheapen the cost of books as far as practical. The purpose is to secure the best books, not the cheapest ones. Quality in subject-matter is not to be sacrificed for sake of economy. No right-minded teacher would think of selecting a book merely because it is the cheapest. All of the school men who testified in this case expressed concurrence in this rule, and the proof shows that such has been the prevailing rule in selecting books by the commission in former years.

Unless the law, as interpreted by the majority of the court in this case, is changed by the Legislature, the commission must, in selecting books, give more consideration to price than to quality.

MATLOCK v. JONES.

Opinion delivered June 7, 1926.

1. HIGHWAYS—ALTERATION OF ROUTE.—The county court had authority to change the route of the road, as designated by special Act No. 172, of February 18, 1920, creating a road improvement district, to a route as surveyed by engineers of the State Highway Department, where the termini remained the same; the construction of a dam having caused a portion of the original route to overflow.
2. HIGHWAYS—ALTERATION OF ROUTE—POWERS OF COMMISSIONERS.—Creation of a road improvement district is not invalidated by the fact that the commissioners were authorized by the act creating it to select or vary the route of the road to be improved.

Appeal from Garland Chancery Court; *William R. Duffie,* Chancellor; affirmed.

B. N. Florence, for appellant.

Martin, Wootton & Martin, for appellee.

WOOD, J. This is an action by the appellant against the appellees, Road Improvement District No. 2, Garland County, Arkansas, and its commissioners. The appellant alleged in substance that he was a taxpayer in the district, being an owner of lands therein, and he brings this action for the benefit of himself and all other taxpayers similarly situated. After setting up the special act creating the district, the appellant alleged that the district was created to construct a road to follow substantially the Hot Springs-Arkadelphia road to the county line, but that the appellees had filed a petition in the county court of Garland County in which it was alleged that the original improvement of the roadbed contemplated by the act could not be made by reason of the proposed construction of a hydro-electric dam across Ouachita River, which would cause a flooding of three miles of the roadbed, and the appellees asked that a change be made in conformity with the United States and State laws, so that Federal aid might be obtained in the construction of the improvement; that an order of the county court was entered making a change in the roadbed as described in the act to a route laid out by the engineers

of the State Highway Department as shown on a map filed with the petition; that the changed route under the order of the county court contemplated 6.1 miles of new roadbed passing through sections 20, 19, 24, 25, 26 and 35, township 3 south, ranges 19 and 20 west, and sections 2 and 1, township 4 south, range 20 west, instead of through the sections and townships as originally routed by the act. The appellant alleged that the construction over the route as changed by order of the county court could not be made under the act creating the district, for the reason that the change was so extensive as to constitute a deviation from the purposes of the district as created by the act of the Legislature, and had the effect of nullifying the provisions of that act. The appellees alleged that the act creating the district contemplated an improvement of the highway approximately ten miles in length, but that, under the change directed by the order of the county court, the roadbed would be lengthened exceeding one mile and take in a new roadbed, not provided in the act, of approximately six or seven miles. The commissioners answered the complaint, admitting all the allegations of fact therein, but denied that they could not proceed with the construction of the road over the changed route under the provisions of the special act creating the district.

The cause was heard upon the deposition of one R. A. Jones and the exhibits to his deposition, showing the petition filed in the Garland County Court and the order of the county court granting the petition for the change in route. The chancery court found that special act 172, approved February 18, 1920, created Road Improvement District No. 2 of Garland County, Arkansas, for the purpose of repairing, improving and constructing a public highway beginning on the north side of Grand Avenue, where it intersects with Central Avenue in the city of Hot Springs, Arkansas, and continuing in a southerly and southwesterly direction along the present public road known as the Hot Springs-Arkadelphia Road to the Garland County line, at a point

(describing it) and including property on each side of the road within the district. The court further found that the district and its commissioners had filed a petition in the Garland County Court alleging that the use of the roadbed as designated in the act creating the district was impossible in view of the proposed construction of the hydro-electric dam across Ouachita River, which would create a lake that would overflow that portion of the roadbed originally contemplated "commencing at a point near the southern boundary of section 20, township 3 south, range 19 west, and extending to the southern boundary of section one, township four south, range twenty west, approximately three miles, and that Federal and State aid, which are necessary in the construction of the proposed road in the district, would be refused, and that a survey had been made by the Federal and State engineers whereby that part of the road which would be overflowed was changed from a point beginning approximately on the southern line of section 2, township 2 south, range 19 west, and extending to the southern line of section 1, township 4 south, range 20 west, Garland County, Arkansas, and passing through section 19, township 3 south, range 19 west, and sections 24, 25, 26, 35 and 36, township 3 south, range 20 west; that the Garland County Court, in accordance with act 422 of 1911 of the Legislature of Arkansas, duly entered its order changing said roadbed, as shown by the survey of the engineers of the State Highway Department, as exhibits "C" and "D" to the deposition of R. A. Jones; and that the commissioners will be unable to make the improvements contemplated by the act creating the district unless the road is constructed over the route as surveyed by the engineers for the State Highway Department. * * * And the court further finds that, in order to improve the road, it will be necessary for the commissioners to abandon approximately three miles of the road as designated in the act creating the district, and to improve a changed roadbed as designated by the county court for a distance of approximately six and a

half miles." The court found that the changed route is not such as to constitute an entire departure from the improvements contemplated by the act creating the district. The court thereupon entered its decree dismissing the appellant's complaint for want of equity, from which is this appeal.

The only question presented by this appeal is whether or not the county court of Garland County had authority to change the route of the road as described and laid out in the act creating the district to the route designated in the order of the county court making the change. The district was created by special act No. 172, approved February 18, 1920. The first section of the act creates the district, and names Robert Jones and John DeWoody and S. H. Grandstaff as commissioners thereof. The second section, after describing the road to be improved, contains this provision: "The improvements to be made by the said district are to be made along the route designated in this act. If it becomes necessary to lay out or designate any new route, the same shall be laid out by the county court of Garland County in accordance with act No. 422 of the Acts of 1911 of Arkansas, being an act to amend § 7328 of Kirby's Digest of the Statutes of Arkansas. All changes in the route of the road are to be approved by the county court. Said road is to be constructed of material selected by the commissioners and approved by the county court."

Section 5 of the act provides, among other things, that, "if said commissioners deem it to the best interest of the district to vary the line of the roads as heretofore laid out, they may report that fact to the county court of Garland County, and, in the event if the county court approves of the report, it may make an order changing the route of the road, and, if necessary, it shall in that event lay out the new roads in the manner provided in act No. 422 of the Acts of the General Assembly of the State of Arkansas for the year 1911."

The above provisions clothe the county court with ample authority to change the route laid out and

described in the act creating the district to the route designated in the order of the county court making the change; that is, to the route as shown by the plans, plat, profile and survey prepared by engineers of the State Highway Department and attached to the petition of the commissioners filed before the county court praying for the change in the route. The language of the act under review, it will be observed, confers authority upon the county court "if it becomes necessary to lay out or designate any new route," to make an order changing the route of the road and lay out the new road in the manner provided in act No. 422 of the Acts of 1911. Act No. 422 confers upon the county court the "power to open new roads, to make such changes in old roads as may be deemed necessary and proper." It occurs to us, when the language of the act under consideration is taken in connection with the language of act 422, *supra,* the Legislature intended to confer upon the county court, not only the power to make material changes in the road to be improved as designated in the act creating the district, but also, if the commissioners and the county court deemed it to the best interests of the district, the power to designate and lay out an entirely new route to be improved under the terms of the statute creating the district. The language of the statute conferring such power is unambiguous and unmistakable. It is not within the province of the court to limit it. The purpose of the law is expressed in its second section—"to repair, improve and construct a public road, beginning on the north side of Grand Avenue where it intersects Central Avenue in the city of Hot Springs, Arkansas, and running thence in a southerly and southwesterly direction along the present public road known as the Hot Springs-Arkadelphia road to the county line." The termini of this road are thus fixed on the Hot Springs-Arkadelphia Road at a certain place in the city of Hot Springs as the beginning of the northern terminus of the road, and the county line of Garland County on the Hot Springs-Arkadelphia Road as the

southern terminus. Observing these termini and this general direction, unquestionably the act creating this district contemplates that the commissioners of the district, if they deem it for the best interest of the district, may report an entirely new road, and the county court, if it approves their report, may lay out such new road to be improved under the act creating the district.

In *Bulloch* v. *Dermott-Collins Rd. Imp. Dist.*, 155 Ark. 176, page 186, we said: "The rule contended for, that only immaterial changes can be made in the route, is applicable to districts organized under the Alexander law, or special acts in which authority was not conferred on any agency to make a change in the route. * * * The Legislature has authority to create an improvement district based upon the benefits to the lands included therein, and to designate the route, or select an agency to do so, without the consent of the propery owners. Having such authority, it naturally follows that it may authorize an agency to make a material change in the designated route."

And in *Mashburn* v. *Northern Arkansas Imp. Dist. No. 3*, 167 Ark. 58, we had under consideration the following language: "If such plans contemplate that the line of any public road to be improved shall be straightened or changed, and the county court of the county in which the changed part is situated approve the same, this shall constitute a laying out by the county court of the said road as changed." A majority of the judges construed this language to mean that "the board of commissioners may, with the approving action of the county court, make material changes in the route, if those changes are not such as to constitute an entire departure from the improvement contemplated by the statute." The language of the statute in the case at bar is more comprehensive and confers a broader power than the statute under review in the above cases, in that it vests the commissioners with the power to report the new route to the county court and the county court with the power to lay out the new road as reported. This court,

in numerous cases, has held that the creation of an improvement district is not invalidated by the fact that the commissioners were authorized by the act creating the district to select or vary the route of the roads to be improved. *Board of Com. Rd. Imp. Dist. No. 9* v. *Furlow,* 165 Ark. 60-64, and cases there cited.

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

MITCHELL *v.* HANLEY.

Opinion delivered June 14, 1926.

1. FRAUDS, STATUTE OF—AGREEMENTS NOT TO BE PERFORMED WITHIN YEAR.—The statute of frauds applies to those agreements only which appear from their terms to be incapable of performance within a year, or such as the parties never contemplated should be performed within that time.
2. FRAUDS—STATUTE OF—PART PERFORMANCE.—Partial performance of an oral contract within the statute of frauds has no effect at law to take the case out of the provisions of the law.
3. FRAUDS, STATUTE OF—ORAL CONTRACT—PART PERFORMANCE.—Where defendant had a contract for a specified consideration to carry the United States mail between certain towns for a period of four years, and, before expiration thereof, plaintiff, for an additional consideration, verbally agreed to execute defendant's contract for the remaining period of 21 months, and accordingly took a subcontract from the United States, the collateral agreement between plaintiff and defendant was within the statute of frauds, and the fact that plaintiff fully performed the subcontract did not take such collateral agreement out of the statute.

Appeal from Baxter Circuit Court; *Jewell Black,* Special Judge; reversed.

STATEMENT BY THE COURT.

John Hanley instituted this action in the circuit court against L. A. Mitchell to recover $345.69 for a balance due for breach of contract.

According to the allegations of the complaint, the defendant entered into a written contract with the United States to carry the mail from Zion to Melbourne, in Izard

County, Arkansas, six times per week, beginning on the first of July, 1918, and ending on June 30, 1922.

On the 30th day of September, 1920, the defendant entered into an oral contract with the plaintiff whereby the plaintiff agreed to take over said contract for carrying the mail, and entered into a subcontract with the United States to carry out the provisions of the defendant's contract with the United States from September 30, 1920, to June 30, 1922, in consideration that the defendant would pay the plaintiff the sum of $38.41 per month in addition to the amount to be paid by the United States. The plaintiff entered into a subcontract with the United States for carrying the mail under said contract, which is exhibited with the complaint.

The plaintiff has fully complied with the terms of his oral contract with the defendant. The defendant paid him the sum of $38.41 per month from September 30, 1920, until October 1, 1921, but has failed and refused to pay him the amount due from the first day of October, 1921, to June 30, 1922.

The defendant Mitchell filed a plea to the complaint in which he alleged that the oral contract, which is the basis of this action, not being a contract to be performed within a year from the date of its execution, is void under the statute of frauds.

His plea was overruled, and the defendant elected to stand upon his demurrer. Whereupon the court found from the original complaint, which has been duly verified, that the plaintiff was entitled to judgment for the amount sued for, and judgment was rendered accordingly.

To reverse that judgment the defendant Mitchell has duly prosecuted an appeal to this court.

W. M. Dyer and *John L. Bledsoe,* for appellant.

S. M. Bone, for appellee.

HART, J., (after stating the facts). The judgment of the circuit court was wrong. In the very nature of things the contract between the plaintiff and the defendant could not be performed within a year, and was void

within the sixth subdivision of § 4862 of Crawford & Moses' Digest, which provides, in effect, that no action shall be brought to charge any person upon any promise, contract, or agreement that is not to be performed within one year from the making thereof, unless the same is in writing and signed by the party to be charged therewith.

This court has held that the statute applies only to agreements which appear from their terms to be incapable of performance within a year, or such as the parties never contemplated should be performed within that time. *Johnson* v. *Cheek,* 163 Ark. 176, and *Reed Oil Co.* v. *Cain,* 169 Ark. 309, and cases cited.

It is true that there was partial performance of the oral contract sued on, but this court has held that partial execution has no effect at law to take any case out of the provisions of the statute. *Henry* v. *Wells,* 48 Ark. 485.

Again, in *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79, it was held that a parol contract for personal services for a period longer than one year is within the statute of frauds, and no action can be maintained on it; and if the employee enter upon its performance and is afterwards discharged, the employer is liable only for his wages for the time he served.

But it is sought to uphold the judgment under the rule announced in *Johnson* v. *Cheek,* 163 Ark. 176, that the contract had been fully executed when the suit was brought, and for that reason the statute of frauds would have no application. In making this contention, counsel rely upon the allegations in the complaint to the effect that the plaintiff entered into a subcontract with the United States whereby he took over the defendant's contract with the United States for carrying the mail between Zion and Melbourne, in Izard County, Arkansas, from September 30, 1920, until June 30, 1922, and has fully performed said contract.

This the plaintiff was required to do under the subcontract for mail service executed by him with the United States on the 30th day of September, 1920. He received

the compensation from the United States provided for in said subcontract, and claims that he is entitled to receive the additional compensation from the defendant of $38.41 per month because he has fully executed his subcontract with the United States.

His claim for the additional compensation is based upon the oral contract which he made with the defendant on the 30th day of September, 1920. This contract, however, was not a part of the subcontract with the United States. The oral contract between the plaintiff and the defendant whereby the defendant agreed to pay the plaintiff the additional sum of $38.41 per month during the remainder of the term of his contract for carrying the mail was a collateral benefit to be conferred, and constituted no part of the subcontract with the United States for carrying the mail. Hence the fact that the plaintiff has fully performed the subcontract with the United States according to its terms does not take the case out of the statute of frauds. The policy of the statute is to prevent frauds which may be accomplished by setting up contracts of the prohibited class by parol testimony.

The plaintiff was bound to perform the contract of carrying the mail with the United States according to its terms and for the compensation named therein. The performance of that contract in full could in no sense take out of the statute of frauds a collateral agreement between the plaintiff and defendant.

The result of our views is that the circuit court erred in not sustaining the plea of the statute of frauds; and for that error the judgment must be reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

McCrory v. Richland Township Road Improvement District.

Opinion delivered June 14, 1926.

1. Highways—improvement district—prospective profits.—In a suit by subcontractors against a road improvement district, organized under a special act of extraordinary session of 1920, for profits which they would have made if permitted to perform the contract, which the district claimed was so improvident as to be invalid, testimony as to what performance would have cost is admissible to show the reasonable cost, though the profit as between contractor and subcontractor does not concern the district.
2. Highways—improvement district—validity of contract.—A road improvement district is not bound by a contract signed, at different times and places, by two of the three commissioners; such signatures not having been obtained as a result of the action of the board of commissioners at a meeting at which all of the members were either present or had notice.
3. Highways—improvement districts—power to contract.—The authority of commissioners of road improvement districts to make contracts is not absolute and unlimited, for they do not contract as individuals, but as representatives of the public interest.
4. Highways—improvement districts—power of courts to review contracts.—While the courts will not review contracts made by the commissioners of a road improvement district when there is involved merely a question of judgment, the courts have a right to interfere where it is made to appear that a contract made by them is so recklessly improvident as to indicate a conscious or reckless indifference to the interests of the district.

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

Bogle & Sharp, for appellant.

Ross Mathis and *Lee & Moore,* for appellee.

Smith, J. Richland Road Improvement District was organized by an act of the General Assembly passed at an extraordinary session in 1920, and it is the contention of appellants that the district entered into a contract with appellant Ran McGregor to do certain construction work, and that McGregor, with the consent of the district, sublet the work to McCrory and Mitchell, but the district

wrongfully refused to permit appellants to perform their contract, and this suit was brought to recover damages resulting from this breach.

The court found that there was no valid contract, and dismissed the complaint.

Appellee road improvement district insists that the testimony supports the finding made, and further insists that the contract was so grossly improvident as to be beyond the power of the commissioners to make. As we have concluded that appellee is correct in the second proposition, we do not consider the first.

By the terms of the contract the district agreed to pay McGregor for unloading, hauling, spreading and rolling gravel $1.48½ cents per yard for the first mile and 54 cents extra for each additional mile. McGregor immediately sublet the contract to McCrory and Mitchell for $1.25 for the first mile and 40 cents extra for each additional mile. The contract contemplated the spreading of something over 70,000 yards, and the profit to McGregor would therefore have been, according to the figures of the engineer of the district, $16,860.44. The subcontractors made proof that they could have laid down and spread the gravel for 50 cents for the first mile and 25 cents for each additional mile.

The subcontractors were parties plaintiff, and sought to recover from the district the profits they would have made had they been permitted to perform their subcontract, and in support of their suit they offered testimony showing what the actual performance of the contract would have cost. The district was, of course, not concerned about the profits in the contract between the principal contractor and the subcontractors, but this testimony is competent to show what the reasonable cost of the work was, and, according to the testimony of the plaintiffs themselves, the district had agreed to pay $1.48½ for the first mile and 54 cents for each additional mile, whereas the actual cost of doing the work was 50 cents for the first mile, with 25 cents added for each additional mile.

We do not set out the testimony showing the circumstances under which the contract was executed which led the court below to the conclusion that no valid contract had in fact been made. It suffices to say that the signatures of two of the commissioners were secured at different times and places, and neither read the contract before signing it. Unquestionably the contract did not become a valid one, notwithstanding these two signatures, because they were not obtained as a result of any action of the board of commissioners had at a meeting at which all were present or of which all had notice.

The theory of appellants is that the contract was ratified at a meeting of the commissioners of which all had notice and at which all the commissioners were present.

We do not pass upon this question of ratification because, in our opinion, the contract was one which the district had no right to make, and, as no work was done under it, the district is not liable for its breach.

At the meeting at which the contract was said to have been ratified, the commissioner who did not sign and who protested against its ratification, pointed out to his associates the reckless improvidence of the contract, and it does not appear to be questioned that this commissioner named a responsible contractor who stood ready to enter into a writing with the district to do the work required by the contract at a price $18,000 less than the amount the contract with McGregor required the district to pay. It will be remembered that appellee district is quite a small one, comparatively speaking.

We have in a number of cases considered the power of commissioners to make contracts of this kind, among the earliest of which are the cases of *Seitz* v. *Meriwether*, 114 Ark. 289, and *Sain* v. *Bogle*, 122 Ark. 14.

In the case of *Bayou Meto Drainage District* v. *Chapline*, 143 Ark. 446, it was said: "The commissioners, as public agents under the statute, as we have seen, are not clothed with arbitrary power in the matter of fixing fees of attorneys. They are acting as trustees for the public,

and must have an eye to the interests of those whom they serve—the property owners who pay all the expenses incident to the improvement. They must be guided, in entering into the contract of employment with attorneys and fixing their compensation, by what would be a reasonable compensation for services which the attorneys are actually to render. It was not the purpose of the statute to confer upon the commissioners absolute power to contract with the attorneys for fees that would be exorbitant and unreasonable for the services rendered the district. While the presumption is that these public agents will conscientiously discharge their duties, yet it is not impossible, and indeed is entirely within the range of probability, that unreasonable and unconscionable fees may occasionally be agreed upon between the attorneys and commissioners. A statute giving the commissioners absolute power in the premises to thus squander the money of the taxpayers, levied for the purposes of making the improvement, would be contrary to public policy."

In the case of *Sikes* v. *Douglas,* 147 Ark. 469, we said: "Appellee, as a taxpayer, has a right of action to prevent the performance of such a contract if it be found to be grossly excessive and unreasonable. *Seitz* v. *Meriwether,* 114 Ark. 289. The commissioners had no authority to enter into a contract for payment of an unreasonable fee to an engineer. *Sain* v. *Bogle,* 122 Ark. 14; *Bayou Meto Drainage Dist.* v. *Chapline,* 143 Ark. 446."

In the case of *Bowman Engineering Co.* v. *Arkansas & Mo. Highway Dist.,* 151 Ark. 47, we said: "We have said that contracts made by the commissioners with the assessor for the amount of fee must be reasonable in order to be valid and binding. The commissioners have power to make contracts, but they are trustees of the property-owners, and can only make reasonable ones. The owners of the property have a right to challenge the validity of such contracts by showing that they are unreasonable. Of course, in testing the validity of such contracts, the court should not substitute its own judgment primarily for that of the commissioners, the authority

to make the contract being lodged by the lawmakers in the commissioners, but the inquiry of the court is to determine whether or not the contract is so improvident as to demonstrate its unreasonableness."

These cases were all reviewed and reaffirmed in the case of *Vaughan* v. *Woodruff-Prairie Road Dist. No. 6*, 158 Ark. 236.

The result of all these cases is that the authority of commissioners of road improvement districts to make contracts is not absolute and unlimited. They do not contract as individuals, but as representatives of the public interest. The courts will not undertake to review mere questions of discretion, for the power of the commissioners to act is fully recognized, and the courts will not therefore substitute their judgment for that of the commissioners of the district when there is involved merely a question of judgment. But when it is made to appear that there was a conscious or reckless indifference to the interests of the district, which the commissioners are supposed to represent, the courts have the right to interfere upon the ground that the commissioners have exceeded the power conferred upon them by law.

We think this showing was made here, as the contract was so recklessly improvident as to indicate no intention or purpose to protect the public interest.

The decree of the court below, which dismissed the complaint as being without equity, is therefore affirmed.

PURSE BROTHERS *v.* WATKINS.

Opinion delivered June 14, 1926.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict upon conflicting testimony is conclusive.
2. APPEARANCE—FILING ANSWER.—Though defendants were not personally served with process, they will be held to have entered their appearance for all purposes by voluntarily filing an answer to the complaint.
3. PROCESS—NECESSITY AFTER AMENDMENT OF PLEADING.—It was not error to permit a complaint to be amended after notice to

allege greater damages without new service of process, where defendants, though not personally served, entered their appearance by filing an answer.

4. TRIAL—REFUSAL OF INSTRUCTION ALREADY COVERED.—It was not error to refuse an instruction covered by one given by the court.

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

Pinnix & Pinnix and *W. C. Rodgers,* for appellant.

J. G. Sain and *Geo. R. Steel,* for appellee.

SMITH, J. This action was brought by appellee Watkins against appellants, Purse Bros., who are produce dealers, with their place of business in Detroit, Michigan, for damages arising from an alleged breach of contract.

It was alleged in the complaint that on June 18, 1923, appellee entered into a written contract with appellants for the sale of eight cars of peaches of the following specifications:

"No. 1 ring-pack corrugated top, $2.60. No. 2 ring-faced corrugated top, $1.60. No. 1 peaches are to be 1¾ inches and above. No. 2 slightly smaller. Peaches to be paid for when loaded and bill of lading signed."

Appellee shipped to appellants, pursuant to said contract, six cars of peaches of the kind and character specified in said contract, and, upon arrival of same in Detroit, they were inspected and rejected, whereby appellee was damaged in the sum of $400, for which amount he prayed judgment.

Appellants filed an answer, in which they alleged that the peaches did not come up to the requirements of the contract, in that many of the peaches shipped as No. 1 contained twenty to thirty per cent. of No. 2, and that the peaches were not of the grade, pack or quality called for by the contract.

Some time after appellants had filed their answer, appellee amended his complaint to allege that the damages sustained amounted to $806.70. The allegations of the complaint were not changed except to allege greater damages had been sustained than the original complaint alleged.

Appellants filed a motion to strike the amended complaint from the files, "for the reason that the defendants have not been served with process within the jurisdiction of this court." Appellants had entered their appearance voluntarily to a suit wherein only $400 damages were claimed, and it was objected that, inasmuch as there had been no personal service, the court should not permit the cause of action to be changed by allowing appellee to claim an increased amount as damages. This motion was overruled, and exceptions were saved. Thereafter, reserving their exceptions, appellants filed an answer denying any liability, as had been done in their original answer.

It was shown that the terms, "No 1 ring-pack corrugated top" and "No 2 ring-faced corrugated top," were trade terms, having a well-known and certain meaning to those engaged in buying and shipping peaches, and the testimony was conflicting as to whether the peaches came up to the standard which those trade terms implied.

The testimony on the part of the appellee was to the effect that the peaches graded up to the specifications required by the contract, that the peaches were in fact of a better quality than the contract required; whereas the testimony on the part of appellants is to the contrary.

The deposition of Ida M. Burns was taken, and she testified that she was a clerk in the Bureau of Agricultural Economics, stationed at Detroit, and that she had in her custody inspection certificates, made by members of her department, on produce shipped to Detroit, and she produced inspection certificates covering five cars of the peaches involved in this litigation, according to which certificates many of the peaches were hail-pricked and scabby and to an extent that the peaches did not grade up to the specifications of the contract. Other testimony to the same effect was offered, but, as we have said, the testimony was conflicting on this question, and the testimony is legally sufficient to support either contention concerning the quality and grade of the peaches.

Unlike the case of *Federal Grain Co.* v. *Hayes Grain & Commission Co.*, 161 Ark. 51, and the same case reported in 169 Ark. 1072, there was no provision whereby any arbitration of the question was provided for, and the verdict of the jury must therefore be treated as conclusive of this question of fact.

It is also insisted that the court erred in giving and in refusing to give certain instructions.

We do not think any error was committed in permitting appellee to amend his complaint to allege a greater damage than that claimed in the original complaint. It is true there was no personal service, but appellants voluntarily filed an answer to the original complaint, and this action entered their appearance as completely as if they had been personally served with process.

In the case of *S. R. Morgan & Co.* v. *Pace*, 145 Ark. 273, the plaintiff sued the defendant to recover the sum of $500 alleged to be due for legal services, and a judgment was rendered by default for that amount. This judgment was later set aside, and an answer was filed in which the defendant denied liability. Thereafter the plaintiff filed an amended complaint in which the value of the services was alleged to be $1,000. No summons was issued on the amended complaint or notice given to the defendant of the claim for the additional amount, and no answer was filed to the amended complaint. The cause was set down for trial, and defendant failed to appear, whereupon a trial was had and a verdict was returned in favor of the plaintiff for $750. Upon the appeal from the judgment pronounced upon the verdict, it was insisted by the defendant below, appellant here, that the increase in the amount claimed in the amended complaint stated a new cause of action, which necessitated the issuance and service of an additional summons. The original action for $500 covered the same transaction, and was alleged in identical language in the amended complaint. We said that, under the statute, a plaintiff may file an amended complaint before answer filed without permission of the

court, but that, after answer had been filed, the complaint could only be amended by permission of the court, and then upon such terms as might be imposed by the court, and that "to allow an amendment, after the issues have been joined, increasing the amount of a claim, and to render a judgment for the additional amount claimed, without notice to a defendant, would be an abuse of sound discretion," for the reason that the defendant had the right to make default in reliance upon the case proceeding to a hearing upon the issues joined. The judgment appealed from was reduced to $500, the amount claimed in the original complaint, and affirmed for that sum.

It appears from the language quoted that new service of process was not required. The amendment to the complaint enlarging the sum claimed was not treated as a new cause of action, and it was required only that permission to amend be obtained from the court and that notice of the amendment be given the defendant, so that he might not, in case he elected not to defend the action, rely upon the assumption that no greater judgment would be rendered than had been prayed for in the complaint which the process served upon him required him to answer. Here there was permission from the court and notice to the defendant. A motion was made to strike the amended complaint, and this motion was overruled, so that appellant had ample opportunity to resist the increased claim as well as the original demand.

In volume 1 Encyclopedia of Pleading and Practice, § 10 of the chapter on Amendments, at page 586, it is said: "Amendments of the *ad damnum* are never deemed to constitute a new cause of action. Hence that frequent ground of objection will not hold at any stage of the case against amendments increasing or reducing the amount demanded." See also Phillips' Code Pleading, § 315, and note to the case of *Commonwealth* v. *A. B. Baxter & Co.*, 42 L. R. A. (N. S.) 484.

Appellants asked instructions to the effect that the contract was an entire one, that appellants were not required to accept any of the cars unless all of the cars

came up to the specifications, and that appellants were not required to accept the peaches unless they were of a kind which could be handled by them under the grade, quality and size called for by the contract. No error was committed in refusing these instructions, for the reason that the instructions given submitted the question of fact whether the peaches conformed to the contract, and required a finding that appellee shipped to appellants, "in pursuance to said contract, six cars of peaches of the kind, grade and specifications provided in said contract," before finding for the plaintiff. There was no question about the deterioration of the peaches in shipment, and the grade of the peaches was, when received, the same as when they were shipped. The instructions required the jury to find, before returning a verdict for the plaintiff, that the peaches were of the kind, grade and quality specified in the contract, and, if they were, plaintiff was entitled to a verdict for any damages sustained by reason of appellants' refusal to receive them.

When appellants refused to receive the peaches, appellee ordered the peaches sold by another dealer, and no complaint is made that the verdict returned by the jury, which was for the sum of $793.80, is excessive.

Finding no error, the judgment is affirmed.

ELLISVILLE LUMBER COMPANY v. FIRST NATIONAL BANK OF FORDYCE.

Opinion delivered June 14, 1926.

1. TRIAL—CONSTRUCTION OF CHARGE AS A WHOLE.—In an action on drafts by an indorsee against a drawer, an instruction to find for the indorsee if the drawer failed to prove that the indorsee agreed to take the drafts in absolute payment of the drawer's indebtedness "without recourse" *held* not objectionable in using the words "without recourse," as their meaning was well-defined, and the instructions as a whole left no doubt as to their meaning.
2. BILLS AND NOTES—ACCEPTANCE OF DRAFT AS PAYMENT—INSTRUCTION.—In an action on a draft by an indorsee against the drawer,

an instruction to find for the drawer if the indorsee accepted them in full payment of the drawer's indebtedness, *held* to submit the issue raised by the drawer's answer alleging that the indorsee induced the drawer to sell lumber at a sacrifice under an agreement to take the drafts in absolute payment.

3. BILLS AND NOTES—BURDEN OF PROOF.—The drawer of a draft has the burden of overcoming the presumption that the drawer is liable to the holder on the drawee's blank indorsement.

4. BILLS AND NOTES—HANDLING OF DRAFTS—EVIDENCE.—In an action by an indorsee against the drawer of a draft, wherein the drawer's answer alleged that the drafts were accepted in payment of drawer's debt to the indorsee, testimony of the indorsee's president as to a conversation had with the drawer relating to the handling of this and other drafts was competent.

5. EVIDENCE—SILENCE AS DECLARATION AGAINST INTEREST.—In an action on a draft by an indorsee against the drawer, wherein the drawer contended that the draft was taken in payment of the debt, *held* that testimony relating to a conversation wherein the indorsee's president demanded payment of the drawer and the drawer said nothing, was competent as a declaration against interest.

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

P. G. Matlock and *Wilson & Martin*, for appellant.

S. F. Morton and *Frauenthal & Johnson*, for appellee.

SMITH, J. This is the second appeal in this case, and, as appears from the opinion on the former appeal (163 Ark. 471), the suit was brought against the appellants, Ellisville Lumber Company, by appellee, First National Bank of Fordyce, to recover the amount of three drafts which had been indorsed by appellants to appellee. These drafts were drawn by appellants on the Morse Bros. Lumber Company, and were payable to the order of appellants, and were indorsed by them in blank to appellee. The drafts were presented to Morse Bros. Lumber Company at the place of payment, and were duly protested when payment was not made. Thereupon this suit was brought.

The Morse Bros. Lumber Company made no defense, but appellants filed an answer in which they alleged that, by threats of suit, appellants had been compelled to sell

certain lumber to Morse Bros. Lumber Company at a price much below its market value, but had made the sale upon the agreement that, if made, drafts drawn on Morse Bros. Lumber Company for the lumber so sold would be accepted at their face value as credits on the indebtedness due from appellants to appellee, and it was alleged that the drafts were indorsed by appellants in blank, and that the indorsements were made simply to pass the title to the drafts indorsed.

A demurrer to this answer was sustained, and appellants stood on their answer and appealed to this court.

Upon the appeal we held that it was not duress to do that which a party had a legal right to do, and the fact that a creditor threatens to bring suit to collect a claim constitutes neither duress nor fraud, and that the compromise of such a claim is binding in law.

We also held that, while there is a conflict of authority upon the question whether parol evidence is admissible to contradict or vary the implied terms of a blank indorsement as between the immediate parties, the prevailing view favors the rule excluding parol evidence, since the contract implied by the blank indorsement is as definite as if it were expressed.

We said, however, that there are certain well recognized exceptions to the general rule as between the immediate parties, that it was always competent to show by parol evidence either want or failure of consideration between indorser and indorsee, or that the indorsement was procured by fraud, or that it was made upon some special trust, or to make collection.

There was some uncertainty about the interpretation of the allegations of the answer, but we construed the answer to mean that appellants had indorsed the drafts merely to pass the title to the indorsee, and had done this under an agreement that the drafts so indorsed should be accepted as absolute payment of the indebtedness of the indorser to the indorsee to the extent of the face of the drafts, and that the demurrer to the answer had therefore been improperly sustained.

Upon the remand of the cause, testimony was offered tending to establish the fact that the indorsement had been made only for the purpose of passing title.

The court gave, at appellee's request and over appellant's objection, an instruction numbered 5, reading as follows: "You are instructed that, when the defendant executed the three drafts as drawer and indorsed them, under the law they became responsible to and agreed to pay the plaintiff the amount thereof in the event that Morse Bros. Lumber Company failed to pay them and they were duly protested, just as if that agreement was written on the back of the drafts above their indorsements, unless there was a specific agreement made at the time to the contrary; and, if you find from the evidence that defendant did draw the drafts and indorse them, and the drafts were not paid, and were duly protested, and the defendant has failed to prove by a preponderance of the evidence that the plaintiff at the time agreed that it took the drafts not only in payment of defendant's indebtedness to the amount of the proceeds of said drafts, but also agreed that it took them without recourse on defendant, regardless of whether Morse Bros. Lumber Company paid them, and that defendant indorsed the drafts only to pass the title to them to the plaintiff, then your verdict should be for the plaintiff."

Appellants specifically objected to that part of the instruction which reads as follows: "but also agreed that that it took them without recourse on defendant, regardless of whether" for the reason that the words "without recourse" were misleading.

Objection was also made to another instruction given at the request of appellee because it too employed the phrase "without recourse", the objection being made for the same reason.

We think there is nothing ambiguous or misleading in the phrase "without recourse." It is a term with a well-defined meaning in commercial law. Indeed, one of the partners composing the appellant firm, in testifying as a witness, employed it himself. The court was

not asked to define the phrase. In fact, all the instructions, read together, left no doubt as to what it meant. Appellants now insist that the jury may have thought the employment of this phrase was necessary at the time the drafts were drawn, but the instruction does not say so, and, if appellants were apprehensive on this score, they should have asked an instruction stating that the employment of these particular words was not essential.

The court gave on its own motion, and over appellant's objection, the following instruction: "A. If the jury believe from a preponderance of the evidence in this case that there was a specific agreement at the time on the part of the First National Bank of Fordyce to take the acceptances introduced in evidence in this case as payment in full of the indebtedness due by defendants to it, the amount of the acceptances, regardless of the fact of whether or not the Morse Bros. Lumber Company paid the acceptances, and that the defendants indorsed the acceptances in blank for the purpose of transferring the title of the acceptances to the plaintiff and thereby carry out its original agreement with the plaintiff, your verdict should be for the defendant."

This instruction fully and correctly submits the issue of fact in the case, and accords with the law as declared in the opinion on the former appeal, and we think makes clear the fact necessary to be shown for appellants to escape liability on their indorsement.

An objection was saved to an instruction which placed the burden of proof on appellants. There was no error in this. In the former opinion we said: "As we have already seen, the presumption of liability arising from a blank indorsement is *prima facie* merely, and not conclusive." The fact that there is a presumption, although it is only *prima facie,* and not conclusive, casts the burden of proof of overcoming this *prima facie* presumption on appellants.

Exceptions were saved to the admission of certain testimony. Mr. Abernathy, the president of appellee bank, testified that, after he had called upon appellants

to reduce their indebtedness to the bank, appellants came to him and wanted to know whether or not the bank would handle drafts given by prospective purchasers of lumber, among these being the Morse Bros. Lumber Company and the Riley Lumber Company. Abernathy testified that lumber was sold to the Riley Lumber Company as well as to the Morse Bros. Lumber Company, and that a draft drawn on the Riley Lumber Company was deposited to appellants' account, and was paid by the company on which it was drawn.

We think no error was committed in admitting this testimony. In the first place, the Riley draft was paid, and appellants were, for that reason, entitled to credit for its proceeds. Moreover, Abernathy testified that the conversation in regard to all these drafts occurred at the same time, and before they were drawn, and that all of the drafts drawn were part of the same arrangement.

Exceptions were also saved to the admission of certain testimony which the appellants say was self-serving. This testimony related to a conversation which occurred in the bank between the president thereof and a member of appellants' firm which was overheard by employees of the bank. The purport of this testimony was that Abernathy advised the member of appellants' firm that the drafts had not been paid, and demanded that they be taken up and paid, and nothing was then said about the drafts having been accepted as absolute payment for the amounts thereof. This testimony was competent. It related to a conversation between the parties in interest, and was in effect a declaration against interest.

The testimony presented a clear-cut issue of fact, and the jury might have found either way, but the jury accepted as true appellee's version of the transaction, and the verdict of the jury is conclusive of the question of fact.

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

LOEWE v. SHOOK.

Opinion delivered June 14, 1926.

1. PARENT AND CHILD—CUSTODY OF CHILD.—As between a mother and grandparents, the mother is entitled to the custody of her child, unless incompetent or unfit, because of poverty or depravity, to provide the physical comforts and moral training essential to its life and well-being.
2. HABEAS CORPUS—CUSTODY OF CHILD—EVIDENCE.—In a proceeding of habeas corpus, evidence *held* to sustain an award of the custody of a three-year-old girl to her mother rather than to her grandparents.
3. INFANTS—PROTECTION OF COURTS.—In awarding the custody of a child to its mother rather than to its grandparents, chancery retains jurisdiction to restore the child to its grandparents if it becomes necessary for the best interest of the child to do so.

Certiorari to Drew Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

Wilson & Norrell, for appellant.

Poff & Smith, for appellee.

HUMPHREYS, J. This case is before us on review to determine the correctness of an order of the chancellor of the Second Chancery District awarding the custody of a three-year-old girl to her mother, Mrs. Thelma Shook, in a contest between the child's grandparents, H. C. and Minnie Loewe, and herself. The contest was instituted by Thelma Shook, who petitioned and obtained a writ of habeas corpus from said chancellor for the custody of her child, Virginia Bernice Loewe, against the grandparents named above and the child's two uncles, Oscar and Ted Loewe, who were residing with the grandparents, their father and mother. Mrs Shook's first husband was Arthur Loewe, a son of H. C. and Minnie Loewe. After their marriage they resided with his parents, where the child was born. Mrs. Shook nursed and cared for the child while living with his parents. They subsequently moved to a farm in Kansas, where they had resided only four months when he died. After her husband's death Mrs. Shook came back to Arkansas, going first to her sister, then to her parents,

then back to her sister, then to the Loewes', and then back to her parents, taking the child from place to place with her. She remained with her parents the entire summer until some time in November, 1924. In February, 1925, she went to work as a saleslady at McGehee, leaving the child with the Loewes. She went from there to Tripp Junction, where she worked in a filling station until April, 1925, at which time she married her present husband, Dalton Shook, who is in the employ of the government making $175 to $200 a month. After marrying, they lived for a while with Mr. Shook's mother, then moved to Halley, where they are keeping house. Mrs. Shook visited the child during the six months she was working prior to her second marriage. After marrying Shook, she got her child and kept it for about two weeks. She then became ill, and requested the Loewes to keep the child until she got well, at which time they refused to give it to her. This suit followed.

There can be no question in the law that, as between a mother and grandparents, the mother is entitled to the custody of her child, "unless incompetent or unfit, because of poverty or depravity, to provide the physical comforts and moral training essential to the life and well-being of her child." *Washaw* v. *Gimble,* 50 Ark. 351; *Baker* v. *Durham,* 95 Ark. 335.

Appellants' contention for a reversal of the order is that Mrs. Shook is not a fit person to have the custody of her child. In support of this contention, learned counsel for appellants have called our attention to the testimony tending to show that Mrs. Shook was an immoral woman. Practically all of the testimony tending to show this fact related to her conduct prior to her marriage to Dalton Shook and while she lived with him. Her reputation for immorality was based largely upon the fact that she went riding at nights during that period with a married man or two. There is nothing in the record of consequence tending to show that she has continued this alleged conduct or that she has been guilty

of any indiscretion since she married Dalton Shook. The child is barely four years of age at this time, and, if her mother is conducting herself discreetly, we can see no good reason why she should be deprived of the joy of parental relationship. If she is leading and will continue to lead a righteous life, the pleasures incident to motherhood should be accorded her by the courts. According to the record, she is not lacking in affection for her child. She is keeping house in Halley, and her husband is amply able and willing to maintain, support, and educate the child. We are unable to discern anything in the record to indicate that the present and future welfare of the child will be imperiled by placing it under the care and control of the respondents. If the welfare of the child should at any time in the future be jeopardized by the misconduct of the mother, or for any other reason it becomes necessary for the best interest of the infant to restore its custody to the grandparents, the chancery court always has jurisdiction in such matters.

The order is therefore affirmed.

MOORE v. MOORE.

Opinion delivered June 14, 1926.

1. APPEAL AND ERROR—MATTERS NOT SHOWN BY RECORD—PRESUMPTION.—Where a decree of divorce recited that evidence not incorporated in the transcript was heard, and found that defendant had due notice, the Supreme Court will presume that the trial court found from evidence not incorporated in the record that summons was properly served, though the sheriff's return did not show proper service.
2. APPEAL AND ERROR—CONFLICT BETWEEN DECREE AND CLERK'S CERTIFICATE.—Where there is a conflict between the recitals of the decree and the certificate of the clerk to the transcript, the recitals of the decree must prevail.
3. APPEAL AND ERROR—MATTERS NOT SHOWN BY RECORD—PRESUMPTION.—Where a decree of divorce recited that other evidence than

that contained in the transcript was heard by the court, the Supreme Court will presume that such other evidence was sufficient to support the decree.

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

C. L. Poole, for appellant.

John Baxter and *J. S. McKnight*, for appellee.

HUMPHREYS, J. Appellee brought a suit for divorce against appellant in the chancery court of Calhoun County, alleging as a ground therefor that she offered him such indignities as to render his life with her miserable and his condition intolerable. She did not appear in person or by attorney in the trial of the cause, and he obtained the following decree:

"Now on this 17th day of February, 1925, a regular day of the February term of the Calhoun Chancery Court, this cause having been regularly reached on the docket and the plaintiff, J. H. Moore, appearing in person and by his attorney of record, J. S. McKnight, and the defendant, having been called three times at the bar of the court, failed to plead in any manner, but made default, and the court, after hearing the depositions of the plaintiff, Floyd Newton, Lovisa Kitchens and other evidence, and being well and sufficiently advised in the premises, finds that the defendant had due and legal notice of the pendency of this suit for the time and in the manner required by law, and that the allegations of the plaintiff's complaint, alleging indignities to the plaintiff, have been fully proved, and that he is entitled to a divorce. It is therefore considered, ordered, adjudged and decreed by the court that the bonds of matrimony heretofore existing between the plaintiff and defendant be canceled, set aside, and held for naught, and that the plaintiff be restored to his rights as a single man."

Subsequent to the rendition of the decree an appeal was prayed and granted out of this court. A reversal of the decree is sought upon two grounds: first, that there

was not sufficient service upon her; and second, that the evidence was insufficient to support a decree dissolving the bonds of matrimony between the parties.

(1). The contention is made that the service was fatally defective because the return of the sheriff failed to show that a copy of the summons was left at appellant's usual place of abode with some member of the family over fifteen years of age, as provided in § 1144 of Crawford & Moses' Digest. The return of the sheriff is as follows:

"SHERIFF'S RETURN.

"State of Arkansas, County of.....

"On the 22d day of January, 1925, I have duly served the within writ by delivering a copy, and stating the substance thereof, to the within named, by leaving a copy of same with Mrs. Moore's daughter, with whom she lived, as I am herein commanded.

"I. C. ABBOTT, Sheriff."

Although the return on its face is deficient, the decree recites that other testimony than that contained in the transcript was heard, and "that the defendant (appellant) had due and legal notice of the pendency of the suit for the time and in the manner required by law." Under a well established rule of this court, we follow the recitals in the decree when there is a conflict between the recitals therein and the certificate of the clerk to the transcript. *Dierks Lbr. & Coal Co.* v. *Cunningham,* 81 Ark. 427; *Toll* v. *Toll,* 156 Ark. 135. According to the certificate of the clerk, no evidence was introduced to supply the defect in the return, but the recitals of the decree show that the court made its findings from evidence introduced and not incorporated in the transcript. Under the rule aforesaid we must presume that the evidence showed that the summons was served upon appellant by leaving a copy thereof at her usual place of abode with a member of her family over fifteen years of age, and that the court treated the return as amended to conform to the proof as a basis for its finding that appellant

had due and legal notice of the pendency of the suit for the time and in the manner required by law.

(2). It is unnecessary to set out and analyze the testimony contained in the transcript to ascertain whether it is sufficient to sustain the finding of the court to the effect that appellant had offered such indignities to appellee as to render his condition in life intolerable, for the decree recites that other evidence than that contained in the transcript was heard by the court as a basis for its finding. We must indulge the presumption that the other evidence referred to was sufficient to support the decree dissolving the bonds of matrimony between the parties.

No error appearing, the decree is affirmed.

BERG v. STATE.

Opinion delivered June 14, 1926.

FORGERY—INSUFFICIENCY OF EVIDENCE.—Proof merely that defendant filed with the recorder a deed to himself in which a consideration of $100 is recited, whereas the same deed, reciting a consideration of $1,000, was filed for record a year previously, was insufficient to show a forgery of the deed, since the alteration might have been made by the grantor or by some authorized person.

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

E. D. Chastain and *Cravens & Cravens,* for appellant.

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

HUMPHREYS, J. Appellant was indicted in the circuit court of Crawford County for the crime of forging a deed and uttering the forged instrument. The first count in the indictment charged the forgery and the second uttering the deed.

On a trial of the cause, appellant was acquitted of the forgery but convicted of uttering the instrument,

and adjudged to serve a term of two years in the State Penitentiary therefor, from which is this appeal.

A number of alleged errors are assigned for the reversal of the judgment, but the first being all-sufficient to support a reversal of the judgment, we need not advert to the others. The first is the alleged insufficiency of the evidence to support the verdict and judgment. The theory of the State was that appellant forged a warranty deed from Joseph Powell to himself to certain real estate in said county belonging to W. A. Smith, H. G. Seiger and J. W. Smith, for record in the circuit clerk's office, with intent to cheat, defraud, and obtain possession of their said property. The circumstances upon which the State relied for a conviction were that, on July 9, 1925, appellant filed a deed with W. A. Bushmiaer, clerk of the circuit court of Crawford County and ex-officio recorder in and for said county, to said real estate from Joseph Powell to appellant, in which a consideration of $100 was recited; whereas the same deed was presented for record a year prior to said date, which, at that time, recited a consideration of $1,000. The record contains no evidence, other than this circumstance, in an attempt to prove that the deed was forged. For all that appears, the deed had been executed and acknowledged by Joseph Powell and was in every respect genuine. If the consideration had been reduced, there was nothing to show that it was not changed by Joseph Powell, the grantor, or if not changed by him, that it was changed by some one authorized by him to do so. We do not think the circumstances relied upon by the State are sufficient to show that the deed in question was a forgery, and, unless the instrument was forged, the uttering or publishing of same was not a crime. The court should have peremptorily instructed a verdict of not guilty.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

OLIVER CONSTRUCTION COMPANY v. UNION TRUST COMPANY.

Opinion delivered June 14, 1926.

1. EVIDENCE—VARYING WRITING BY PAROL.—Where an order drawn by a subcontractor on a construction company to pay a sum of money direct to a trust company named upon the sole condition that a certain estimate due to the drawer at a named date should be sufficient to cover the order, testimony of the president of the construction company that the acceptance was upon a further condition that the amount named should be due to the drawer after paying the wages of laborers employed under the drawer, was properly excluded.
2. ASSIGNMENTS—OPERATION AND EFFECT.—Where an order drawn on a construction company to pay a trust company named a sum of money out of an estimate due the drawer on a named date and the drawee's acceptance amounted to an absolute agreement to pay the sum out of the estimate if it amounted to the face of the order, and, under the undisputed evidence, the estimate amounted to more than the sum named in the order, *held* that an instructed verdict for the trust company was properly directed.

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

Phillip McNemer, for appellant.

Charles S. Harley, for appellee.

HUMPHREYS, J. This suit was instituted in the circuit court of Pulaski County, Third Division, by appellee against appellant upon the following order and acceptance.

"September 4, 1923.

"Oliver Construction Company,
Little Rock, Ark.

"Gentlemen: Please pay direct to the Union Trust Company of Little Rock, Arkansas, the sum of one thousand dollars ($1,000) out of estimate due me October 12, 1923. Yours very truly,

(Signed) "J. C. STEBBINS.

"Accepted for payment direct to the Union Trust Company of Little Rock, Ark., on October 12, 1923, this 4th day of September, 1923.

"THE OLIVER CONSTRUCTION COMPANY,
"By R. B. Oliver, President."

It was alleged in the complaint that J. C. Stebbins was a subcontractor under appellant, which had a contract with Pulaski County Road Improvement District No. 10 for the construction of certain work for said district; that he executed the aforesaid order, which was accepted by appellant; that the estimate furnished by the engineer of the work done by J. C. Stebbins under the contract up to the 12th day of October, 1923, amounted to more than the sum specified in the order, and that appellant had refused to pay the order when presented.

Appellant filed an answer admitting the execution of the order and its acceptance, but denying any indebtedness thereon for the alleged reason that it had paid more than the amount of the estimate of the work done by J. C. Stebbins up to October 12, 1923, to laborers, in accordance with the provisions of the bond which appellant was required to give as original contractor under the act establishing the district. It also denied liability upon the alleged ground that its acceptance was conditioned upon money being due J. C. Stebbins out of the estimate on said date after the payment of his laborers, and that none was due him.

The cause was submitted upon the pleadings and testimony introduced by the respective parties, at the conclusion of which the court instructed a verdict for the appellee, over the objection and exception of appellant, upon the theory that the acceptance of the order was an unconditional promise to pay it to the extent of the estimate to be rendered on said date. A judgment was rendered for $1,000 against appellant in accordance with the instructed verdict, from which is this appeal.

In the course of the trial, appellant offered to prove by its president, R. B. Oliver, that, when the order was brought to him for acceptance, he told appellee that J. C. Stebbins was a subcontractor of appellant in District No. 10; that he had two big gangs of laborers on the job, which were getting along badly with their work; that the

laborers would have to be paid every fifteen days, and that, after paying them, he would pay appellee such amount as he might owe Stebbins out of the estimate on October 12, 1923; that, after paying the laborers out of the estimate rendered on that date, there was nothing left to pay on the order given by Stebbins and accepted by him; that the estimate rendered on said date was the amount due appellant from the district for work done by employees under Stebbins; that the estimate due Stebbins by appellant was determined by first deducting the amount due the laborers from the amount due him according to the contract price he had with appellant.

The court excluded this testimony upon the ground that it contradicted the written order and acceptance, to which ruling of the court appellant objected and excepted.

The undisputed evidence shows that the sum due Stebbins from appellant under his contract with it amounted to more than the face of the order on October 12, 1923, unless appellant had the right to deduct the amount it had paid the laborers employed by Stebbins before paying anything on the order and acceptance. The language of the order and acceptance is unambiguous, and means that appellant will pay appellee the sum of $1,000 out of the estimate to be rendered on October 12, 1923, if it should amount to that much or more. The order and acceptance did not provide for payment out of any balance which might be due Stebbins on that date, but for payment out of the estimate which would be due on that date. There being no ambiguity in the order and acceptance which imported absolute liability upon the sole contingency of the estimate being sufficient to cover the order, the court properly excluded the testimony of Oliver tending to contradict the written contract.

The court also correctly construed the order and acceptance as an absolute agreement to pay $1,000 out of the estimate to be rendered on October 12, 1923, if said estimate amounted to the face of the order or more.

According to the undisputed evidence, the estimate amounted to over $1,500. In view of this undisputed fact, the court properly instructed a verdict and rendered a judgment in favor of appellee for $1,000.

No error appearing, the judgment is affirmed.

NATIONAL REFINING COMPANY v. THIELMAN.

Opinion delivered June 21, 1926.

1. PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S ACT.—Where plaintiff sold an automobile to defendant's salesman, the shipment by defendant to plaintiff of certain goods pursuant to plaintiff's order, which stated that plaintiff's delivery of an automobile to defendant's salesman had paid plaintiff's account to defendant and would pay the order inclosed, did not constitute a ratification of the purchase of the automobile on defendant's credit, nor an agreement to pay the remainder of the purchase price.
2. PRINCIPAL AND AGENT—UNAUTHORIZED ACT OF AGENT—RATIFICATION.—Where defendant's salesman, without authority, purchased an automobile on defendant's credit, and plaintiff's account with defendant was credited as part of the purchase price, *held* that acceptance by defendant of the salesman's notes covering plaintiff's account with defendant did not constitute a ratification of the purchase.

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

M. F. Elms, for appellant.

Joseph Morrison, for appellee.

McCULLOCH, C. J. The appellee, L. H. Thielman, is engaged in the automobile business and the business of selling oils, gasoline and other supplies in the city of Stuttgart, Arkansas, under the style of Stuttgart Auto Company, was so engaged during the year 1923, and he instituted this action against appellant to recover the price of an automobile alleged to have been sold by appellee to appellant on June 11, 1923. Appellant answered, denying that it purchased the automobile from

appellee or authorized its purchase or ratified the sale. The trial of the issues before a jury resulted in a verdict in favor of appellee for the price of the automobile.

Appellant is a foreign corporation, engaged in refining and distributing gasoline and oil. Its principal office, through which the Arkansas business is done, is situated in Memphis, Tennessee. At the time of the transaction under investigation, appellant had an employee named Peckenpaugh looking after the Arkansas business. Peckenpaugh was designated as "field agent," and the testimony shows that his duties were to employ salesmen and superintend their operations. There were numerous salesmen covering the territory, whose business was to solicit sales of commodities and send in orders for approval to the Memphis office. These salesmen traveled in automobiles, which they furnished themselves for their own use. According to the undisputed testimony, appellant did not furnish automobiles to its agents and did not give them any authority to purchase same.

Shortly before the purchase of the automobile from appellee, a man named Dornblaser was employed by Peckenpaugh as a traveling salesman for appellant. It became necessary for him to purchase an automobile with which to cover his territory as salesman, and Peckenpaugh suggested to him that he buy the car from one of appellant's customers so as to encourage trade, and, pursuant to this suggestion, Peckenpaugh and Dornblaser went to Stuttgart to confer with appellee about the purchase of a car, and the sale was consummated from appellee to Dornblaser. The usual form of sales contract was entered into, signed by appellee, and by Dornblaser in his individual capacity. Appellant's name does not appear in the contract of sale. At that time appellee was indebted to appellant on account in the sum of $383.38 for gasoline and oil previously purchased. In the contract, or memorandum, of sale between appellee and Dornblaser the price of the automobile and certain equipment sold at the time aggregated $1,060, and appel-

lant's account against appellee for $383 was credited on the account, leaving a balance of $678.62. There was inserted opposite this balance a statement in writing as follows: "Balance to be paid for with products from National Refining Company." When the sale was made and the contract was signed, Peckenpaugh was present, and he made out at that time an itemized statement of the amount due from appellee to appellant in the sum of $383.38, and added thereto the following statement: "This account to be paid by Raymond Dornblaser, salesman for the National Refining Company, in monthly installments, which is covered with notes in favor of above company; each month a paid-up note will be forwarded to Stuttgart Auto Company, together with credit memo, showing credit on account." This was signed, "National Refining Company, by D. L. Peckenpaugh." Dornblaser then executed installment notes in the sum of fifty dollars each, payable to appellant, and delivered same to appellant. One of the notes was paid, and appellant credited same to the account of appellee and forwarded to the latter a memorandum credit slip.

On June 16, 1923, appellee sent to appellant's place of business, or substation, at DeWitt, Arkansas, an order for gasoline and oil, as follows:

"National Refining Co.,
DeWitt, Arkansas.

"Attention Mr. Williams.

"Dear sir: Mr. Parrish called on us last Wednesday and we gave him an order for one barrel of heavy oil and 200 gallons of gasoline, which was to be delivered Friday of this week.

"We delivered a Dodge car to you people not long ago, which paid our account in full and will also pay for this order. Please deliver this not later than Monday, as we will need it then.

"Yours truly,

"STUTTGART AUTO COMPANY."

There was no reply to this letter, but the quantity of gasoline specified therein was shipped to appellee,

and the testimony establishes the fact that the order was forwarded to the Memphis office, where it was approved on August 4, 1923. Appellee wrote to the Memphis office of appellant thereafter informing the manager of the sale of the automobile and that payment would be claimed from appellant. Shortly thereafter there was a reply to this letter, denying liability for the sale of the automobile to Dornblaser. It appears from the testimony that, before this time, Dornblaser had quit the employ of appellant and had disappeared from the country. No one who testified in the case knew anything about what had become of him.

The trial court instructed the jury that the undisputed evidence showed that neither Dornblaser nor Peckenpaugh had any authority to purchase the automobile in appellant's name, and that the question of authority should not be considered. The court, however, submitted to the jury the question of liability on the theory of ratification of Dornblaser's purchase by appellant. That instruction was in correct form, and, if the evidence is sufficient to sustain the finding of the jury on the issue of ratification, the judgment should be affirmed; otherwise it should be reversed.

It will be observed that the sale on its face does not purport to be a sale to appellant. According to the undisputed evidence in the case, the purchase was made by Dornblaser in his own name. The car was delivered to him and the contract of sale was made in his name, and he signed it in his individual capacity. There is no proof that Dornblaser acted as the agent of appellant in the purchase of the car or that he had any authority to purchase the car for appellant. The court was correct in holding that there was no evidence of authority on the part of Dornblaser or Peckenpaugh to purchase the car in appellant's name or upon its responsibility. Both of those men were in the sales department, without any authority to make any purchase for appellant. Nor is there any testimony tending to show that appellant,

with knowledge that the contract had been made for the purchase of the car on its credit, ratified the same.

It is contended that the shipment of the bill of gasoline and oil ordered by appellee through the DeWitt station on June 29, 1923, constituted a ratification of the purchase of the automobile for appellant. Such is not the effect of the shipment of the oil and gasoline, for appellant had the right to make that shipment without committing it to any promise to pay anything more on the price of the automobile. Appellee was not put to any disadvantage or caused to change his attitude by reason of appellant's shipping this small bill of oil and gasoline. Conceding that appellant could not demand payment of this bill after shipping the same under the directions contained in the letter, it does not follow that the shipment constituted a ratification of the contract of purchase, or an agreement to pay the remainder of the price. Nor can it be said that the acceptance by appellant of the Dornblaser notes covering appellee's account constituted a ratification of the purchase. The contract with reference to these notes is complete in itself and specifies that the particularly described account of appellee to appellant was to be paid by Dornblaser in monthly installments covered by notes in favor of appellant, and that "each month a paid-up note will be forwarded to Stuttgart Auto Company, together with credit memo showing credit on account." This contract with reference to the account has no effect upon the contract of purchase, either as confirmation of authority on the part of appellant for the purchase to be made or ratification of the same. The most that can be said about it is that it is a contract with reference to appellant's preexisting account against appellee.

Our conclusion is that the court erred in submitting to the jury the question of ratification of the contract. The judgment is therefore reversed, and the cause remanded for a new trial.

POLK COUNTY v. FREDERICK.

Opinion delivered June 21, 1926.

1. STATUTES—CLERICAL ERROR.—Under Special Acts 1921, p. 856, creating the office of county collector in Polk County, and providing that the act should take effect in 1922, a provision therein that the collector should be elected in 1908, and every two years thereafter, *held* a clerical error and not to invalidate the act.
2. STATUTES—PAYMENT OF SALARY OF COUNTY OFFICER.—Though Special acts 1921, p. 856, creating the office of county collector, failed to provide for payment of his salary from any specified fund, the statute is not unenforceable, since the implication is that the salary is to be paid from the general revenue of the county.

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

J. R. Campbell, Jr., for appellant.

Pipkin & Frederick, for appellee.

McCULLOCH, C. J. The General Assembly of the year 1921 enacted a statute separating the offices of sheriff and collector in Polk County, fixing the compensation of the collector at a salary of two thousand dollars per annum and one-half of the fees and emoluments allowed by law to collectors arising from the collection of delinquent taxes. Special Acts 1921, p. 856. The first section of the statute, which relates to the office of collector, reads as follows:

"Section 1. That the office of collector of Polk County is hereby created, and at the general election held in 1908 for the election of all State, county and township officers whose term of office is fixed by the Constitution of the State at two years, and every two years thereafter, such collector shall be elected and shall qualify as other county officers, and shall give bond in the manner now prescribed by law for the collector of the revenue, and shall hold his office until his successor is elected and qualified. It shall be the duty of said collector to collect all taxes in the manner now prescribed by law for the collection of taxes, and he shall receive as full compensation for all his services a salary of $2,000 per annum, payable

monthly at the end of each month, and, in addition to said sum, he shall be entitled to one-half of the fees and emoluments now allowed by law to collectors arising from the collection by him of delinquent taxes, and out of such sums so received he shall pay all deputies and assistants that may be necessary for the discharge of the duties of his office and all expenses of his office."

The next section relates to the office of sheriff, and fixes the salary of that office, "payable monthly out of the general county revenue fund." There is a provision in the last section of the statute that the same should take effect and be in force from and after the second Tuesday of November, 1922.

Appellee was elected collector, and the county court refused to allow his salary. He appealed to the circuit court, where a judgment was rendered allowing appellee his salary, and the county court has prosecuted an appeal to this court.

The contention of counsel for appellant is that the statute is too vague and uncertain in every material respect to be enforceable. In the first place, it is contended that it is uncertain because of the provision in § 1 in regard to the election of a collector in the year 1908. That was an obvious clerical error, and should be disregarded. The statute provides that it shall take effect on the second Tuesday of November, 1922, which necessarily meant that the office of collector should be separate from that of sheriff from and after that date, and that the collector should be elected at each general election.

It is also contended that, because of failure to expressly provide for the payment of the salary out of specified funds, the statute is unenforceable. The collector is a county officer, and there is a necessary implication that the salary is to be paid by the county, and, that being true, it could only be paid out of the general revenue fund of the county, unless there was legislation directing otherwise. We think that the language of the statute

is sufficiently definite to render its terms unmistakable, and that the argument of counsel for appellant to the contrary is untenable.

Judgment affirmed.

SIMS v. CRAIG.

Opinion delivered June 21, 1926.

1. COUNTIES—ACCOUNTING OF PUBLIC FUNDS.—In an action to surcharge and correct the accounting of a county treasurer, where the complaint alleged that errors and fraud therein were not discovered by the use of ordinary diligence until more than two years after settlement with the county court, the chancery court is the proper forum, under Crawford & Moses' Dig., § 10165.
2. COUNTIES—ACCOUNTING OF PUBLIC FUNDS.—Unintentional errors or mistakes in accounting of county officers, resulting in loss to the county, may be corrected within two years after the settlement by the county court, and such errors may likewise be corrected by the chancery court after the expiration of two years and before the expiration of five years from the time of such settlement.
3. LIMITATION OF ACTIONS—ACTIONS NOT SPECIALLY PROVIDED FOR.—After five years from the time of settlement of a county treasurer, a cause of action to surcharge and falsify his account is barred by Crawford & Moses' Dig., § 6960.
4. COUNTIES—ACCOUNTING OF PUBLIC FUNDS.—A taxpayer's action to surcharge and falsify the accounts of a county treasurer for the benefit of the county is in effect the same as an action by the county or by the State for the use of the county.
5. LIMITATION OF ACTIONS—ACTIONS BY COUNTIES.—The statute of limitations applies to actions by individuals or by the State for the benefit of a county to surcharge and falsify the accounts of a county treasurer.
6. LIMITATION OF ACTIONS—TIME OF ACCRUAL.—The right of action of a county to surcharge a settlement of a county treasurer for accident, fraud or mistake accrues upon the approval of the settlement, unless he was guilty of some fraud or concealment in making the settlement.
7. LIMITATION OF ACTIONS—PLEADING IN ANTICIPATION OF DEFENSE.—Since the law requires that all county warrants be numbered

and show the date of issue, name of payee and amount, allegations, in a complaint to falsify the settlement of a county treasurer, that the treasurer took credit for warrants previously credited to him do not show that the fraud could not have been discovered by the exercise of diligence nor toll the five-year statute of limitations (Crawford & Moses' Dig., § 6960).

Appeal from Prairie Chancery Court, Northern District; *John E. Martineau,* Chancellor; affirmed.

Cooper Thweatt and *John D. Thweatt,* for appellant.

Emmet Vaughan, Trimble & Trimble, and *Gregory & Holtzendorf,* for appellee.

WOOD, J. This is an action brought in the chancery court of Prairie County by J. F. Sims, a qualified elector and taxpayer of the county, against one Geo. W. Craig and Lloyd Eddins. The appellant alleged in substance that Craig was elected on November 7, 1916, to the office of treasurer of Prairie County, and duly qualified and entered upon his duties as such; that he filed a settlement as treasurer of the county with the county court of Prairie County on July 1, 1918, which was passed on by the county court and approved, and confirmed by such court on September 2, 1918; that said settlement was false and fraudulent in that on October 29, 1917, Craig, as treasurer, received from the State of Arkansas the sum of $172.78 for the payment of nomination fees which should have been placed to the credit of the general county fund, but which Craig instead appropriated to his own use; that Craig also, as treasurer, had received money from the Farmers' & Merchants' Bank of Des Arc, Arkansas, for interest on county funds deposited therein amounting in the aggregate to $352.97, which amount should have been placed to the credit of the county general fund, and instead the said Craig, as treasurer, appropriated to his own use; that Craig paid off certain warrants and took credit for the same by covering a period of time up to and including June 30, 1917, and also took credit for the same warrants in his settlement covering a period of time ending June 30, 1918, thereby taking credit twice for the same warrants. These warrants amounted in the

aggregate to $5,776.42; that in his final settlement with the county court, filed on January 1, 1919, covering a period ending December 31, 1918, he showed all the moneys received and disbursed by him and the amount of money left in his hands as treasurer due his successor in office. This final settlement was in all things approved and confirmed by the county court on October 7, 1919. The complaint alleged that this final settlement was false and fraudulent, and a fraud was practiced on the court by including the former fraudulent settlements, as alleged, which final settlement resulted in Craig's taking credit to himself in the sum of $340.10, which amount in his hands belonged to the county and should have been credited to the general fund of the county, but which instead was appropriated by Craig to his own use. Sims alleged that the fraud perpetrated on the county court of Prairie County could not have been discovered by the use of ordinary diligence, and was not discovered until a short time prior to the institution of this suit, when an audit of the treasurer's books was made; that these settlements with the county court were had more than two years prior to the institution of this action, and the county court therefore did not have jurisdiction to correct the errors in the settlement, and that relief could only be had in a court of chancery to surcharge and falsify the settlements of the accounts of Craig as treasurer with Prairie County. The prayer of the complaint is that the settlements of the county court with Craig be reviewed for fraud in the procurement thereof and that the same be readjusted, and that Sims have judgment for the use and benefit of the county for the amounts found to be due by Craig, together with penalty and costs. The complaint was filed and summons issued January 8, 1925.

The answer denied specifically all allegations of the complaint as to the fraudulent settlements with the county court. The defendant admitted that certain warrants listed in the complaint were received by him and returned as a credit for a period of time ending in 1918. He

alleged that, if the amount of the warrants was not correctly added, the mistake occurred by failure to list warrants which he was entitled to credit for, which was an error against which the statute of limitations had run; that the evidence of such mistake had been destroyed, rendering it impossible for the defendant to defend the charge. The defendant alleged that all warrants that had been presented to him through the collector's office were paid and filed with the county clerk, and checked by him, and were then passed to the county judge, and were by him stamped "Redeemed." The warrants were then filed away by the county clerk and were later checked by the commissioners of accounts, and then rechecked by the county judge and found to be correct, and then were burned by the commissioner and the county judge; that this method of checking and rechecking the warrants paid by the defendant, for which he received credit, rendered it impossible for him to use and receive credit for the warrants a second time; that it was impossible for him to have used the warrants a second time, because there was no money in the treasury sufficient to pay them a second time. Defendant alleged that, if fraudulent warrants were presented to and received by him, he received them through mistake, believing them to be genuine, and that the statute of limitation had now run against such mistake. He pleaded the statute of limitations against the plaintiff's alleged cause of action. The defendant also filed a separate demurrer to the complaint in which he alleged that the complaint on its face showed that it was barred by the statute of limitation, in that the matters and facts set forth as alleged fraudulent settlements with the county court occurred five years before the filing of the complaint herein, and that the complaint did not allege facts sufficient to take the cause out of the operation of the statute of limitation; that the alleged fraudulent acts occurred prior to December 31, 1918, when the defendant filed the statement of his account with the county; that the complaint was in the nature of a collateral attack upon the judgment of the

county court approving and confirming the statement of the defendant as treasurer of Prairie County, rendered October 7, 1919, and that the remedy of the plaintiff, if any, was by appeal from that judgment to the circuit court. The decree of the trial court recites that the cause was submitted to the court on the complaint of the plaintiff, the answer and demurrer of the defendant, and the separate demurrer of the defendant, and the court sustained each of said demurrers; that the plaintiff duly excepted to the ruling of the court, and refused to plead further, and stood on his complaint, which was thereupon dismissed for want of equity, and judgment entered in favor of the defendant for costs, from which is this appeal.

1. It will be observed that more than five years elapsed from the time of the approval by the county court of the final settlement of the appellee, George W. Craig, with the county court to the institution of this suit on January 8, 1925. Our statute on the limitation of actions, ch. 111, C. & M. Digest, after enumerating various actions and specifying the time in which same may be brought, and not thereafter, contains this general provision:

"Section 6960. All actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued."

The action under review comes within the above provision. It is alleged in the complaint that the alleged errors and fraudulent settlement of appellee Craig were not discovered and could not have been discovered by the use of ordinary diligence until a short time prior to the institution of this action. Therefore the alleged errors and fraud could not have been corrected by the county court itself under the authority of § 10165 of C. & M. Digest, and the chancery court was the proper forum for the correction of such errors and the granting of the relief prayed for in the appellant's complaint. *State* v. *Turner,* 48 Ark. 311, 5 S. W. 302; *State* v. *Perkins,* 101 Ark. 364, 142 S. W. 515; *Fuller* v. *State,* 112 Ark. 91, 164

S. W. 770. See also *Johnson County* v. *Bost,* 139 Ark. 35, 213 S. W. 388.

While this court has held that errors caused by fraudulent settlements of officers handling the public revenue may be corrected and relief granted against such settlements after two years have expired from the date of such settlements, we have not held in any case that a suit to correct mere errors in the settlements of revenue officers with the county courts, in the absence of fraud perpetrated upon that court, could be brought and maintained after the expiration of the five-year period of limitation prescribed by § 6960, *supra.* Unintentional errors or mistakes in accounting resulting in loss to the county would be a legal fraud upon the county, and all such errors may be corrected within two years after the settlement, under the provisions of § 10165, *supra,* by the county court itself, and such errors might likewise be corrected by the chancery court after the expiration of the two years and before the expiration of five years from the time of such settlement. But, after the expiration of five years from the time of such settlement in the county court, the cause of action to surcharge and correct such accounting or settlement in the chancery court is barred. Unless the five-year statute of limitation is thus made to apply in the case of officers making settlements with the county court, such officers could have no repose whatever against any mistakes in their accountings and settlements, and their bondsmen would likewise have no repose against such mistakes. Section 6960, *supra,* comprehends every character of action not embraced in those before enumerated, and there is no authority for the courts to make exceptions in the case of officers handling the public revenue and their bondsmen. Officers and their bondsmen are as much entitled to this provision of the statute as any others embraced therein, and the statute is comprehensive of all character of actions except those thereinbefore specifically enumerated.

The action by the appellant is for the benefit of the county, and in legal effect is the same as an action by the county itself, or by the State for the use of the county. As is said in *People* v. *Van Ness*, 76 Cal. 121, 18 P. 139, "the statute of limitations is as applicable to actions like the one at bar brought by the State as to those brought by private persons, and public officers and their bondsmen cannot be harassed by suits brought after the statutory period of limitation has expired." In *State ex rel. Board of Commissioners of Fountain County* v. *Stuart,* 91 N. E. 613 (46 Ind. Appeal 611), it is held: "In actions for the benefit of a county against an officer thereof, the statute of limitations applies the same as between individuals." *People for the use of Knox County* v. *Davis,* 157 Ill. App. 438; *Knox County* v. *Rebstock,* 157 Ill. App. 440; *Board of Commissioners Woodward County* v. *Willett,* 152 Pac. 365, L. R. A. 1916E, 92.

Our own court has held that municipal corporations are bound like individuals by the statute of limitations. See *Fort Smith* v. *McKibbin,* 41 Ark. 45; *El Dorado* v. *Grocery Co.,* 84 Ark. 104, 104 S. W. 549; *Clark* v. *School District No. 16,* 84 Ark. 516, 106 S. W. 677.

2. Since the five-year statute of limitations (§ 6960 *supra*) is applicable to actions of this character, the next question is, when did the cause of action, if any, accrue? The right of action to surcharge in the chancery court for accident, fraud or mistake, settlements of the county treasurer with the county court, accrues within five years from the time such settlements are made and approved by the county court. *Blackwell* v. *Fidelity & Deposit Co.,* 173 S. W. (Ky.) 321. The complaint alleges that final settlement was filed with the county court of Prairie County by the appellee Craig as treasurer thereof on January 1, 1919, and the same was confirmed and approved by such court on October 7, 1919. Thus more than five years had elapsed between that time and the institution of this action on January 8, 1925.

3. So the issue here, in its final analysis, on the demurrer is whether or not the complaint alleges facts

sufficient to toll the statute of limitations. Any error, innocent or intentional, on the part of the treasurer in making the statement of his accounts and final settlement thereof with the county court, as we have seen, could have been corrected by the county court itself within two years after the date of such settlement. Section 10165, C. & M. Digest. The chancery court, after the two years had expired for the county court to correct the settlement, could have, within the period of five years from the date of the final settlement and approval by the county court, surcharged and corrected the accounts of the treasurer for error caused by inadvertence, accident or mistake. But, after such five years had expired, an action could not be maintained in equity to surcharge and correct the settlement and hold the treasurer liable, unless he was guilty of some fraud or concealment in making the settlement. He could not maintain the action unless he perpetrated a fraud upon the court in procuring the settlement, concealed the fraud, and thereby tolled the statute of limitations. Now the complaint alleges in substance that, in the settlement by Craig in June, 1918, he took credit for 61 warrants aggregating $1,333.82, and in the settlement of December 31, 1918, he took credit for 53 warrants aggregating a total of $4,442.60, or a total credit of 114 warrants aggregating $5,776.42, all of which warrants had been credited to him in the previous settlement of June 30, 1917; that Craig concealed the misappropriation by false entries in his books; that the fraud was not discovered and could not have been discovered by ordinary diligence until a short time before the bringing of the suit. The complaint further sets out the number of warrants drawn on the county general fund of Prairie County, the date of their issue, the name of the payee and the amount which it is alleged the appellee Craig duplicated in making his final settlement. It is also alleged that Craig in his settlements showed credits for $20,833.77, when it should have been $20,043.67, thereby showing that he had taken in excess in the sum of $340.10. While the complaint alleges in

general terms that fraud was covered up and concealed from the county court by false statements and that such fraud could not have been discovered by ordinary diligence on the part of the county court, it does not occur to us that the facts stated are legally sufficient to show that the fraud alleged in the statement of his account as set forth in the complaint could not have been discovered by the exercise of ordinary diligence on the part of the county court. The facts as alleged do not show that the appellee Craig intentionally made false statements in his accounts and endeavored to conceal the same from the county court. The law requires all warrants presented and paid to be numbered and to show the date of their issue, the name of the payee and the amount thereof. Therefore if any mistake was made by the treasurer in taking credit twice for the warrants presented and paid by him, surely the county court, by the exercise of proper diligence in checking these warrants, could have readily discovered any duplication resulting in an excess credit being taken by and given to appellee Craig.

In short, it occurs to us that the complaint wholly fails to properly state facts which, if conceded to be true, would show that the appellee had intentionally erred in the settlement of his accounts, and had, by false entries and statements in his accounts, perpetrated a fraud upon the county court in procuring his settlement. No fact is stated in the complaint which might not have been the result of an honest and unintentional mistake. The facts here alleged do not show any systematic padding of the accounts of the treasurer, and do not bring this case within the doctrine of *Johnson County* v. *Bost, supra.* The facts stated do not show such a confidential relation between the appellee and the county as would constitute the making of a mere mistake in the duplication of credits a fraud upon the county court in procuring an erroneous allowance. The facts alleged do not show any mistake in the statement of appellee's accounts that could not have been readily discovered and remedied by the exercise of reasonable diligence by the county

court within two years after the final settlement; and the facts do not show any mistake that could not have been corrected in the chancery court before the expiration of five years from the date of the settlement. Therefore the allegations of appellant's complaint are not sufficient to toll or defeat the operation of the five-year statute of limitation. The trial court ruled correctly in so holding and in sustaining the appellee's demurrer to the appellant's complaint. The decree is therefore affirmed.

MOYE & DAVIS v. WATKINS.

Opinion delivered June 21, 1926.

ASSIGNMENTS—EFFECT OF UNACCEPTED ORDER.—A written order by a landlord to her tenant that he pay the rent to a particular person is not operative as an assignment of such rents, as against a garnishment, in absence of an acceptance of the order by the tenant.

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

Brundidge & Neelly, for appellant.

John E. Miller and *Cul L. Pearce*, for appellee.

WOOD, J. On December 3, 1919, Addie M. Garrison executed a note to the Bank of Searcy, hereafter called bank, in the sum of $600, and a mortgage on certain lands to secure the same, in White County, Arkansas, described as the east part of the northeast quarter of the southeast quarter of section 14, less six acres in the southeast corner, sold to W. P. Lattimer; also the east part of the southeast quarter of northeast quarter of section 14, less one acre in the northeast corner, sold to School District No. 8 and R. M. Lattimer, all in township 8 north, range 9 west. Payments have been made on the indebtedness reducing the same to the sum of $486.18. In July, 1924, the bank threatened to foreclose the mortgage, and Mrs. Garrison thereupon wrote to the president of the bank and the trustee named in the

mortgage the following letter: "July 18, 1924. In regard to the place, I am not able to come down now, but if you will let me keep the place I will turn over the rents until it is paid for; so let me know."

At the time the above letter was written, one B. F. Lawrence was in possession of the land under an oral contract to pay the customary rent for same. No reply was made to the above letter by Watkins or the bank. No further payments were made, and in December, 1924, Watkins, the trustee in the deed, and the bank instituted this action against Mrs. Garrison to recover on the note and to reform and foreclose the mortgage for the amount then due on the note. At the same time the plaintiffs caused a writ of garnishment to be issued against B. F. Lawrence, which was duly served upon him. The garnishee answered, stating that he had in his hands the sum of $186.06, rents from the land which he had rented from Mrs. Garrison and which sum he had deposited in the bank and would pay over to the party or parties entitled thereto under order of the court. On January 2, 1925, Moye & Davis intervened, alleging that they were the owners of the rents from the lands mentioned in the complaint by virtue of a certain chattel mortgage that had been executed to them by one Garrison, the agent of Addie M. Garrison. They asked that the chattel mortgage be reformed so as to show that it included the rents in controversy. They also alleged that in October, 1925, Mrs. Garrison had made a written assignment to them of the rents for the year 1923, and they asked that the court make an order directing the garnishee to pay over to them the money held in his hands. Mrs. Garrison did not answer the complaint.

Watkins testified that he was the president of the bank and trustee named in the mortgage. The note in suit was due December 3, 1920. She paid the rent, which was credited on the note for the years 1921 and 1922. She didn't pay rent for the year 1923, whereupon witness wrote her urging her to make payment, and on July 18, 1924, she wrote the letter above set forth. She

had rented the land for the year 1924 to B. F. Lawrence. Witness never replied to the above letter in writing. Witness went to see Mrs. Garrison in October in regard to the payment of her note, and she stated there would be no trouble about getting the rents for that year. Witness brought suit to foreclose the mortgage and to have the description therein corrected.

Moye testified that he and Davis were partners in business, under the firm name of Moye & Davis. Garrison had been doing business with his firm and giving it a mortgage every year. He gave the firm a mortgage to cover rents on lands in White County. The mortgage didn't say rent. Garrison had rented the lands to one Lawrence, but they forbade him to turn the rent over to anybody, and witness asked Garrison to give the mortgage. Mrs. Garrison gave witness a statement to show that Garrison was acting as her agent when he executed the mortgage. Witness knew nothing about Mrs. Garrison's agreement to give the rent to the bank. Witness let Mrs. Garrison have the money to pay the interest on the note at one time. The mortgage to Moye & Davis was executed by Garrison on February 21, 1924. It included certain personal property and crops to be grown on land in White County, but did not mention the rents. On October 25, 1924, Mrs. Garrison executed the following instrument: "Please pay to Moye & Davis all cotton rents grown on my place in White County this year (1924), to cover mortgage given by my husband, N. B. Garrison, acting agent for me, same mortgage being given by my husband February 21, 1924, to be paid November 1, 1924." Garrison and his wife owed Moye & Davis about $250.

Garrison testified that he gave the mortgage to Moye & Davis to cover the rent on his wife's place for supplies to go on during the year 1924, the place on which Lawrence was living. Witness was agent for his wife, and had no other property in White County. He had been executing a mortgage on her property ever since he had been farming. Witness did not represent to

the bank that the payments made on its note were from the rent.

Mrs. Garrison testified that Garrison was acting as her agent at the time he executed the mortgage to Moye & Davis, and she understood that she was mortgaging the rents on her property in White County. When she wrote the letter to the bank on July 18, 1924, she intended that the bank should have the rent provided it did not close her out. Witness was not willing that the mortgage should be reformed, so that the bank could get the money, since the bank treated her as it had. The reason the witness was willing to turn the rent over to Moye & Davis was because she and her husband had to have supplies to make their crop. Witness knew that the mortgage had been executed at the time she wrote the letter to the bank. It was shown that there was some mistake in the description of the land intended to be embraced in the mortgage to the bank.

Upon substantially the above facts the court rendered a decree in favor of the bank for its debt in the sum of $584.11 and reforming the mortgage and ordering the same to be foreclosed. The court also entered an order finding that Lawrence had in his hands $183.06 to which the bank was entitled, and directed that this sum, the amount of rents on the lands included in the deed of trust executed by the Garrisons to the bank, be paid over to the bank by the garnishee, such sum to be credited on the note. From that order is this appeal. The court thereupon rendered its decree reforming the mortgage, and directed that the same be foreclosed to satisfy the balance of the indebtedness due the bank on the Garrison note. There is no appeal from the decree of foreclosure.

The order of Mrs. Garrison of October 25, 1924, on her tenant Lawrence, requesting him to pay the rents for the year 1924 on the White County place to Moye & Davis, did not operate as an assignment to Moye & Davis of such rents, for the reason that there is no testimony in the record tending to prove that the instrument was ever accepted by Lawrence, on whom it was drawn,

Therefore the amount of these rents in the hands of Lawrence must be treated as money or property of Mrs. Garrison and subject to garnishment at the time the appellees had the writ of garnishment issued and served upon him.

In *Exchange Bank & Trust Co.* v. *Arkansas Grain Co.*, 169 Ark. 1084, 277 S. W. 871, we said: "It is the settled doctrine that the payee of an unaccepted check, order, draft, or bill of exchange cannot maintain an action upon it against the drawee, for there is no privity of contract between them. But, if the drawee has accepted, then the payee may maintain the action." See authorities there cited.

The testimony is not sufficient to show that the appellant had a mortgage on the rents in controversy, and, since the appellant had no title by transfer or assignment, it follows that the garnishment issued and served on Lawrence impounded the funds in his hands for the benefit of the appellees and entitles them to subject the same to their debt. The decree of the trial court so holding is correct, and it is therefore affirmed.

NELON v. NELON.

Opinion delivered June 21, 1926.

1. TRIAL—ADMONITION TO JURY.—While the circuit court may admonish jurors to give due consideration to the opinions of each other, to the end that they may reach an agreement, the court should not use language from which the jury may reasonably infer that the minority should yield to the majority.
2. TRIAL—LENGTHY CAUTIONARY INSTRUCTIONS.—The circuit judge should not give lengthy cautionary instructions, lest by inadvertence he should violate the rule against charging the jury upon matters of fact.
3. TRIAL—PROVINCE OF JURY—WEIGHT OF TESTIMONY.—The weight to be given to the opinions of experts is for the jury, and it would be error for the court to intimate that the testimony of experts would be entitled to greater weight than that of other witnesses.

4. WILLS—COMPETENCY OF TESTATOR—JURY QUESTION.—Whether a testator was mentally competent to make a will *held,* under conflicting evidence, to be a proper question for the jury.

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

STATEMENT BY THE COURT.

Jewel Nelon, James Scott Nelon and Tillman Nelon filed for probate the last will and testament of J. R. Nelon, deceased. The probate of the will was contested by George Nelon. The will was duly admitted to probate, and George Nelon prosecuted an appeal to the circuit court. The cause was tried there upon a state of facts substantially as follows:

The will was written in proper form and duly executed and attested as required by our statutes. Under the terms of the will, George Nelon was given the sum of $5, and the remainder of the testator's property was devised to his wife, Ella Nelon, during her natural life, and, at her death, to his sons Jewel, James Scott and Tillman Nelon. The property devised consisted of 160 acres of farm land and some lots in the town of England. The will was executed on the 23d day of August, 1910, and J. R. Nelon died in 1920. James Scott and Tillman Nelon were the children of J. R. Nelon by Ellen Nelon, and Jewel and George Nelon were his children by a former wife.

According to the evidence for George Nelon, J. R. Nelon was suffering with rheumatism so badly that it had affected his mind, and that he was so completely under the control of his wife at the time he executed the will that he was mentally incompetent to make a will.

George Nelon testified that his father had conveyed to him and Cleve Cantrell in January, 1910, two hundred acres of land which had a mortgage on it for $1,500, which was about its value. The understanding was that Cantrell was to pay off the mortgage for a half interest in the land. George Nelon sold his interest in the land for something like $300.

According to the evidence adduced in favor of the proponents of the will, J. R. Nelon was an eccentric but strong-minded man, and was in full possession of his mental faculties at the time he executed the will. He was suffering with rheumatism, and continued to suffer with it until the date of his death, but his mental faculties were unimpaired. George Nelon was only given $5 in the will because his father had already conveyed to him a half interest in two hundred acres of land in consideration that Cantrell should pay off a mortgage on it for $1,500. According to their testimony, his interest in the land was worth considerably more than he sold it for.

The jury returned a verdict for the proponents of the will, and from the judgment rendered George Nelon has duly prosecuted an appeal to this court.

Lee Miles, for appellant.

Williams & Holloway, for appellee.

HART, J., (after stating the facts). The first assignment of error is that the court erred in giving a cautionary instruction to the jury. The record shows that the court instructed the jury, and fully and fairly submitted to it the respective theories of the proponents of the will and of the contestant. The jury retired to consider its verdict, and subsequently returned into open court without a verdict, and the court gave it a very lengthy cautionary instruction. The jury again retired to consider its verdict, and within a short time brought in a verdict in favor of the proponents of the will. It is insisted that the jury arrived at its verdict because of the cautionary instruction given by the court. On account of its length, we do not deem it necessary to set out this instruction in full in the opinion. We deem it sufficient to say that we have considered it carefully, and do not think that it is open to the objection that it is argumentative and tends to single out certain portions of the evidence and give undue emphasis to them. This court has held that the circuit court, in its discretion, may admonish the jurors to give due consideration to the

opinions of each other, to the end that they may reach an agreement, but has said that it is prejudicial for the trial court to use language from which the jury may reasonably infer that the court intimates that the minority should yield its opinion to that of the majority. *St. L. I. M. & S. R. Co.* v. *Carter,* 111 Ark. 272, 164 S. W. 705; and *Stepp* v. *State,* 170 Ark. 1061, 282 S. W. 684.

In this connection, however, it may be stated that, under our Constitution, judges are not allowed to charge juries with regard to matters of fact, and should be very careful to abstain from intimating an opinion to the jury as to any fact in evidence in the case. On this account it is best that the circuit judge should not give a lengthy cautionary instruction, lest by inadvertence he should violate this rule.

A particular objection is made to that part of the cautionary instruction which is as follows:

"The evidence, it is true, comes from various different witnesses, and they have their peculiar views about the matter. With the exception of one witness, they were all laymen on the question of the capacity of the testator to make a will. Only one witness who could be classed as an expert, if an expert at all on mental diseases, pretended to give testimony."

Dr. N. B. Beakley was a witness for the proponents of the will, and testified that, in his opinion as a physician, having known the testator over a period of years, doing his practice and discussing business and social affairs with him, he considered him entirely normal mentally until a few months before he died. It will be remembered that the will was executed in 1910, and the testator did not die until 1920.

At the outset, it may be stated that the weight to be given to the opinions of witnesses testifying as experts is always a matter to be determined by the jury from all the circumstances appearing in evidence, and it would be error for the court to intimate to the jury that the testimony of medical experts would be entitled to greater weight than that of the other witnesses. *Jenkins* v.

Tobin, 31 Ark. 306; *Maclin* v. *State,* 44 Ark. 115; and *Hogue* v. *State,* 93 Ark. 316, 124 S. W. 783.

We do not think, however, that the part of the instruction quoted is fairly susceptible of the construction now placed upon it by counsel for the contestant. It in no sense tells the jury that greater force should be given to the testimony of the expert witness than to that of the other witnesses. It is true that Dr. Beakley was the only expert witness in the case, but all the other witnesses were permitted to state their opinions as to the mental capacity of the testator and to give their reasons for it. If counsel for the contestant thought that the language quoted might in any sense be construed as an intimation by the court that the testimony of the expert witness was entitled to more consideration than that of the other witnesses, a specific objection should have been made to it.

We have carefully considered the instructions as a whole, and they fully and fairly submitted to the jury the disputed issues of fact as to whether the testator was mentally competent to make a will at the time he executed the will in question.

It is also insisted that the court erred in refusing to tell the jury that there was not sufficient legal evidence to warrant a finding that the will should be admitted to probate. On this point but little need be said. It is true that the evidence was conflicting as to whether or not the testator was mentally competent to make a will at the time he executed the will in question, but, according to the evidence for the proponents of the will, the testator was of sound mind and perfectly capable of making a will at the time he executed the will under consideration in this case. Indeed, the evidence for the proponents tends to show that the mind of the testator remained unimpaired for ten years after he executed his will.

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

STATE v. ADCOX (TWO CASES).

Opinion delivered June 21, 1926.

1. FORGERY—FALSE STATEMENT.—The term "forge or counterfeit any writing whatever" in Crawford & Moses' Dig., § 2642, relating to forgery, refers to a writing as being forged and not to the falsity of its statements, and a false statement of fact in an instrument, which is itself genuine, and by which another person is deceived or defrauded, is not a forgery.
2. FORGERY—ELEMENTS OF OFFENSE.—A person signing his own name to a check and using it to obtain credit in a lawsuit against him is not guilty of forgery, though done for the purpose of defrauding another.

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

STATEMENT BY THE COURT.

In both of these cases the Attorney General has sued out a writ of error to obtain a review of the record.

In No. 3222, T. J. Adcox was indicted for forgery and uttering a forged instrument.

The defendant filed a demurrer to the indictment, which was overruled as to the first count and sustained as to the second count of the indictment.

The prosecuting attorney then entered a *nolle prosequi* as to the first count and prayed an appeal to the Supreme Court as to the second count, which charged defendant with the crime of uttering a forged instrument, which prayer was by the court refused. Whereupon the State, through its Attorney General, obtained a writ of error to review the proceedings as above indicated.

The second count of the indictment reads as follows:

"And the grand jury aforesaid, in the name and by the authority aforesaid, further accuse the said T. J. Adcox of the crime of uttering a forged instrument, committed as follows: The said T. J. Adcox, in the county and State aforesaid, on the 16th day of July, 1925, fraudulently and feloniously did utter and publish as true, in a proceeding in Jackson Chancery Court, wherein the Farmers' National Bank of Newport, Arkansas, is plain-

tiff and T. J. Adcox is defendant, and more particularly at the taking of the deposition of F. J. Harmon, in said cause, on behalf of the plaintiff, a certain forged and counterfeited writing on paper purporting to be a bank check, which said writing on paper is in words and figures as follows:

" 'Newport, Ark., Jan. 6, 1920.

" 'FARMERS' NATIONAL BANK.

" 'Pay to the order of.....

By Cash

Four hundred eight six 72-100 dollars

" 'T. J. Adcox

" 'H.'

"The said forged and counterfeited writing on paper being then and there uttered and published by the said T. J. Adcox as true in said proceeding, with the felonious intent then and there unlawfully, fraudulently and feloniously to obtain credit on his indebtedness to said Farmers' National Bank of Newport, Arkansas, to which he was not entitled, and to cause said Farmers' National Bank of Newport, Arkansas, to be injured in its lawful rights, then and there well knowing said writing on paper to be forged and counterfeited, as aforesaid, against the peace and dignity of the State of Arkansas."

It is conceded that the same question of law is presented in case No. 3223 as is presented in case No. 3222.

H. W. Applegate, Attorney General, *John L. Carter,* Assistant, *F. M. Pickens* and *H. U. Williamson,* for appellant.

Otis W. Scarborough and *McCaleb & McCaleb,* for appellee.

HART, J., (after stating the facts). The Attorney General says that the indictment is based on § 2462 of Crawford & Moses' Digest, which reads as follows: "If any person shall forge or counterfeit any writing whatever, whereby fraudulently to obtain the possession or to deprive another of any money or property, or cause him to be injured in his estate or lawful rights, or if he shall utter and publish such instrument, knowing it

to be forged and counterfeited, he shall, on conviction, be confined in the penitentiary not less than two nor more than ten years."

In *Goucher* v. *State,* 204 N. W. 967, 41 A. L. R. 227, the Supreme Court of Nebraska held that the genuine making of a false instrument in writing is not generally a forgery, and that this is the usual interpretation of the courts, unless otherwise provided by the forgery statutes themselves.

The court said that a check bearing the genuine signature of the maker, though drawn on the bank in which the maker has no money or credit, with the intention of cheating the payee or the bank, is not a forgery. The term, "forge or counterfeit any writing whatever," refers to the writing as being forged, and not to the falsity of its statements. A false statement of fact in an instrument which is itself genuine, by which another person is deceived or defrauded, is not forgery. *Rose* v. *State,* 64 Col. 332, 171 Pac. 359, L. R. A. 1918C, 1193.

In a case-note to 41 A. L. R., at page 231, it is said that, while there is a conflict in the authorities upon the subject, the majority view is that, under the common law and under statutes defining forgery in the substantial language of the common law, the genuine making of an instrument for the purpose of defrauding does not constitute the crime of forgery. Numerous cases from the Federal court and from the various State courts of last resort are cited which sustain the annotator.

According to the allegations of the indictment, the check in this case was written by the defendant for the purpose of defrauding the Farmers' National Bank upon which it was drawn and was so used by him in a civil action wherein said bank was the plaintiff and T. J. Adcox was the defendant.

According to the allegations of the indictment, the defendant, T. J. Adcox, signed his own name to a check on the Farmers' National Bank and used the same to obtain credit in a lawsuit brought against him in the chancery court by said bank. He signed his own name

to the check, and is not guilty of forgery, although it was done for the purpose of defrauding another. The falsity of the instrument consists in its purporting to be the check of some other person than the one actually making the signature. *People* v. *Bendit,* 111 Cal. 277, 43 Pac. 901, 31 L. R. A. p. 831; *People* v. *Cole,* 130 Cal. 13, 62 Pac. 274; *State* v. *Ford,* 89 Ore. 121, 172 Pac. 802; *State* v. *Young,* 46 N. H. 266, 88 Am. Dec. 212; *New Mexico* v. *Gutierrez,* 13 N. M. 312, 84 Pac. 525, 5 L. R. A. (N. S.) 375; and *People* v. *Pfeiffer,* 243 Ill. 200, 90 N. E. 680, 17 Ann. Cas. 703, 26 L. R. A. (N. S.) 138.

T. J. Adcox was charged with uttering a forged instrument, and, in a prosecution for uttering a forged writing, before there can be a conviction, the State must prove that the instrument offered was a forgery. *Maloney* v. *State,* 91 Ark. 485, 121 S. W. 728. In that case it was held that forgery may be committed by the use of a fictitious name with the intention to defraud. The reason is that, if the drawer of the check has no existence, the name must have been affixed by some one without authority, and such act constitutes forgery.

But in *Harrison* v. *State,* 72 Ark. 117, 78 S. W. 763, it was held that forgery is not committed by drawing a check on a bank in which the drawer has no funds, in the name by which he is generally known, although it is not his real name.

As we have already seen, the instrument in question was not a forgery because T. J. Adcox signed his own name to it, and the circuit court properly sustained a demurrer to the second count in the indictment, which charged T. J. Adcox with uttering a forged instrument.

The conclusion we have reached renders is unnecessary to consider or determine the other objections to the indictment.

The judgment in each case will therefore be affirmed.

LAWS v. WHEELER.

Opinion delivered June 21, 1926.

1. EXECUTORS AND ADMINISTRATORS—JURISDICTION OF PROBATE COURTS.—The probate court has exclusive jurisdiction in administration proceedings, and an administrator who pays legacies or distributive shares before an order of the probate court for that purpose does so at his peril.
2. EXECUTORS AND ADMINISTRATORS—RIGHT OF ACTION OF DISTRIBUTEE.—It is only where the probate court has ascertained the amount in the hands of an administrator and ordered payment to a distributee that he can sue for the amount ordered to be paid.
3. EXECUTORS AND ADMINISTRATORS—JURISDICTION OF PROBATE COURTS.—The probate court of the county wherein an administrator was duly appointed has exclusive jurisdiction to administer the estate of a decedent and complete authority to settle his accounts and order a distribution of the estate, though the administrator has left the county without winding up the administration.

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

STATEMENT BY THE COURT.

The same question or issue of law is presented for our decision in each of these cases, and that is, whether a claim for a distributive share in an estate may be allowed before an order of distribution is made. In case 9224, Steven Laws, Jr., filed his claim with the administrator of the estate of Daniel Nelson, deceased, for allowance. In case 9378, Genie West filed her claim with the administrator of the estate of Daniel Nelson, deceased, for allowance. The record shows that the claim in each case was disallowed in the probate court, and each claimant duly prosecuted an appeal to the circuit court. There were separate trials and judgments in the circuit court, but the facts are the same in each case.

It appears that Steven Laws Sr. died intestate in Conway County, Arkansas, and that Daniel Nelson was duly appointed and qualified as administrator of his estate. It does not appear that Daniel Nelson ever filed an

account current as administrator of said estate, or that any order of distribution was ever made in the probate court of Conway County. Subsequently Daniel Nelson moved to Jefferson County, Arkansas, and no administrator in succession was appointed by the probate court of Conway County, nor was there any settlement made by Daniel Nelson in that court as administrator of the estate of Steven Laws, Sr., deceased.

In 1923 Daniel Nelson died intestate in Jefferson County, Arkansas. An administrator of his estate was duly appointed by the probate court of Jefferson County. Steven Laws, Jr., and Genie West duly filed their claims with the administrator of the estate of Daniel Nelson, deceased, and in each instance the claim is based upon what the claimant alleges would be due him as his distributive share of the estate of Steven Laws Sr., deceased.

The circuit court was of the opinion that the claims or demands of Steven Laws, Jr., and Genie West should be dismissed and judgment rendered accordingly in each case. Separate appeals have been prosecuted to this court, and the cases have been consolidated for hearing.

C. L. Poole, for appellant Laws; *Oscar Winn,* for appellant West.

Rowell & Alexander, for appellee.

HART, J., (after stating the facts). The Constitution of 1836 contained a provision that courts of probate should have jurisdiction in matters relative to the estates of deceased persons, executors, administrators and guardians, as may be prescribed by law.

In construing the statutes passed in obedience to this provision of the Constitution, it was held that the probate court had exclusive jurisdiction in administration proceedings, and that the administrator paid out legacies or distributive shares, before an order of the probate court for that purpose, at his own peril. The court said that the assets are in the custody of the law, primarily for the benefit of creditors; and that it is presumed by the law that they remain in the hands of the executor, or administrator, subject to the claims of creditors only,

until ordered by the court to be paid out, or distributed to legatees or distributees. *McPaxton* v. *Dickson,* 15 Ark. 41.

Our present Constitution contains an essentially similar provision, and in construing it this court has held that it is only where the probate court has ascertained the amount in the hands of an administrator and ordered payment to a distributee that he can sue for the amount ordered to be paid. *Ferguson* v. *Carr,* 85 Ark. 246, 107 S. W. 1177; and *Carpenter* v. *Hazel,* 128 Ark. 416, 194 S. W. 325.

It is true that Daniel Nelson, while administrator of the estate of Steven Laws, Sr., deceased, left Conway County without winding up the administration, but, under our statute, it would have been an easy matter to have made him file his account, and, after the payment of creditors, an order of distribution could have been easily obtained. The jurisdiction of the probate court of Conway County was exclusive in the administration of the estate of Steven Laws, Sr., deceased, and that court had complete authority to settle his accounts and make an order of distribution, notwithstanding the fact that Daniel Nelson left the county.

It follows that the probate court of Jefferson County had no authority to allow a claim for a distributive share in the estate of Steven Laws, Sr., deceased, before an order of distribution in said estate was made by the probate court of Conway County.

The judgment of the circuit court will therefore be affirmed in each case.

STANDARD RICE COMPANY *v.* LANDERS.

Opinion delivered June 21, 1926.

ACCORD AND SATISFACTION—MISTAKE IN ACCEPTANCE OF CHECK.—Where the seller of three carloads of rice authorized the cashier of his bank to indorse the buyer's check when it came to the bank, neither he nor the cashier knowing that there was any dispute as to the price to be paid for the rice, and the cashier having no authority to adjust any controversy, *held* that acceptance of a check for a less sum than the buyer had agreed to pay did not bind the seller, such acceptance not amounting to an accord and satisfaction.

Appeal from Poinsett Circuit Court; *George E. Keck,* Judge; affirmed.

Sivley, Evans & McCadden and *L. C. Going,* for appellant.

S. T. Mayo, for appellees.

SMITH, J. Appellees sold to appellant three cars of rice, and they testified that the sale was made at the price of $1 per bushel. The rice was shipped to appellant at Memphis, where it was weighed and inspected, after which appellant remitted to the Bank of Harrisburg at Harrisburg, a voucher-check, in which was shown the numbers of the cars in which the rice was shipped and the proceeds of the sale. This statement was preceded by a printed notation on the check reading as follows: "Items covered by this check. In full settlement following cars as per wt. sheet attached." The check was for $2,967.15, and was payable to the joint order of J. L. Landers and the Bank of Harrisburg. The rice was owned by appellees, A. H. Landers and his brother, who were copartners under the firm name of Landers Bros. The check was made payable in this way for the reason that the bank had a mortgage on the rice. A. H. Landers testified that he advised the bank of the sale, and informed the cashier that the check would be sent to the bank, and directed the cashier, when the check came, to indorse it and collect it and apply the proceeds thereof to the indebtedness secured by the mortgage.

The cashier of the bank did not know what the terms of the sale were, so, when the check was received by him, he indorsed the names of both payees, and in due course collected the check and applied the proceeds thereof as directed.

Appellee A. H. Landers had the rice in charge for the firm of which he was a member, and was not in Harrisburg when the check was received by the bank. He returned to Harrisburg about three days after the check had been received and indorsed, and was then told by the cashier what the amount of the check was. Landers stated, at the time he received this information, that a mistake had been made, and he immediately called appellant over the long-distance telephone and inquired why he had not been allowed $1 per bushel for his rice in accordance with the contract of sale. The representative of appellant denied that appellant had agreed to pay $1 per bushel for the rice, and testified that the rice was shipped to be sold at the market price, and that the market price had been paid and the rice accounted for on that basis.

Within a few days after this conversation occurred Landers went to Memphis and demanded a settlement on the basis of $1 per bushel. Appellant's manager insisted that appellant had not agreed to pay $1 per bushel; that the sale had been made subject to inspection in Memphis, and that, upon inspection, it was found that the quality of the rice was poor, the rice was badly mixed, and some of it was actually rotten. The manager testified that he produced and exhibited to Landers samples of the rice, which confirmed the inspection, and he further testified that the rice was all in the warehouse, and he proposed to deliver the rice back to Landers if he were not satisfied with the inspection and the price.

Landers admitted that this offer was made to him, but he testified that the rice shown him was not his rice, and that he knew it was not his from the kind of sacks from which it was taken, these sacks being unlike those in which his rice was shipped.

H. H. Rowe testified that, before the rice was shipped, he was employed as a buyer for appellant, and that he inspected the rice and found it in good condition, and that he communicated to appellant the result of his inspection as to samples and grade. A rice buyer for another dealer testified that he, too, inspected appellee's rice, and offered $1.03 per bushel for the rice, but that his offer was declined for the reason that the rice had already been sold to appellant.

The cashier of the bank who indorsed the check testified that, at the time he indorsed it, he did not know there was or would be any question about the correctness thereof.

The jury returned a verdict for appellees for the amount sued for, thus indicating a finding that the rice had been sold at $1 per bushel, and from the judgment pronounced on this verdict is this appeal.

At the trial appellant requested only two instructions, one being a request that the jury be directed to return a verdict in its favor. The second instruction requested by appellant reads as follows: "2. If you find from a preponderance of the evidence that A. H. Landers told Tom Flournoy, cashier of the Harrisburg State Bank, that he had sold his rice to the Standard Rice Company and that that company would send a check to the bank for the proceeds of same, and, when said check came, to indorse it and credit him with the proceeds of it, and if you further find from the evidence that Flournoy did that, you will return a verdict for defendant, although Landers may not have told Flournoy of the contract between himself and the defendant rice company."

Both of these instructions were refused, and exceptions were saved to the refusal, and exceptions were also saved to the instructions given.

Appellant states the issue presented by this appeal as follows: "The question to be determined by this court may be concretely stated as follows: Did the court correctly declare the law with reference to the appellant's plea of accord and satisfaction. If it did, the judgment

in this case should be affirmed; if it did not, the judgment should be reversed and the cause dismissed."

The court told the jury that there had been no accord and satisfaction, for the reason that the undisputed evidence showed the fact to be that the cashier did not know there was a controversy about the price of the rice and had not been authorized to indorse the check for an incorrect amount; and then submitted to the jury the question of fact as to what the terms of the sale were. In these instructions the court told the jury, if the rice had been sold for $1 per bushel, to return a verdict for appellees for the amount sued for, as there was no controversy about the quantity, but, if the sale had not been made for that price, to find the market value of the rice and to credit the amount of the check thereon.

We do not find it necessary to determine what effect should be given the language printed on the check quoted above, for the following reasons: In authorizing the bank cashier to indorse the check, Landers assumed that it would be drawn for the correct amount, as found by the jury, and the cashier did not know it was not for the correct amount. As soon as it was discovered that the check did not cover the contract price, Landers refused to receive it as payment in full. That the cashier had no authority to adjust a controversy—had he known that one existed or would arise—is an undisputed fact in the case. It is also an undisputed fact that appellees sold the rice to appellant, and the question of fact—at what price the rice had been sold—is settled by the verdict of the jury, and, under the testimony, the jury might have found that the market price was even greater than the price sued for, as there was testimony that appellees had refused an offer of $1.03 per bushel, for the reason that it had previously been sold to appellant for $1. The face of the check was for an amount which appellant admitted owing appellees, and the check itself was never received by them or by their authority in settlement of the true price of the rice. It is true the proceeds of the check had been credited to their account at the bank, but it is

true also that this money belonged to them, according to appellant's own testimony.

There was therefore no accord and satisfaction, and the testimony fully sustains the finding that the rice had been sold for $1 per bushel, and the judgment of the court below will therefore be affirmed.

PEPPERS v. PENNSYLVANIA DOOR & SASH COMPANY.

Opinion delivered June 21, 1926.

1. CONTINUANCE—ABSENCE OF PARTY.—A continuance was properly denied upon a showing that defendant was an important witness, and was absent attending to important business of an undisclosed character.
2. CONTINUANCE—FAILURE TO PRODUCE DOCUMENT.—Failure of plaintiff to produce an original document pursuant to notice *held* not a sufficient reason for postponing the trial when defendant's counsel knew that such document had not been produced, and a copy was available.
3. CONTRACTS—WHAT LAW GOVERNS.—The law of the State in which a contract is to be performed governs in its construction and in the determination of the rights and liabilities of the parties.
4. CORPORATIONS—LIABILITY OF STOCKHOLDERS.—Under Const. Cal. art. 12, § 3, as construed by the Supreme Court of that State, a stockholder is primarily liable for proportionate share of corporate liabilities, and a creditor need not pursue the corporation before suing a stockholder, notwithstanding the demand is for unliquidated damages for breach of a contract.
5. PLEADING—ADMISSION BY FAILURE TO DENY.—Failure to deny allegations of the complaint is an admission of their truth.
6. EVIDENCE—CONTENTS OF STOCK BOOK.—Testimony of the vice president and active manager of a corporation as to the number of shares therein owned by the president is competent as against contention that such fact is to be shown only by the stock book.
7. SALES—DAMAGES FOR BREACH.—In an action by a buyer for breach of a contract for the sale of lumber f. o. b. cars, the loading charges are proper element of damages.
8. SALES—DAMAGES FOR BREACH.—The cost of surfacing lumber in excess of the contract price is a proper element of damage for

breach of a sale contract, requiring the seller to surface lumber as directed.

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

J. G. Sain, for appellant.

R. B. Ivory and *W. P. Feazel,* for appellee.

SMITH, J. Appellee brought this suit in the Howard Circuit Court against appellant, and for its cause of action alleged that, on the 16th day of April, 1921, the Pennsylvania Door & Sash Company, a Pennsylvania corporation, entered into a contract with the Peppers-Cotton Lumber Company, a California corporation engaged in the sawmill business, for the entire cut of lumber No. 2 shop and better, white and sugar pine, for the season of 1921, estimated at 6,000,000 feet, and that the California corporation, hereinafter referred to as the lumber company, breached this contract by failing to deliver the lumber contracted to be delivered. That T. H. Peppers was the president and principal stockholder of the lumber company, and there was a prayer for damages against Peppers as a stockholder in the lumber company. There was a verdict and judgment for the plaintiff, and Peppers has appealed.

Although a citizen of California, Peppers was served with the summons while sojourning in this State, and he filed an answer denying the material allegations of the complaint.

When the cause came on for trial a motion for continuance was filed, and an exception was saved to the action of the court in overruling this motion. The ground of the motion was that Peppers had left his home in California on February 18, 1925, for the purpose of going to Chicago and New York and of returning to Nashville, where the case was pending, to be present at the trial, but that it was impossible for him to be present, and that his presence was highly important to a proper presentation of his defense to the cause of action sued on. It was not shown, however, wherein it was impossible for Peppers to be present at the trial. There was no ele-

ment of surprise in the case, and no unavoidable casualty of any kind was shown. So far as any showing was made, nothing appears except that Peppers had important business, of an undisclosed character, to which he preferred to attend rather than the trial, and there was therefore no error in overruling the motion for continuance. *Trumbull* v. *Harris,* 114 Ark. 493.

The contract which it is alleged the lumber company breached was in writing, and contained specifications as to kind of lumber, dimensions, and prices, the prices being f. o. b. Macdoel, California, the place where the mill was located. The lumber company entered upon the performance of the contract, and made a partial delivery of the lumber contracted for, when it ceased to make deliveries under the contract, and later a receiver was appointed by the court in California, who took over the assets and affairs of the lumber company.

There was served on counsel for plaintiff on February 2, 1925, a written notice to produce the original of a contract entered into between J. S. Kent, the receiver of the lumber company, and plaintiff, which was dated November 3, 1921. It does not appear from the notice what the provisions of the contract were nor the purpose for which it was intended to be used, and its relevancy and materiality do not therefore appear. The attorney upon whom the notice was served was called as a witness, and was examined concerning the failure to produce the original contract as required by the notice. From the testimony of this witness it appears that the contract was executed in triplicate, one copy of which was delivered to the plaintiff. This witness testified that he called upon the plaintiff company to produce the contract, and he went through its papers looking for it without finding it, and had not notified counsel for Peppers of his failure to locate it, for the reason that counsel for Peppers had stated that he would prove the contents of the contract if the original were not produced, and counsel for appellee consented that this be done.

If for any reason this contract was relevant and material, there was no reason why the deposition of the receiver, who was known to have a copy, could not have been taken. Moreover, a foundation was laid for the introduction of secondary evidence to prove the contents of this writing, and no objection was made to this being done; in fact, consent was given that this be done.

The failure to produce the original of this instrument does not appear to have been sufficient reason for postponing the trial. Counsel, of course, knew the contract had not been produced, and he should therefore have taken the deposition of the receiver, or should have offered testimony proving the contents of this instrument if, in fact, its contents were relevant and material.

It was insisted below, and the insistence is renewed here, that it was error to permit plaintiff to proceed with the suit against Peppers as a stockholder in the lumber company before its claim was established and adjudicated in the State of California. In other words, it is insisted that, as it was not shown that the affairs of the lumber company had been settled, the suit against a stockholder was premature.

The contract which forms the basis of the suit was to be performed in California, and therefore the laws of that State govern in its construction and in the determination of the rights and liabilities of the parties thereto.

Section 3 of article 12 of the Constitution of California contains the following provisions: "Each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation * * *."

This provision of the Constitution has been frequently construed by the Supreme Court of that State, and the construction by that court of the language quoted is, of course, binding on us. A number of the earlier cases in that State are cited in the case of *Chambers* v. *Farnham*,

182 Cal. 191, 187 P. 732. It is the consistent holding of these cases that a stockholder is primarily liable, and that a creditor is not required to first pursue the corporation before bringing suit against the stockholder. See also *Thomas* v. *Matthiessen*, 232 U. S. 221, 34 S. Ct. 312; *Lanigan* v. *North*, 69 Ark. 62, 63 S. W. 62.

In the case of *Western Pacific Ry. Co.* v. *Godfrey*, 166 California 346, the plaintiff had made a deposit in a bank which failed. A receiver was appointed, who took charge of the assets and affairs of the bank, and, while the receivership was pending and unsettled, the depositor brought suit against a stockholder in the bank to enforce the proportionate liability of the stockholder under the Constitution of that State. It was held in that case (to quote a syllabus) that "the pendency of receivership proceedings against an insolvent banking corporation does not affect the right of its creditors to proceed against its stockholders in the enforcement of their stockholder's liability."

In the case of *Thomas* v. *Matthiessen, supra,* Mr. Justice Holmes, in construing the provision of the California Constitution quoted and the section of the Civil Code relating thereto, said: "This means that, by force of the statute, if the corporation incurs a debt within the jurisdiction, the stockholder is a party to it and joins in the contract in the proportion of his shares."

It is insisted that the provisions of the California Constitution and of the Civil Code of that State did not apply to the demand here asserted, for the reason that this is an action to recover unliquidated damages for the breach of a contract, the insistence being that the stockholder's liability is limited to actions for debt and does not extend to actions for unliquidated damages for breach of a contract.

We think counsel are mistaken in this contention. The case of *Chambers* v. *Farnham, supra,* was a suit in which the plaintiff claimed damages against a corporation in which the defendant was a stockholder by reason of an alleged breach of a covenant contained in a lease

to certain land for farming purposes delivered by the corporation to the plaintiff. It was insisted, and the court held, that the suit to enforce the stockholder's liability had not been commenced within the time prescribed by the Code of Civil Procedure of that State. But, while the cause of action sued on (a claim for damages) was held to be barred by the statute of limitations, the opinion distinctly recognized the right to maintain a suit of that character. In the opinion by Chief Justice Angelotti it was said: "The *liability* of the corporation to respond in damages for any failure to perform the covenants contained in its contract was necessarily created or incurred by the execution of the contract, notwithstanding that no right of action could accrue until a breach." It was there also said: "As said in *Coulter Dry Goods Co.* v. *Wentworth, supra* (see 171 Cal. 510, 153 Pac. 493), *when the corporation* made its contract with the plaintiffs, it '*incurred a liability for any breach of the contract which it might commit,* and its stockholders were equally liable for such breach. The stockholders *who were such when the contract was made* are therefore bound under the Constitution, which holds them for the 'liability' incurred by the corporation during the time that they were stockholders.'"

It is also insisted that the testimony did not show the amount of the capital stock owned by Peppers, and for this reason the judgment against him was excessive. There was offered in evidence a certified copy of the articles of incorporation of the lumber company, from which it appeared that the capital stock of that company was $1,000,000, and in the seventh section of these articles it was recited that the amount of said capital stock which had been actually subscribed is $5, and the names of the five subscribers were given, each for one share of stock at $1.

It appears, however, that the complaint contained the following allegation: "Plaintiff further alleges that the defendant T. H. Peppers was a large stockholder in the Peppers-Cotton Lumber Company at the time the

transactions complained of occurred, holding $400,000 par value of its stock, and the total subscribed stock of said corporation was $600,000."

The answer admitted that the lumber company had been declared a bankrupt, and denied that appellant owned any stock therein in any amount, but did not deny that the total subscribed stock of the lumber company at the time of the transaction between the parties to the suit was $600,000. The undenied allegation that the capital stock was $600,000 is conclusive of that question. Besides, the undisputed testimony shows that the lumber company was in the possession of assets of very great value, which could not, of course, have been acquired with $5 of capital. Moreover, the deposition of C. A. Cotton, who was a vice-president and active manager of the lumber company, was taken, and introduced at the trial. Cotton testified that, after the charter was issued, Peppers owned $300,000 of the capital stock, and that he later bought from his father $100,000 of the stock which had been issued to Peppers' father. The testimony of Cotton, who testified that Peppers had himself stated to witness the amount of stock owned by Peppers, placed the ownership of all this stock as of the 6th, 7th or 8th of September, 1921, which was the year during which the contract was to be performed.

Appellant insists that this testimony was not competent to prove the amount of stock owned by Peppers, as that fact could be shown only by the stock-book of the lumber company.

The case of *Shean* v. *Cook*, 180 Cal. 92, 179 P. 185, is against this contention, it being there held that it is the actual, and not the ostensible, owner of the stock who is liable. In the case just cited the first syllabus reads: "A stockholder of a corporation, within the meaning of article 12, § 3, of the Constitution, declaring stockholders' liability, is one who owns shares in a corporation which has a capital stock, being so defined in § 298 of the Civil Code, which was in effect at the time of the adoption of the constitutional provision, and the Legislature, in

providing in § 322 of the Civil Code that the term 'stockholder' applies not only to such person as appears upon the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another * * *."

We conclude therefore that the jury was warranted in finding that appellant owned, not one share, but $400,000 of the capital stock, which was $600,000, and was therefore liable for two-thirds of the damages which appellee was shown to have sustained.

It is finally insisted for the reversal of the judgment of the court below that the testimony does not sustain the verdict for the amount of damages assessed by the jury.

The lumber company contracted to deliver to appellee "the entire cut of lumber two shop and better, white and sugar pine, for the season 1921, estimated at six million feet." Mr. Cotton, who, as we have said, was a vice-president and active manager of the lumber company, testified concerning the output of the mill, and his testimony fully supports the finding that the output would have equaled or exceeded the estimate contained in the contract if the lumber company had operated the mill as it had contracted to do.

The testimony on the part of appellee showed a rapid rise in the price of lumber, and, according to the testimony offered on behalf of appellee in this respect, a loss of $80,000 was sustained by the non-delivery of the lumber. This is a much larger sum than was found by the jury, the verdict returned being for the sum of $25,012. At any rate, we think the testimony supports the finding for the damages returned.

Error was assigned in submitting to the jury as an element of damages certain loading charges; but there was no error in this, as the contract, after stating the prices to be paid, specifies the "prices f. o. b. cars, Macdoel, California, net." If appellee was compelled to incur an expense which the contract required the lumber company to discharge, the payment of this expense

was a proper element of damage to be considered by the jury.

What we have just said about loading lumber is equally applicable to the assignment of error in regard to surfacing certain portions of the lumber. The contract gave appellee the right to direct that certain parts of the lumber be surfaced by the lumber company, for which an additional price of $5 per thousand was to be paid. This service was not performed by the lumber company, but was done by appellee at a necessary cost to it of more than $5 per thousand. This excess was therefore also a recoverable element of damage.

Upon a consideration of the whole record we find no reversible error, and the judgment of the court below is affirmed.

ROSE v. HALL.

Opinion delivered June 21, 1926.

1. VENDOR AND PURCHASER—ASSUMPTION OF CONTRACT BY ASSIGNEE.—Evidence *held* to show substitution, by consent of all parties, of the purchaser's assignee in lieu of the purchaser, on the terms of the original contract.
2. USURY—SALE OF LAND.—Usury cannot be based upon the terms of deferred payments in the sale of land, as the parties have a right to agree upon the price to be paid and the manner of payment.
3. PAYMENTS—MODE OF MAKING PARTIAL PAYMENTS.—Under Crawford & Moses' Dig., §§ 7357, 7358, monthly partial payments exceeding interest to date are to be applied first to interest and balance on principal.

Appeal from Miller Chancery Court; *C. E. Johnson*, Chancellor; reversed in part.

William H. Arnold, William H. Arnold, Jr., and *David C. Arnold*, for appellant.

B. E. Carter and *J. M. Carter*, for appellee.

SMITH, J. Appellee Sarah Hall, who was one of the plaintiffs below, alleged as her cause of action the following facts: On April 9, 1920, appellant Rose, who was

the defendant below, owned a certain lot in the city of Texarkana, Arkansas, which she proposed to buy from the defendant in person for the sum of $1,200, but the lot was shown to her by one W. W. Shuptrine, acting as agent for the defendant Rose. She had agreed with Rose to pay $1,200 for the lot, of which $100 was to be paid in cash and the balance in monthly payments of $20.20 each. She was shown the property by Shuptrine, and, after seeing it, paid him the $100 cash payment. Shuptrine brought back and gave to plaintiff Sarah Hall a book of the kind used by persons who had bought stock in or had borrowed money from the Citizens' Building and Loan Association of Texarkana, Ark., but the name of the building and loan association had been erased from the front page of the book and, instead thereof, the name of Sarah Hall had been written, so that it then read "Sarah Hall, of Texarkana, in account with W. W. Shuptrine." The pages of the book were so ruled as to show monthly payments to be made by investors or borrowers, a line being devoted to each month, and space was left for the person who received the payments to write his name.

The name of the building and loan association was printed on the cover of the book, but it was erased and that of Shuptrine written in its place, so that, when delivered to plaintiff Sarah Hall it read: "W. W. Shuptrine, in account with Sarah Hall," and on the first page within the cover appeared this memoranda:

"$1,150 bal. April, 1920
In account with Sarah Hall
Payments on house & lot No. 606 Laurel St., City.

	$1,250.00
"By cash	100.00
	$1,150.00

Plaintiff alleged she had been placed in possession of the property upon the delivery of the book to her by Shuptrine, and that she had since continuously remained in possession, and had made all her payments regularly, when she was advised that defendant Rose had obtained

a loan upon this lot as security from the building and loan association, whereupon she tendered the balance due under her contract, and prayed that Rose be required to execute a deed to one W. C. Howell, to whom she had assigned her contract of purchase.

A disclaimer of any interest in the lot was filed by the building and loan association.

Rose filed an answer wherein he denied that Shuptrine was his agent or had acted for him in the contract which he had made with Sarah Hall. He denied that he had contracted to sell the lot to plaintiff Sarah Hall, but alleged the fact to be that he had contracted to sell it to W. W. Shuptrine under a contract which contained the following provision: "That for and in consideration of the sum of $1,200 to be paid, $100 cash in hand, the receipt of which is hereby acknowledged, and the balance of $1,100 to be paid $20.20 per month in accordance with the rules and regulations of the Texarkana Building & Loan Association of Texarkana, Arkansas, Andrew Rose, party of the first part, agrees to sell to W. W. Shuptrine, party of the second part, the following described property." This contract was dated April 8, 1920.

It was alleged that a sale "in accordance with the rules and regulations of the Texarkana Building & Loan Association" would require 76 monthly payments of $20.20 each, and it was alleged that plaintiff Sarah Hall had failed and refused to make the last 22 of these payments, wherefore defendant prayed that he have judgment for the amount of these 22 payments, aggregating $440.40, or, in default thereof, that the contract be canceled and possession of the lot restored to him and that payments made be treated as rent.

Sarah Hall testified that, when the book containing the notation set out above was delivered to her, it appeared that the price of the lot to her had been increased $50, and she inquired about and protested against the increase, whereupon Shuptrine stated to her

that, as he had to make the collections of the monthly payments, he had added $50 to pay himself for his trouble.

Sarah Hall had a written contract with Shuptrine, and its recitals in regard to the payment of the purchase price read as follows: "That for and in consideration of the sum of $1,250, to be paid in monthly installments as follows: $20.20 per month, same due and payable on the 25th day of each month, first payment due April 25, 1920, W. W. Shuptrine, party of the first part, hereby agrees to sell to Sarah Hall, party of the second part, the following described property." This contract was dated April 9, 1920.

It will be observed that this contract contains no provision in regard to the payment of interest, and does not contain the provision found in the contract between Rose and Shuptrine that the payment shall be made "in accordance with the rules and regulations of the Texarkana Building & Loan Association."

After making the initial cash payment of $100 to Shuptrine, which was credited in the book he gave her, she made six monthly payments to him of $20.20 each, the receipt of which were evidenced by Shuptrine's signature in the space assigned for that purpose.

Sarah Hall testified that, when she made her sixth payment, Shuptrine stated that he would no longer make the collections, but that future payments should be made direct to Rose, and that Shuptrine carried her to Rose's office, where he said: "Here's Sarah Hall, Mr. Rose. I brought her down to turn her over to the office. She's a good woman, and makes her payments regularly as they come due," and that Mr. Rose said: "Very well," and she thereafter continued to make the payments regularly each month either to Rose personally or to some one in his office until she had made 48 payments to Rose, making a total of 54 payments altogether.

Rose testified that he had no recollection of the conversation detailed above, and that Shuptrine was never his agent, and that he had contracted to sell the lot to Shuptrine, and not to plaintiff Sarah Hall, and that,

under the terms of his contract, Shuptrine was required to make 76 payments of $20.20 each to discharge the contract.

Rose was the secretary of the building and loan association, and he testified that the association sold investment stock and made loans on property, and that when a loan of $1,200 was made the borrower also bought stock in the building and loan association and was required to pay $11 per month for a period of 76 months, and that the interest on these payments, calculated at 10 per cent., would, at the expiration of the 76 months, equal $1,200. This result was arrived at in the following manner: The payment of $11 per month for 76 months is $836, and the interest on this amount is calculated for 38 months, which is one-half the time required to mature the stock, the interest on the total sum paid during the 76 months being equivalent to the interest on the entire sum paid for one-half the time required to make the monthly payments. But, where a loan was made for $1,100, the borrower was required to subscribe for stock, upon the maturity of which the loan was discharged, and that 76 monthly payment of $20.20 each were ordinarily required to mature stock for $1,100 purchased against a loan of that amount.

The court below found that, by the receipt of the payments from Sarah Hall, Rose had ratified the contract of purchase between Sarah Hall and Shuptrine, and that this contract did not require the payment of interest, and, inasmuch as the payments had been promptly made, no interest could be charged, and that, as Sarah Hall had made 54 payments of $20.20 each, totaling $1,090.80, there was due under the contract only the sum of $59.20. Upon this finding it was decreed that, upon the payment of the balance of $59.20, the title to the lot should be divested out of Rose and vested in Sarah Hall's assignee. From this decree Rose has appealed.

The court below found that Sarah Hall should not be required to pay any interest, because her contract with Shuptrine did not exact the payment of interest, and,

as she made the payments promptly when due, there was no default which warranted a charge of interest. The court decreed, however, that Sarah Hall should make the payments required by the Shuptrine contract, that is, a balance of $1,150, and not the $1,100 called for in the contract between Rose and Shuptrine. This decree was rendered on the theory that Rose had ratified the contract between Shuptrine and Sarah Hall, and that the effect of this ratification was to substitute for the contract between Rose and Shuptrine the one made by Shuptrine with Sarah Hall.

Appellees further say that the transaction was not a loan, but a sale, and that the contract in accordance with which Sarah Hall should be required to settle contained no provision for the payment of the debt in accordance with the building and loan plan, and that, if the transactions were treated as a loan to be repaid according to the building and loan plan without the purchase of stock—appellee Sarah Hall bought no stock—and 76 consecutive monthly payments of $20.20 each were required to mature the loan, the contract would be usurious, in that more than 10 per cent. interest would be exacted.

It is unquestioned that Sarah Hall made 54 consecutive monthly payments of $20.20 each, and these were made in payment of the purchase price of the lot. There were two contracts for the sale of the lot, and Sarah Hall knew that the person from whom she contracted to buy was not the owner of the property. On the contrary, she knew that Rose did own the lot. Shuptrine passed out of the transaction, but he did not do so until he had received six payments and had receipted for them in the books furnished by him to Sarah Hall, and the payments made to Shuptrine were paid over by him to Rose. We think what was intended and the thing which was in fact done was to substitute, by consent of all parties concerned, Sarah Hall as the purchaser from Rose, instead of from Shuptrine. In other words, the new arrangement was that Sarah Hall should make the payments which Shuptrine had agreed to make, and, having made

them, should thereby acquire the right to have a deed made direct to her or to her assignee.

We do not find anything in the testimony to support the finding that Rose agreed to forego his claim of interest on the purchase price of the lot, or that he has estopped himself from claiming interest. The monthly payments were noted in the book furnished Sarah Hall by Shuptrine, but she had begun to make these payments under her contract with Shuptrine, and when Shuptrine turned her over to the office, as she expressed it, we think there was a mere substitution of Sarah Hall as the purchaser from Rose, instead of Shuptrine, and that equity will be done by permitting her to complete the payments which Shuptrine had begun to make.

We think there is no usury in the transaction, because no loan of money was made. The transaction was the sale of a lot, and the parties had the right to agree on the price to be paid and the manner of payment. The manner specified was according to the building and loan plan, and the testimony shows that, when a loan was made, the usual and customary interest charged by the building and loan association was 10 per cent., and that this rate was always charged when there was no special agreement to the contrary. The testimony also showed that a loan by the building and loan association was always accompanied by a sale of stock, and that a loan amounting to $1,100 would contemplate monthly payments of $20.20 each. This was the amount of each of the payments made by Sarah Hall, and the building and loan custom required these payments to be monthly, and they were made monthly.

We conclude therefore that the sum which Sarah Hall should pay is not the amount named in her contract with Shuptrine, which was $1,250, but the price which Rose agreed to take from Shuptrine, which was $1,200, of which $100 was cash in hand paid, leaving a balance of $1,100, and that this sum was payable in monthly payments of $20.20 each. These payments were to be made, and were made, monthly, and, as they

exceeded the interest on the purchase money for a month, the payments must be credited as provided by the statute governing partial payments. Sections 7357-7358, C. & M. Digest. But, when thus credited, 76 payments were not required to discharge the debt. 74 payments would have sufficed for this purpose, and, upon making the 74th payment, a balance of 80 cents would remain unpaid. Appellee Sarah Hall did not make 74 payments; the number made was 54, and these 54 payments, credited as the statute provides they should be, left a balance due, when the 54th payment was made, of $351.39. This therefore was the balance due when appellee Sarah Hall demanded her deed, and is the amount for which Rose should have judgment.

The decree of the court below is therefore reversed in so far as it is found that the sum due appellant is only $59.20, and the cause will be remanded with directions to enter a decree in Rose's favor for $351.39, with interest from the date of the 54th payment, and upon payment of this balance the provisions of the original decree for a deed to appellee Sarah Hall's assignee will be enforced.

STANLEY v. STATE.

Opinion delivered June 21, 1926.

1. WITNESSES—IMPEACHMENT ON CROSS-EXAMINATION.—In a prosecution for murder, it was error to compel defendant on cross-examination to answer questions as to how many men he had previously shot, since such acts were not necessarily crimes.
2. WITNESSES—IMPEACHMENT ON CROSS-EXAMINATION.—Witnesses, including accused, may be impeached on cross-examination by drawing out the fact that they have committed other crimes and immoralities, but they cannot be asked about a mere accusation or indictment preferred against them.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; reversed.

Rogers & Robinson, for appellant.

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

HUMPHREYS, J. Appellant was indicted in the circuit court of Pulaski County, First Division, for the crime of murder in the second degree by killing Roy Arrington. He was subsequently tried and convicted of involuntary manslaughter, and was adjudged to serve a term of eleven months in the State Penitentiary as a punishment therefor, from which is this appeal.

Appellant seeks to reverse the judgment on the sole ground that the trial court erred in compelling him, over his objection and exception, to answer the following questions propounded by the prosecuting attorney while cross-examining him, to-wit:

"Q. How many men did you shoot before that? Q. Tell the jury how many men you shot before that. A. I have shot two men before this."

These questions were asked for the purpose of affecting the credibility of appellant, upon the theory that his testimony might be discredited or impeached by specific acts committed by him in the past which may have been crimes, but not necessarily so. This court has adopted the rule that witnesses, including the accused, may be impeached on cross-examination by drawing out the fact that they have committed other crimes and immoralities of various kinds. *Hollingsworth* v. *State,* 53 Ark. 387; *Shinn* v. *State,* 150 Ark. 215; *Bullen* v. *State,* 156 Ark. 148; *Lytle* v. *State,* 163 Ark. 129. Although committed to this liberal rule for impeaching witnesses, including the accused, this court has said that the rule has its limitations, one being that the witness cannot be asked about a mere accusation or an indictment preferred against him for the purpose of attacking his credibility, because a mere accusation or indictment raises no legal presumption of guilt. *Jordan* v. *State,* 165 Ark. 502. We think the same reason should apply to questions touching specific acts of a witness which are not necessarily crimes. A homicide is not necessarily a crime. The killing may have been an accident or entirely justifiable.

The court erred in requiring appellant to answer the questions propounded by the prosecuting attorney relative to shooting other men prior to shooting the deceased.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

McCULLOCH, C. J., (dissenting). The question propounded to appellant, while on the witness stand, was in no sense a mere accusation, nor did the answer carry any such implication. The answer was a direct statement of the fact that the witness had theretofore committed homicide—an act which might or might not involve moral turpitude, according to the circumstances of the incident. Mere proof of the killing of a human being creates a presumption of guilt of some degree of crime (C. & M. Dig., § 2342) and casts the burden on the accused to show circumstances of mitigation or justification.

In the present case the appellant should have been allowed, if he requested it, to narrate the particular circumstances under which he had "shot two men," so as to remove the apparent stain on his character and credibility; but it was proper, I think, in the first instance, to permit the State to interrogate the witness concerning his having committed a deed which, unexplained, would constitute a crime.

This court held in *Bullen* v. *State,* 156 Ark. 148, that, when a defendant in a murder case makes himself a witness in his own behalf, he may, on cross-examination, be interrogated as to his commission of other murders.

Mr. Justice SMITH concurs in this dissent.

AMERICAN SOUTHERN TRUST COMPANY v. MARTIN.

Opinion delivered June 21, 1926.

1. PLEADING—MOTION TO STRIKE.—Issues as to whether notes and a mortgage sued on belonged to plaintiff, or whether they had been assigned to him by his brother to hinder his creditors from collecting their debts, *held* germane to foreclosure proceedings, as against a motion to strike an intervention from the pleadings.
2. APPEAL AND ERROR—MOTION TO STRIKE INTERVENTION—REVIEW OF RULING.—An order sustaining a motion to strike out an intervention may be reviewed without a bill of exceptions where the motion attacked the sufficiency of the intervention on its face.
3. APPEAL AND ERROR—WAIVER OF ERROR.—Interveners contesting a mortgage foreclosure do not waive the right to review the decree by reason of the vice president of one of the interveners purchasing the land at the foreclosure sale as truste, in absence of proof for whom he was acting.

Appeal from Arkansas Chancery Court, Southern District; *John M. Elliott,* Chancellor; reversed.

R. W. Wilson, Coleman & Gantt and *Sam T. & Tom Poe,* for appellee.

T. J. Moher and *John L. Ingram,* for appellee.

HUMPHREYS, J. This suit was commenced in the chancery court of Arkansas County, Southern District, by one of the appellees, F. E. Martin, against William Moll, W. F. Simmons and others, to foreclose a mortgage on certain real estate described therein, executed on April 21, 1920, by W. F. Simmons and his wife to the said William Moll, to secure three notes aggregating $12,000. It was alleged in the bill that the notes had been assigned to F. E. Martin, and that he was the owner of same by virtue of the assignment. It was also alleged that the Bank of Gillett claimed some right, title and interest or claim to the land in question, and for that reason it was made a party defendant to the suit.

The Bank of Gillett filed an answer denying that F. E. Martin was the owner of the notes and mortgage, and a cross-bill alleging that J. H. Martin, his brother, was indebted to it in a large sum, and that, in order to cover up this property and prevent said bank from col-

lecting its debt, he had the notes assigned to F. E. Martin instead of himself. It was alleged that J. H. Martin had rendered himself execution-proof and apparently insolvent by transferring all of his real estate and other property, including these notes, to his near relatives.

At a subsequent date the American Bank of Commerce and Trust Company (American-Southern Trust Company) and the First National Bank of St. Louis, Missouri, filed an intervention alleging the assignment to the interveners by the Bank of Gillett of all the evidences of indebtedness upon which the Bank of Gillett based its cross-complaint. The cross-complaint of the Bank of Gillett was in the nature of a creditor's bill against J. H. Martin, seeking to set aside a number of alleged fraudulent conveyances and to subject the notes secured by said mortgage to the payment of the alleged indebtedness of J. H. Martin to the Bank of Gillett.

A motion was filed by F. E. Martin to strike the answer and cross-complaint of the Bank of Gillett as finally amended and the intervention filed by the American Bank of Commerce & Trust Company and the First National Bank of St. Louis from the files, for the alleged reason that the pleadings had not raised issues cognizable in the suit, but foreign to it.

Upon a hearing of the cause the court sustained a motion to strike from the files of the suit the pleadings of the Bank of Gillett, the American Bank of Commerce & Trust Company, and the First National Bank of St. Louis, upon the ground that the issues raised therein were not germane to and cognizable in the foreclosure suit. In other words, the court ruled, over the objection and exception of appellants, that the pleadings filed by them failed to state a defense or a cause of action by way of cross-complaint to the foreclosure proceedings. After striking the pleadings aforesaid from the files the court rendered a decree foreclosing the mortgage against the land to satisfy the sum found due upon the notes, which totaled $14,373, including interest thereon. Pursuant to the decree the commissioner sold the lands, at which sale

W. A. Hicks, trustee, became the purchaser for $13,700. The sale was confirmed by the court, and the commissioner executed a deed to W. A. Hicks, trustee, which was acknowledged and approved in open court. Several months thereafter appellants prayed an appeal to this court, which the clerk granted.

It is sought by this appeal to have the cause remanded with directions to reinstate appellants' pleadings and to allow them to litigate their alleged right to have the proceeds from the sale of said land applied to the payment of the said indebtedness due by J. H. Martin to them.

Appellants contend for a reversal of that part of the decree striking their pleadings from the files upon the ground that they did not raise issues germane to and cognizable in the foreclosure proceeding. We agree with appellants in their contention that the pleadings sufficiently state a defense and a cause of action by way of cross-complaint to the right of appellee, F. E. Martin, to foreclose the mortgage for his individual benefit. The pleadings, as we understand them, tendered the issue of whether the notes and mortgage belonged to J. H. Martin or F. E. Martin, and the further issue of whether the notes and mortgage had been assigned to F. E. Martin for the purpose of covering them up so as to hinder the Bank of Gillett and its assignees from collecting the indebtedness which J. H. Martin owed them. These issues were germane to and cognizable in the foreclosure proceeding. The motion challenged the sufficiency of the pleadings on their face, and was in effect a demurrer, and should have been treated as a demurrer by the court. The motion did not invoke collateral matter as a ground for striking the pleadings from the files.

Appellees suggest that the motion to strike appellant's pleadings are not properly in the record and before us for consideration, because, after being stricken from the files, they were not brought into the record by a bill of exceptions. This result cannot be accomplished through a misnomer of a pleading. If the motion attacked

the sufficiency of the pleadings on their face, it was in effect a demurrer and not a motion to strike. It is said in 4 Corpus Juris, p. 117, that, "where a motion to strike out a pleading serves the purpose of a demurrer, it seems a ruling thereon may be reviewed without a bill of exceptions." Of course, if the motion had set up collateral matter as a ground for striking the pleadings and had not challenged the sufficiency of them, then it would have been necessary to resort to a bill of exceptions to bring the pleadings thus stricken from the files back into the record. *Floyd* v. *McDaniel,* 36 Ark. 484.

Appellee suggests that the decree must be affirmed because its validity was recognized by appellants' purchase of the lands at the foreclosure sale and procurement of a confirmation of the deed executed by the commissioner to them for the land. It is true that one who accepts or secures a benefit under a decree thereby waives his right to have same reviewed by an appellate court, but the record in the instant case fails to show that appellants purchased the land at the foreclosure sale. It is true that W. A. Hicks purchased same in the capacity of a trustee, but it does not appear for whom he was acting. We cannot indulge the presumption that he purchased it for appellants simply because he is the vice-president of the American Bank of Commerce & Trust Company.

Appellees have suggested several other reasons why the decree should be affirmed *in toto,* which we do not regard as sound.

On account of the error indicated, that part of the decree is reversed striking out the pleadings of appellants, and the cause is remanded with directions to allow appellants to ligitate their alleged rights to the proceeds arising from the foreclosure sale.

FIRST NATIONAL BANK OF CORNING v. POLK.

Opinion delivered June 21, 1926.

1. TAXATION—LIEN OF AGENT PAYING TAXES.—Crawford & Moses' Dig., § 10053, does not subrogate an agent paying taxes on lands to the lien of the State, but only gives a lien to the agent against the owner.
2. TAXATION—AGENT'S LIEN—PRIORITY OF MORTGAGE.—The lien of a mortgagee, executed by the owners of land after the taxes thereon had been paid by an agent at the owner's request, is superior to agent's lien provided by Crawford & Moses' Dig., § 10053.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A finding of fact of the chancellor not clearly against the preponderance of the testimony will be sustained on appeal.

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

Beloit Taylor and *W. E. Spence*, for appellant.

G. B. Oliver, Jr., for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Clay County, Eastern District, dismissing the cross-bill of appellant for the want of equity, filed in a second foreclosure proceeding instituted by appellee against J. N. Moore and others. In the first foreclosure proceeding, appellee made appellant a party because J. N. Moore had executed a mortgage to appellant upon the lands mentioned in the mortgage, which he had theretofore executed to appellee, except the north half of the northeast quarter of section 8, township 21 north, range 6 east. In the first foreclosure proceeding appellant prayed for a foreclosure of its mortgage also. After both appellant and appellee had obtained foreclosure decrees, it was ascertained that the land described above, which was embraced in appellee's mortgage, had been sold for the taxes in 1919 to M. V. Diboeld, who was in possession of same, claiming to be the owner thereof. J. N. Moore, the mortgagor, instituted a separate suit against M. V. Diboeld to cancel the tax title. The instant or second foreclosure proceeding was brought for the purpose of collecting a part of the notes which were not due at the time the decrees were entered in the first fore-

closure proceeding. Appellant sought in its cross-bill to obtain a paramount lien for the taxes paid by it at the request of J. N. Moore upon a part of the land covered by appellee's mortgage and to obtain one-half of the eighty-acre tract of land which M. V. Diboeld claimed under a tax purchase, or one-half the proceeds which might be derived therefrom when sold under the foreclosure proceeding. Appellant alleged in its cross-bill that appellee's mortgage was dated January 1, 1920, and that the taxes upon the lands described therein for the year 1919 had not been paid, and that it paid taxes to the amount of $411 for said year, at the request of J. N. Moore, upon certain lands embraced in appellee's mortgage but not embraced in its own mortgage. It also alleged that it entered into a contract with appellee to employ an attorney to assist his attorney in the prosecution of the suit instituted by J. N. Moore to cancel the tax title to the eighty-acre tract of land aforesaid held by M. V. Diboeld, in consideration that, if successful, they should divide said eighty-acre tract, or the proceeds therefrom, equally between them. These allegations in the cross-bill were controverted by appellee. These issues were submitted on testimony introduced by the respective parties, which resulted in a decree to the effect that appellant should take nothing on its cross-bill.

Appellant's first contention for a reversal of the decree is that the trial court erred in dismissing its claim for taxes. It relies for a prior and paramount lien to the mortgage lien of appellee for the taxes paid by it upon § 10053 of Crawford & Moses' Digest, which is as follows:

"Every attorney, agent, guardian, executor or administrator seized or having care of lands as aforesaid, who shall be put to any trouble or expense in listing or paying the taxes on such lands, shall be allowed a reasonable compensation for the time spent, the expenses incurred and the money advanced as aforesaid, which shall be deemed in all courts as a just charge against the person for whose benefit the same shall have been advanced, and the same shall be preferred to all other

debts or claims, and be a lien on the real estate as well as the personal estate of the person for whose benefit the same shall have been advanced."

It will be observed that the statute does not attempt to subrogate the agent paying the taxes at the request of the owner to the lien of the State, but only gives a lien to the agent against the owner. The taxes were paid by appellant at the request of J. N. Moore on April 10, 1920, which payment satisfied the lien of the State. Appellee's mortgage was executed July 7, 1920, and his lien was superior to that of appellant. The payment of the taxes by appellant was just as if the taxes had been paid by J. N. Moore, the owner of the land. Moore could not have claimed a lien on account of the payment of the taxes paramount to the mortgage lien of his own mortgagee.

Appellant next contends for a reversal of the decree upon the ground that the court erred in finding from the evidence that appellee had not entered into a contract with appellant to divide the eighty-acre tract aforesaid, or the proceeds thereof, equally between them in case the tax title thereto was canceled.

S. P. Lindsey, cashier of the appellant bank, testified upon this issue, in substance, as follows: That appellee informed him that he was going to bring a suit to cancel the tax title of M. V. Diboeld to the eighty-acre tract of land, and proposed to divide it equally between appellant and himself if appellant would employ an attorney to assist his attorney in prosecuting the suit to a successful issue; that he accepted the proposition, and employed F. G. Taylor to assist appellee's attorney, G. B. Oliver, in the prosecution of the suit, for which he paid him a fee of $50.

F. G. Taylor testified, in substance, as follows: that he was employed by appellant to assist G. B. Oliver in a suit brought by appellee in the name of J. N. Moore to cancel a tax title held by M. B. Diboeld to the eighty-acre tract of land in question, and that, pursuant to the employment, he referred G. B. Oliver to the case of *Earle* v. *Harris*, 121 Ark. 621, which, in his opinion, conclu-

sively settled the issue involved in the suit for the cancellation of the tax title in favor of appellee; that he met Mr. Oliver in consultation several times, but that he took no part in looking up the record upon which the tax title was based; that he rendered a bill of $50 to appellant for this service, which it paid.

G. B. Oliver was introduced as a witness by appellee and testified, in substance, as follows: that he advised appellee to propose to appellant to employ an attorney to assist him in the suit to cancel the tax title claimed by M. V. Diboeld to the eighty-acre tract in question; that his reason for making the suggestion was that appellee had a mortgage on all of Moore's land, including the Diboeld tract, and that appellant had a mortgage on a part of the same land not including the Diboeld tract; that, under these circumstances, appellant would have a right to marshal the assets and request that appellee be first requested to exhaust the land that appellant did not have a mortgage on, and in that way would be directly interested in appellee's suit to recover the eighty-acre tract of land from Diboeld; that appellee asked him to mention the matter to appellant; that he explained the matter to Lindsey, who afterwards informed him that he had procured Judge Taylor to assist him in the matter; that, later, appellee brought him a written contract providing that, in case the tax title was canceled, appellee would divide the eighty-acre tract, or the proceeds thereof, in a foreclosure proceeding, with appellant; that the written agreement was entirely different from the proposal he made to Lindsey, so he advised appellee not to sign it, and that appellee followed his advice; that, after appellee's refusal to enter into the written contract, he did not consult Taylor with reference to the conduct of the cancellation suit, and that he received no assistance from Taylor in the prosecution thereof.

In view of the fact that appellee refused to enter into the written contract submitted by appellant to him, and the further fact that Judge Taylor knew nothing personally of the alleged contract between Lindsey and Polk,

and the conflict in the testimony of Lindsey and Oliver, we are unable to say that the finding of the chancellor is clearly against the preponderance of the testimony bearing upon this issue.

No error appearing, the decree is affirmed.

RUDDELL v. GRAY.

Opinion delivered June 28, 1926.

1. EVIDENCE—JUDICIAL NOTICE OF LEGISLATIVE RECORDS.—The Supreme Court will take judicial knowledge of legislative records, regardless of any agreement of the parties concerning same.
2. STATUTES—CONFLICT BETWEEN JOURNAL AND PRINTED RECORD.—Where there is a conflict between the journal of one of the branches of the Legislature and the printed record thereof, the former will prevail.
3. STATUTES—VOTE ON BILL.—The House journal showing that 73 voted for a bill and 4 against, naming them, the fact that there is a discrepancy as to the number of absentees does not invalidate the bill, as the Constitution does not require the names of absentees to be recorded.
4. EVIDENCE—PRESUMPTION OF REGULARITY.—It will be presumed that legislative officers complied with constitutional requirements unless the contrary affirmatively appears.
5. STATUTES—PRESUMPTION AS TO PASSAGE.—An enrolled bill, signed by the Governor and deposited with the Secretary of State, raises a conclusive presumption that every requirement has been complied with, unless the contrary conclusively appears from the records of the General Assembly.
6. BRIDGES—NOTICE OF PETITION OF LANDOWNERS—EFFECT OF MISTAKE.—A mistake of the commissioners of a bridge district in allowing the notice of the hearing of the property owners to state that the petition contained a majority in value and numbers of the landowners, that being the question to be determined at such hearing, *held* not to affect the validity of the proceedings, where a hearing was had at the time and place specified, and a finding made that a majority had signed the petition.

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

John E. Miller, Culbert L. Pearce and *Ben B. Williamson,* for appellant.

Ernest Neill, S. M. Bone and *S. M. Casey,* for appellee.

McCULLOCH, C. J. Appellees are commissioners of an improvement district, created by a statute enacted by the General Assembly of 1925 (Acts 1925, p. 977) for the purpose of constructing a bridge across White River, near the city of Batesville, in Independence County, and this action was instituted against them in the chancery court of Independence County by appellant, the owner of real property in the district, to restrain proceedings by the commissioners. One of the grounds for relief is that the statute was not legally enacted and is void, and the other ground is that the commissioners failed to give proper notice of the filing of the petition of property owners, which is a prerequisite to operations under the statute. Appellees filed an answer, and the cause was heard upon the pleadings and an agreed statement of facts, and the chancery court decided against appellant, and dismissed the complaint for want of equity.

The agreed statement of facts related, in part, to the condition of the legislative records concerning the enactment of the statute, but we can only treat this agreement as informatory of the condition of the record, for we are bound to take judicial knowledge of the record, regardless of any agreement of the parties concerning the same. *Booe* v. *Road Improvement District No. 4 of Prairie County,* 141 Ark. 140.

The first contention with reference to the invalidity in the enactment of the statute is a discrepancy in the journal entries with regard to the vote on the final passage of the bill in the House of Representatives. There is a slight variance between the journal entry itself and the printed record thereof, but each shows a majority in favor of the passage of the bill. Wherever a conflict between the two records appears we must look to the entries upon the journals themselves rather than to the printed record in order to determine the true condition.

The bill for this statute originated in the House of Representatives, and was voted on and passed by the house on March 9, 1925. The entry on the journal recites that the clerk called the roll, and that 73 members (naming them) voted in the affirmative; that 4 members (naming them) voted in the negative, and that 21 Representatives (naming them) were absent. This accounted for only 98 Representatives, leaving two unaccounted for, and it is contended that this constitutes a failure to comply with the constitutional requirement that "no bill shall become a law unless, on its final passage, the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of each house be recorded thereon as voting in its favor." Article 5, § 22. It will be observed that there is no requirement in the Constitution that the names of absentees shall be recorded, the only requirement being that "the names of the persons voting for and against the same be entered on the journal." We cannot assume that there was a failure to record the names of any member voting, for the names of those voting on the bill were stated in the record, and, since there is no constitutional requirement for recording the names of the absentees, we must indulge the presumption that a clerical error occurred in recording the names of the absentees. The presumption that the officers performed their duties, until the contrary appears, must be indulged with reference to legislative compliance with the constitutional requirements, and it is our duty to uphold the enactment unless it affirmatively appears that the constitutional requirements were not complied with. Hence we must indulge the presumption, as before stated, that a clerical error occurred in recording the names of the absentees and not in recording the names of those who were present and voting.

There is an attack on the validity of the statute in an attempt to impeach the recitals of the journal by showing that the entry reciting the final passage of the bill

on its return from the Senate with an amendment was false. After the passage of the bill in the House on March 9, 1925, it was sent to the Senate, and passed there after the adoption of an amendment. The House adjourned on March 12, and the records recite a vote by yeas and nays on the passage of the amended bill—a large majority of the House voting yea. Appellant offered oral testimony to the effect that this entry was false, that the bill was not called up in the House at all after its return from the Senate, and that there was never any concurrence in the Senate amendment, but that, on the contrary, the entry on the journal was ordered by the Speaker several days after the adjournment of the House. The chancery court was correct in disregarding this testimony, for legislative enactments cannot be attacked in this manner. It has been repeatedly decided by this court that an enrolled statute, signed by the Governor and deposited with the Secretary of State, raises the presumption that every requirement was complied with, unless the contrary affirmatively appears from the records of the General Assembly, and that this presumption is conclusive, "unless the records, of which the court can take judicial knowledge, show to the contrary." *State* v. *Crowe,* 130 Ark. 272, 197 S. W. 4; *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92; *Perry* v. *State,* 139 Ark. 227, 214 S. W. 2; *Booe* v. *Sims,* 139 Ark. 595, 215 S. W. 659; *Road Imp. District* v. *Sale,* 154 Ark. 551, 243 S. W. 825. In *Booe* v. *Sims, supra,* we said: "In determining whether an act has been properly passed by both houses of the General Assembly, the court will not look beyond the records, books, papers and rolls of the General Assembly and the journals of each house required to be kept by the Secretary of State." The journals of the Legislature cannot be impeached by oral testimony, for the reason that there is a conclusive presumption arising from the enrolled bill signed by the Governor, which can only be overcome by affirmative recitals of the record. It would be disastrous to hold otherwise and to permit the validity of a statute to depend on oral testimony as to

the correctness of the journal entries of the Legislature. Our conclusion is that the statute cannot be successfully impeached in this manner, and that, in accordance with the records, of which we take notice, the statute was properly enacted.

There remains only for discussion the question of the attack upon the proceedings on account of alleged irregularity in the notice given by the commissioners. Section 7 provides, in substance, that the provisions of the statute can only be put into operation by petition or vote of a majority in value and numbers of the owners of real property in the district; that, if a petition purporting to be signed by a majority of the owners of property be filed with the commissioners, they shall "give public notice of such facts in at least one weekly newspaper and in two issues thereof, published in Batesville, Arkansas, and set a day and place for the hearing, not less than twenty days after the first publication of said notice, and at said place and time the commissioners shall examine the petitions filed, together with the county assessment list of the lands in said district, for the year of 1924, and shall continue said hearing from day to day until completed, and shall determine whether those signing such petition constitute a majority in numbers and in value of the owners of lands in said district. The statute further provides that, if the commissioners find that the petition or petitions have been signed by the requisite majority, they shall so declare, and that public notice of the finding shall be given in at least one weekly newspaper for one issue published in Batesville, and that the findings shall be conclusive unless suit to invalidate the findings shall be commenced in the chancery court within twenty days.

It will be observed from the narrative of the requirements of the statute that, when a petition is filed, the commissioners must name a day to hear protests, and publish a notice thereof, and that, on the day named, if they find that the petition contains a majority, they shall so declare, and publish a notice to that effect. Now, it

is alleged and shown in this case that the first notice published by the commissioners contained a declaration of findings that the petition contained a majority. It is the contention of appellant that this invalidated the notice. It is true that the commissioners had no power to make a finding on the question of majority until the day set for hearing, and the declaration contained in the notice was premature, but it does not affect the validity of the proceedings, which are otherwise in compliance with the statute. The notice gave information as to the time and place and purpose of the hearing, which was held on the day named in the notice, and the declaration was then made and published as to a majority having signed the petition. The mistake in making the premature declaration did not impair the rights of property owners with respect to being given a hearing on the question whether or not a majority had signed the petition.

All of the attacks on the validity of the statute and the proceedings thereunder are unfounded, and the chancery court was correct in its decision.

Affirmed.

ARKANSAS COLD STORAGE & ICE COMPANY v. FULBRIGHT.

Opinion delivered June 28, 1926.

1. FIXTURES—TRADE FIXTURES—REMOVABILITY.—The general rule as to the removal of trade fixtures is more favorable where the relation of landlord and tenant exists than in regard to any other relationship.
2. FIXTURES—TEST OF REMOVABILITY.—The principal tests of the removability of trade fixtures are the intention of the party making the annexation, his situation and relation to the owner of the soil, and whether the annexation was intended to be permanent.
3. FIXTURES—REMOVABILITY OF TENANT'S MACHINERY.—Where machinery used in making ice-cream and soft drinks was by a tenant placed in a rented building solely for the use and benefit of the tenant in the operation of his business, without any inten-

tion of making an annexation for the purpose of improving the land, the fixtures were removable where no material injury to the freehold would result from their removal.

Appeal from Washington Chancery Court; *Sam Williams,* Chancellor; affirmed.

Walker & Walker and *W. N. Ivie,* for appellant.

J. W. Grabiel and *John W. Nance,* for appellee.

McCULLOCH, C. J. This litigation involves the ownership of property which constituted the machinery and equipment used in making ice-cream and soft drinks. The articles involved in the controversy are described as follows:

One bottle-rinsing machine of the value of	$ 400.00
One bottle soaker	300.00
One bottle carbonator	500.00
One bottling machine	1,500.00
Two centrifugal pumps	400.00
One ice-cream freezer	500.00
One ice cooler and freezer combined	300.00
One cream mixer	300.00
One emulsifier	500.00
One cooling machine	200.00
Seven electric motors	500.00
Two ammonia compressors	1,500.00

The property was situated upon premises owned by appellant, but was removed therefrom by appellees, the purchasers at a judicial sale passing the title of former occupants of the building, who were tenants of appellant. The sole question involved in the case is whether the items of property in controversy were irremovable fixtures attached to the soil owned by appellant, or whether they were movable trade fixtures placed on the premises by the tenants. There is little, if any, controversy about the facts in the case.

Appellant is a corporation, and for many years has been engaged in the business of cold storage and the manufacture and sale of ice in the city of Fayetteville. Appellant owned its own plant and vacant lots adjoining

the plant, and, about the year 1906, appellant erected a small frame building on the vacant lot and permitted D. M. Allen to occupy the same for the purpose of engaging in the manufacture of ice-cream and soft drinks. At first no charge was made by appellant for the rent of the premises, and the right of occupancy was granted to Allen merely in consideration of Allen becoming a customer for the purchase and use of ice from appellant's factory. Allen put in the machinery and equipment and operated the business for a few months, and then sold an interest to Winkleman, and the two subsequently sold to Fulbright. Fulbright sold an interest in the business to Waugh, and the two operated the business for a number of years under the copartnership name of Fayetteville Ice Company. Waugh died in 1922, and the business was conducted by Fulbright as surviving partner. Then Fulbright died, and the business of the copartnership was wound up and the property sold by a commissioner under decree of the chancery court. Appellee became the purchaser, and removed the machinery and equipment from the building, and appellant intervened, claiming title to the property in controversy.

It appears from the testimony that the copartnership composing the Fayetteville Ice Company and their predecessors in the operation of the business established there, increased the size of the buildings on the property owned by appellant, constructed concrete floors in the building, and put in all of the equipment for the manufacturing plant, including the property in controversy. A portion of the property in controversy was actually attached to the building or to the soil in some way, and the remainder was heavy machinery used in the manufacture of ice-cream and soft drinks. The two ammonia compressors weighed about 1,800 pounds, and rested on a concrete floor, and were supported by rods which ran through the floor and into the ground to a depth of two feet. The compressors were bolted to these rods and the rods were fastened in the concrete. The emulsifier and the cooling machine were fastened to the water

pipes, which came up from the ground and ran into them. The two pumps were attached to the building, and also the ice-cream cooler and freezer, which weighed about 600 pounds. All of the other items were heavy articles, resting on the concrete floor. In fact, most of the property was motor-driven and had to be anchored to the floor or wall. The motors were fastened to frames on the wall.

There is no testimony tending to establish any express contract between appellant and the occupants of the building with respect to the ownership of the property in controversy or the right to remove the same. The property was, as before stated, occupied by the predecessors of appellees as tenants of appellant, and the permission to occupy was granted in order for appellant to secure a purchaser of its ice produced in the adjoining factory. At first no rent was charged, but in later years twenty-five dollars per month was charged as rent.

The chancery court decided that the property in controversy constituted removable trade fixtures, and our conclusion is that this decision was correct. It is very generally held by the courts and text-writers that the rule as to removal of trade fixtures is more favorable where the relation of landlord and tenant exists than in regard to any other relationship of the parties (Ewell on Fixtures, p. 137), and this court has recognized that favorable aspect of the rule. *Stone* v. *Suckle,* 145 Ark. 387, 224 S. W. 735. The case of *Choate* v. *Kimball,* 56 Ark. 55, 19 S. W. 108, is a leading one in this court, and in that case we laid down, as the principal tests of removability, the intention of the party making the annexation and his situation and relation to the owner of the soil—whether the annexation was intended to be made as a permanent accession to the freehold or merely for the benefit of the party making it. It is apparent from the facts in this case that the property in controversy was placed in the building by the predecessors of appellees solely for their own use and benefit in the operation of the business in which

they were then engaged, and that there was no intention to make the annexation for the purpose of improving the property. The annexation was therefore altogether for their own benefit and not for the benefit of the landlord. This is manifested by the fact that the building originally constructed by appellant and turned over to the tenants was of little value, and the additions thereto and annexations have been gradual, in accordance with the growth of the business, hence there was no material injury to the freehold by the removal of these fixtures.

Decree affirmed.

PADGETT v. STATE.

Opinion delivered June 28, 1926.

1. CRIMINAL LAW—PETITION FOR CHANGE OF VENUE—SUPPORTING AFFIDAVITS.—Affidavits in support of a petition for a change of venue upon the ground that the defendant could not obtain a fair trial in the county *held* insufficient under Crawford & Moses' Dig., § 3088, where they did not show that affiants were qualified or that they were not related to the defendant.
2. CRIMINAL LAW—CHANGE OF VENUE—AFFIDAVITS.—Affidavits in support of a petition for change of venue on the ground that accused could not obtain a fair trial in the county *held* not to show such acquaintance with the minds of the inhabitants of the county as to qualify affiants as credible persons within Crawford & Moses' Dig., § 3088.
3. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES.—In a prosecution for selling intoxicating liquors, denial of a continuance on the ground of the absence of witnesses who would have testified merely as to the absence of drunkenness or disorderly conduct on defendant's premises, was not error, since such testimony would have been irrelevant.
4. CRIMINAL LAW—REFUSAL OF INSTRUCTIONS ALREADY GIVEN.—Denial of requested instructions covered by others given is not error.

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

J. N. Rachels and *J. R. Linder*, for appellant.

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

WOOD, J. This appeal is from a judgment of the White Circuit Court sentencing the appellant to imprisonment in the State Penitentiary for a period of one year on conviction for the crime of selling intoxicating liquor.

1. The appellant filed his petition for change of venue in due form, supported by affidavits in the following form: "We, the undersigned, resident citizens of White County, Arkansas, on oath state that we, and each of us, are familiar with the statements contained in the foregoing petition, and that we, and each of us, believe the same to be true. (Signed) S. G. David, J. R. Jackson, H. L. Kannon. Subscribed and sworn to before me this the 25th day of January, 1926. J. E. Turnidge, J. P."

Two of the affiants to the petition testified to the effect that they did not believe the appellant could obtain a fair and impartial trial in White County from the expressions they had heard from the people around Beebe. One of the affiants had lived in the county and at Beebe more than 25 years. Beebe was the market for a great many people in the western part of the county, and he had come in contact with people from all over the county. From what he had heard of the expressions of several people from different parts of the county he didn't believe the appellant could obtain a fair and impartial trial in the county. This witness concluded his testimony by saying that the people he had heard express opinions about it were around Beebe, his home. "Of course, I don't pretend to say all over the county," said the witness. The other affiant testified that he based his opinion upon what he had heard around Beebe. That was the only place he had been. He stated that he had not talked to any people in Antioch, Albion, Bald Knob, Big Creek and Pangburn townships. "Beebe is about all I know about," said the witness. Witness was in the dray business, and that was not such a business as

caused him to come in touch with a great many people around over the community.

The court overruled the petition for change of venue. This ruling was correct for two reasons. First, the statute requires that the petition for change of venue be supported by the affidavits of two credible persons who are qualified electors and actual residents of the county and not related to the defendant in any way. Section 3088, C. & M. Digest. The supporting affidavit does not show that the affiants were qualified electors of White County and that they were not related in any way to the defendant. Second, the testimony of the two affiants does not show that they were credible persons within the meaning of the statute. Their testimony does not show such knowledge of the condition of the minds of the inhabitants of White County as would justify the affiants in making oath that appellant could not get a fair and impartial trial in the county. *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346; *Speer* v. *State,* 130 Ark. 457, 198 S. W. 13; *Williams* v. *State,* 162 Ark. 285, 258 S. W. 386.

2. The bill of exceptions shows the following:

"Mr. Linder: We want to file a motion for a continuance. Three of the witnesses called failed to answer, two of which I understand have certificates here from physicians that they are unable to attend court. Court: What is the motion? Mr. Linder: The motion for a continuance sets out the fact that these witnesses are absent not by the connivance or consent of ourselves, that they have been summoned here, and what we expect to prove by them; they live in the community of the defendant down there— Court: You need not go into details; sit down, all of you. Mr. Linder: Shall I file the motion, your Honor? Court: Sit down. Mr. Reporter, take this: This case was regularly set for trial this morning and was called for trial. The witnesses were called and the State announced ready for trial, and the defendant called his witnesses and announced to the court that he couldn't go to trial because two of them were out of the

county and not here. The court thereupon passed the case until the afternoon; before the afternoon, during the recess of the court, counsel for the defendant announced to the court that his witnesses had arrived in the county, that he had a telephone message from them from Kensett, and that he would be ready for trial on the arrival of those witnesses from Kensett, that he would take his chances on any other witnesses. The court is now informed that those witnesses are here, so any further motion to postpone this case is not admissible and will be denied. Mr. Rachels: The conversation I had with the court was that I thought with these people here we could go to trial, also stating to the court that Mr. Linder was in the case with me, and I would ascertain whether or not we could go to trial and let the court know, and Mr. Linder informed me, when I talked to him about it, that it was necessary to have these certain witnesses here, and he prepared the motion, and it is filed, and we would like to present it to the court for further postponement of this case. That is as full as I remember the conversation that I undertook to tell the court. At any rate, I don't want to be placed in the position of binding the defendant, Sidney Padgett, if he has a further legal reason why he should not go to trial. Inasmuch as I am the attorney who talked to the court, I am asking that Mr. Linder be permitted to present to the court defendant's motion, and let the court pass upon the legality of the motion. Court: "Examine the jury, gentlemen." "Save our exceptions."

One of the grounds of error alleged in appellant's motion for a new trial is that "the court erred in refusing to permit counsel for defendant to present motion for continuance in the usual and proper manner, and in refusing to hear the contents of the same, thus depriving the defendant of a legal defense as set out in said motion for continuance." The motion for continuance, which the appellant offered to present, states in substance that three witnesses, naming them, if present, would testify that they are close neighbors of the defendant, and that

they have never seen or been annoyed by disorderly or drunken conduct of persons on the premises of the defendant; that the defendant is basing this defense on the ground that the State will attempt to show by a number of witnesses that there has been disorderly conduct in and near the home of the defendant. The ruling of the trial court was tantamount to a refusal to allow the appellant, under the facts stated by the court, to file and present any further motion for a continuance. This ruling is not prejudicial to the appellant, unless he offered to file a motion in which he set forth testimony of absent witnesses that would be material to his defense and that he had used due diligence to obtain the same; that he believed the testimony to be true, and that there was just ground to believe that the evidence could be had at the next term of the court. Now, the motion for continuance which appellant offered to file in the court below set forth that three witnesses, naming them, if present would testify that they were close neighbors of the defendant, and that they had never seen or been annoyed by disorderly or drunken conduct of persons on the premises of the defendant. The indictment against appellant charged him with unlawfully and feloniously selling and being interested in the sale of intoxicating liquors. The appellant was tried and convicted of this offense. The testimony was sufficient to show that he was guilty of the crime charged. Such being the nature of the offense, the testimony of the alleged absent witnesses, as set forth in the motion for continuance, was not material to the charge, and, if the witnesses had been present and offered to testify as set forth in the motion, it would have been the duty of the trial court to exclude their testimony. Such testimony was wholly irrelevant to the issue as to whether or not the appellant had sold and was interested in the sale of intoxicating liquors. Moreover, the alleged testimony of these absent witnesses was but negative in character, because no testimony is set forth tending to prove that there had been any disorderly or drunken conduct

of persons on the premises of the defendant, Sidney Padgett. Such was not the charge in the indictment, and an attempt upon the part of the appellant to rebut such charge would have been wholly irrelevant. The court therefore did not err in overruling the motion for continuance.

3. Counsel for appellant insist that the court erred in refusing to grant its prayers for instructions numbered from one to thirteen inclusive. Counsel point out no specific objection to the ruling of the court in refusing these instructions. We have examined them, however, and find that such of these prayers as were correct were fully covered by instructions which the court gave. The oral and written instructions as given by the court fully covered the law of the case in conformity with the rules of law governing such cases often announced by this court, and we deem it unnecessary to set out and comment upon them.

We have also examined the specific objection made by the appellant to the refusal of the court to give his instructions numbered 11 and 13 in the original form and to the modification of these instructions and the giving of the same as modified. There was no error in these rulings of the court.

The record presents no reversible error, and the judgment must therefore be affirmed. It is so ordered.

BOOTH v. RACEY.

Opinion delivered June 28, 1926.

1. APPEAL AND ERROR—QUESTIONS RAISED.—Where plaintiff recovered judgment against a part only of the defendants, who have appealed, the only question involved is whether there is error in the judgment against them.
2. TRESPASS—DAMAGES.—Evidence *held* to sustain a verdict for $250 for digging borrow-pits outside of the right-of-way for a road without the landowner's consent.

3. TRESPASS—JUSTIFICATION—BURDEN OF PROOF.—It was not error to instruct the jury that road contractors digging borrow-pits outside of the right-of-way had the burden to show justification.
4. TRESPASS—JOINT TORT-FEASORS.—All persons participating in wrongfully digging borrow-pits outside of the right-of-way to secure dirt for a roadbed without the landowner's consent are liable as trespassers and joint tort-feasors.
5. TRIAL—ARGUMENT OF COUNSEL.—In an action for digging borrow-pits for road without the landowner's consent, an argument of plaintiff's counsel asking what one of the defendants would take to have a borrow-pit in his yard destroying the beauty of the home he built at a cost of probably $8,000 or $10,000 that he made from the profits of building the road, *held* not reversible error.

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

Eugene Cypert and *Downie & Schoggen,* for appellant.

J. N. Rachels, for appellee.

WOOD, J. This action was brought by the appellee against the Arkansas-Missouri Highway District of White County, its commissioners, and the appellants as contractors for the building of the improvement contemplated by the creation of the district. He alleged in substance that, without his knowledge or consent, they entered upon his lands and dug six large pits, ranging from three to six feet deep, beyond and outside the right-of-way, and unlawfully used the dirt to build the roadbed of said road; that he was damaged by reason of their trespass in the sum of $2,000, for which he prayed judgment. The defendant denied the material allegations of the complaint.

The commissioners of the district and the appellants as contractors filed separate answers, in which all the material allegations of the complaint are denied except that the appellants were the contractors for the building of the improvement contemplated by the district. On the first trial, after the testimony was adduced and the instructions given, the jury returned a verdict in favor of the appellee against the appellants, the contractors, in

the sum of $200. The court thereupon rendered judgment in favor of the district and its commissioners and against the appellee, and granted a new trial as between the appellee and the contractors, appellants here. On the second trial of the issue as between the appellants, contractors, and the appellee, the jury returned a verdict in favor of the appellee in the sum of $250. No appeal has been prosecuted by the appellee from the judgment rendered by the trial court in favor of the district and its commissioners. The appellants prosecute this appeal from the judgment in favor of the appellee against them.

1. Therefore the only question presented by this appeal is whether or not there is any error in the judgment in favor of the appellee against the appellants. At the conclusion of the testimony, the appellants prayed the court to instruct the jury to return a verdict in their favor, which prayer for instruction the court refused, to which ruling the appellants duly excepted.

The court, over the objection of appellants, gave to the jury the following instruction: "This is a cause of action by Glen A. Racey against Booth Brothers and Harve Brown, in which he is seeking to recover damages on account of their wrongful appropriation of his property, and you are instructed that, under the law and the testimony of this case, the plaintiff should recover from the defendants, unless you further find that the defendants or some one in their behalf, or the law, relieved them from so doing. In other words, gentlemen of the jury, the borrow-pits and other alleged wrongful acts can be excused only by three methods known to the law, either by contract with Mr. Racey, or by just compensation, or by a lawful taking, and, the taking being admitted, in the absence of contract, the burden is on the defendants to show justification without compensation."

The contract between the district and the appellants contains, among other provisions, the following: "The land for borrow-pits will be furnished by the district. The contractor must restore in an acceptable manner all property, both public and private, which has

been damaged during the progress of the work. If there is not enough material within the right-of-way to complete the grading and bring the subgrade to the proper height and dimensions, the contractor shall furnish such additional material of a satisfactory quality as is necessary to secure the established grade and alignment for the roadway, embankments, etc. The land for 'borrow-pits' will be furnished by the district. The contractor shall notify the engineer in advance of the opening of any borrow-pits, so that it may be properly cross-sectioned, if the engineer so desires. Should the engineer so elect, he shall have the right to estimate borrow quantities from the fill or embankment, allowing ten per cent. for shrinkage. Any 'borrow' removed without notice to the engineer will not be estimated or paid for. The widening of cuts or other excavation within the limits of the roadway will not be under 'borrow.' Where material is borrowed the contractor shall not excavate the 'borrow-pits' below the general drainage level so as to form pockets or holes, nor shall he leave the banks from which he has taken the material rough or uneven in line. All 'borrow-pits' shall be connected up with the general drainage scheme of the improvement so as to insure their being properly drained. All boulders uncovered in the 'borrow-pits' shall be removed. 'Borrow' will not be required in rock."

The testimony is exceedingly voluminous, and we will only set out such of it as we deem material. Suffice it to say the testimony on behalf of the appellee tended to support the allegations of his complaint and to warrant at least the amount of damages as returned by the verdict of the jury in his favor. He states in substance that no one applied to him for permission to dig the borrow-pits. There were six of these pits dug, and knolls were dug out into duck lakes. There was not a suitable place left for building a dwelling along the highway, as it was before the pits were dug. The property is damaged outside of the borrow-pits because the water accumulates and stands there. The pits were dug back

of the right-of-way to get dirt to build a dump. The witness gave permission for the right-of-way.

L. E. Mercer, one of the engineers for the district, testified that the right-of-way for the road was fifty feet wide. They got the dirt along the right-of-way and some from the borrow-pits. He never gave the contractors the right to dig borrow-pits along Mr. Racey's lands. The contractor took all of the fifty feet right-of-way except about five feet. If they had taken the dirt the full width of the right-of-way they would have had enough dirt to build the roadbed without digging borrow-pits, but would have had to build a deep ditch. They would not have had enough dirt in the right-of-way to build the roadbed by digging ditches of reasonable depth. They could not have done it and made the ditches.

Another engineer, an expert, testified, among other things, that he had examined the plans and specifications, and, according to these, it would not have been necessary to take any dirt outside of the right-of-way. Witness believed they could have found dirt enough on the right-of-way without the digging of the pits. There was plenty of dirt there for the height of the road as shown by the plans. The Racey land was damaged because it destroyed the best of the land along the highway. Pits are in an irregular condition, holding water, making an unsightly appearance and a breeding place for mosquitoes.

The secretary of the board of commissioners testified that the right-of-way along the Racey land was fifty feet wide. From 44 to 50 feet right-of-way was used in the construction of the road. Witness figured that there was about 1,500 yards of dirt, and that it could have been gotten out of the right-of-way. The board of directors did not give the contractors permission to build the borrow-pits. But witness understood that Blackshire, the engineer, did. The matter was not before the board before the pits were dug, but was before the board after they were dug.

There was testimony on behalf of the appellants to the effect that they completed the work, and that the same was accepted by the commissioners and final settlement made with them for the same; that the commissioners employed L. E. Mercer and Blackshire as engineers of the district, and gave them authority to superintend the road and build it; that, after the highway engineer and the engineers of the district had been over the road with the commissioners several times and pronounced the same finished, the contractors were released. The commissioners did not release the contractors from any liability they might be under to other people. The matter of digging the dirt out for the fills was left to the engineers by the commissioners. The foreman in charge of the work took the dirt from the land of Racey adjacent to the right-of-way under the authority of Blackshire, who was the engineer in charge of the work—he did what Blackshire said.

One of the contractors also testified that Blackshire was the engineer in charge of the work, and the taking of the dirt from the borrow-pits by the foreman was under the authority of this engineer. The witness did just what the engineer told him to do.

The testimony above set forth is sufficient to justify the ruling of the court in refusing to grant appellant's prayer for instruction No. 1, which would have directed the jury to find in appellant's favor. The court likewise did not err in granting the appellee's prayer for instruction No. 1 set out above. There was testimony from which the jury might have found that it was unnecessary to go beyond the limit of the right-of-way to get dirt for the construction of the improvement. In other words, that it was not necessary, in the construction of the improvement, to dig the borrow-pits on the appellee's land beyond the right-of-way, the digging of which caused the damage of which he complains. The testimony was sufficient to warrant the submission of the issue to the jury as to whether or not such digging of the borrow-pits was done for the convenience of the contractors.

Such being the case, it was no defense for the contractors that, under the terms of the contract, the land for the borrow-pits was to be furnished by the district. Such being the case, it was likewise no defense for the contractors that the digging of the unnecessary borrow-pits on appellee's land outside of the right-of-way was done under the direction of the engineer of the district and its commissioners, even if it could be said that under the evidence this was an undisputed fact. All who thus participated in the wrongful and negligent injury and damage to appellee's property would be trespassers and joint tort-feasors and liable to him as such. *Foohey Dredging Co.* v. *Mabin,* 118 Ark. 1, 4, 175 S. W. 400. See also *Wood* v. *Drainage Dist. No. 2,* 110 Ark. 416, 161 S. W. 1057.

This court, in the case of *North Arkansas Highway Improvement District No. 1* v. *Greer,* 163 Ark. 141, 259 S. W. 380, held that the district, under the facts there stated, was liable to the owner of the land for damages resulting to him in the building of borrow-pits by the contractors, where the taking of the land by the contractors was authorized by the district. But we did not hold in that case that the contractors would not likewise be liable as joint tort-feasors. The question of the liability of the contractors, under the facts there stated, was not passed upon by this court.

2. The attorney for the appellee, in his argument to the jury, made the following statement: "Gentlemen of the jury, when you come to consider those things, I want you to ask Henry Booth what he would take to have one of those borrow-pits in his yard, destroying the beauty of the home he built at a cost of probably eight or ten thousand dollars, that probably he made out of the profits of building this road." The appellant objected to this argument and asked the court to instruct the jury to disregard the same. The court overruled the objection, to which the appellants duly excepted. There is no reversible error in this argument. It was not the statement of any fact, but was merely the statement by the attorney of

grandiose and imaginary suppositions of his own that he would like for the jury to consider. It is not probable that a jury would be prejudiced or influenced against appellants by this argument. It was in the nature of a mere expression of the opinion of the attorney, and does not fall within the ban of nonpermissible and prejudicial arguments. The judgment is correct, and it is therefore affirmed.

BUTTS v. STATE.

Opinion delivered June 28, 1926.

1. CONTINUANCE—ABSENCE OF WITNESSES.—It was not error to deny a continuance for the absence of witnesses where the affidavit stated merely that their attendance could be procured at the next term of the court, and did not state where the witnesses were nor why their attendance could not be had, nor why they were absent.
2. CONTINUANCE—DISCRETION OF COURT.—Much discretion must be left to the trial court in granting or refusing continuances.
3. ROBBERY—INDICTMENT OF ACCESSORY.—An indictment for the crime of being accessory before the fact to a robbery which charges the principal offenders with robbery and defendant with aiding, abetting and encouraging the robbery, is not insufficient for omitting the words, "in manner and form aforesaid."
4. CRIMINAL LAW—CONFESSION OF PRINCIPAL OFFENDER.—It was not error to permit an officer to testify, in a prosecution of an accessory, that one of the principals confessed his own guilt, without implicating the accessory.
5. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—Evidence *held* to corroborate an accomplice in a trial for robbery.

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

STATEMENT OF FACTS.

The body of the indictment against the defendant reads as follows:

"The grand jury of Madison County, in the name and by the authority of the State of Arkansas, accuse J.

S. Campbell and Jess Butts of the crime of accessories before the fact of robbery committed as follows, to-wit:

"The said J. S. Campbell and Jess Butts, in the county of Madison, in the State of Arkansas, on the 9th day of February, 1926, Charley Williams and Fred Conway feloniously and violently from the Citizens' Bank of Pettigrew, Arkansas, a corporation, by putting in fear Chas. E. Crawford, the president of said Citizens' Bank, having the legal charge and custody of the funds of said bank, did feloniously and violently take the sum of $1,355.55 gold, silver and paper money, current and lawful money of the United States and the State of Arkansas, and circulating as such, and of the value of $1,355.55, from said Chas. E. Crawford, and against his will, the same being the property of the Citizens' Bank of Pettigrew, Arkansas, and the said J. S. Campbell and Jess Butts, not being present, aided, abetted, advised and encouraged the perpetration of the robbery of said bank aforesaid, against the peace and dignity of the State of Arkansas."

The defendant filed a motion for a continuance and then a supplemental motion on account of the absence of Floyd Dickson and Ed Donahue, for whom subpoenas had been issued in his behalf. In his motion he alleges that Dickson lived in Newton County, Arkansas, and that a subpoena for him was directed to that county; that Dickson's postoffice address is Racker, Newton County, Arkansas, and that Donahue's postoffice address is Pettigrew, Madison County, Arkansas; that each of said witnesses are residents and citizens of the State of Arkansas, and are temporarily absent without the consent, procurement or connivance of the defendant. The testimony which the witnesses would give is then set out in the motion.

The witnesses for the State testified that, on the first day of February, 1926, about three o'clock in the afternoon, Chas. Williams and Fred Conway entered the Bank of Pettigrew, in Madison County, Arkansas, armed, and forcibly took from the bank $1,355.55.

Fred Conway was a witness for the State, and admitted that he was one of the parties who robbed the bank. He testified in detail about the planning of the robbery and how it was committed. According to his testimony, the defendant directed him how to reach the home of his father, where they took dinner on the day following the robbery. The defendant had been given his share of the money secured, in accordance with a previous agreement had with him. According to his testimony, the defendant helped them plan the robbery and furnished them with sacks with which to carry away the money. On the day of the robbery the defendant went to town to see if there were any officers there, and came back towards where the others were hidden and gave them a signal to go ahead and rob the bank.

Other evidence tending to corroborate the testimony of Conway will be stated under an appropriate heading in the opinion.

The defendant was a witness for himself, and denied that he took any part whatever in the robbery, and introduced witnesses tending to show that he was at another place on the day the robbery was committed.

The jury returned a verdict of guilty, and fixed the punishment of the defendant at three years in the penitentiary.

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

J. Wythe Walker, for appellant.

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

HART, J., (after stating the facts). It is first insisted that the court erred in refusing to grant the defendant's motion for a continuance.

The record shows that the defendant was arrested on February 20, 1926, charged with accessory before the fact of robbing the Bank of Pettigrew, and was placed in jail and kept there until an indictment was returned against him on the 2d day of March, 1926, and his trial was set for March 8, 1926. He expected to introduce

Floyd Dickson and Ed Donahue as witnesses in his behalf to establish an alibi.

It is true that he states in his motion that Dickson lived in Newton County and Donahue lived in Madison County, and that he could procure their personal attendance at the next term of the court. He does not state, however, where the witnesses were, but only makes a general statement that they were temporarily absent from the court without his consent or procurement. He did not ask for a postponement of the trial, and did not state where the witnesses were, or what business carried them away from home. He does not state when they will return, but only makes a general statement that he could procure their personal attendance at the next term of the court. Much discretion must be left to the trial court in granting or refusing a motion for a continuance. He is on the ground, and knows the local conditions and the situation of the absent witnesses. A general statement that they would be back by the next term of the court, which would be six months away, is too indefinite. Then, too, a statement should have been made of where the absent witnesses were, and whether they were gone on business or pleasure, so that the court would be fully advised of the likelihood of obtaining their presence at court within a reasonable time. If so, the court might have postponed the trial of the case for a short time until they could return. *Lewis* v. *State*, 169 Ark. 340, 275 S. W. 663; *Scott* v. *State*, 169 Ark. 326, 275 S. W. 667; and *Harris* v. *State*, 169 Ark. 627, 276 S. W. 361.

It is next insisted that the court erred in not sustaining a demurrer to the indictment. The indictment in this case substantially conforms to the rule of law laid down in *Jones* v. *State*, 58 Ark. 390, 24 S. W. 1073, as to the essential elements of an indictment of an accessory.

It is true that the indictment in that case charges that the defendant had advised and encouraged the principals in the crime, whose names are set out, had committed the murder "in the manner and form aforesaid," against the peace and dignity of the State of Arkansas, while the indictment in this case leaves out the words,

"in the manner and form aforesaid." We do not think, however, that the omission of these words changes the rule of law. The use of the words, "in manner and form aforesaid," are simply formal and add nothing to the substantial elements of the crime.

In the case at bar, the indictment, after charging the principal offenders with robbery of the bank, concludes by charging that J. S. Campbell and Jess Butt, the defendants, although not being present, aided, abetted, advised and encouraged the perpetration of the robbery of the said bank. As said in the Jones case, this averment relates back to and adopts the words used in the principal charge. Therefore we hold that it is a good indictment for accessory before the fact of robbery.

It is next contended that the circuit court erred in permitting the sheriff of Madison County to testify that he arrested Fred Conway in the State of Missouri for the robbery, and that Conway confessed that he was guilty. We cannot see how this testimony can in any way prejudice the rights of the defendant. Conway was a witness for the State, and testified before the jury about robbing the bank. In his confession to the sheriff he only implicated himself, and did not attempt to tell him, or at least the sheriff did not testify, anything whatever implicating the defendant in the crime. He only made a statement to the jury that Conway had confessed his guilt to him when he arrested him. Hence we hold this assignment of error is not well taken. *Monk* v. *State,* 130 Ark. 358, 197 S. W. 580, and *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995.

It is next insisted that the testimony of Fred Conway was not sufficiently corroborated to warrant the jury in convicting the defendant.

We cannot agree with this contention. The president of the bank was a witness for the State, and identified Fred Conway as one of the men who robbed the bank. He told in detail about the commission of the robbery. According to his evidence, he lived near a hotel which was run by the defendant. After J. S. Campbell had been arrested as being implicated in the robbery and

placed in jail at Fayetteville, Washington County, the president of the bank went to Fayetteville. Upon his return, the defendant asked him if Campbell was trying to implicate him in the robbery. This was before the defendant was arrested. The defendant also paid off a note which he owed the bank, and made the payment mostly in one-dollar bills. The proof for the State shows that a good many one-dollar bills were taken from the bank when it was robbed.

Conway testified that four persons who planned to rob the bank, including himself and the defendant, met in a hollow near the town on the morning of the robbery.

Another witness for the State testified that he saw the defendant and three other parties in the hollow that same morning.

The father of the defendant was a witness for the State, and admitted that Fred Conway and Charley Williams came to his house the next day after the robbery, just as testified to by Conway. They ate dinner with him, and then left.

Other witnesses for the State testified that the defendant was seen near the bank a short time before the robbery occurred. These facts and circumstances were sufficient to corroborate the testimony of Fred Conway and to warrant the jury in returning a verdict of guilty against the defendant. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995, and cases cited.

Objections were made to certain instructions given and refused by the court, which are now pressed upon us as grounds for reversal. We do not deem it necessary to set out these instructions. The instructions given by the court fully and fairly covered the respective theories of the State and of the defendant. The jury was fully instructed on the question of corroboration, in accordance with the rule laid down in the Middleton case above cited, and many other cases which might be cited.

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

FARMERS' HOME MUTUAL FIRE ASSOCIATION *v.* MCALISTER.

Opinion delivered June 28, 1926.

1. INSURANCE—FIRE POLICY—LOSS RECOVERABLE.—Under Crawford & Moses' Dig., § 6147, making the full amount of the insurance named in a fire insurance policy payable in the event of a total loss, an instruction, in an action on a fire policy for the total loss of a barn, to return a verdict for insured for the value of the barn, as fixed in the policy, *held* proper.
2. INSURANCE—VALUED FIRE POLICY—STIPULATION AS TO AMOUNT PAYABLE.—A stipulation in a valued fire policy, limiting the insurance to two-thirds of the actual value of the property, *held* void as conflicting with Crawford & Moses' Dig., § 6147, making the full amount of the policy payable in the event of total loss.

Appeal from Pope Circuit Court; *J. T. Bullock,* Judge; affirmed.

STATEMENT BY THE COURT.

Leo McAlister sued the Farmers' Home Mutual Fire Association to recover the sum of $600 alleged to be due on a fire insurance policy on his barn and its contents. In the policy the barn was valued at $500, and the grain, corn and other feed in the barn were valued at $100. The policy contains a clause that no property, real or personal, shall be insured by the company for more than two-thirds of its actual value. The barn and its contents were totally destroyed by fire without any fault on the part of the insured.

The jury returned a verdict in favor of the plaintiff for the sum of $500 as the value of the barn.

The case is here on appeal.

Joe D. Shepherd, for appellant.

HART, J., (after stating the facts). The principal ground relied upon for a reversal of the judgment is that the court instructed the jury that its verdict should be for the plaintiff for the value of the barn as fixed in the policy. This instruction is in accordance with § 6147 of Crawford & Moses' Digest, which makes the full amount of the insurance named in the policy payable in the event of a total loss, and limiting the recovery to that amount.

Statutes of this sort are commonly called valued policy laws, and have been sustained by this court and by the Supreme Court of the United States. *Minneapolis Fire & Marine Mutual Ins. Co.* v. *Fultz*, 72 Ark. 365, 80 S. W. 576; *American Central Ins. Co.* v. *Noe*, 75 Ark. 406, 88 S. W. 572; *National Union Fire Ins. Co.* v. *Kent*, 163 Ark. 7, 259 S. W. 570; *Liverpool & London & Globe Ins. Co., Ltd.* v. *Payton*, 128 Ark. 528, 194 S. W. 503; and *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 19 S. Ct. 281.

The contention of the insurance company in this case is that this statute does not apply, because the policy contains a provision that no property, either real or personal, shall be insured by the association for more than two-thirds of its actual value, and that the proof shows that this was done in the present case.

Counsel for the insurance company, in making this contention, have not taken into consideration the Payton case cited above, in which it was expressly held that a stipulation of the policy in conflict with the terms of the statute is void. Statutes of this sort are passed for the purpose of avoiding the uncertainty of determining the value after the fire. The manifest policy of the statute is to guard against over-insurance of the property. The agents of the company have the opportunity to inspect the property fully before taking the insurance and fixing the amount of the premiums. It is the valuation fixed in advance by the parties by way of liquidated damages in case of a total loss by fire of the property insured without the fault of the insurer.

No errors of law appear in the record, and the judgment of the circuit court will therefore be affirmed.

MARTIN v. STATE EX REL. SALINE COUNTY.

Opinion delivered June 28, 1926.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A finding of fact by the chancellor will be sustained on appeal when not against the preponderance of the testimony.
2. COUNTIES—AUTHORITY OF COUNTY COURT.—Under the Constitution, the county court is the general fiscal agent of the county, and has power to do all things necessary to the preservation of its funds.
3. COUNTIES—POWER TO ISSUE BONDS.—Constitutional Amendment No. 11, authorizing county courts to issue bonds to secure the indebtedness outstanding at the time of its adoption, is self-executing, and the county court need not await the passage of an enabling act to order a sale of bonds.
4. COUNTIES—AGREEMENT OF JUDGE TO ISSUE BONDS.—Where county warrants were worth not exceeding 60 cents on the dollar, an agreement of the county judge with one owning a considerable amount of such warrants to issue bonds and redeem the warrants held and to be acquired by the other, *held* supported by a sufficient consideration.
5. FRAUDS, STATUTE OF—ORAL AGREEMENT—PART PERFORMANCE.—Purchase by a dealer of county warrants and issuance of bonds to pay same, in accordance with an oral agreement for redemption of such warrants, *held* a sufficient part performance to take the agreement out of the statute.
6. EQUITY—JURISDICTION—MULTIPLICITY OF SUITS.—Equity *held* to have jurisdiction to determine rights of a dealer in county warrants relating to numerous warrants, which might involve a multiplicity of suits, if resort were had to law.
7. INJUNCTION—PAYMENT OF PUBLIC MONEY.—Injunction at the instance of a citizen to prevent payment of more for county warrants than a dealer in such warrants was entitled to under an agreement with the county judge, *held* to present a proper case for equitable jurisdiction.

Appeal from Saline Chancery Court; *W. R. Duffie*, Chancellor; affirmed.

STATEMENT BY THE COURT.

The State of Arkansas, on the relation of Saline County, brought this suit in equity against A. V. Martin and George H. Ramsey as treasurer of Saline County, to enjoin the county treasurer from returning to Martin

certain county warrants, and praying that Martin be required to accept the price for said warrants which had been agreed upon between him and the county judge of Saline County in order to induce the county judge to issue bonds in payment of said warrants.

Martin defended the suit on the ground that he did not make such an agreement, and upon the further ground that any such agreement would be void because there was no consideration for it.

The chancellor made a special findings of facts, which is embodied in his decree, and which reads as follows:

"That John P. Kirkpatrick was elected county judge of Saline County in the year 1924, and assumed the duties of office as such on or about January 1, 1925, and thereafter decided it was advisable to place said county upon a cash basis, issuing bonds under Amendment Number Eleven (11) to the Constitution of the State of Arkansas, in case same should be declared adopted, or by some other means in case decision on said amendment should be that it was not adopted, and, in deciding upon this, talked with defendant, A. V. Martin, who, at that time, stated he had approximately $16,000 of the scrip or warrants of said county, and agreed with the said county judge to purchase other outstanding warrants, which, with the warrants held by him, would make approximately $30,000, and that he, said A. V. Martin, would sell all the county warrants held and which should be acquired by him issued prior to October 7, 1924, at the price of 75 cents on the dollar, or turn same over to such person as the county judge might select at said price; and, after said amendment had been declared adopted by the Supreme Court of the State of Arkansas, bonds were issued by said county and the amount for same received by said county immediately preceding the filing of this suit; and, after said decision of the Supreme Court, said Martin agreed to turn over to said county and accept said price for all of said warrants held by him which were issued prior to said October 7, 1924, and which were held by said defendant Martin immediately prior to the institution

of this suit, and turned over by him to the said treasurer of said county for payment, amounting to $18,642.03, and for which the county treasurer erroneously issued his check in the sum of 100 cents on the dollar instead of 75 cents on the dollar, but which check had not been paid at the time of the institution of this suit; and that said county judge, acting on behalf of said county, would not have caused bonds to have been issued under said amendment except for the agreement with said defendant Martin. That, at the time the negotiation between said county judge, acting on behalf of said county, and said defendant Martin, began, the general market price of the scrip of said county was around 60 cents on the dollar, and, in pursuance and fulfillment of the contract between said county judge, acting on behalf of said county, and defendant Martin, and said county judge, acting for said Martin, purchased several thousand dollars' worth of scrip, and was instrumental in assisting said defendant Martin to purchase a material amount of other scrip, and that the scrip held by said Martin and purchased by and for him up to the time when bonds were issued by said county under the provisions of said amendment, amounted to $30,158.55, and that bonds were issued by said county in the amount of the indebtedness of said county. That said contract was made between said county through its county judge and officers, and, had it not been for the said defendant Martin, the county would not have acted to its detriment in issuing bonds."

A decree was entered in accordance with the findings of the chancellor, and the county treasurer was enjoined from paying to A. V. Martin more than 75 cents on the dollar for the county warrants which had been deposited with him, in accordance with the contract between Martin and the county judge. The case is here on appeal.

D. M. Cloud and *W. R. Donham,* for appellant.

W. A. Utley and *Brouse & McDaniel,* for appellee.

HART, J., (after stating the facts). We deem it unnecessary to make an abstract of the evidence. While

the testimony of A. V. Martin flatly contradicts that of John P. Kirkpatrick, county judge of Saline County, to the effect that the agreement found by the chancellor was made, still the testimony of Kirkpatrick was corroborated by that of other witnesses, and we think that it cannot be said that the finding of the chancellor was against the preponderance of the evidence. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160.

It may be then taken as settled, in so far as this opinion is concerned, that the chancellor was warranted in finding that Martin and the county judge of Saline County made a contract whereby the former was to receive 75 cents on the dollar for the county warrants which he owned at the time the agreement was made and those purchased pursuant to the agreement, and that these warrants had been deposited with the county treasurer for payment in accordance with the agreement.

The main reliance of Martin for a reversal of the decree is that the agreement in question was without consideration, and is unenforceable.

Counsel invoke the application of the common-law rule, which has been followed in this State, that, where part payment of a liquidated demand is made in full settlement of the debt, no consideration exists for this promise of the creditor to release the remainder of his debt, and an action may be maintained for it by the creditor. *North State Fire Ins. Co.* v. *Dillard,* 88 Ark. 473, 115 S. W. 154; *Pettigrew Machine Co.* v. *Harmon,* 45 Ark. 290; *St. L. Sw. Ry. Co.* v. *Mitchell,* 115 Ark. 339, 171 S. W. 895; *Ledwidge* v. *Ark. Nat. Bank,* 135 Ark. 420, 205 S. W. 808; *United States* v. *Bostwick,* 94 U. S. 53; and *Fire Insurance Assn.* v. *Wickham,* 141 U. S. 564.

In *Clayton* v. *Clark,* 21 So. 565, 37 L. R. A. 771, 60 Am. St. Rep. 521, the Mississippi Supreme Court, in a vigorous opinion, declared the rule to be absurd and unreasonable, and expressly set it aside.

In a case-note to 41 A. L. R. 1490, it is said that the general rule that part payment of a liquidated indebtedness is no consideration for the discharge of the entire

debt has always been regarded as technical and unjust, and that the modern tendency of the courts has been to enlarge the exceptions to the rule in order to avoid its harshness, and to carry into effect settlements, adjustments and compromises.

In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Clark,* 178 U. S. 353, the Supreme Court of the United States, in commenting upon the rule, said:

"The result of modern cases is that the rule only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and, while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it."

While our own court has adhered to the rule, it has recognized exceptions to it. One of these is that part payment of a liquidated indebtedness by a third person is a sufficient consideration for its acceptance by the creditor in the discharge of the entire debt. *Pope* v. *Tunstall,* 2 Ark. 209; *Gordon* v. *Moore,* 44 Ark. 349; and *Wilks* v. *Slaughter,* 49 Ark. 235, 4 S. W. 766.

In the *Pope* v. *Tunstall* case the court said that any change or alteration which renders the creditor's situation more advantageous or the debt more secure, will suffice.

This court has also held that, in cases of contract for the payment of a liquidated sum of money, the payment of a less sum will not be a good satisfaction unless it was paid and accepted before the time when it was to have been paid, or at a different place from that appointed for the payment. *Cavaness* v. *Ross,* 33 Ark. 572, and *Martin-Alexander Lumber Co.* v. *Johnson,* 70 Ark. 215, 66 S. W. 924.

So, too, it has been held that an agreement by a debtor not to go into bankruptcy and thereby be discharged from his debts furnishes a sufficient consideration to support a contract by the creditor to accept less for his debt than the full amount thereof. *Dawson* v. *Beall,* 68 Ga. 328; *Hinckley* v. *Arey,* 27 Me. 362; and *Her-*

man v. *Schlesinger*, 114 Wis. 382, 91 A. S. R. 922, 90 N. W. 460.

We think that, under the facts of this case, the contention of Martin that the agreement to take 75 cents on the dollar for his county warrants was without consideration and for that reason invalid, is without merit. In the first place, it may be said that, under our Constitution, the county court is the general fiscal agent of the county, and has power to do all things necessary to the preservation of its funds. *Leathem & Co.* v. *Jackson County,* 122 Ark. 114, 182 S. W. 572. In the exercise of this power the county court might have called in all the county warrants for cancellation and reissuance, and might have canceled all those which had been illegally issued or whose issuance had been procured by fraud. *Monroe County* v. *Brown,* 118 Ark. 524, 177 S. W. 40; *Izard County* v. *Vincennes Bridge Co.,* 122 Ark. 557, 184 S. W. 67; and *Izard County* v. *Bank of Melbourne,* 123 Ark. 458, 185 S. W. 794.

Constitutional Amendment No. 11, authorizing county courts to issue bonds to secure the indebtedness outstanding at the time of its adoption, is self-executing, and the county court need not await the passage of an enabling act to order a sale of bonds. *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22, and cases cited.

Before the agreement under consideration was made between Martin and the county judge, the former owned certain county warrants, which are general orders payable when funds are found in the county treasury, and which are to be paid in the order of their presentation. These warrants could not be paid until there were funds in the county treasury available for the purpose. Since the issuance of the warrants in question, it appears that there had been no funds out of which they could be paid, and they had not been paid for want of funds.

It is true that the warrants could be used in the payment of taxes by the holders thereof, but, on account of there being no available funds from which to pay them,

they had depreciated in value until they were not worth exceeding 60 cents on the dollar. In order to secure the price of 75 cents on the dollar, Martin made an agreement with the county judge that, if he would exercise his discretion in issuing bonds, he would buy up other outstanding warrants and take 75 cents on the dollar for them.

Upon the situation being explained to the prosecuting attorney and others who held county warrants, they sold their warrants to Martin at a discount, and the county judge assisted Martin in buying up these warrants, so that he could make a profit by the county paying him 75 cents on the dollar for them. Then, pursuant to the agreement, he exercised his discretion and issued bonds to an amount which would pay off these warrants at 75 cents on the dollar, and thereby put the county on a cash basis.

These facts differentiate this case from *Schlessinger* v. *Schlessinger,* 39 Col. 44, 88 Pac. 970, where it was held that payment by a debtor of a sum less than is due under his agreement to the creditor, who executes a release, not under seal, purporting to discharge the debtor of all claims under the agreement, is not a satisfaction of the debt, though the debtor borrowed the money with which to make the payment.

In the first place, it may be said that one reason for so holding was that there was no averment that the plaintiff knew about the defendant's borrowing the money. Then, too, the debt was due at a certain date, and it was the duty of the defendant to pay it on that date, either with his own money or with borrowed money. It was a question whether the county judge could be compelled to issue bonds under Amendment No. 11 to secure money to pay off the existing county warrants. Martin is also charged with knowledge that the county judge had the power to call in the scrip for cancellation and reissuance, and that he might refuse to issue scrip which was illegal or whose issuance had been fraudulently procured in the beginning.

It is true that there is no evidence in the record tending to show that any of the scrip held by Martin was illegal or fraudulently issued, but Martin was a scrip dealer, and had purchased all of his county warrants from various persons, and knew the hazards attached to the calling in of the county warrants by the county judge for cancellation and reissuance. Martin also knew that no levy of taxes could be made beyond the constitutional limit for the purpose of paying county warrants. These facts were sufficient to make the case at bar an exception to the general rule, and the mutual promises and forbearance of the county judge and Martin were sufficient consideration for the execution of the agreement in question.

On the question of the statute of frauds, but little need be said. The facts recited above constituted such a substantial part of the performance of the contract as in any event to take it out of the statute of frauds. *Storthz* v. *Watts,* 117 Ark. 500, 175 S. W. 406; and *Newton* v. *Mathis,* 140 Ark. 252, 215 S. W. 615.

Again, on the question of the jurisdiction of the chancery court a short discussion will suffice. The record shows that Martin had numerous county warrants of various denominations, which would cause a multiplicity of suits, had a resort been made to law. Again, under the allegations of the complaint and the proof made in the case, Martin was not entitled to collect more than 75 cents on the dollar of the face value of his county warrants, and the collection of an amount in excess of that sum would have amounted to an illegal exaction, which any citizen of the county might prevent by the injunctive process of a court of equity.

The result of our views is that the decree of the chancery court was correct, and it will be affirmed.

DISSENTING OPINION.

McCULLOCH, C. J. My conclusion is that the alleged contract is not enforceable against appellant, for several reasons. In the first place, the contract was not made by the county court, but with the county judge in vaca-

tion, and there was no authority for the execution of such a contract by the county judge. *Ross Drainage District* v. *Clark County*, 153 Ark. 175, 239 S. W. 740. In the next place, there was no consideration to support the contract, which was, in substance, one to accept payment of county warrants at less than face value. It was merely an executory contract to accept, without other consideration, payment of a smaller sum than due in full discharge of the debt. This court held in *Dreyfus* v. *Roberts*, 75 Ark. 354, 87 S. W. 641 (departing from the rule theretofore adhered to by this court), that, when an agreement to discharge a debt by the payment of a smaller sum has been fully executed, "and such discharge is evidenced in writing, * * * it is a valid and irrevocable act"; but in the later case of *North State Fire Ins. Co.* v. *Dillard*, 88 Ark. 473, 115 Ark. 154, it was said that "where the agreement is not executed, and is not evidenced by any writing, then it is not a bar to an action on the original debt; and, not being a bar, it is immaterial why the agreement is not executed." Later on, in the opinion in that case, this court said: "Still, the promise is to satisfy, and until that promise is fulfilled the agreement has not become binding."

There was no other consideration than the promise of the county judge to issue bonds under Amendment No. 11, for, if the bonds were issued, it could only be for the purpose of paying old indebtedness of the county, of which appellant's warrants formed a part, and, when the bonds were issued and the proceeds thereof received by the county treasurer, these funds could only be applied in the payment of such old indebtedness. In other words, appellant had the absolute right to have the warrants paid out of the funds which accrued from the sale of bonds; therefore the promise of the county judge was merely to comply with the law in that respect.

It is not important at this time to consider whether or not creditors of a county can compel the county court to issue bonds pursuant to Constitutional Amendment

No. 11, for, if they have that right, it is one which exists under the law and does not result from contract, and therefore the promise of the county judge to issue the bonds added nothing to appellant's legal right. On the other hand, if the issuance of bonds was merely discretionary with the county judge, his agreement to do so was merely a promise to pay in part the debts of the county in discharge of the whole, and, as before stated, the unexecuted agreement was unenforceable.

Finally, it is clear, I think, that the contract was unenforceable against appellant for the reason that there was no mutuality, in that it was unenforceable against the county. As before stated, the power to issue bonds is one created by law, and such power, or duty to exercise the same, cannot be enlarged or restricted by contract; and if the county court cannot be compelled under the law to issue bonds, then it is under no such compulsion by virtue of the contract. And the contract, even if it had been made by the county court itself, would have been unenforceable, hence appellant is not bound. I dissent therefore from the conclusion of the majority.

ROAD IMPROVEMENT DISTRICT NO. 1 OF CONWAY COUNTY
v. MOBLEY CONSTRUCTION COMPANY.

Opinion delivered June 28, 1926.

1. HIGHWAYS—RELATION OF DISTRICT TO SUBCONTRACTOR.—Approval by a road improvement district of the contractor subletting a portion of the work did not create a contractual relation between the district and the subcontractor.
2. CONTRACTS—RIGHTS OF THIRD PERSON.—Where a contract is made between two parties, in order that a third person may sue the promisor for a breach of the contract, the obligation of the promisor to the third person must be one which existed at the time of making of the contract, or one which grew out of the contract itself, and where the benefit to the third person accrued subsequently, as a mere incident, he cannot recover.
3. HIGHWAYS—LIABILITY OF DISTRICT TO SUBCONTRACTOR.—The fact that a road improvement district consented to subletting of a

portion of the work did not render it liable to the subcontractor, on stopping the work, for profits which the latter might have made by performance of the subcontract.

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

Strait & Strait, for appellant.

Carmichael & Hendricks, for appellee.

SMITH, J. The Mobley Construction Company, hereinafter referred to as the Mobley company, the plaintiff below, alleged as its cause of action the following facts: Road Improvement District No. 1 of Conway County, hereinafter referred to as the road district, entered into a contract with the P. J. Lewelling Construction Company, hereinafter referred to as the Lewelling company, to build and construct a road in Conway County, Arkansas, according to plans and specifications on file at that time in the office of the engineer of the road district. On March 15, 1920, by and with the consent of the road district, the Lewelling company sublet to the Mobley company certain portions of the work included in the contract between the road district and the Lewelling company. The contract between the Lewelling company and the Mobley company was made an exhibit to the complaint, and it was there provided that that contract should be governed by the contract between the road district and the Lewelling company as to prices, grades and payments.

It was further alleged in the complaint that the road district consented to this action by a resolution adopted by its board of directors on the ..... day of January, 1920, which reads as follows: "On this ..... day of January, 1920, is filed with the board of commissioners of Road Improvement District No. 1 of Conway County, Arkansas, a copy of the agreement between the P. J. Lewelling Construction Company, the contractor for the surfacing of the roads being improved within the district, and the Mobley Construction Company, a subcontractor, in which agreement the subcontractor undertakes to perform certain portions of the work undertaken by the orig-

inal contractor, and the board in open session, after the adoption of a resolution approving the foregoing contract and agreement, by its individual members, hereunto sign this approval in the name of the district and by the members as its commissioners."

It was alleged that the Mobley company entered upon the performance of the contract and was ready, willing and able to complete it, when the road district ordered the cessation of all work.

The Mobley company sued both the Lewelling company and the road district for damages for the breach of contract. Neither the road district nor the Lewelling company answered, and the Mobley company offered testimony to the effect that it would have earned, had it been allowed to complete the contract, a profit of $73,585.01, the amount for which it sued, and a decree was rendered in its favor for that amount against both the road district and the Lewelling company, and the road district has appealed.

For the affirmance of the decree of the court below it is insisted that the road district was liable because it had adopted and approved the subcontract, and, by the passage of the resolution set out above, the road district approved the contract of the Mobley company with the Lewelling company, and this made the district a party to that contract, and it became a joint contract whereunder any party in interest might sue for damages for its breach.

We do not agree with counsel in this contention. There was no contractual relation between the road district and the Mobley company. The contract between the road district and the Lewelling company was not abrogated, nor was the contract between the two contractors substituted for it. The second or subcontract covered only a part of the work required to be performed by the first contract, and the sum due by the district would have been dependent on the completion of the entire improvement, and not on a portion thereof.

We think the purpose and legal effect of the resolution set out above was that the district consented to a subletting of a portion of the work, and in doing so the district assumed no contractual relation with the subcontractor. So far as the district was concerned, there was only one contract for the construction of the improvement, and not two. The subcontract between the Lewelling company and the Mobley company left the original contract between the road district and the Lewelling company in full force and effect, and the liabilities of the road district for the construction of the completed improvement are determinable by that contract, and by it alone, and the Mobley company was not a party thereto. Had the Mobley company defaulted in the performance of this subcontract, the recourse of the district would have been against the party with whom it had contracted, which was the Lewelling company, and not the plaintiff Mobley company.

It is insisted that the Mobley Construction Company was a party for whose benefit the original construction contract was made, and it had the right therefore to sue for the damages sustained by it. We do not agree with counsel in this contention. In the first place, the contract did not inure to any one's benefit except the P. J. Lewelling Construction Company, which was the only party to it.

The decision of this court in the case of *Dickson* v. *McCoppin*, 121 Ark. 414, is a second answer to this contention. In that case an improvement district had let a construction contract to McCoppin, and Dickinson was employed as engineer by the district. A controversy arose over the compensation due Dickinson, and he sought to avail himself of certain provisions of the contract between the district and McCoppin, but it was held (to quote a head-note) that:

"Where a contract is made between a promisee and a promisor for the benefit of a third party, in order that the third party may sue the promisor for breach of the contract, the obligation of the promisor to the third party

must be one which existed at the time of the making of the contract, or one which grew out of the contract itself; and where the benefit to the third party accrued subsequently, as a mere incident, he cannot recover."

There was no obligation to the Mobley company when the construction contract was made, and such rights as it had itself arose out of the subsequent contract between itself and the Lewelling company, a contract to which, as we have said, the road improvement district was not a party.

We conclude therefore that, in consenting to the subletting of a portion of the work which the Mobley company contracted with the Lewelling company to perform, the district assumed no contractual relation with the Mobley company which rendered it liable to that company for any profits it might have made by the performance of its subcontract.

The judgment against the road district is therefore reversed, and, as no cause of action is stated against it, the cause against the road district is dismissed.

BACQUIE v. STATE.

Opinion delivered June 28, 1926.

1. INTOXICATING LIQUORS—SALE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain conviction of selling liquors.
2. WITNESSES—IMPEACHMENT OF WITNESSES.—Under Crawford & Moses' Dig., § 4187, providing that a witness may not be impeached "by evidence of particular wrongful acts, except that it may be shown, by the examination of a witness, or record of a judgment that he had been convicted of a felony," *held* in a prosecution for selling intoxicating liquor, where accused denied having been convicted of selling intoxicating liquor, which is a misdemeanor, it was error to impeach her by proof of her having been convicted of selling same, such conviction having no relation to the offense charged.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; reversed.

Booker & Booker, for appellant.

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

SMITH, J. Appellant was tried under an indictment containing two counts, the first charging her with selling intoxicating liquors and the second with the offense of procuring intoxicating liquors. She was convicted on the first count and acquitted on the second, and has appealed.

Mrs. Calvin Wilson, a white woman, testified that she and her daughter, Mrs. Hazel Naylor, went to the restaurant of appellant, a colored woman, and asked for some whiskey. They went back into the kitchen and told appellant that Mrs. Naylor was cramping to death, and they wanted some whiskey, and that appellant produced a bottle of whiskey, and the cramping lady and the non-cramping lady each took a drink, for which they paid appellant a dollar.

Appellant admitted the women were at her restaurant, and that they came into her kitchen and inquired for whiskey, but she denied that she sold them any, and her cook corroborated her in this denial. This conflict was, of course, a question for the jury, and the testimony is legally sufficient to support the verdict returned by the jury.

We think, however, that error was committed in the cross-examination of appellant, and that this cross-examination may have weighed with the jury in determining this conflict in the testimony. We quote from the transcript the following cross-examination of appellant:

"Q. In February, 1922, did you sell any whiskey? A. No, it was Spot McNutt. Q. In May, 1924, didn't you disturb the peace? (Objected to; objection overruled, and exceptions saved by defendant). A. I don't know that I did. Q. In January, 1922, didn't you disturb the peace? (Objected to by defendant; overruled, and exceptions saved). (No answer). Q. In April, 1925, didn't you transport whiskey? A. No. Q. In April, 1925, didn't you possess liquor for the purpose of sale? (Objected to by defendant; overruled, and exceptions

saved). A. No. Q. December 9, 1921, were you not convicted in this court for procuring liquor? A. I don't know whether I was convicted, but I paid a fine. Q. June 7, 1922, in this court you were convicted on another charge for procuring liquor? (Objected to by defendant; overruled, and exceptions saved). A. No."

After appellant had denied that she had been convicted on June 7, 1922, for procuring liquor, the attorney representing the State said: "Q. June 15, 1925, this record of the circuit court shows you were convicted for possessing liquor for sale. (Exhibiting record of circuit court). Q. Listen to these two records of conviction that I read from these records here: (Here counsel reads records of cases Nos. 21805 and 18881 as follows, to wit."

Thereafter counsel read at length from the court proceedings had on June 7, 1922, the judgment of the court in cause No. 18881, showing the trial and conviction of appellant on a charge of procuring liquor, wherein she was fined $200. Counsel for the State then read from the court proceedings had on June 15, 1925, the judgment of the court in cause 21805, wherein appellant was fined $100 for possessing liquor.

It is recited in the transcript that "defendant objects to the reading of the record of the two convictions referred to; objection overruled, and exceptions saved."

Appellant was then asked: "Q. Do you recall these transactions?" and answered: "A. No, I do not." She was then asked: "Q. Doesn't that refresh your memory, my reading these two convictions?" Appellant answered: "A. That one is the only one, only one of them; the other one was Solly Magness; he paid that fine, that wasn't my case."

In the course of the argument the attorney representing the State referred to this testimony as follows: "I have tried to show you by the evidence of other liquor transactions by the defendant that she is an old and constant offender against the liquor laws of the State." Further on in the argument the prosecutor said: "You

will see from the evidence that the defendant is not a virgin in the liquor business, judging from the number of times she has been convicted of liquor violations."

Appellant objected to these remarks at the time they were made, and her objections were overruled, and exceptions were saved.

We think this testimony was incompetent, and its prejudicial nature is shown by the use which was made of it in the argument quoted from. These judgments were read to the jury, and are copied in full in the transcript, and it appears that in the first case she was fined $200, and $100 in second. Appellant was asked specifically if she had not been convicted on June 7, 1922, but denied that she had been. The record read in evidence was, of course, a contradiction of her testimony. The date of this trial was about four years prior to the one from which this appeal comes, and there was no connection between the two offenses, and the first offense was necessarily collateral to the other.

Section 4187, C. & M. Digest, reads as follows: "A witness may be impeached by the party against whom he is produced, by contradictory evidence by showing that he has made statements different from his present testimony, or by evidence that his general reputation for truth or morality renders him unworthy of belief, but not by evidence of particular wrongful act, except that it may be shown, by the examination of a witness, or record of a judgment, that he had been convicted of a felony."

The judgments read into the record showing prior convictions were not for felonies, and the offenses upon which these prior convictions were secured have no relation to the offense charged. The court should not therefore have allowed the State to contradict the witness by proving that she had been convicted of the misdemeanors which she denied having committed. *McAlister* v. *State*, 99 Ark. 604; *Perkins* v. *State*, 168 Ark. 710; *Tullis* v. *State*, 162 Ark. 116; 7 Enc. of Evidence, page 180.

If the testimony had been competent, it would have been proper for the prosecuting attorney to comment

upon it; but its incompetency is shown by the use which was made of it. The necessary effect of the testimony was to leave the impression, not only that appellant was untruthful and therefore unworthy of belief as a witness in her own behalf, but to show also that she was an old offender or, as it was expressed in the argument, "not a virgin" in crime.

For the error in admitting this testimony the judgment must be reversed, and the cause will be remanded for a new trial.

McCULLOCH, C. J., (dissenting). The judgments of conviction were not introduced in evidence, but were merely read to appellant, as a witness, to refresh her memory. This is a technical distinction, but it is as substantial as the theory that appellant may have been prejudiced by the incident further than discrediting her as a witness, which the State had the right to do. When we look to the substance of the incident—disregarding the form in which it got to the jury—we see that appellant admitted the correctness of the record showing her conviction of two offenses. She said that one of the convictions was for her own offense, and that the other was for the offense of Solly Magness, who paid the fine. In other words, she admitted that she was twice convicted—once for procuring liquor, and the other for possessing it, but she explained by saying Solly Magness was the real offender in one of the cases. The State was bound by her answer, and the court would have so instructed the jury if so requested, but no such request was made.

It seems to me that the trial court, in substance and effect, merely followed the rule long adhered to by this court that a witness may, on cross-examination, be interrogated concerning past offenses involving moral turpitude which are calculated to affect credibility.

JONES v. FOWLER.

Opinion delivered June 28, 1926.

1. TAXATION—WHO MAY PURCHASE AT TAX SALE.—One who was administrator of a decedent's estate and guardian *ad litem* of his minor children at the time dower was assigned, was not prohibited, after the administration had closed, from buying the land assigned as dower at tax sale after the administration had closed and the widow's grantee was in possession.
2. TAXATION—WHO MAY PURCHASE AT TAX SALE.—One who was commissioner to assign dower to a widow is not prohibited thereafter from purchasing the land so assigned at a tax sale.
3. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.—The admission of incompetent evidence will not be ground for reversal where it does not appear that it could have been prejudicial.
4. LIFE ESTATES—ADVERSE POSSESSION—REMAINDERMEN.—While a valid tax sale bars the right of all interested parties, those holding remainder interests as well as the life tenant, yet, when the sale is void, one who enters under a void sale is a trespasser, and the statute of limitations does not run against the remaindermen until the expiration of the life estate.
5. APPEAL AND ERROR—NECESSITY OF MOTION FOR NEW TRIAL.—Error in directing the jury to find for the plaintiffs is not before the Supreme Court where no motion for new trial was filed.
6. TAXATION—INVALID TITLE—COMPENSATION FOR IMPROVEMENTS.—Remaindermen who assert title to land sold for taxes at void sale 50 years before, and since held by assignees of the purchaser in good faith and under color of title, are required to pay for betterments and taxes, though no tax deed was issued until after suit was brought.
7. TAXATION—RECOVERY OF FORFEITED LAND—BETTERMENTS.—Crawford & Moses' Dig., § 3708, providing that one seeking to recover land sold for taxes should tender to the defendant in possession the taxes paid by him and the value of improvements, applies where the defendant is in possession under a donation certificate.
8. TAXATION—COMPENSATION FOR IMPROVEMENTS—EVIDENCE.—In suit by remaindermen to recover land from a tax purchaser, evidence of the cost of improving and fencing adjoining land was admissible in determining the enhanced value of the land by reason of improvements.
9. TAXATION—VOID SALE—RECOVERY OF TAXES.—Where defendants in ejectment paid taxes on an 80-acre tract and were entitled to recover the taxes paid on two-thirds thereof, the amount recoverable may be computed by taking two-thirds of the taxes paid,

where no testimony was offered showing any difference in value between the one-third and the two-thirds.

10. APPEAL AND ERROR—PRESUMPTION.—Although a witness computed the interest on tax payments at 10 per cent., it will be presumed, in the absence of a contrary showing, that the jury obeyed the court's instruction to allow 6 per cent. interest thereon.

11. JUDGMENT—AMOUNT.—Where successful plaintiffs in ejectment were awarded judgment for rents and profits, and defendants given a separate judgment for improvements, taxes and interest, it will be presumed that the amount of plaintiff's recovery was to be deducted from the larger amount due to the defendants.

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

Ejectment of D. S. Jones and others, heirs of B. C. Jones, against J. S. Fowler, S. Bondi and O. L. Clement. Verdict was directed for plaintiffs, upon payment of the value of improvements. Plaintiffs appealed, and Bondi was granted a cross-appeal.

Ward & Ward, for appellant.

John M. Parker, for appellee.

SMITH, J. Appellants are the children and heirs at law of B. C. Jones, who died in 1863, and who was survived by his widow and minor children. Jones owned at the time of his death 400 acres of land in Yell County, and in 1866 a proceeding was had whereby dower was assigned to the widow in these lands. The lands assigned as dower were described as the east half of the southeast quarter section 23, township 5 north, range 22 west, and the west two-thirds of the west half of the southwest quarter section 24, township 5 north, range 22 west. The last described tract was described by metes and bounds in the order assigning the dower.

Mrs. Jones, the widow, married one Columbus Carpenter, and resided with him on the lands above described until February 25, 1867, at which time they executed a deed to Elizabeth Ann White conveying the interest of Mrs. Carpenter in the lands. After conveying her interest in the lands, Mrs. Carpenter moved to Texas, and resided there for a short time, when she returned to Clay County, in this State, where she resided until her death,

which occurred July 25, 1919. Mrs. White allowed the land to sell for taxes, and has passed out of the case and is not a party.

The northwest quarter of the southwest quarter section 24 was sold in 1869 for the taxes of 1868 to C. B. Mills, who received a certificate of purchase at the sale, but no demand was made for a tax deed until after the institution of this suit.

The southwest quarter of the southwest quarter section 24 and the east half of the southeast quarter section 23 were sold in 1872 for the taxes of 1871 to W. H. Ferguson, who received a tax deed June 29, 1874, for both tracts.

It appears that Ferguson had been the administrator of the estate of B. C. Jones and was the guardian *ad litem* for the minor children when the dower was assigned, and it is insisted that the tax sale to him was void for that reason. It was stipulated, however, that Ferguson was discharged as administrator in 1869, and the administration was then closed, and, at the time of his purchase at the tax sale, dower had been assigned to the widow, whose grantee was in possession and had been for several years before the sale. We perceive no reason therefore why Ferguson could not buy at the tax sale in 1872, long after the administration had closed. We regard these facts as unimportant, however, for the reason that the sale at which Ferguson purchased was void for a number of reasons, and the court so declared as a matter of law.

It is also argued that the sale to Mills was void for the reason that he had been a commissioner when the dower was assigned. His duties as commissioner were performed in 1866, and he did not purchase until 1869, and we perceive no reason therefore why he could not have purchased. But the fact that he was a commissioner is unimportant for the reason that the sale at which Mills purchased was void, and the court so declared as a matter of law.

Mills conveyed the forty-acre tract which he bought to W. H. Ferguson in 1869; Ferguson conveyed to Choate

in 1880; Choate conveyed to John M. Harkey in 1884; Harkey's estate was partitioned, and this forty-acre tract was assigned to Olga J. Harkey, who conveyed to Henry M. Corn in 1906, who conveyed to S. Bondi and O. L. Clement in 1912; and Bondi and Clement conveyed to J. S. Fowler February 1, 1918. These deeds conveyed the entire northwest quarter southwest quarter, although, as we have said, the dower assigned to Mrs. Carpenter in this tract was the west two-thirds thereof.

In a chain of title of equal length, beginning with W. H. Ferguson and ending with Fowler, the other two tracts were conveyed. Fowler's immediate grantors of all three tracts were Bondi and Clement.

Upon the death of Mrs. Carpenter, her heirs demanded possession of the land from Fowler which had been assigned as dower to their mother, and, when the demand was refused, suit was brought to recover possession. This suit was begun June 21, 1921, but was dismissed for the reason that there was no affidavit showing tender of the taxes and betterments. Later—and within a year—this suit was brought, and the affidavit showing a tender was filed.

It is assigned as error that the court permitted counsel for defendants to interrogate D. S. Jones as to the consideration paid by him to his sister for a deed to his sister's interest in the lands. This testimony was incompetent and should not have been admitted, but we do not see wherein it could have been prejudicial.

It is also assigned as error that the court permitted counsel for defendants to interrogate D. S. Jones concerning the tender of the taxes, improvements and interest. But there can be no prejudice in this, as the court treated the tender—whatever it was—as sufficient to authorize the institution and prosecution of this suit, and, more than that, directed the jury to find that plaintiffs were entitled to recover the lands.

The case of *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972, is authority for the action of the court in directing the jury to find for the plaintiffs for the recov-

ery of the land. It was, of course, the duty of the life tenant to keep the taxes paid, and by § 10054, C. & M. Digest, it is provided that, if the life tenant neglects to pay the taxes on the land so held, and shall not, within a year after the sale, redeem from the sale, "such person shall forfeit to the person or persons next entitled to such land in remainder or reversion all the estate." But in the case just cited we held that, while a tax sale, if valid, barred the right of all interested parties, those holding remainder interests as well as the life tenant, yet, when the sale is void, one who enters under the sale is a trespasser, and the statute of limitations does not run against the remaindermen until the expiration of the life estate. That case was brought to recover the land within two years of the death of the life tenant, and the cause of action was held not barred by the prior possession of the defendants and their predecessors in title during the life of the life tenant.

Counsel for defendants, appellees here, insist for various reasons that the court erred in directing the jury to find for the plaintiffs for the possession of the land; but nowhere in their brief is it stated that a motion for a new trial was filed by them, and, in the absence of a showing that a motion for a new trial was filed and that this action of the court was assigned therein as error, the action of the court in so directing the jury is not before us for review.

It is strenuously insisted by counsel for appellants that the court was in error in charging the jury as to each tract of land "that, whether or not the deed purporting to be a tax deed is valid or invalid, is immaterial on the issues of betterments and taxes, and that, notwithstanding it might be invalid, still the defendants, under the record in the present case, are entitled to betterments and taxes." There was no error in this instruction. One tract of land had been sold for taxes fifty years before the death of the life tenant, and nearly that length of time had elapsed since the sale of the other two tracts, and the defendants in the case had acquired title to all

three tracts through a chain of a half a dozen or more conveyances to each. The life tenant and the remaindermen had removed from the State, and when they returned to the State they resided in a distant county, and there is nothing in the testimony to show that the lands were not occupied and improved in good faith and under color of title.

It is true that no tax deed issued on the sale to Mills in 1869 until after the institution of this suit, but we have set out the chain of conveyances by which Mills' title passed to the defendants, and these deeds constituted color of title. Moreover, as to this tract of land to which no tax deed issued prior to the institution of the suit, the case of *McCann* v. *Smith*, 65 Ark. 305, 45 S. W. 1057, applies. There a donation deed had been issued to a tract of land which had been sold to the State. The sale was void for the reason that the taxes had been paid. There had not been two years' possession under the donation deed at the time the owner brought suit to recover possession.

Two questions were presented for decision in that case, which the court stated as follows:

"First. Is two years' adverse possession of a tract of land held by a donee, first under a certificate of donation, and then under a donation deed by the State, sufficient to bar an action against him, when the possession under the deed has not continued two years, and it is necessary to add it to that held under the certificate to make the two years' adverse possession?

"Second. Is a donee, holding land under a donation deed executed to him by the State, entitled, in an action against him by the owner for the possession of the same, to recover the value of the improvements made by him on the land after a certificate of donation was issued to him, and before the deed was executed, when the land was sold or forfeited to the State after the taxes for which it was sold or forfeited had been previously and in due time paid, and the owner recovers a judgment against him, in such action, for the possession of the same?"

The court answered the first question by saying that the possession necessary to bar the "plaintiff, his ancestor, predecessor, or grantor," must be held under the donation deed, and, as the donee had not had possession under the donation deed for that length of time, the recovery of the land by the owner was upheld.

The second question was answered by holding that the donee was entitled to recover the value of his improvements made after his entry under his donation certificate before as well as after the receipt of his deed. This conclusion was reached by the construction given §§ 2595 and 2597, Sandels & Hill's Digest, which are to be found as §§ 3708 and 3710, C. & M. Digest.

Section 3708, C. & M. Digest, so far as it relates to this case, provides as follows: "No person shall maintain an action for the recovery of any lands, or for the possession thereof, against any person who may hold such lands by virtue of a purchase thereof at a sale by the collector, * * * unless the person so claiming such lands shall, before the issuing of any writ, file in the office of the clerk of the court in which suit is brought an affidavit setting forth that such claimant hath tendered to the person holding such lands in the manner aforesaid, * * * the amount of taxes and costs first paid for said lands, with interest thereon from the date of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale, with interest thereon, and the value of all improvements made on such lands by the purchaser, his heirs, assigns or tenants, after the expiration of the period allowed for the redemption of lands sold for taxes, and that the same hath been refused."

In the case of *McCann* v. *Smith, supra,* Mr. Justice BATTLE, after quoting the provisions of the section just quoted from relating to donation deeds, said: "The requirement of §§ 2595 and 2597 of Sand. & H. Digest, which makes it the duty of the owner to pay for improvements, is based upon the equity and justice of the claim of the party who has made them in good faith, to com-

pensation for the same, and not upon the legality or non-payment of taxes. The Legislature evidently intended to encourage the purchase of lands sold for taxes, and to protect those making improvements on lands so purchased in good faith, by securing to them compensation for the same, in the event they should for any reason fail to hold the land. Color of title is not made a condition to this right by §§ 2595 and 2597. Our answer to the second interrogatory propounded in the beginning of this opinion is that he is, provided he has made the improvements in good faith, and the owner is entitled to rents and profits."

The tax deed obtained after the institution of the suit added nothing to the rights of the defendants, but, as appears from the case just quoted from, Mills and his successors would be entitled to recover the value of their improvements and taxes, even though Mills had only a certificate of purchase and had not procured a deed.

The court permitted one D. F. Montgomery to testify what it had cost him to improve and fence lands adjoining the lands in litigation, and the admission of this testimony is assigned as error. The court stated at the beginning of the examination of this witness that the cost of clearing was not the measure of betterments, but that testimony concerning cost would be admissible if the enhanced value equaled the cost of the improvement, and we think the examination of this witness and others on the same subject proceeded along the right line, and we think the rulings of the court in the admission of testimony and in the instructions on the subject made it clear that the money recoverable was not necessarily the cost of the improvement but the enhanced value resulting from the improvement, and that evidence of cost was admissible in determining that fact if the improvement enhanced the value of the lands.

The witness Montgomery owned land adjoining the land in litigation, and testified what it had cost him to clear similar land, and that he considered the enhanced value equal to the cost of the improvement. His testi-

mony was, in substance, that it cost from thirty to thirty-five dollars per acre to clear similar land, and that, when cleared, the value of the land was increased from thirty to thirty-five dollars per acre. This testimony was competent.

Certain improvements on the land had been made by O. J. Harkey, and he testified as to the cost and value of the improvements, and that he made them in good faith, believing he was the owner of the land when the improvements were made. This testimony was objected to upon the ground that Harkey was not a party to the litigation. It is true, as counsel insists, that Harkey was not a party to the suit, but he had owned at one time the northwest quarter of the southwest quarter section 24 and the east half of the southeast quarter section 23, and if, during his ownership, he made improvements which resulted in an enhanced value, which existed at the time the suit was instituted, it was competent for him to so testify, although he was not a party to the suit.

Witness Henry Chaney had, after examining the taxbooks, made a tabulation of all the taxes paid on the west half southwest quarter section 24 and the east half southeast quarter section 23, and objections were made to this testimony. It was not insisted that the tax records or the tax receipts be produced, but that the tabulation showed the taxes paid on the whole of the west half of the southwest quarter, whereas plaintiffs claimed and sought to recover only the west two-thirds of this tract. The witness stated, however, that by taking two-thirds of the taxes paid on the entire tract the amount paid on the land in litigation would be determined, and this he did. We see nothing wrong with this calculation. Defendant and his predecessors in title claimed the whole of the eighty-acre tract and paid on it as a whole, and we see nothing inequitable in apportioning the taxes in proportion to the acreage, especially as no testimony was offered showing any difference in value between the west two-thirds and the east third.

It is insisted that error was committed in admitting Chaney's tabulation because he had calculated interest at ten per cent., instead of six per cent. Section 3708, C. & M. Digest, from which we have already quoted, provides that the tax purchaser shall have interest on the amount of taxes paid, with interest thereon from the date of payment, "and the amount of taxes paid thereon by the purchaser subsequent to such sale, with interest thereon." As the rate of interest is not stated, it will be six per cent., and, while Chaney did calculate interest at ten per cent., the court told the jury the interest should be calculated at six per cent., and we must assume that the jury obeyed the court's instruction and made the necessary correction in Chaney's calculation, the contrary not being made to appear.

It is insisted that the jury allowed an excessive amount for the enhanced value of the land. The evidence on this subject is conflicting, and it would serve no useful purpose to set it out or to review it, and it will suffice to say that the court correctly declared the law on the subject, and the testimony on behalf of defendants is sufficient to support the finding made by the jury.

The jury found the value of the rents recoverable to be $1,033.60, and the improvements, taxes and interest to be $3,771.65, and the judgment was rendered accordingly, without specifically directing that the amount of rents be deducted from the larger item and that plaintiffs pay only the difference. This should have been done, but, in our opinion, such is the effect of the judgment, and we so construe it without remanding it for correction.

Certain other errors are assigned, but they relate to matters already thoroughly settled.

Upon a consideration of the whole case we find no prejudicial error, so the judgment must be affirmed, and it is so ordered.

STERNBERG DREDGING COMPANY v. DAWSON.

Opinion delivered June 28, 1926.

1. DAMAGES—BREACH OF CONTRACT.—In an action by a subcontractor against the contractor for abandonment of a clearing contract, the measure of damages is the difference between the contract price and the reasonable cost of doing the work at the time it should have been done.
2. TRIAL—INSTRUCTION—UNDUE PROMINENCE OF PARTICULAR MATTER.—In an action by a subcontractor against the contractor for breach of a contract to clear a right-of-way, an instruction that weather conditions may be considered in determining damages for such breach was properly refused as stressing one only of the elements of the subcontractor's expense to be considered in ascertaining the cost of the clearing.
3. TRIAL—INSTRUCTION—NECESSITY OF SPECIFIC REQUEST.—A general instruction on the measure of damages for breach of a contract was not erroneous in omitting the specific elements of damage, in the absence of a request embracing all such elements.

Appeal from Poinsett Circuit Court; *G. E. Keck*, Judge; affirmed.

Harrison, Smith & Taylor, for appellant.

John W. Scobey and *Gautney & Dudley*, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $2,000, rendered in the circuit court of Poinsett County in favor of appellee against appellants, and is the second appeal in the cause, the first appeal being reported in 164 Arkansas Reports, at page 24, under the same style as this. Reference is made to that case for a full statement of the facts herein. The judgment was reversed on the first appeal, and the cause was remanded for a new trial because the trial court erred in giving instructions Nos. 10 and 11, which are set out in full in the statement of that case. The cause was retried upon testimony not materially different from that introduced in the first trial, and under the same instructions, except Nos. 10 and 11, aforesaid. In the instant case the court eliminated the erroneous matter from the instructions given on first trial and instructed the jury in accordance with the rule for the measure of damages announced by the court.

This rule was formulated and given as instruction No. 9, which is as follows:

"If you find for the plaintiff in this case, the measure of damages he would be entitled to recover would be the difference between the contract price for clearing the right-of-way that remains uncleared at the time (which, under the evidence here, and under the pleadings in this case, is 125 acres) and the amount that it would have reasonably cost the plaintiff to have cleared said right-of-way at the time at which it should have been cleared, which was during the year 1922, if there was any difference. If you find that there was no difference, then, of course, the plaintiff would not be entitled to recover, even though you adopt his theory of the case, but, if you should adopt his theory of the case, and find that he is entitled to recover, then he would be entitled to recover only such difference, if there was any difference." A general objection was interposed to this instruction, which was overruled; whereupon appellants requested the following instruction upon the measure of damages, which was refused:

"If you find from the evidence that, at the time improvement No. 59 was relocated, the season was wet and a considerable quantity of water was over the right-of-way, and you further find that it would be necessary for the clearing contractor to have performed the work under such circumstances, you may take these facts into consideration in determining the amount of profit which he would have made."

It is now contended that the court erred in giving instruction No. 9 because it did not take into account the weather conditions as an element to be considered by the jury in ascertaining the cost of clearing, and in refusing to give appellants' requested instruction No. 5 because it did take weather conditions into account as an element for the jury to consider in ascertaining the cost of clearing the right-of-way.

Appellants' request No. 5 was erroneous and properly refused, because it singled out and emphasized

weather conditions alone as an element to be considered in arriving at the cost of the clearing, whereas the testimony reflected that other elements should be considered in arriving at the profits to be made in clearing the right-of-way, such as the cost of labor, the nature and the condition of the ground to be cleared, etc. Had instruction No. 9 referred to weather conditions alone as an element to be considered in arriving at the profit to be reaped from clearing the right-of-way, it would also have been erroneous. It announced the general rule as to the measure of damages applicable in the case without setting out the elements that should be considered by the jury in ascertaining the profits which appellee could have made on his contract for clearing the right-of-way. If appellants desired an instruction specifically setting out every element to be considered by the jury in arriving at the profits, if any, a correct instruction embracing them all should have been requested.

Appellants make the further contention for a reversal of the judgment that they were entitled to a peremptory instruction upon the ground that the undisputed evidence shows that appellee either abandoned the contract himself or acquiesced in the abandonment of it by appellant for clearing the right-of-way, and that there had been an accord and satisfaction of his alleged claim. This court ruled on the former appeal that all these issues were facts for the jury, under the evidence, and that they were correctly submitted to the jury by the court. As stated above, there was no material change in the evidence on the retrial of the cause, so the contention of appellants is without foundation.

No error appearing, the judgment is affirmed.

STATE USE ARKANSAS COUNTY *v.* POLLARD.

Opinion delivered July 5, 1926.

1. APPEAL AND ERROR—CONCLUSIVENESS OF RECORD.—On appeal the record will be accepted as correct, as against a contention to the contrary in the brief.
2. APPEAL AND ERROR—PRESUMPTION IN ABSENCE OF EVIDENCE.—Where the evidence was not preserved in the record, it will be presumed on appeal that the recitals of the decree and findings of the court were correct.
3. SHERIFFS—ACTIONS FOR ACCOUNTING.—Under Crawford & Moses' Dig., § 8312, authorizing the prosecuting attorney "to commence and prosecute actions, both civil and criminal, in which the State or any county in his circuit may be concerned," the prosecuting attorney may bring an action for accounting against a sheriff to recover interest on public funds and excessive fees, without an order of the county court directing him to bring such action, and, where such authority is exercised, it will be presumed, in the absence of a contrary showing, that it was rightly exercised.
4. EQUITY—WAIVER OF OBJECTION TO JURISDICTION.—Where a party has invoked the jurisdiction of the chancery court, he cannot thereafter object to the jurisdiction unless the subject-matter is wholly without the jurisdiction of the court under all circumstances.

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

Botts & O'Daniel and *W. J. Waggoner,* for appellant.

Bogle & Sharp, R. E. Holt and *John L. Ingram, amici curiae.*

McCULLOCH, C. J. Appellee served as sheriff and *ex officio* collector of Arkansas County for two consecutive terms, beginning on January 1, 1921, and ending December 31, 1924, and on November 21, 1924, an action was instituted against him by the State of Arkansas for the use and benefit of the State and the county and of the school districts of the county, to recover unaccounted-for interest on public funds deposited in bank, and also to recover fees and emoluments of office in excess of $5,000 per annum. Each of the four complaints was identical and the prayer of each was for the same recovery, and it does not appear why separate actions were instituted,

but this is unimportant, for the reason that they were consolidated and tried as one case, and a single decree was rendered by the court in favor of appellee. The case therefore may be treated as one case.

In the complaint it is alleged in substance, after setting forth the service of appellee in the office of sheriff and collector for the period of time mentioned above, that, during each year of appellee's incumbency, he deposited public funds in banks in the county and received interest thereon without accounting therefor to the county, and that he had also received each year fees and emoluments of office largely in excess of $5,000. The prayer of the complaint was for an accounting of all funds received by appellee by virtue of his office, and that there be a final decree against appellee "for all funds received by him during the four years of his official term as sheriff and *ex officio* collector in excess of the $20,000 already determined by law; * * * for all sums received by him as interest from any bank or depositories on account of the placing of said funds belonging to the plaintiffs or any of them in said banks or depositories." The name of the prosecuting attorney of the district appears signed in his official capacity to three of the complaints, and all of the complaints are signed by Mr. A. G. Meehan as attorney.

There was an adjourned day of the chancery court held on December 9, 1924, and appellee appeared in court on that day in person and by attorney, and waived service of process and filed his answer, denying all the allegations of the complaint. A final decree was rendered by the court, reciting the appearance of all the parties and the announced readiness of both sides for trial, and the trial of the cause upon the "complaints of the plaintiffs, the answers of the defendants, and the testimony of C. E. Condrey, M. F. Montgomery, W. B. Pfefer, E. C. Benton, Arch Rawlins and N. P. Burd on behalf of the plaintiffs, and J. S. Pollard, E. B Gibson and Mrs. Annie M. Connor on behalf of the defendants, the testimony of said witnesses being taken *ore tenus* at

the bar of the court, together with certain documentary evidence, which was properly identified and made a part of the record, and other evidence introduced on behalf of the parties." The decree also recites a finding in favor of appellee. The court found expressly that appellee had made his settlements regularly and accounted for all public funds which had come into his hands. The oral evidence was not preserved, and no appeal to this court was prayed for at the time. Six months later, and on the last day allowed for an appeal, one was obtained from the clerk of this court on behalf of the plaintiffs below. The transcript contains only the pleadings and the decree.

It is contended, in the first place, that the suit is a collusive one, brought without authority in the name of the State, for the purpose of obtaining an adjudication in appellee's favor to protect him from other hostile litigation which might ensue in the future. The difficulty about this contention is that the evidence does not justify the charge, which was made only in the printed argument here. The complaint is regular on its face and appears in the record to have been signed by the prosecuting attorney in his official capacity, as well as by another attorney. The court recited in its decree that the plaintiff was represented at the trial by the prosecuting attorney in person as well as by Mr. Meehan. In the brief there is a denial that the prosecuting attorney was in fact present, but we must accept the record here as being authoritative. None of the evidence introduced has been preserved in the record, and we must presume that the recitals of the decree and the findings of the court are correct. There has been no effort made, so far as this record shows, to attack the good faith of the officers in bringing the suit, hence we are not at liberty to infer that there was any collusion merely because appellee entered his appearance and consented to trial without process being served upon him. In other words, the decree is regular on its face, and, in the absence of a showing to the contrary, we must assume that it was correct.

It is also contended that the prosecuting attorney had no right to institute the action except on orders of the county court, and there is nothing in the record to show that there was an order of the county court made directing him to bring the suit. Our attention is not called to any statute providing that a prosecuting attorney can only institute an action on authority granted by the county court. On the contrary, the statute confers power upon the prosecuting attorney to "commence and prosecute actions, both civil and criminal, in which the State or any county in his circuit may be concerned." Crawford & Moses' Digest, § 8312. It may be that the county court has the power to control litigation, but, even if that be true, it would require affirmative action on the part of the county court to withdraw litigation instituted by the prosecuting attorney. At any rate, the authority of the prosecuting attorney being expressly granted by statute, we indulge the presumption that the authority was rightly exercised.

Finally, it is contended that the chancery court was without jurisdiction, and that therefore the decree should be reversed and the action dismissed for want of jurisdiction. It has been held by this court in numerous cases, beginning with *State* v. *Turner*, 49 Ark. 311, that the common-law jurisdiction of the chancery court to set aside settlements of public officers on account of fraud or mistake was not taken away by the statute providing that the county court may, within two years from the date of the settlement, readjust such settlements for errors. The contention now is that the jurisdiction in chancery remains as to setting aside a settlement for fraud after the expiration of two years allowed for readjustment in the county court, but we do not find it necessary to enter into a discussion of that question, for the reason that, even if that contention be sound, both parties appeared and submitted to the jurisdiction of the court, which might or might not have been exercised, according to the facts alleged and proved, and it is too late now to raise the question of jurisdiction for the first time. In

other words, this is not a case where the subject-matter of the litigation was wholly beyond the jurisdiction of the chancery court, but it is one where the court had jurisdiction of the subject-matter, to be exercised according to the circumstances of the particular case. Where a plaintiff has invoked the aid of the chancery court, he cannot thereafter object to the jurisdiction of the court, unless the subject-matter is wholly without jurisdiction of the court under all circumstances. *Sexton* v. *Pike*, 13 Ark. 193; *Cockrell* v. *Warner*, 14 Ark. 345; *Cribbs* v. *Walker*, 74 Ark. 104, 85 S. W. 244; *Young* v. *Fowler*, 132 Ark. 145, 200 S. W. 813; *Gray* v. *Malone*, 142 Ark. 609, 219 S. W. 742.

The chancery court found, presumably upon sufficient evidence, that appellee had made his settlement with the county court regularly and in accordance with law, and that he had accounted for all of the funds which he is charged in the complaint in this cause with wrongfully withholding. The proceedings below being regular, and, the court having acquired jurisdiction, we find nothing which would justify us in deciding that the court was wholly without jurisdiction.

The decree is therefore affirmed.

COLE v. BRANCH & O'NEAL.

Opinion delivered July 5, 1926.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—An issue based upon conflicting testimony was properly submitted to the jury, and their verdict is conclusive.
2. PLEADING—DISCRETION AS TO PERMITTING AMENDMENT.—A request for leave to amend the complaint by changing or adding to the original cause of action is addressed to the court's sound discretion, and the exercise thereof will not be disturbed unless an abuse thereof clearly appears.
3. PLEADING—REFUSAL TO PERMIT AMENDMENT.—Where the complaint alleged a breach of an express warranty, refusal of a request, made after all the testimony was in, for leave to amend

by alleging an implied warranty and breach thereof will not be disturbed.

4. SALES—CAVEAT EMPTOR.—Where a dealer sold cotton seed to another dealer for resale, there was no implied warranty of quality or fitness, but the doctrine of *caveat emptor* applies.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

E. L. Matlock and *D. H. Howell,* for appellant.

C. M. Wofford and *Starbird & Starbird,* for appellee.

McCULLOCH, C. J. This is an action instituted by appellant against appellees to recover damages sustained by reason of the breach of an alleged warranty in the sale of cottonseed. Each of the parties to the action is engaged in the business of handling and selling cottonseed, and appellees sold 201 bushels to appellant, who purchased the same for resale to customers. It is alleged in the complaint that appellees expressly warranted the seed to be of a certain brand and of a certain percentage of fertility. The answer of appellees contained a denial of the warranty, and denied that the seeds were infertile to any appreciable extent. There was a trial of the issues before a jury, which resulted in a verdict in favor of appellees.

Appellant testified that appellees made an express warranty as to the quality and fertility of the seed, but there was a conflict in the testimony, and the court correctly submitted that issue to the jury. The verdict is therefore conclusive on that issue.

When all of the testimony had been introduced, appellant asked leave of the court to amend his complaint so as to charge an implied warranty and the breach thereof. The court denied the request, and an exception was duly saved. Appellant also asked the court to give certain instructions submitting the issue of implied warranty and the breach thereof, but these requests were denied. The request for leave to amend the complaint by changing or adding to the cause of action originally stated was one which was addressed to the sound discretion of the trial court, and on appeal the exercise of that discre-

tion will not be disturbed unless an abuse thereof clearly appears. *Rucker* v. *Martin*, 94 Ark. 365, 120 S. W. 1062. We are of the opinion that the discretion vested in the court was not abused in this instance, at least it does not clearly so appear. A litigant cannot, in the trial of a cause, wait until all the testimony is introduced and then ask, as a matter of right, for a change of the issues. His request is not granted purely as a matter of right, but it appeals to the discretion of the court. There is no reason shown why appellant could not have amended his complaint in the beginning as well as at the end of the trial. We think there was no abuse of discretion and that we ought not to disturb the ruling of the court in the exercise thereof. In addition to that, we are of the opinion that the evidence fails to show a state of facts from which a warranty can be implied. Appellant was a dealer, and bought the seed for resale, not for his own use, and the rule established by decisions of this court in such cases is that the doctrine of *caveat emptor* applies in the sale of a commodity by one dealer to another and that there is no implied warranty of quality or fitness. *Nelson* v. *Armour Packing Co.*, 76 Ark. 352, 90 S. W. 280; *Drury* v. *Armour & Co.*, 140 Ark. 371, 216 S. W. 40. This rule was announced in cases involving the sale of commodities to be consumed as food, but the rule applies with equal force to planting seed and other articles of merchandise. Therefore we hold, for both reasons, that there was no error in the court's ruling, and the judgment is therefore affirmed.

McCANN v. SUPREME TRIBE OF BEN HUR.

Opinion delivered July 5, 1926.

1. APPEAL AND ERROR—DIRECTED VERDICT—TEST.—In testing the correctness of a directed verdict, the appellate court must consider the testimony in the light most favorable to appellant.
2. INSURANCE—BENEFIT ASSOCIATION—CONSTITUTION AND BY-LAWS.—Where the constitution and by-laws of a benefit association are made part of a contract of insurance, they are binding upon the beneficiary.
3. INSURANCE—REINSTATEMENT.—Where an application for reinstatement and past dues, mailed before the insured's death, were received by the supreme tribe of a benefit society after his death and rejected by that officer, that did not constitute a reinstatement, where the by-laws of the society required acceptance of the application by that officer.
4. INSURANCE—WAIVER OF FORFEITURE.—Negotiations between a benefit society and a member looking toward reinstatement of the member did not constitute a waiver of the forfeiture by nonpayment of dues, where such negotiations contemplated a compliance with the by-laws, which was not done.
5. INSURANCE—REINSTATEMENT—ACCEPTANCE OF APPLICATION.—Failure of the local officer of a benefit society, having no authority to accept applications for reinstatement and grant reinstatement, to make tender of repayment of dues *held* not to constitute an acceptance of an application for reinstatement made after death of the member.

Appeal from Craighead Circuit Court, Jonesboro District; *W. W. Bandy*, Judge; affirmed.

Gautney & Gautney, for appellant.

Horace Sloan, for appellee.

McCULLOCH, C. J. Appellee is a fraternal benefit association, organized under the laws of Indiana, domiciled at the city of Crawfordsville, in that State, and doing business in the State of Arkansas. Subordinate organizations, designated as courts, have been established in this State, and Ernest L. Akens was a member of the local organization at Wynne, Arkansas. A benefit certificate, or policy, was issued to Akens, payable to appellant, who was then his wife. Akens was a railroad brakeman, and was accidentally killed on November 23, 1923,

while on duty at or near the town of Tinsman, in the southern part of this State. Appellant has married again since the death of Akens, and this is an action instituted by her against appellee to recover the amount named in the policy, or benefit certificate.

Appellee defended on the ground that Akens had forfeited his membership and policy by failing to pay dues and assessments within the time required under the by-laws, and that he had not been reinstated to membership at the time of his death. The contention on the part of appellant is that the reinstatement was complete, and the question of reinstatement in accordance with the by-laws is the sole issue in the case. The court directed a verdict in favor of appellee, and in testing the correctness of that direction by the court we must, of course, consider the testimony in its light most favorable to appellant's right of action.

The constitution and by-laws of the association were, in express terms, made a part of the contract of insurance with the member, and the beneficiary under the policy is bound thereby. *Woodmen of the World* v. *Jackson,* 80 Ark. 419. It is undisputed that Akens stood suspended and forfeited his membership by nonpayment of dues and assessments for the month of September, 1923, payable not later than the twenty-fifth day of that month. The constitution and by-laws provided for the reinstatement of suspended members, and the applicable by-law on that subject is as follows:

"Section 109. Any member who has been suspended for more than thirty days, and less than six months, must, in addition to his warranty of good health, make affidavit before some public official authorized to administer oaths, stating that he is in as good health as when beneficial certificate was issued, as provided on the blank form furnished by the supreme scribe; and if it appears that such member warrants his health to be good, and this fact is certified to before some public officer authorized to administer oaths, he may tender such health certificate to his local scribe, together with his monthly pay-

ments and per capita tax for all the months in which he was suspended and the court dues, if any be due, as well as any additional payments or extra assessments that may have been called in that time, and a monthly payment, including per capita tax, for the current or present month. It is the duty of the local scribe to see that the health certificate so tendered is made out in ink, is dated, and all blanks are filled as required by the laws. He will then forward the same to the supreme scribe, holding the monthly payments and per capita tax and forwarding them with the next monthly report, unless notified by the supreme scribe that the application for reinstatement has been refused, in which event he will return the payments to the applicant. If the supreme scribe is satisfied of the truth of the statements contained in said certificate of health, and relying on the warranties contained therein, he will reinstate the suspended member and issue a certificate of reinstatement. * * *".

After Akens' suspension, one of the supreme officers mailed to him, from the home office at Crawfordsville, Indiana, a form letter, dated October 16, 1923, which reads as follows:

"Dear Member: You are suspended—the protection you thoughtfully provided for your beneficiary is no longer in effect. Was your nonpayment due to oversight? If so, notify your scribe you wish to be reinstated at once. Has a mistake been made? If so, write to us, inclosing your receipt, if you have one, and a prompt adjustment will be made. Were you dissatisfied? If so, tell us the reason, so we may apply a remedy, but don't leave your beneficiary unprotected in the meantime—apply for reinstatement at once. Did you feel that you could not afford to pay any longer? If so, I want to ask you what you would do if your income stopped for a few months? Imagine, then, the circumstances of your beneficiary when your income stops forever. The protection of the Tribe of Ben Hur will be greatly needed then. The Tribe of Ben Hur has paid nearly $22,000,000 to the families of deceased members. It cannot pay

anything to your beneficiary unless you reinstate. Reinstatement is easy—just sign the inclosed health certificate and hand or send it to your scribe with your payments. Take no chances. Tomorrow may be too late. Do it now."

Proper blanks for reinstatement were inclosed with this letter, and notice was appended, as an addendum to the blank form, of the fact that, if the applicant for reinstatement had been suspended for more than thirty days, he must make affidavit to his application before some officer authorized to administer oaths, and under seal. At the time that letter was mailed out to Akens, thirty days had not elapsed since the date of his suspension. Appellant was herself a member of the association, and had been suspended, and, according to her testimony, she and her husband both made out applications for reinstatements on November 16, 1923. She and her husband were in El Dorado, Arkansas, at that time, and she mailed the two applications to her father at Wynne. Neither of the applications, according to her testimony, was accompanied by affidavits required by the by-laws of the association. She testified that she also mailed to her father at that time a check for twenty dollars and a five-dollar bill. Appellant's father testified that he received these blanks and the accompanying checks and money from his daughter, and that the application for Akens' reinstatement was mailed to the local scribe of appellee's court in Wynne, together with the check and the five-dollar bill. The witness says that he does not remember whether he mailed the communication himself or whether he gave it to one of his sons-in-law to mail. At any rate, Foster, the local scribe, testified that he received the application of Akens and the check and five-dollar bill in the mail on November 24, 1923, which was the next day after Akens was killed. Foster testified that, on November 28, 1923, he made out a receipt for the payment of Akens' dues and assessments. Foster antedated the receipt as of November 18 and gave it to appellant's brother-in-law. Foster testified that he mailed the appli-

cation to the supreme scribe, but that he made a mistake in the address by sending it to Crawfordsville, Arkansas, and that upon return it was changed to Crawfordsville, Indiana.

The testimony is undisputed that Foster was informed on November 24 of the death of Akens, and, of course, was in possession of that information when he subsequently signed the antedated receipt and mailed the application to the supreme scribe. At the time of the receipt of the application by the supreme scribe at Crawfordsville, the latter was informed of the death of Akens, and promptly rejected the application for reinstatement, and immediately gave directions to the local scribe to that effect, and directed a return of the check and money, which were still in the hands of the local scribe, who testified that he made an effort to return the money to somebody, but could not find any one who would accept it.

Now, it is manifest from the undisputed evidence that the reinstatement was not accomplished in accordance with the terms of the by-laws, which provide expressly that the reinstatement could only be granted by authority of the supreme scribe. Even if it were undisputed that the application, together with the check and money, was placed in the mail, directed to the local scribe, before Akens' death, still this did not constitute a reinstatement, for the by-laws expressly provided to the contrary, and there could be no reinstatement until the application was accepted and granted by the supreme scribe. *Sovereign Camp W. O. W.* v. *Barnes,* 154 Ark. 486, 243 S. W. 55. The by-laws contained an express provision that local officers should not have authority to vary the by-laws. Counsel for appellant invoke the rule that an insurance company waives a forfeiture by entering into negotiations with the assured, treating the policy as being in force after the alleged forfeiture has occurred. The weakness of this contention, however, is that appellee did not enter into negotiations with the assured other than those negotiations provided for in the by-laws with

reference to reinstatement. After the death of Akens nothing occurred which constituted a waiver. The local scribe had no authority to grant a reinstatement at that time or at any other time, and, according to the undisputed testimony, the supreme scribe rejected the application immediately upon its receipt. The by-laws provided that the local scribe should hold in his possession the money paid for reinstatement and that it should be returned upon rejection by the supreme scribe, but, according to the evidence, the money was tendered back by the local scribe. Even if there was no technical tender of repayment of the money, this did not constitute an acceptance of the application, which was sent in after the death of the member.

It is also contended that the form letter sent out from the home office to Akens on October 16 constituted a waiver by the supreme officers of the terms of the by-laws with respect to the method of reinstatement, and that it invited Akens to become reinstated merely by delivering the application and amount of delinquency to the local scribe. This contention is unsound, for the letter was merely an invitation or an admonition concerning the duty of the member to become reinstated, and it did not in any sense attempt to waive any provisions of the by-laws. It was a mere invitation to the member to cause himself to be reinstated in the manner prescribed in the by-laws. The statement that reinstatement "was easy," and the direction to "sign the inclosed health certificate and hand or send it to your scribe with your payment" did not waive any requirement of the by-laws, as it did not carry any implication that the reinstatement could be accomplished merely by complying with that suggestion by sending in the application. Moreover, at the time this letter was sent out and received by Akens, thirty days had not elapsed, and the by-laws did not require an affidavit to the health certificate as a prerequisite to reinstatement, but at the time the application was made out at El Dorado, on November 16, the thirty days had expired, and the affidavit was an essential

requirement. When the application was received by the local scribe, it appeared to be sworn to before a notary public in Wynne, but, according to the undisputed testimony of appellant herself, neither she nor her husband made any affidavit, and could not have done so in Wynne, for the reason that they were both in El Dorado. At any rate, the supreme scribe was authorized to reject the application if found not to be in accordance with the by-laws, and this was promptly done by that officer upon receipt of the application.

We are of the opinion that the trial court was correct in peremptorily directing a verdict in appellee's favor, for, according to the undisputed testimony, there was no liability.

Affirmed.

MURPHY v. STATE.

Opinion delivered July 5, 1926.

1. INDICTMENT AND INFORMATION—MOTION TO QUASH.—The proceedings of the grand jury cannot be reviewed by a trial court on a motion to quash the indictment upon the ground that it was returned by the grand jury without having had any evidence before that body upon which to base the indictment.
2. CONSTITUTIONAL LAW—SUSPENSION OF SENTENCE—ENCROACHMENT ON EXECUTIVE.—Crawford & Moses' Dig., § 2956, as amended by Acts 1923, p. 265, § 1, relative to wife desertion, and empowering the court to suspend sentence, *held* not invalid as in conflict with Const., art. 6, § 18, empowering the Governor to "grant reprieves, commutations of sentence and pardons."
3. HUSBAND AND WIFE—DESERTION AS OFFENSE.—Willful desertion of the wife by a husband without good cause may be made a criminal offense.
4. WITNESSES—HUSBAND AND WIFE AGAINST EACH OTHER.—Under Crawford & Moses' Dig., § 3125, providing that husband and wife may testify against each other "in all cases in which an injury has been done by either against the person or property of the other, *held* that the statute is not limited to cases involving physical injury, so that a wife may testify against the husband in a prosecution for abandonment.

5. CRIMINAL LAW—INSTRUCTION IN LANGUAGE OF STATUTE.—An instruction in a prosecution for wife abandonment, in the language of Crawford & Moses' Dig., § 2596, as amended by Acts 1923, p. 265, § 1, including the authority of the court to suspend sentence, *held* not erroneous as conveying the implication that the court would suspend the sentence.

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

Holland, Holland & Holland and *A. M. Dobbs,* for appellant.

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

McCULLOCH, C. J. Appellant was convicted under an indictment charging him with the crime of abandonment of his wife and leaving the State, the indictment being preferred under the following statute, Crawford & Moses' Digest, § 2596, as amended by § 1 of act No. 331 of the General Assembly of 1923, which reads as follows:

"Section 1. If any man shall, without good cause, abandon or desert his wife, or abandon his child or children under the age of fourteen years, born in or legitimatized by lawful wedlock, or shall fail, neglect or refuse to maintain or provide for such wife, child or children, he shall, upon conviction, be punished by imprisonment in the county jail for not more than one year, or by a fine not less than fifty nor more than one thousand dollars, or both such fine and imprisonment; provided, however, that, if such person, after leaving his wife or child, or wife and child, or children, shall leave the State of Arkansas, said person shall be guilty of a felony, and punishable by imprisonment in the penitentiary for a time not to exceed one year; and provided, however, that in all cases the court may suspend sentence upon probation, employment and support of his wife or child, or wife and child, or children, as the case may be."

It is charged in the indictment that appellant, "without good cause, did unlawfully and feloniously abandon and desert his wife * * * and, after leaving his wife, as aforesaid, left the State of Arkansas."

The first ground urged for reversal is that the court refused to sustain appellant's motion to quash the indictment. The ground stated in the motion was that the grand jury returned the indictment without having had any evidence before that body upon which to base the indictment. The court heard oral evidence on the motion to quash, and, in support of the motion, appellant introduced his deserted wife, who testified that she did not appear before the grand jury at any time. On cross-examination the witness identified a transcript of her testimony given before a justice of the peace on a trial of appellant for the crime of seduction, the trial having been held before the intermarriage of the witness and appellant. It was shown that this transcript of the testimony of the deserted wife was before the grand jury. It has been decided by this court that the proceedings of a grand jury cannot be reviewed by a trial court on motion to quash the indictment for the purpose of determining whether or not the indictment was based upon legal evidence, that the statutory provision that "the grand jury can receive none but legal evidence" (Crawford & Moses' Digest, § 2988) is directed to the grand jury, and that a failure to observe the statute does not afford grounds for quashing an indictment. *State* v. *Fox,* 122 Ark. 197, 182 S. W. 906; *McDonald* v. *State,* 144 Ark. 142, 244 S. W. 20.

It is next contended that the statute is void, and that the court should have sustained the demurrer to the indictment on the ground that the provision in the statute empowering the court to suspend sentence is in conflict with art. 6, § 18, of the Constitution, conferring power upon the Governor to "grant reprieves, commutations of sentence and pardons after conviction." The recent case of *Emerson* v. *Boyles,* 170 Ark. 621, 280 S. W. 1005, is, we think, decisive of the question contrary to appellant's contention.

It may be well, in this connection, to consider the validity of this statute with respect to the feature which makes abandonment or desertion of the wife by the

husband a crime, even in the absence of the element of failure or refusal to support the wife. It is contended that it is beyond the power of the Legislature to create an offense out of the mere act of willful desertion. The offense created under the statute as originally enacted was the abandonment and desertion of the wife or children *and* the failure or refusal to support, but the amended statute, as quoted above, changes the conjunctive word to disjunctive and creates the separate offenses of desertion and of failure to support. The indictment in the present case, as we have already seen, merely charges the offense of desertion, and does not charge the other element of failure to support. We upheld the validity of the statute as originally enacted (*Green* v. *State,* 96 Ark. 175, 131 S. W. 463, Ann. Cas. 1912B, 279), and, in doing so, we cited with approval the decision of the Supreme Court of Louisiana in the case of *State* v. *Cucullu,* 110 La. 1087, 35 So. 300. The Louisiana statute under review in that case was substantially the same as our present statute on the subject. The Louisiana court in the case cited, as well as in the later case of *State* v. *Baker,* 112 La. 801, 36 So. 703, sustained the validity of the statute, without, however, discussing this particular feature of it. The court merely gave its approval to the whole statute as one which was enacted for the general public welfare and within the power of the lawmakers. The Texas statute on this subject is also similar to ours, and has been sustained by the Criminal Court of Appeals in that State in several cases. *Wade* v. *State,* 252 S. W. 770.

It is a little difficult to determine the extent to which the lawmakers may go, for the protection of society at large, in creating public offenses based upon the conduct of those joined together in marriage contract; but we entertain no doubt that willful desertion of the wife by the husband "without good cause" may be made a criminal offense. Certainly society at large is interested in preventing such conduct, and the fidelity to the marriage vows is a moral obligation the violation of which

may be made a public offense. Our conclusion is that the statute is valid in every respect and that the court was correct in overruling the demurrer.

It is urged that the court erred in permitting the wife to testify, the contention being that the testimony of the wife does not fall within the statutory exception permitting either of the spouses to testify against the other "in all cases in which an injury has been done by either against the person or property of either." Crawford & Moses' Digest, § 3125. Counsel for appellant contend that the statute relates only to physical injury to the person, but we think this is too narrow a construction of the statute. Counsel rely on the decision of this court in *Davis* v. *Nichols*, 54 Ark. 358, 15 S. W. 880, and *Billingsley* v. *St. L. I. M. & S. Ry. Co.*, 84 Ark. 617, 107 S. W. 173, holding that the words "injury to the person" in the statute creating a cause of action to recover damages refers only to physical injuries. We are of the opinion that the two statutes were enacted for wholly different purposes, and call for different interpretations, and that the statutes permitting husband or wife to testify against each other should be given a much broader range in allowing either to testify against the other. The manifest purpose of the statute was to permit the husband or wife to testify against the other in a criminal prosecution in any case where the offense involved an injury to the spouse personally, in addition to the effect of the offense upon society at large. In other words, where it is a special injury to the spouse, he or she may testify against the other. The nature of this offense brings it within the exception, for the deserted wife undoubtedly suffered an injury in excess of the effect of the offense upon the public generally.

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

"1. The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that the defendant, Walter Murphy, in the Greenwood District of Sebastian County, Arkansas, and within three years

next before finding this indictment, without good cause, did unlawfully and feloniously abandon and desert his wife, and, after leaving her, left the State, then you should convict the defendant of a felony and fix his punishment at not exceeding one year in the penitentiary; provided, however, in all cases the court may suspend sentence upon probation, employment and support of his wife and child, or wife and child, or children, as the case may be."

It is the latter part of the instruction, referring to the power of the court to suspend sentence, which is criticised as being erroneous. It will be observed that this instruction is in the precise language of the statute, and does not convey the implication that the court would exercise the power in favor of appellant by suspending the sentence. There was no error therefore in incorporating the language of the statute in the instruction. *Jones* v. *State,* 161 Ark. 242.

It is also contended that the evidence is not sufficient to sustain the verdict. We find it unnecessary to discuss the testimony in detail, as it would serve no useful purpose to do so, but we find that it was legally sufficient to support the finding that appellant deserted his wife, and that in doing so he left the State. This made out a complete crime under the statute.

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

SMITH, J., and HUMPHREYS, J., dissent.

HUMPHREYS, J., (dissenting). As I understand the record, it affirmatively appears that the indictment against appellant was returned by the grand jury without having heard any evidence for wife-desertion. The only evidence before the grand jury was a transcript certified by the justice of the peace containing unsworn statements made by appellant's wife, prior to their marriage, on the trial of appellant for the crime of seduction. The third statutory ground for quashing an indictment is that it was not found and presented as required by law. Crawford & Moses' Digest, § 3057. Grand juries have no right to return an indictment for a crime with-

out first hearing some evidence relating thereto as a basis for the indictment.

In my opinion the court committed reversible error in overruling the motion to quash the indictment, and for this reason the judgment should be reversed.

I therefore dissent from the majority opinion of the court affirming the judgment in this case.

O'CONNOR v. PATTON.

Opinion delivered July 5, 1926.

1. ADOPTION—ORAL CONTRACT.—Although an oral contract to adopt a child, not legally executed, where the child has fulfilled its part of the contract, may be enforced where the foster parent dies intestate, such a contract does not defeat the latter's disposition of his property by will to others.
2. ADOPTION—BURDEN OF PROOF.—The burden is on the person claiming the benefit of an alleged contract for adoption to establish it by clear, cogent and convincing evidence.
3. WILLS—AGREEMENT TO MAKE.—An enforceable contract to will property to one agreed to be but never legally adopted was not created by a promise that he would inherit property if he would return to the promisor's home and live with him, where the promisee did not comply therewith.
4. EQUITY—MAXIMS.—In equity it is a maxim that he who comes into equity must come with clean hands, or, as otherwise expressed, he that has committed iniquity shall not have equity.
5. EQUITY—CLEAN HANDS.—A young woman, who became engaged to an old man before divorce from her first husband and married him four days after her divorce, but refused to live with him, *held* not entitled to relief in equity against an antenuptial conveyance by him as intended to deprive her of her marital rights.
6. DEEDS—CONSIDERATION.—As between the parties to deeds and their privies, the consideration thereof or the fact that they were voluntary conveyances is immaterial.
7. PROPERTY—DISPOSITION.—The owner of property who is *compos mentis* may dispose of it as he sees fit, so long as he does not interfere with the existing rights of others.
8. TRUSTS—PAROL EVIDENCE.—An express trust cannot by parol evidence be ingrafted upon a deed absolute in form.

9. TRUSTS—FRAUD IN PROCUREMENT OF DEED.—Where there is fraud in the procurement of a deed, the conveyance may be shown to create a trust, though the deed is absolute on its face.

10. TRUSTS—CONSTRUCTIVE TRUST.—To establish a grantee as a trustee *ex maleficio*, there must be something more than a mere verbal promise, however unequivocal; otherwise, the statute of frauds would be virtually abrogated.

11. VENDOR AND PURCHASER—OPTION TO REPURCHASE.—An option to repurchase, given to the grantor some time after the conveyance, and not exercised by him before his death, *held* to be personal, and not to inure to the benefit of his devisees.

Appeal from Ouachita Chancery Court, Second Division; *A. L. Hutchins,* Chancellor on exchange; reversed.

Smith & Little, Jones, Buck & Gibson and *U. A. Gentry,* for appellant.

H. E. Meek and *L. B. Smead* and *J. N. Saye,* for appellee.

WOOD, J. A. H. Patton executed two deeds dated February 25, 1924. In one of these deeds he conveyed to Dan O'Connor certain lands in Ouachita County, consisting of about 600 acres. By the other deed he conveyed to Dan O'Connor an undivided half interest in about 240 acres, all situated in Ouachita County. The consideration named in both of the above deeds was "$1 and other valuable considerations." This action was instituted by Ellen E. Patton in the Ouachita Chancery Court against Dan O'Connor and certain other parties named as the heirs-at-law of A. H. Patton, deceased. She alleged that A. H. Patton died in June, 1924, testate, without issue, and that she was his widow; that, on or before March 1, 1924, A. H. Patton executed the deeds above mentioned to O'Connor for the purpose of defrauding her. She alleged that her husband, A. H. Patton, had instituted a suit for divorce against her, and that, while this suit was pending, he conveyed the lands mentioned by warranty deed to O'Connor, with the understanding that O'Connor was to hold the same in trust for A. H. Patton until the divorce suit was terminated, and that O'Connor was then to reconvey the lands to

A. H. Patton; that, before the divorce suit was terminated, Patton died. She alleged that she was entitled to a half interest in the lands in fee simple; that A. H. Patton, prior to his death, executed a will in which the plaintiff, Mrs. Sallie Reynolds, Louis Patton and Walter Patton are named as beneficiaries. She alleged that she elected to renounce the will and take her estate as the widow of A. H. Patton. She prayed that the deeds of Patton to O'Connor be canceled and that she be declared the owner in fee simple of an undivided half interest in the lands mentioned.

O'Connor answered, and denied that the deeds mentioned in the complaint were executed on March 21, 1924, and alleged that they bore the true date of their execution. He denied the allegations of fraud, and denied that he held the deeds in trust for Patton. He alleged that on March 21, 1924, he executed and delivered to A. H. Patton the following instrument: "That whereas, on February 25, 1923, A. H. Patton, by warranty deed, conveyed 588.21 acres of land in consideration of $1 and other valuable considerations to Dan O'Connor; that said lands are described in a deed now of record executed by A. H. Patton to Dan O'Connor on February the 25, 1924, and on said day the said A. H. Patton executed to Dan O'Connor a deed conveying an undivided one-half interest in 237.27 acres, in consideration of $1 and other valuable considerations, that said deed is now of record. And whereas, it is understood by and between the said Dan O'Connor and his wife, Anna O'Connor, and A. H. Patton, grantor in said deeds, in consideration of $500 and other considerations when the same is paid to the said Dan O'Connor by the said A. H. Patton, that the said land will be reconveyed to the said A. H. Patton by the said Dan O'Connor and his wife, Anna O'Connor, their heirs and assigns. (Signed) Dan O'Connor, Anna O'Connor. In witness whereof we set our hands on this 21st day of March, 1924. J. L. Diffie, notary public."

O'Connor alleged that there was no consideration for the above instrument, and in the alternative, if the

instrument was held to be valid, that the same was personal to A. H. Patton, but, if held otherwise, then neither the plaintiff nor any one claiming under A. H. Patton had tendered to the defendant the amount mentioned in the option, and that the defendant therefore withdrew the option. He denied any charge of conspiracy to defraud the plaintiff, and denied that she had any interest in the land.

Louis Patton, Walter Patton and Mrs. Sallie Reynolds filed separate answers to the complaint, and, among other things, they admitted that Patton died at Hot Springs, Arkansas, in June, 1924, testate, and named Louis Patton and the plaintiff as beneficiaries. They denied that they had conspired with O'Connor to defraud the plaintiff of any interest in the land, and denied that she was entitled to a half interest therein. With that exception they adopted the complaint of the plaintiff as cross-allegations on their part against their codefendant, O'Connor, and asked that the deeds to him be canceled and that they be declared entitled to take as devisees under the will.

Louis E. Patton filed an intervention in which he denied that A. H. Patton died without issue and testate, and denied that the plaintiff was entitled to an undivided half interest in the lands. He alleged that he was the adopted son of A. H. Patton, and, as such, was entitled to inherit all of his property. He adopted as his own the allegations of the complaint that the deeds to O'Connor were without consideration, and alleged that O'Connor held the same in trust for A. H. Patton. He alleged that the will of A. H. Patton was void, and pleaded in the alternative that, if the court should hold the same valid, he be allowed to take half of the lands as one of the devisees under the will. He also alleged that, if the court should hold that the deeds to O'Connor were valid, the option given by O'Connor to Patton would inure to his benefit as the heir of Patton. He asked that he be allowed to exercise the option. He alleged that the plaintiff, Ellen E. Patton, was entitled to a dower

interest in the lands described, and he prayed that the deeds be canceled and that the dower be assigned her, and that his title be declared and quieted. He made an exhibit to his intervention what purported to be the last will and testament of A. H. Patton, as follows: "This, my last will and testament. I want any money, if any, or land or any other property whatsoever to be divided equally between Walter and Louis Patton, and I want my wife, Ellen, to have $1 and Sallie Reynolds $2,000."

A separate answer was filed by all the other parties to the intervention of Louis E. Patton, in which they denied that he was the adopted son of A. H. Patton and all other allegations. The defendant, Dan O'Connor, denied that the intervener was entitled to exercise the option executed by O'Connor to A. H. Patton. The deeds and "option" mentioned in the pleadings were introduced in evidence. Also certain other deeds, by agreement, were introduced in evidence, and the will of A. H. Patton and the order of the probate court showing that the same had been duly probated.

Mrs. Ellen E. Patton, the plaintiff, testified that she was twenty-nine years old. She had been married twice. She was married the first time to Steve L. Williams, and lived with him four years. She was divorced from Williams on March 4, 1924. The ground alleged by Williams for divorce was desertion. She first met A. H. Patton in June, 1923, at which time she was the lawful wife of Williams. She was engaged to Patton in the fall of 1923, before Christmas, while she was the wife of Williams. Patton was sixty-seven years old. After she and Patton were married, they went immediately to Hot Springs and stayed all night there. They then went to Little Rock and stayed four or five days, and then came back to her home, where they stayed all night. Her husband then insisted that she go with him to his home, and she told him that there was no place out there for her to stay. After they came back he went down on the farm and insisted on her going down there, and she said he didn't have any place to live. She didn't know when she

married him that the land wasn't in his name. She married him to take care of him. She was asked if she loved Patton, and answered that "she thought enough of him to take care of him."

O'Connor testified concerning the issue here involved substantially as follows: He had lived in Camden about 26 years, and was then engaged in the automobile business. He had known A. H. Patton about as long as he had lived in Camden. They were good friends —visited in each other's homes frequently, and were partners in a land deal. He had his home on a certain tract of land near Camden. The deeds executed to him were dated February 25, 1924. A man by the name of Diffie made them out. Witness was present when they were made out, but would not swear that he was present when they were signed. They were signed in witness' office. Witness was pretty sure he saw Patton sign them, although he would not swear to it. Witness thought he heard the notary take Mr. Patton's acknowledgment. Diffie worked for witness. Witness stated that he was not an expert on handwriting, and couldn't explain how it happened that part of the deed was filled out in pen and ink and part on the typewriter. Witness stated that he didn't know that where the name "Dan O'Connor" was written in the deed it was in witness' handwriting. He didn't know whether it was or not. He didn't believe that any man in the world could tell his own handwriting. Witness didn't think it was in his handwriting. It looked to witness like Diffie's writing. Patton gave witness the deeds on February 25, 1924. Witness didn't give him any property in exchange for it, and didn't remember for sure whether he had given him any money. He couldn't recollect. He would not swear whether he did or didn't give Patton $1, but he would swear that the deeds were made out completely like they are at the present, when they were given to witness by Patton. Witness could not remember the conversation that look place between him and Patton at the time the deeds were made. Witness was asked what reason Patton had for giving him

the deeds, and answered: "I don't know why; anybody could give a deed. The land belonged to him, and he could go ahead and deed it to whoever he wanted to." Witness didn't know whether he bought the land or whether it was a gift to him, but thought that Patton gave it to him. Witness believed that he filed the deeds for record the 21st of March, but didn't know for sure. Witness didn't record it before, because he didn't think it was anybody's business whether he recorded it then or whether he ever recorded it. Mrs. Patton and A. H. Patton were married on March 8. Witness never told Mrs. Patton, after her marriage to Patton, that he didn't have deeds to the property. Further along in his testimony witness was asked if he had any conversation with Patton, and answered, "I didn't have any—nothing more than he wanted to deed this land to me, and for me to go ahead and take care of it—deed this land to me just in case somebody was going to beat him out of it." Witness was asked who he thought was going to beat him out of it, and answered, "I don't know. He was kind of figuring on getting married. He thought if he did get married he would rather let me have it." Patton was married on March 8. He stated that he was figuring on two different women, and didn't know which one he would marry. He thought he might get married. He didn't want to be beat out of his land. Witness saw Patton every day after he gave witness the deeds, and saw him on the day witness placed the same of record. Witness on that day signed the other instrument designated in the record as an option. Witness gave Patton one and kept one. The instrument was executed in witness' office. Witness didn't remember where Patton was when he gave it to him, but he did deliver it to Patton at his request, so that, in case anything should happen to witness, Patton could have his land back. Witness further explained his relationship with Patton by saying that they had been friends for a long time, and anything witness could do for Patton he would do, and anything Patton could do for witness he would do. Patton always came to witness

for advice. Witness never solicited Patton to make him a deed to the land. The execution of the deeds to witness by Patton was voluntary on his part. Witness was asked what his attitude was in regard to a reconveyance to Patton, and stated, "Well, there was no agreement like that at the time, but, of course, it was mutually understood between us." Witness had that much confidence in Patton that he knew Patton would do that for him, and he would do the same for Patton without any question, as long as they both lived. Witness stated that the way he and Patton made the option contract, it was made for Patton personally. Patton was the only person to whom witness agreed to reconvey. Patton didn't pay witness anything for the execution of the option agreement. Witness stated that he was a careless observer of handwriting; about all the writing witness did was to sign his own name. Witness concluded his testimony on this branch of the case by stating that the deeds were executed to him because Patton wanted to make the deed to witness for fear some one was going to take the property away from him. It was mutually understood between them all the time that anything witness had Patton could get it, and anything Patton had witness wanted, witness could get it. Even witness' individual property, if Patton wanted it, witness would have conveyed it to him. After the deeds were executed, Patton wrote a will and signed the same in witness' presence. Witness wrote it at Patton's dictation. After the will was written and signed, witness gave it to Patton. One of the boys spelled his name L-o-u-i-s and one L-e-w-i-s. Patton's nephew's name was spelled L-o-u-i-s. Patton stated that he wanted his nephews named in the will. Witness could not say that Patton ever saw his two nephews. One of them lived in Amarillo, Texas, and if he ever lived in this community witness did not know it. Witness' memory is very poor, but he thought that he and a man named Sautur were present and witnessed the will.

Witness Diffie testified that he was a notary public, and took the acknowledgment of A. H. Patton to the

deeds in controversy on February 25, 1924. Patton did not say that he acknowledged the deeds for the consideration and purposes therein mentioned. Witness filled out the deeds conveying all the land. Witness was bookkeeper for O'Connor, and the deeds were filled out and the acknowledgment taken in O'Connor's office. Witness likewise took the acknowledgment of Patton's will. Sautur and O'Connor were present at the time Patton signed the will, and were present at the time each of the witnesses signed their names.

Intervener, Louis E. Patton, *née* Lucian Spaulding, offered oral testimony to prove that A. H. Patton, at a church gathering, received Lucian Spaulding, then eight years old, from a preacher representing the Home Society of Indiana, and publicly agreed to adopt the child, and then and there gave him the name of Louis Patton. The intervener offered also to show by witnesses who lived in the home of Patton at the time that Louis was living with him; that they saw A. H. Patton mail certain formal papers adopting the intervener; that, after these papers were mailed, A. H. Patton claimed that he had adopted the intervener, and demanded and received from him the love, respect and services of a son. By various other witnesses the intervener offered to prove that A. H. Patton had received Louis Patton, intervener, into his home and treated him as a son, and had publicly said that he had adopted him. By another witness the intervener offered to show that, a short time before A. H. Patton's death, he went to Marshall, Texas, where the intervener was then residing, and there stated that he had adopted the intervener and wished him to return to Arkansas to live, and that, in order to induce him to do so, he (Patton) would give the intervener whatever land he wanted—that the intervener was his adopted son and only heir, and would inherit all of his property. All of this testimony the trial court refused to consider.

Upon the above pleadings and testimony the trial court found the issues of law and fact in favor of the plaintiff Ellen E. Patton and the defendant Louis Patton

and Walter Patton, and entered a decree canceling the deeds of A. H. Patton to O'Connor, dated February 25, 1924, and dismissed the intervention of Louis E. Patton for want of equity. The court found that the will of Patton had been duly probated, and that it named Louis Patton, Walter Patton, Mrs. Sallie Reynolds and Ellen E. Patton as its sole beneficiaries. The court found that A. H. Patton died without issue; that his widow, Ellen E. Patton, renounced the will and elected to take dower under the statute. The court thereupon entered a decree vesting in Ellen E. Patton a fee simple title to an undivided half interest in all the lands owned by A. H. Patton at the time of his death, describing them, which the court found was a new acquisition, and vesting the other undivided half interest in these lands in fee simple in Louis Patton and Walter Patton. The defendant O'Connor and Louis E. Patton excepted to the findings and decree of the court adverse to them, and duly prosecute this appeal.

1. We will first dispose of the appeal of the intervener, Louis E. Patton, *née* Lucian Spaulding. It is conceded, at least no testimony was offered to the contrary, that intervener was never legally adopted under the laws of Arkansas or Indiana. But the intervener alleged that he had been adopted by oral agreement of A. H. Patton, and that Patton had promised that at his death the intervener should inherit his property, and had promised to will him his property. Conceding, without deciding, that an oral contract for the adoption of a child and to give the same rights as a natural child may be enforced after the death of the foster parent, this doctrine could not avail Louis E. Patton under the pleadings and proof in this case, because A. H. Patton disposed of all the property of which he was possessed by will which was duly probated by judgment of the probate court. The uncontroverted testimony is that the Louis Patton mentioned in the will was the nephew of A. H. Patton; that the testator desired his nephew named in the will, which was done.

The doctrine on this subject is correctly stated as follows: "The implied covenant arising from a contract to adopt, not legally executed, where the child has fulfilled its part of the contract, is that the infant should receive a child's share of the estate of the foster parent. In case of intestacy that share is fixed by the statutes of descent and distribution, but, if there is a will, it is fixed by the will. The mere contract to adopt is not sufficient of itself to make the child a legal heir of the promisor, because the right to take as heir exists only by operation of law. The child takes in these cases by virtue of the contract and by way of damages or specific performance. An agreement to adopt does not prevent the person making the agreement from disposing by will of all his property to other persons than the child to be adopted; but an agreement, either express or implied, to give the adopted child a certain portion of the adoptive parent's property will be enforced." 1 C. J., p. 1377, § 21 (b). Our statute providing that, where a person makes a will and omits to mention the name of a child, if living, etc., he shall be deemed to have died intestate, and the child whose name is omitted shall be entitled to a child's portion of the estate, refers to natural children, or legally adopted children. The right of inheritance as such is conferred in our State upon a stranger in blood only by pursuing the special statutory proceeding for adoption. See *Morris* v. *Dooley,* 59 Ark. 483, 28 S. W. 30; *Chehak* v. *Battles,* 133 Ia. 107, 110 N. W. 330, 12 Am. Cas. 140.

But, even if it were conceded that a parol contract of adoption can be established in this State, the testimony offered by the intervener is not sufficient to prove that Patton contracted with him that he would inherit all of Patton's property, or that he (Patton) would will him all of his property at his death. While a person may enter into a valid and enforceable agreement to make a particular disposition of his property by will, the testimony offered by the intervener falls far short of establishing a contract capable of being enforced. "The burden is on the person claiming the benefit of an alleged

contract for adoption to establish it by clear, cogent and convincing evidence." 1 C. J., 1379, § 28, and cases cited in note. The contract alleged by the intervener was that he would inherit all of A. H. Patton's property; that "he (Patton) would will him all of his property at his death." The intervener proved that, to induce him to return to Arkansas and live with A. H. Patton, Patton said he would give the intervener whatever land he wanted and that the intervener would inherit all of his property. But the intervener himself offered to testify that he did not, after his promise, return to Arkansas and live with Patton in his declining years. Therefore, his proffered testimony proves no contract capable of being enforced against Patton or his estate. The court ruled correctly in dismissing the intervener's complaint for want of equity.

2. The uncontroverted proof is that the deeds from Patton to O'Connor were executed and delivered by Patton to O'Connor on February 25, 1924. The undisputed testimony shows that these deeds were voluntary, at least the testimony of the grantee does not show that he paid any money for these deeds or that he gave anything of value for them. His testimony further shows that Patton stated that, at the time the deeds were executed, he deeded the land to O'Connor "just in case somebody was going to beat him out of it. Patton was kind of figuring on getting married, and he thought if he did get married he would rather let witness have the land. He had two women in mind, and didn't know which one he would marry. He didn't want to be beat out of his land." This occurred on February 25, 1924, and Patton was married to appellee Ellen E. Patton on March 8, 1924, eleven days thereafter.

Learned counsel for the appellee Ellen E. Patton contend that these facts bring the case within the doctrine announced by this court in *West* v. *West,* 120 Ark. 500, 179 S. W. 1017, as follows: "The general rule is that, if a man or woman convey away his or her property for the purpose of depriving the intended husband or wife of

the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust for, or subject to, the rights of the defrauded husband or wife." And again, in *Roberts* v. *Roberts,* 131 Ark. 90, 198 S. W. 697, where we said: "That the wife's right of dower is a substantial property right, entitled to protection by the courts, is perhaps most strikingly shown in action by her to set aside conveyances made by the husband for the purpose of defeating her expectation (though not yet vested even as an inchoate right) of dower. If, shortly before a marriage, the future husband conveys away his real estate without consideration, and without the consent or knowledge of his betrothed, with the purpose and result of unfairly depriving her of dower, the courts will set aside the conveyance as a fraud upon her rights."

It is strongly urged by learned counsel for the appellant that the appellee cannot invoke the above doctrine in a court of chancery because her own testimony shows that, at the time she engaged herself to be married to Patton, she was the wife of Williams; that her conduct in thus engaging herself to Patton while yet the wife of Williams and marrying Patton four days after Williams obtained divorce from her, then, after living with Patton a few days, refusing to live with him any longer, causing him to institute a suit for divorce against her, proves that her marriage to Patton was not in good faith. The contention of counsel for appellant is sound. "He who comes into equity must come with clean hands", or, as it is sometimes expressed, "He that hath committed iniquity shall not have equity," is one of the cardinal maxims of equity. Says Mr. Pomeroy: "Whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any

remedy." 1 Pomeroy Eq. Jur., § 397, and numerous cases cited in note.

Now, Mrs. Patton's own testimony shows that she contracted to marry Patton while she was yet the wife of Williams, and that, a few days after she married Patton, she refused to live with him any longer. She refused to go to his home, stating that he had no place for her to live. While she states that she married him to take care of him, yet her conduct shows that she refused to live with him and to care for him. The only legitimate, and the irresistible, conclusion from her testimony is that she married him, not in good faith because she loved him and wanted to care for him, but solely for his property. Her own testimony proves that Patton, had he lived, would have been entitled to a divorce against her; and therefore, upon such divorce, she would have had no right to be endowed with any property which Patton had conveyed in anticipation of marriage. The doctrine announced in *West* v. *West* and *Roberts* v. *Roberts*, *supra*, cannot be invoked by one who shows that she entered upon the contract of marriage, not with a *bona fide* purpose of living with her husband and performing her marital duties and discharging the obligations of the marriage relation, but purely for the purpose of obtaining financial gain. Where husband and wife have thus each perpetrated a fraud upon the other, equity will close its doors against both, and will not allow either to enter its unsullied forum to assert and build rights upon the fraud of the other. It follows from what we have said that Mrs. Patton cannot maintain this action to cancel the deeds as a fraud on her marital rights, and likewise, the other appellees, who claim under A. H. Patton, cannot maintain their action to set aside the conveyance bottomed on the fraud perpetrated on the marital rights of Mrs. Patton.

3. This brings us to a consideration of the issue as to whether or not O'Connor holds the land in trust for the A. H. Patton estate. The deeds, on their face, are absolute conveyances. The testimony shows that they

were likewise voluntary conveyances, but, as against the parties and their privies, the question of consideration is immaterial. The owner of property who is *compos mentis* has the absolute dominion over it and may dispose of it as he sees fit, so long as he does not interfere with the existing rights of others; and, in the absence of fraud, accident, or mistake, no one can call in question a man's disposition of his property. 18 C. J. 162; 8 R. C. L. 961, § 35. Bump on Fraudulent Conveyances, p. 287, § 250. It is well settled under our statute, and by our decisions and the authorities generally, that an express trust cannot be engrafted by parol evidence upon a deed absolute in form. Section 4867, C. & M. Digest; *Bray* v. *Timms,* 162 Ark. 247-270, 258 S. W. 338, and cases there cited; *Leake* v. *Garrett,* 167 Ark. 415, 268 S. W. 608; *Gregory* v. *Bowlsby,* 88 N. W. (Ia.) 822, and cases there cited. But likewise, under our decisions (and the authorities generally) where there is fraud in the procurement of a conveyance, such conveyance, even though absolute upon its face, may be shown to create a trust. *Ammonette* v. *Black,* 73 Ark. 310, 83 S. W. 910; *Morris* v. *Nowlin Lumber Co.,* 100 Ark. 253-261, 140 S. W. 1; *Bray* v. *Timms, supra.*

In the last case, at page 274, we quoted the following from Mr. Pomeroy: "A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose, as, for example, the promise to convey the lands to a designated individual, or to reconvey it to the grantor, and the like, and, having thus fraudulently obtained the title, he retains, uses and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charted with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement." And again: "Whenever the

legal title to property, real or personal, has been obtained through actual fraud, misrepresentation, concealment, or other undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests." Measuring by the above standard, it is impossible to find anything in the conduct of O'Connor to justify the conclusion that he was a trustee *ex maleficio*. According to his testimony, which is all the testimony there is in the record on that subject, he did not perpetrate any fraud upon Patton in the procurement of the deeds. While O'Connor and Patton were intimate friends of long standing, O'Connor did not occupy any fiduciary relation to Patton. O'Connor did not exercise any undue influence over Patton to induce him to execute the deeds. On the contrary, the deeds were proposed, executed, and delivered by Patton to O'Connor without any solicitation or prompting whatever upon the latter's part. There are some inherent weaknesses in O'Connor's testimony; it is unique and peculiar in its manner of statement, and such as to challenge belief in some respects. Nevertheless, in the salient and essential features as to the execution, delivery and purpose of the deeds we do not feel justified in disregarding it. So far as the execution of the deeds is concerned, his testimony is corroborated by the testimony of Diffie, the notary public who took Patton's acknowledgment of his signature to the deeds. The testimony of O'Connor proves conclusively that the deeds to him were proposed, signed and delivered by Patton, *suo motu,* and because of the unbounded trust Patton reposed in him. True, the testimony of O'Connor shows that it was his purpose and the purpose of Patton that O'Connor should reconvey the lands to Patton at any time Patton might desire. But this was not a condition proposed by O'Connor or exacted by Patton; it was simply the mutual understanding because of the reciprocal trust and confidence each reposed in the other, according to O'Con-

nor's testimony. There is no testimony that Patton ever expressed a desire to have O'Connor reconvey the property to him. O'Connor testified that he always intended to reconvey the lands to Patton, if Patton had requested it, and would have done so without the execution of the written agreement designated "option." But Patton died without ever making such request.

Now, there is nothing in all of this testimony to warrant a finding that O'Connor was a trustee *ex maleficio*. The death of his friend and benefactor left O'Connor the absolute owner of the property, unless it can be said that his refusal to acknowledge that he held the lands in trust and to reconvey the same to the estate of Patton was sufficient to constitute him in law a trustee of such estate *ex maleficio*. Mr. Pomeroy says: "In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud, by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts." 3 Pomeroy's Eq. Jur., p. 2412, § 1056. Certainly it cannot be said that the execution and delivery of these deeds to O'Connor was the result of a scheme on his part in order to obtain title in himself and defraud Patton. In *Acker* v. *Priest*, 61 N. W. (Ia.) 235, 239, speaking of the facts in that case, which are even stronger than in the case at bar, the court said: "He (the grantee) did not sustain such a fiduciary relation to the other parties as that he cannot, in perfect good faith, hold the title to the land, as the authorities before cited clearly demonstrate. Even had he taken title under an express promise to hold it in trust for his wife—which the evi-

dence shows he did not do—his denial of the trust would not be such a fraud as to raise a constructive trust, unless it be shown that such promise was part of a scheme to get the title in himself to defraud his wife."

And in *McClain* v. *McClain,* 10 N. W. (Ia.) 333, the facts were also stronger than those in the case at bar. The Supreme Court of Iowa in that case, among other things, said: "No fraud has been shown prior to or contemporaneous with the execution of the deed to defendant. His fraud consists in denying and repudiating his agreement to convey the land to plaintiff. However abhorrent this fraud may be in the eyes of honest men, yet it is not a ground upon which the case may be removed from the operation of the statute of frauds so that parol testimony may be admitted to establish the agreement creating the express trust." Such is the doctrine of our own cases. *Ammonette* v. *Black,* 73 Ark. 310, 83 S. W. 910; *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848; *LaCotts* v. *LaCotts,* 109 Ark. 335, 159 S. W. 1111; *Ussery* v. *Ussery,* 113 Ark. 36, 166 S. W. 946; *Barron* v. *Stuart,* 136 Ark. 481, 207 S. W. 22; *Bray* v. *Timms,* 162 Ark. 247, 258 S. W. 38.

4. In regard to the instrument designated in the record as the "option," but little need be said. This "option" was without consideration moving from Patton. It was purely voluntary on the part of O'Connor, and while, under the circumstances, Patton, after the delivery of the same to him, might have exercised the option within a reasonable time from its execution and delivery, nevertheless it was purely personal to him, and he died without claiming its benefits. No one could succeed to his rights under it. Being without consideration, and with no time specified for its exercise, it was simply a mere offer on the part of O'Connor to Patton, and O'Connor had the right to withdraw it within a reasonable time after Patton had been given notice and an opportunity to exercise the same. See *Hogan* v. *Richardson,* 166 Ark. 381, 266 S. W. 299; 6 R. C. L. 603, § 25, and cases cited.

The decree of the chancery court is therefore reversed, and the cause is remanded with directions to dismiss for want of equity all complaints challenging the title of O'Connor to the lands in controversy.

Mr. Justice HART dissents.

SMITH v. BIDDLE.

Opinion delivered July 5, 1926.

1. PUBLIC LANDS—CERTIFICATE OF ENTRY.—A certificate of entry issued by the United States invested an entryman with the equitable title to the land.
2. VENDOR AND PURCHASER—MARKETABLE TITLE.—A tax deed from the State to land for which a certificate of entry was issued by the United States, and which was forfeited to the State for taxes, in connection with affidavits showing continuous possession of the land in appellee and his grantors for 35 years before execution of the contract, *held* to show a marketable title.
3. VENDOR AND PURCHASER—TIME TO PERFECT TITLE.—Where no time limit is fixed in a contract for the vendor to perfect the title, the vendor, contracting to convey a marketable title, has a reasonable time to perfect the title.
4. VENDOR AND PURCHASER—MARKETABLE TITLE.—Where a vendor contracted to furnish a marketable title, and a mortgage of record had been satisfied, but the deed of release had not been filed, procuring and filing such release within a reasonable time after the execution of the contract was a compliance with the contract.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellee to cancel a deed executed by them to appellee to certain lots in the city of Little Rock, Pulaski County, Arkansas, and to cancel a contract executed to them by appellee to certain land in Arkansas County, Arkansas.

The written agreement in question was executed on the 21st day of November, 1923, and was signed by appellee and by appellants. Under its terms appellee was to convey certain land to appellants in Arkansas County

which is described according to the United States Government survey. A part of the consideration is represented by the exchange of property and the balance by notes given for the deferred payments. Appellants, as a part of the consideration, executed to appellee a deed to certain lots in the city of Little Rock, Pulaski County, on the 21st day of November, 1923. This deed was delivered to appellee and was duly filed for record. Pursuant to the deed and contract, appellee entered into possession of the lots in the city of Little Rock and appellants entered into possession of the land in Arkansas County.

According to the testimony of appellants, the contract was delivered upon condition that appellee was to deliver an abstract showing a marketable title to the Arkansas County land, and it turned out that the Arkansas County land had a mortgage on it which had not been satisfied of record.

According to the evidence for appellee, no such condition was agreed upon between the parties, and appellants were fully informed that there had been a mortgage on the Arkansas County land, but that it had been paid off. Subsequently appellee obtained a deed of release showing that the mortgage had been satisfied, and this deed of release was duly signed and acknowledged by the trustee named in said mortgage on the 8th day of December, 1923. It was filed for record on the 22d day of February, 1924.

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

The chancellor found the issues in favor of appellee, and the complaint of appellants was dismissed for want of equity. The case is here on appeal.

Mehaffy & Mehaffy, for appellant.

J. C. Marshall, for appellee.

HART, J., (after stating the facts). The conclusion we have reached renders it unnecessary to decide where the preponderance of the evidence lies on the question of the conditional deliverance of the contract in question. If it be conceded that the preponderance of the evidence

shows that it was to be delivered upon condition that appellee should furnish an abstract showing a marketable title in himself to the Arkansas County land, the evidence shows that this has been done.

It appears from the record that a certificate of entry was issued by the United States in 1820 to the Arkansas County land. This had the effect of investing the entryman with the equitable title to the land. 32 Cyc. 1079, and *Hartman* v. *Butterfield Lumber Co.,* 199 U. S. 335, 26 S. Ct. 63.

Subsequently there was a forfeiture of the land to the State for taxes, and the grantors of appellee received a tax deed from the State. The tax deed, in connection with the affidavits showing continuous possession of the land in appellee and his grantors for 35 years before the execution of the contract in question, gave a marketable title, within the rule announced in *Hinton* v. *Martin,* 151 Ark. 343, 236 S. W. 267. Indeed, no complaint was made by appellants on the failure of title, except that, when the contract was executed, the record shows there was an outstanding mortgage on the land which had not been satisfied.

The proof shows that this mortgage had been paid off before the contract in question was executed, but that, for some reason, a deed of release had not been secured and filed for record. The record shows that the deed of release was duly procured and filed for record by appellee. No time was fixed in the contract for perfecting the title, and, where no time limit is fixed in the contract for the sale of land for perfecting the title, the seller has a reasonable time to perfect it. *Dollar* v. *Knight,* 145 Ark. 522.

The deed of release was executed and filed for record within a reasonable time after the execution of the contract in question. The abstract shows a marketable title in appellee to the Arkansas County land, and the chancery court properly held that the contract of sale should not be rescinded because of the failure of appellee to furnish a marketable title.

The decree will therefore be affirmed.

F. KEICH MANUFACTURING COMPANY *v.* WALLACE.

Opinion delivered July 5, 1926.

1. MASTER AND SERVANT—NEGLIGENCE OF FOREMAN—INSTRUCTION.—An instruction that defendant's engineer was negligent in turning on steam if he knew or should have known that plaintiff was attempting to turn the flywheel in defendant's sawmill off the center, *held* supported by proof.
2. MASTER AND SERVANT—NEGLIGENCE—INSTRUCTION.—Undisputed evidence that it was plaintiff's duty to help roll a flywheel off center when ordered *held* to warrant an instruction that, if the employee was in the discharge of his duty in attempting to do so, he could recover for an injury caused by the defendant's engineer turning on the steam or neglecting to turn it off.
3. TRIAL—IMPROPER ARGUMENT—CORRECTION.—Where defendant's attorney stated that he wished the jury could know why the case was in the county where neither of the parties resided, response of plaintiff's counsel that it was brought to the county possibly on an agent's false affidavits, *held* not prejudicial error, where he withdrew the remark on objection, and the court instructed the jury not to consider it.
4. DAMAGES—PERSONAL INJURIES.—A verdict of $22,541, of which $13,833 was for loss of earning capacity and $8,708 was for pain and suffering, *held* not excessive in view of his permanent injuries.

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

STATEMENT OF FACTS.

John Wallace sued Silas Baker and F. Keich Manufacturing Company to recover damages for injuries received while in the employment of said company.

John Wallace was a witness for himself. According to his testimony, he was injured on the third day after he commenced to work for F. Keich Manufacturing Company. He was working by the piece, and was making shingle blocks. The lubricator valve on the engine broke, and the steam was cut off. Silas Baker, the millwright of the company, went to fix the defective part of the machinery, and John Wallace assisted him. After the repairs were made, it was found that the flywheel of the engine was on center, and the machinery could not be

started until the flywheel was pulled off of center. Baker gave the employees the signal to start the wheel. Wallace and other employees then went to the flywheel and started to roll it. Wallace caught hold of one of the spokes of the wheel with his hand and stood on another spoke so that he could exert more power in pulling the flywheel off of center. When the flywheel was pulled off of center, the flywheel started to running faster, and revolved with such a jerk that it carried Wallace around with it and severely injured him.

As above stated, when the flywheel gets on center, it cannot be started on its own power, and it was the duty of one of the employees to roll the flywheel of the engine off of center, and then steam is turned on and the machinery started up. It was the duty of Silas Baker to order the employees to roll the flywheel to get the flywheel off of center so that it would start. It would frequently stop that way, and the millwright would ask any of the employees present to start it.

Other witnesses who were working at the time the appellee was injured corroborated his testimony.

Os Bowman was also a witness for appellee. According to his testimony, he had worked around sawmills for thirty years, and knew the location of the mill where the appellee was hurt. As he approached the mill on the morning the appellee was hurt, he heard a band slip and heard some one hollowing in the mill. As he ran in, one of the men said that a man was in the flywheel. He ran over there, and saw Silas Baker at the throttle with his hand on it. The engine was running under full steam. The witness hollowed to Baker to shut it down, and he did so. After they had got the appellee out of the flywheel, Baker said, "That is two I have killed in the last year or so."

L. W. Highsmith, the superintendent of the appellant, had control and direction of the sawmill, and was present on the day when Wallace was injured. The lubricator valve broke in the morning, and the witness told Baker to repair it. Baker went up on the boilers, a

distance of about ten feet from the engine, and cut off the steam. The flywheel was in line with the front of the boilers. The diameter of the flywheel was ten feet, and its weight was two tons. Its flange or rim was twenty-three inches wide. The width from the actual edge of the rim to the spokes at the thinnest point was ten and seven-eighths inches. The spokes were five inches thick. After the repairs had been completed the witness heard some one hollowing. He ran back into the boiler-room and saw a man inside the wheel. The engine was going slow. Baker then shut off the engine, and, approaching the witness, said, "We have killed a man."

Silas Baker was also a witness for the appellant. He was running the mill and looking after the machinery the day the accident occurred. He made the repairs on the lubricator valve, and shut off the steam before he did so. He opened the throttle valve and let the steam go out and then closed the valve. He took a wrench to get the lubricator valve off, and Wallace helped him. He went upstairs to get another wrench, and, when he returned, Wallace had the lubricator valve out. The witness then, with the help of Wallace, put on a new lubricator valve. The flywheel of the engine was on center, and they had to roll it to get it started. When they got the flywheel of the engine off of center, it started to revolving, and the fireman hollowed, "Shut it down." The witness did so, and knew that the steam was not on full.

Again the witness stated that there was some steam turned on at the time appellee was injured. He was asked who turned it on, and answered, "We might have rubbed against the valve." Baker admitted that he was the one who told them to turn the flywheel, and that, if there had not been any steam on, there would not have been any danger in doing so. After being notified that there was a man in the flywheel, Baker turned the steam off while Wallace was still in the revolving flywheel; he ran out to where Highsmith was and said, "I have hurt another man."

Wallace testified that he never touched the throttle while they were repairing the lubricator valve, and did not turn on the steam. A. Ketchum, a witness for appellee, testified that he saw Baker turn the steam on before Wallace got hurt.

The jury returned the following verdict: "We, the jury, find for plaintiff, John Wallace, against F. Keich Manufacturing Company, and assess his damages as follows:

"For loss of earning capacity	$13,833
"For pain, suffering and mental anguish	8,708
	$22,541

"H. E. Neblett, Foreman."

Judgment was rendered upon the verdict, and the defendant, F. Keich Manufacturing Company, has duly prosecuted an appeal to this court.

Gautney & Dudley, and *Cooley, Adams & Fuhr,* for appellant.

T. H. Caraway, for appellee.

HART, J., (after stating the facts). The main reliance of appellant for a reversal of the judgment is that the court erred in giving instruction No. 1, which reads as follows:

"You are instructed that if Baker, as engineer, knew, or, in the exercise of reasonable care and observation, should have known, that plaintiff was attempting to turn the flywheel 'off center' and that it was necessary that the same be done before the engine could be started; that in so doing plaintiff was in the discharge of a duty and in the line of his employment, and if you find, while plaintiff was so doing, Baker turned on the steam, or, having previously turned it on, neglected to turn it off, and that this resulted in the rapid revolutions of the flywheel, causing the injuries to plaintiff, then this conduct on the part of Baker was negligence as that term has been defined, and your verdict will be for plaintiff, unless you further find that he was guilty of contributory

negligence or had assumed the risk, as those terms have been defined in other instructions."

It is insisted that the instruction is erroneous and prejudicial to the rights of appellant, because it tells the jury that it was negligence for Baker to turn the steam on under the facts stated, or, if he had previously turned it on, it was negligence not to turn it off. It is claimed that there is no proof in the record that it was negligent to leave the steam on while attempting to roll the flywheel off of center, or that it was not the duty of Baker more than of Wallace to turn the steam off or on. We cannot agree with counsel in this contention. Appellee had nothing whatever to do with turning the steam on or off. His whole duty in the premises was to help roll the flywheel so as to get it off of center when told to do so by Baker. The undisputed evidence shows that Baker was running the machinery, and it was his duty to order the other employees to roll the flywheel so as to get it off of center, and that he did so. The testimony of the appellant showed that it was its duty to get the flywheel off of center. The testimony of Highsmith, the superintendent of the mill, as well as that of Baker, shows that there would have been no danger to appellee in helping to roll the flywheel if the engine had not been running. The only dispute about the matter at all was as to the amount of steam turned on. The witnesses for appellee testified that the steam was turned on full, while Highsmith and Baker testified that there was some steam turned on, but that it was not turned on full. Now, in the very nature of things, it is manifest that it was dangerous to turn on the steam while the employees were engaged in rolling the wheel. They could not make it revolve rapidly, and, if there had been no steam on, appellee could have readily jumped off of the flywheel after they started it to rolling. The purpose of turning on the steam was to make the flywheel revolve rapidly, and it was manifestly dangerous to turn the steam on while the employees were engaged in rolling the wheel to get it off of center. Hence there was no error whatever in

telling the jury that it was negligence on the part of appellant for Baker to turn on the steam, or, having previously turned it on, to neglect to turn it off while appellee was helping to roll the flywheel. There was some testimony to the effect that appellee could not have been required to help roll the wheel. But the undisputed evidence shows that it was a part of the duty of any of the employees who happened to be present to help roll the wheel when ordered to do so. Under these circumstances appellee was in the line of duty when he was hurt by the negligence of Baker in turning on the steam. In other words, appellee was engaged in helping to roll the wheel under the direction of Baker, and, while he was so engaged, Baker turned on the steam, thereby causing the revolving wheel to turn faster and injure appellee. According to the testimony of appellee, he did not turn on the steam, accidentally or otherwise.

A. Ketchum, a witness for appellee, testified that he saw Baker turn on the steam. Another witness testified that Baker was standing at the throttle when Wallace was being carried around by the rapidly revolving wheel. Still another witness testified that Baker was at the throttle when they went to turn the wheel. Baker denied turning on the steam, but the court submitted to the jury the question whether or not he did so. The undisputed evidence shows that the steam was turned on by some one, and this caused the flywheel to revolve so rapidly that it jerked appellee and carried him around with it. The act of turning on the steam and thus causing the flywheel to revolve rapidly while the appellee was in it was the proximate cause of his injury and constituted negligence on the part of appellant.

It is next insisted that counsel for appellee made a statement of matters not in the record, which were prejudicial to the rights of appellant and called for a reversal of the judgment. One of the attorneys for appellant, in his argument to the jury, said: "I wish you could know why this case is here in Mississippi County. Plaintiff lives at Lake City, Craighead County, and the

defendant lives in that county. Why then is it here? You ought to know."

In response to this statement, counsel for appellee said: "Mr. Adams says he wishes you to know why the case is here. I am willing that you should know. It was brought to this county—although I have no objection to its being here—it was brought in another county, and then brought to this county, and possibly on the false affidavits of an insurance agent."

Upon objection being made to the statement of appellee's counsel, he withdrew it. The presiding judge was in an ante-room right next to the court when the above colloquy took place. He returned to the courtroom, and, when one of the counsel for appellant stated the substance of what had occurred, as above quoted, the court said that the remarks of counsel for appellee were highly improper, and had no place in the lawsuit. The jury was instructed not to consider the same.

Under these circumstances we do not think any prejudice could have resulted to appellant. The attorney for appellee withdrew his remarks, and the presumption is that the jury were men of ordinary discretion and experience in the affairs of life. They were a part of the court engaged in trying cases, and we are of the opinion that the remarks of the court would necessarily have more influence upon them than the remarks of counsel. This is especially so, when we consider that the remarks of counsel for appellee were to an extent invited by previous remarks by one of the attorneys of appellant, and that counsel for appellee himself withdrew his remarks from the jury.

In support of our ruling on this point, we cite the following cases: *Chess & Wymond Co.* v. *Wallis,* 134 Ark. 136, 203 S. W. 274; *Arkansas Central Rd. Co.* v. *Goad,* 136 Ark. 467, 206 S. W. 901; *Central Coal & Coke Co.* v. *Orwig,* 150 Ark. 635, 235 S. W. 390; *Arkansas Short Leaf Lbr. Co.* v. *Wilkinson,* 154 Ark. 455, 243 S. W. 819; *Southern Anthracite Coal Mining Co.* v. *Rice,* 156 Ark.

94, 245 S. W. 805; *Black Brothers Lumber Co.* v. *Person,* 163 Ark. 40, 258 S. W. 976.

It is next insisted that the verdict is excessive, both as to loss of earning capacity and as to pain and suffering. Appellee was a steady worker and in good health at the time he was injured. He had been at work two days and three hours at the time he was injured. He was doing piece work, and was due $6.50 for his work. He volunteered to help repair the machinery in order that he might get to work again. He knew that he would not be paid anything for helping to repair the machinery, or for helping to start the flywheel rolling. He did these things in order that he might get back to work, and the jury might have inferred from this that he was an industrious man and that his earning capacity would increase. He had a life expectancy of practically twenty-one years. His body was horribly bruised and mangled by being carried around in the rapidly revolving fly-wheel, and it is evident that he can never work any more. Under these circumstances it cannot be said as a matter of law that the sum of $13,883 is excessive compensation for his loss of earning capacity. The jury allowed him $8,708 for pain and suffering. Appellee was in the hospital thirteen weeks, and suffered excruciating pain. When the engine was started, he was in the flywheel, standing on one spoke and pulling down with his hands on another spoke. Two ribs were broken from his breastbone and two other ribs were torn from his backbone when the engine was started, thereby causing the flywheel to revolve rapidly. Before the accident he was in good health, but cannot now even sit up a day at a time. He has no strength whatever in his left leg. His right leg was torn off, except hanging by a few muscles. It was amputated. His left leg was partly crushed, but has a fairly good union. Three or four inches of bone is gone out of it. He has two or three dislocated vertebrae, and this has a bad effect. He is not able to work, and never will be. It gave him much pain to walk at the time of the trial. The undisputed evidence

shows that he suffered great agony and must continue to suffer for the balance of his life.

When all these matters are considered, it cannot be said that the judgment should be reversed because excessive damages were awarded by the jury.

The court gave numerous instructions at the request of both parties, and it would seem that fewer instructions might have presented the issues. We have examined the instructions, however, and are of the opinion that there is no conflict between them, and that they have fully and fairly presented the matters at issue under the principles of law so often declared by this court. The instructions refused were either covered by the instructions given or are argumentative in character.

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

LACEFIELD v. STATE.

Opinion delivered July 5, 1926.

1. INTOXICATING LIQUORS—POSSESSION OF STILL.—In a prosecution for having a still, its ownership is immaterial if in fact the accused was operating it.
2. INTOXICATING LIQUORS—POSSESSION OF STILL.—In a prosecution for having a still, an instruction defining possession as the right to control or manage the still or some sort of ownership therein, and requiring the State to prove same beyond a reasonable doubt, *held* favorable to the accused.
3. CRIMINAL LAW—HEARSAY EVIDENCE.—In a prosecution for possessing a still, testimony of officers who arrested accused that they had suspected some one else who, they had been informed, was owner and operator of the still, *held* properly excluded as hearsay.
4. INTOXICATING LIQUORS—POSSESSING STILL—EVIDENCE.—Evidence *held* to sustain conviction for possession of a still.

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

H. W. Applegate, Attorney General, and *J. S. Abercrombie,* Assistant, for appellee.

SMITH, J. Appellant was indicted for having a still and stillworm in his possession without having the same registered, was convicted, and has appealed.

There is but little to discuss on the appeal. Three witnesses testified that they located the still, and, a few days later, they surrounded it very early in the morning. They saw appellant with an armful of wood, with which he built a fire in the furnace of the still. Appellant was alone at the time. After starting the fire, appellant walked off some little distance and brought something back, and sat down in front of the fire. Some mash, which had been in a barrel when the witness first discovered the still, had been poured into the still. Appellant was arrested, and, after his arrest, was asked if he knew of any one else interested in the still, and he answered that he did not.

Appellant admitted having been found at the still, but denied having any knowledge about it or anything to do with it. He testified that he happened to be at the still that morning, as he was going hunting, and that he stopped and lit a torch to light himself through the woods, when he discovered the still, and stopped to look at it, but did not start a fire in the furnace.

The court submitted to the jury the question whether appellant was in possession of the still, and the jury was told that mere presence at the still as a spectator would not warrant a conviction.

The court gave, at appellant's request, an instruction numbered 9, reading as follows: "The court instructs the jury that the word 'possession' means the right to control or manage the still, or some sort of ownership therein, and, unless the jury finds from the testimony in the case, beyond a reasonable doubt, that the defendant in this case did own the still or some interest therein, or that he had a right to control or manage the same, you will find him not guilty, and the burden of proving such right of possession or control rests upon the State."

This instruction was as favorable to appellant as he could ask an instruction to be. The ownership of the still was immaterial if in fact appellant was operating it. The operation of the still was itself an act of possession sufficient to sustain the conviction. The State was not required to show that appellant was the owner or was rightfully in possession. If he assumed control of the still, and put it to the use for which it was intended—that of making intoxicating liquors—this was such an act of possession as constituted a violation of the law against possessing a still.

Defendant's counsel asked the officers if they had suspected appellant of being in possession of the still before arresting him, and they answered that they had not. The witnesses were then asked whom they suspected, and the court sustained an objection to this question. Appellant's counsel then asked the witnesses if they did not have information that another person, whose name the appellant's counsel asked the witnesses to state, was the owner and operator of the still, and objections were sustained to these questions.

There was no error in these rulings. The testimony was hearsay, and incompetent for that reason. Moreover, as we have said, the ownership of the still was unimportant, as was also the complicity of some other person, if appellant was in possession of the still, operating it as such.

In the case of *McGuffin* v. *State,* 156 Ark. 392, the accused was charged, as is the appellant here, with the offense of having possession of a still without registering it. McGuffin and another man were found making whiskey with the still, and we said this testimony was sufficient to support the verdict of guilty returned by the jury. See also *Ring* v. *State,* 154 Ark. 250, 242 S. W. 56; *Wright* v. *State,* 155 Ark. 169, 244 S. W. 12; *Goodwin* v. *State,* 161 Ark. 266, 255 S. W. 1095.

Appellant requested instructions on the subject of reasonable doubt, which the court refused to give, but the

instructions given fully and correctly declared the law of this subject.

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

HARRIS v. STATE.

Opinion delivered July 5, 1926.

1. INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.—In a prosecution for manufacturing and being interested in the manufacture of intoxicating liquors, evidence *held* to sustain conviction.
2. WITNESSES—EXCLUSION OF IMPEACHING TESTIMONY.—Where, in a prosecution for manufacturing intoxicating liquor, a State's witness testified to having seen accused at a still at a certain time, and a witness for accused testified to having seen the State's witness at another place at the time in question, exclusion of the testimony of two witnesses corroborating accused's witness was reversible error.
3. CRIMINAL LAW—PUTTING WITNESS UNDER THE RULE.—Whether any or all of the witnesses shall be put under the rule is within the trial court's discretion, under Crawford & Moses' Dig., § 4191.
4. CRIMINAL LAW—PUTTING WITNESSES UNDER RULE.—A wider discretion is allowed the trial court in relaxing the rule when it has been ordered than in excluding testimony when the rule has been violated.
5. CRIMINAL LAW—PUTTING WITNESSES UNDER THE RULE.—Where counsel for accused did not know until a few minutes before offering testimony that witnesses would testify to certain facts, and for that reason they had not been called as witnesses and put under the rule, refusal to permit them to testify was an abuse of discretion, where they were offered before the close of the testimony.
6. CRIMINAL LAW—PUTTING WITNESSES UNDER THE RULE.—The court, after placing the witnesses under the rule, may enforce its order by directing the witnesses to retire, may compel retirement by ejection, or fine for contempt any witness evading or disobeying the order.
7. CRIMINAL LAW—COMMENT OF COUNSEL ON CONDUCT OF WITNESS.—Counsel of opposing side may comment on the failure of a witness to obey the rule as affecting his credibility.

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

Toney & Smith, for appellant.

H. W. Applegate, Attorney General, and *J. S. Abercrombie*, Assistant, for appellee.

SMITH, J. Appellant was tried under an indictment charging him with manufacturing and being interested in the manufacture of intoxicating liquors, was convicted, and has appealed.

A still had been located, and officers were watching it to learn who were operating it. Officers Vick and McBurnett, accompanied by two citizens, crept up to the still and saw two men operating it. Vick testified that he identified both men, one being appellant, Arthur Harris, the other a man named Bob Sykes. The posse had surrounded the still, and ordered the men found operating it to throw up their hands, but, instead of submitting to arrest, they ran away. A copper still with a charcoal burner was found, and four or five barrels of mash, and about five gallons of whiskey had been run.

Without setting out the testimony of the officers further, it may be said that their testimony showed very conclusively that two men were found making whiskey, and the principal question of fact in the case is the identity of these men. Vick was positive in his identification of both appellant and Sykes, and the testimony of the other members of the posse is more or less corroborative of the testimony of Vick. There is therefore no question about the legal sufficiency of the evidence to sustain the verdict of the jury finding appellant guilty as charged. It appears, however, that Sykes had been previously tried and acquitted, and appellant denied that he was seen at the still. He also denied that he knew anything about the still or that he had ever seen it. The still was found about three-quarters of a mile from appellant's home.

A witness named Stone testified that, prior to the time the still was raided by the officers, he had lost a hog, and was looking for it in the woods, when he came upon the still, which was in full operation, and that he recog-

nized appellant as one of the men operating it. Stone found between twenty and thirty gallons of whiskey in kegs and bottles and about seven or eight barrels of mash. He testified that the men in charge of the still ran away, after which witness got in his car and went to a schoolhouse, and from there he went to Pine Bluff, where he told the officers what he had seen.

Appellant offered testimony to the effect that, on the day the officers raided the still, he was at home working in his field.

A boy named Troy Tucker testified that he knew the afternoon when the witness Stone claimed to have been in the woods and to have seen appellant at the still, and that Stone came to the school in the afternoon before the school was dismissed for the day. This witness had not been subpoenaed in the case, and was in attendance on the trial just to hear it, as he knew the parties. As soon as the witness Tucker had thus testified the following proceedings were had: "Mr. Toney: Call Miss Jacks. If the court please, I find out there are two girls that were going to that school—(interrupted). Mr. Brockman: They have been in the courtroom all day. The Court: They have been here all day. You may let the record show, Mr. May, that the defendant offered to use these witnesses and the court denies them the right to testify; save his exceptions. Mr. Toney: I would like to state to the court what—(interrupted). The Court: Don't state that in the presence of the jury. Preserve your record outside. I will give you a chance to do that later on."

The trial proceeded, and another witness testified in support of appellant's defense, after which it is recited that the following proceedings were had: "The following proceeding was had in the court's private chamber, out of the presence and hearing of the jury: The Court: Let the record show that the witness, Miss Helen Jacks, that the defendant offered to prove by Miss Helen Jacks and Miss Gladys Hunt that they were going to the school in question; that on Thursday they saw the witness Stone at the schoolhouse, Thursday afternoon at three o'clock,

the same afternoon that it is claimed that he (Stone) saw these boys in the woods. That these witnesses were not sworn along with the others, and were not put under the rule, and had been sitting in the courtroom and were not summoned as witnesses in the case; that they had been sitting in the courtroom listening to all the testimony up until that time, and that the court refused to permit them to testify, to which action of the court the defendant at the time objected, and asked to save his exceptions. Counsel for defendant did not know until a few minutes before he offered these girls as witnesses that they went to this said school in question. Let the record show further that, at the time of offering these parties as witnesses, counsel did not state to the court that they had just found out that they were in possession of this information. Mr. Toney: I want to offer our instruction number 'A,' and ask that the court give it to the jury along with the other instructions. The Court: It is refused. Mr. Toney: Note our exceptions, and, your Honor, since you refuse this instruction, we ask to be allowed to introduce additional testimony. The Court: That request will be granted. You may do that. This concludes the proceedings had in chambers out of hearing of the jury."

Thereafter Bob Sykes testified as a witness in appellant's behalf, as did also Claud Pledger, and officer McBurnett, who had previously testified, was recalled for further examination.

After the conclusion of this testimony the court proceeded to instruct the jury, and, while exceptions were saved to the instructions given, no error is pointed out in them, and we find none.

Appellant asked only one instruction, it being to the effect that testimony tending to show that appellant had been seen operating a still in July, 1925, could be considered by the jury only as "a circumstance tending to show that appellant was in the whiskey business." The indictment under which appellant was convicted charged that on the 4th day of December, 1925, he manufactured and was interested in the manufacture of intoxicating liquors.

The instruction requested by appellant was properly refused. The date referred to in the instruction was within three years of the date of the return of the indictment, and the venue was the same. In other words, the testimony was to the effect that appellant had been seen on two different occasions operating the same still, and the State had the right, as it evidently elected to do, to use testimony which would have shown two separate offenses to secure a single conviction. The testimony concerning the prior offense was admissible therefore to show that appellant was guilty of the offense charged, as a conviction could have been had if it were shown that, at any time within three years of the date of the indictment, appellant had manufactured or been interested in the manufacture of intoxicating liquors. It is true the jury might have believed that the officers who raided the still were mistaken in their identification of appellant as one of the men seen at the still, and would, no doubt, have done so had they believed the testimony tending to prove an alibi for appellant, and may, in fact, have found him guilty of making liquor on the prior occasion, but the jury had the right to do this if they found appellant had made liquor on either occasion, both occasions being within three years of the date of the indictment. *Turner* v. *State*, 130 Ark. 48, 196 S. W. 477.

We are of the opinion, however, that the court was in error in excluding the testimony of the two young ladies. Their testimony would have contradicted that of the witness Stone, and it may be that the conviction was based upon the testimony of Stone, and not upon that of the officers who raided the still. As we have shown, it could have been, and for this reason no error was committed in refusing to give the only instruction which appellant requested. The witness Tucker was a pupil at the school, and testified that Stone came to the school before it was out. This testimony tended to contradict that of Stone, and the testimony of the two young ladies who were also pupils at the school would have been corroborative of that of young Tucker. The testimony was

therefore relevant and material, and might have been of great value to appellant. The testimony of the young ladies was not excluded because it was irrelevant and immaterial, but because the rule had been ordered on the witnesses, and the young ladies had not been called and sworn and placed under the rule along with the other witnesses in the case.

Counsel for appellant stated, when he offered to call the girls as witnesses, that he did not know, until a few minutes before he offered the girls as witnesses, that they were in attendance upon the school in question. The court did not hear any testimony as to when this information was first acquired by counsel, and the statement of counsel therefore stands unchallenged. When these witnesses were first called, counsel for appellant undertook to make a statement to the court, but was interrupted by the court and told that a chance to do so would be given later. The court, in excluding this testimony, had the record to show "that at the time of offering these parties as witnesses counsel did not state to the court that they had just found out that they were in possession of this information." But, as has been shown, the court had interrupted counsel with the statement that a chance would be given later. Moreover, it appears that, when this chance was later given, it was not then too late to permit these witnesses to testify. The case had not then been closed. In fact, as we have already shown, other witnesses were thereafter called and permitted to testify.

By § 4191, C. & M. Digest, it is provided that "if either party require it, the judge may exclude from the court room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witnesses."

It has been held that whether any or all the witnesses shall be put under this rule is a matter within the discretion of the court. *Oakes* v. *State,* 135 Ark. 221, 205 S. W. 305; *Marshall* v. *State,* 101 Ark. 155, 141 S. W. 755; *St. Louis, I. M. & S. Ry. Co.* v. *Pate,* 90 Ark. 135, 118 S. W. 260.

Notwithstanding the discretion which it has been held that the court has in the enforcement and the relaxation of the rule, this discretion is not beyond review, and we think an abuse of discretion was shown in excluding the testimony of the young ladies.

The court may order the rule, and may enforce it by ordering the witnesses to retire, and may compel their retirement by ejecting them from the court room, if it should be necessary so to do, or may fine for contempt any witness who had returned or had otherwise evaded or disobeyed the order of the court. It would also be permissible for counsel against whose side the witness had testified to comment upon the failure of the witness to obey the rule as a circumstance affecting his credibility.

In the case of *Pleasant* v. *State,* 15 Ark. 650, a witness for the State named Landers had, along with the other witnesses in the case, been put under the rule and admonished not to talk with the other witnesses in the case. Landers was seen conversing with Fulmer, the husband of the prosecuting witness, who was alleged to have been raped, after this prosecuting witness had testified. After stating that there was a presumption—the contrary not appearing from the bill of exceptions—that the court had ascertained that no conversation had occurred between the witness and the husband of the prosecutrix prejudicial to the prisoner, the court said: "But, if this were not so—even if Landers had remained in, or returned to, the courthouse, after he was put under the rule, and heard Mrs. Fulmer testify, this would not have been absolute cause to exclude him, but the court had the discretion to permit him to be examined, and his conduct would have gone to his credit. The power of the court to exclude a witness for disobedience of the rule is rarely exercised in this country, but the witness is punishable with contempt."

In the case of *Golden* v. *State,* 19 Ark. 590, a witness gave testimony which the attorney for the defendant stated to the court was a surprise, whereupon he asked that a witness who had not been sworn nor put under the

rule be sworn as a witness. Counsel stated that this witness had not heard the testimony of the State's witnesses, but the trial court refused to permit the defendant's witness to be sworn. This was held to be error, and in so holding the court said: "The course formerly was to exclude witnesses who might disobey the rule and return into the court after they had been ordered out. But the practice in the American courts seems to be different. In this country the right of excluding witnesses for disobedience, though well established, is rarely exercised. The practice here is to punish the witness for contempt in case of disobedience."

In the case of *Hellems* v. *State,* 22 Ark. 207, the witnesses had been put under the rule, and, after both the State and the defendant had closed, the court permitted the State to introduce rebutting witnesses who had not been put under the rule, and an exception was saved to this ruling. It was not shown whether these witnesses had heard the testimony of the other witnesses or not, but the court said: "If they had, the court had the discretion to admit them, and this went to their credibility, and not to their competency."

In 14 Encyclopedia of Evidence, chapter "Witnesses," page 598, it is said: "The better rule seems to be that a witness is not disqualified from testifying by reason only of his having disobeyed an order of exclusion, that his testimony ought not to be rejected and the party who called him deprived of his testimony where such party is himself without fault; but that such violation should only affect the witness' credibility, or subject him to punishment for contempt."

In the case of *Smith* v. *State,* 4 Lea (Tenn.) 428, the syllabus reads as follows: "In a criminal case involving the life of the prisoner, a witness whose testimony has only been discovered a few moments before he is put on the stand, ought not to be excluded merely upon the ground that the defendant had joined the State in requiring that the witnesses be put under rule, where the testimony of the witness is material to the defense."

In the case of *Davis* v. *Byrd,* 94 Ind. 525, it is said: "We hold the true rule to be this: Where a party is without fault, and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility. The modern authorities are overwhelmingly in favor of this doctrine. Mr. Bishop says: 'On the other hand, if the party was without fault, the judge had no right to punish his innocence by depriving him of his evidence, and ruin him at the will of a witness. The testimony should be admitted, subject to observation to the jury. Such is the law in principle. * * * Other judges, less mindful of these reasons, appear to deem it within their discretion in all cases of disobedience to the order to reject the witness.' 1 Bishop Crim. Proc., §§ 1191, 1192. An English author gives this statement of the rule: 'But it seems to be now settled, that the judge has no right to reject the witness on this ground, however much his willful disobedience of the order may lessen the value of his evidence.' 2 Taylor, Ev. 1210. The same doctrine is found in 2 Phillips, Ev. (5th Am. ed.) 744." Among the numerous cases cited by the court as sustaining the rule announced is our own case of *Pleasant* v. *State, supra.*

In the case of *Hubbard* v. *Hubbard,* 7 Ore. 42, a syllabus reads as follows: "It is error to reject the testimony of a witness on the ground that he was present in the court room, in violation of an order of the court excluding the witnesses during the trial, unless it appears that the party calling him was in complicity with him. The witness, however, may be punished for contempt for violation of such order."

A wider discretion is allowed the trial court in relaxing the rule, when it has been ordered, than is possessed in excluding testimony when the rule has been violated. This is recognized in the opinion of the Supreme Court of the United States in the case of *Holder* v. *U. S.,* 150 U. S. 91. That case was appealed from the Circuit Court of the United States for the Western District of Arkansas.

There the witnesses had been placed under the rule, and an uncle of the man the defendant was charged with having murdered had violated it. When this witness was called, it was then objected that he had heard the testimony of the other witnesses, in disregard of the direction of the court in that behalf, and the objection was overruled and the witness was allowed to testify. Speaking through Chief Justice Fuller, the court said: "If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." After citing numerous cases the court proceeded to say: "Clearly, the action of the court in admitting the testimony will not ordinarily be open to revision."

Here the statement of counsel that he had just come into possession of the information as to the young ladies who had not been called and sworn and put under the rule was unchallenged. This information was communicated to the court before the taking of the testimony was concluded. Appellant must have known that the officers would testify concerning what they saw and found when they raided the still, for Sykes had been previously tried upon that charge and acquitted, and, if it be said that the defendant should have been prepared to meet any issue relating to this occasion, and should have had the witnesses supporting his defense against that charge present and under the rule, it may be answered that the witness Stone testified to another and different violation of the law—an act permissible to be shown—yet one which might have occasioned surprise.

We conclude therefore that the court should have permitted the young ladies to be called as witnesses, and, for the error in refusing to permit this to be done, the judgment of the court below will be reversed, and the cause remanded for a new trial.

BOARD OF DIRECTORS OF GOULD SPECIAL SCHOOL DISTRICT *v.* HOLDTORFF.

Opinion delivered July 5, 1926.

1. SCHOOLS AND SCHOOL DISTRICTS—TRANSPORTATION OF CHILDREN.—Crawford & Moses' Dig., § 9060, empowering school districts to provide transportation for schoolchildren, does not authorize a contract for transportation of the children of one district to the schools of another district, or to use the school funds to pay tuition in the school of another district.
2. SCHOOLS AND SCHOOL DISTRICTS—RATIFICATION OF UNAUTHORIZED CONTRACT.—A contract of a school district for the transportation of pupils to the schools of another district and for payment of their tuition therein, being unauthorized under Crawford & Moses' Dig., § 9060, cannot be ratified by performance.

Appeal from Lincoln Chancery Court; *H. R. Lucas,* Chancellor; affirmed.

Mike Danaher and *Palmer Danaher,* for appellant.

W. B. Sorrels, for appellee.

SMITH, J. In this case appellee, who is a citizen and taxpayer residing in Gould Special School District and a patron of the public school of that district, brought suit against the directors of the school district to enjoin them from paying T. H. Free the sum of $50 per month, which the said school district had contracted to pay Free for transporting children residing in the Gould Special School District to a school in another district. There was a prayer also for the recovery of money already paid under the contract.

W. E. Massey was the only witness who testified in the case, and he was one of the directors of the Gould Special School District, and his testimony was to the following effect: At a meeting of the school board on May 16, 1923, a resolution was passed authorizing a contract to be made with T. H. Free, who was also a school director, to transport certain children residing in the Gould Special School District to the Grady School District. The resolution recited that Free's children were sufficiently advanced to study music and expression, and that these subjects were not taught in the Gould Special

School District. Out of this allowance of $50 per month Free was to pay the tuition of his own children and that of any and all other children who might be transported to and attend the Grady school.

The contract was performed for that school year, and on May 5, 1924, by a second resolution of the board of directors, the contract was renewed for another year. The suit was brought to enjoin the payment of money under this contract and to recover what had been paid under both contracts.

Mr. Massey testified that Free resided in the western end of the Gould Special School District, and that neighborhood was eight miles from school, and that, for a number of years, a school had been taught in Free's neighborhood at a cost to the district of $75 per month for teacher's salary and an expense of from five to ten dollars per month for other purposes, and the contract with Free was regarded as advantageous to the school district because it enabled the district to close that school and to effect a saving of about $35 per month by so doing. The school at Gould was crowded, and, by sending the children in the Free neighborhood to Grady, the congested condition at the Gould school was relieved to that extent. The Free neighborhood was eight miles from Gould, and the same distance from Grady, and this distance was so great that the children in that neighborhood could not attend either school unless transportation were furnished. When the contract was first entered into there were seven or eight children transported under the contract, but this number had decreased until there were only four children of Mr. Free to be transported.

The court enjoined the further performance of the contract, and rendered judgment against Free for the sums paid under the contract, and this appeal is from that decree.

The case of *Hendrix* v. *Morris,* 127 Ark. 222, 191 S. W. 949, was a suit by a taxpayer in the England Special School District to enjoin the payment of the operating expenses of an automobile to carry schoolchildren to the

school. We there reviewed act 116 of the Public Acts of 1911, page 81, § 15 of which provides "that the board of directors shall have power to provide such transportation for the pupils of the district as the board may deem advisable, and may purchase, rent or hire conveyances for this purpose, or the board of directors may enter into contracts with others for transportation service," etc., and that "the cost of this transportation shall be paid out of the school funds to the credit of the consolidated school district."

The England Special School District was not a consolidated school district, and it was held, for that reason, that the provisions of the statute quoted did not apply, and, inasmuch as there was no statutory authority for transporting the children to school at the expense of the school district, the contract to that effect was enjoined.

In reaching that conclusion it was said: "Cases on this subject are collected in a note to the case of *Shanklin* v. *Boyd,* 38 L. R. A. (N. S.) 710. In the case cited the Supreme Court of Kentucky held that a vote of the tax 'for local purposes' did not authorize the school directors, who were operating under a school law not materially different from our own, as far as the powers of the directors are concerned, to expend money for the purpose of conveying children to the schools of the district. The court expressly stated that it did not hold the Legislature might not provide for the levying of a tax for this purpose, but that it did hold that the revenues could not be so employed in the absence of a statute authorizing it. We think the reasoning of that case is applicable to the facts of this. The Legislature has enumerated the purposes for which the revenues may be spent, and, as no authority is given to expend money in the transportation of children, we must hold that no such authority exists."

After the opinion in that case was rendered, the General Assembly, at its regular 1919 session, passed an act entitled, "An act to authorize special, consolidated, and common school districts to expend public school revenues for transportation facilities, and for other purposes."

Section 1 of this act (which appears as § 9060, C. & M. Digest) reads as follows: "The board of directors of all special school districts in cities and towns, in all consolidated districts, in all common districts, and in all rural special, or single school districts, heretofore created or which may be hereafter created, be and they are authorized and empowered to purchase, or otherwise provide when desired, means for transporting pupils to and from school, and to this end they may hire or purchase such school wagons, or busses, or other means of transportation, and hire persons to operate them, or make such other arrangements as may be deemed necessary for carrying out the purposes of this act; and said board are empowered to buy, lease or build teacherages or homes and to select suitable sites for same for the use of the teachers in the regular employ of the district, in such way and under such regulations as they may deem proper, and to pay for all such property or services out of any funds that may accrue to the district."

By this act the power was conferred on all school districts—which, prior thereto, only consolidated districts possessed—"to purchase, or otherwise provide when desired, means for transporting pupils to and from school," and to that end conferred power on the directors to hire or purchase school wagons, or busses or other means of transportation, and to hire persons to operate them, or to make such other arrangements as may be deemed necessary to carry out the purposes of the act.

But it is quite obvious that the legislative purpose was to provide means for the transportation of the children of any particular district to the schools of that district. The act says nothing about transporting the children of one district to the schools of another district, nor is any authority conferred to use the school funds to pay tuition in the schools of another district.

No authority was conferred by the act of 1919 to make such a contract as was made with Free, nor does such authority otherwise exist, and, as the directors were without authority to make the contract, it has not been

ratified by its performance. *First National Bank of Waldron* v. *Whisenhunt*, 94 Ark. 583, 127 S. W. 968.

The court below was correct therefore in enjoining the further performance of the contract and in rendering judgment for the recovery of the money paid, and the decree to that effect is affirmed.

SPOHN v. STATE.

Opinion delivered July 12, 1926.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to sustain a conviction of an assault with intent to kill.
2. CRIMINAL LAW—IMPROPER TESTIMONY—WITHDRAWAL.—The prosecuting attorney's disclaimer of intent to elicit a statement from a witness, made by him without being asked, was in effect a withdrawal thereof.
3. CRIMINAL LAW—MOTION TO STRIKE TESTIMONY.—A motion to "strike all this testimony, the defendant having objected and the court not having ruled," *held* insufficient to identify the testimony objected to.
4. HOMICIDE—EVIDENCE.—In a trial for assault with intent to kill, the record of divorce proceedings between defendant's wife and the prosecuting witness *held* inadmissible.

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

Williams & Williams, for appellant.

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

McCULLOCH, C. J. Appellant was convicted of the crime of assault with intent to kill, committed upon the person of Henry Birks. Appellant admitted that he shot Birks with a gun and inflicted a severe wound upon the latter, but he claims that he acted in necessary self-defense. The testimony was conflicting, but was legally sufficient to sustain the verdict finding appellant guilty.

Appellant is the husband of Birks' divorced wife, and the shooting occurred at appellant's home in the city of Siloam Springs. There were two children of the

marriage between Birks and his former wife, and, after the divorce, these children remained in the possession of Birks a portion of the time, and were living with Birks at the time the shooting occurred. The children had been living with appellant's wife for some time prior to the shooting, and, on the morning that the shooting occurred, she and Birks met away from appellant's home and had a discussion about the amount Birks was to pay her for boarding the children. After some discussion, they went back to appellant's home to procure an article of clothing (shirt) of one of the children, and, while Birks was out in front of the house, the shooting occurred. Birks testified that, when he and his former wife reached the house of appellant, the woman went into the house to get the shirt, and brought it out and gave it to him, and that, just as he was rolling it up into a package and putting it into his pocket, appellant came out of the house with a shotgun and, without warning, fired upon him.

The contention of appellant is that Birks, when he came up to the house, made threats against him, and finally attacked him with a pocket-knife, and that he fired the shot in self-defense.

Error of the court is assigned in admitting incompetent testimony. It is contended that the court erroneously permitted Birks and other witnesses to testify concerning improper conduct between appellant and his wife before her divorce from Birks, and that they were permitted to testify concerning improper conduct after the divorce from Birks and before the marriage with appellant. The record shows that Birks testified, without objection from appellant, concerning the latter's conduct with the woman prior to the divorce and between the time of divorce and her intermarriage with appellant. Birks testified that appellant stayed around his house a great deal of the time while he and the woman were living together as husband and wife, and that appellant and the woman went off to Missouri and lived together prior to her divorce from the witness. There

was no objection made to this testimony—the only objection being made was to the statement of the witness concerning a conversation with the woman's father, Duncan. The statement came from the witness without a question being asked concerning the matter, and the prosecuting attorney disclaimed any intention to draw out this statement from the witness. There was, in effect, a withdrawal of that statement.

At the conclusion of the cross-examination of appellant, his attorneys interposed an objection to certain questions asked on cross-examination, and, according to the recitals of the record, moved the court to "strike all this testimony, the defendant having objected and the court not having ruled." The particular testimony referred to in the motion was not specified, and this was not a sufficient identification of the testimony referred to in the motion for a new trial.

Error of the court is also assigned in refusing to permit appellant to introduce in evidence the record of the divorce proceedings between appellant's wife and Birks. We are unable to discover any theory upon which this testimony would have been competent or relevant. The witnesses referred to the procurement of the divorce by appellant's wife from Birks, but the record of the divorce proceedings was purely collateral, and the contents threw no light on the question of appellant's guilt or innocence.

These are the only assignments of error, and our conclusion is that they are unfounded.

Judgment affirmed.

PEOPLE'S SAVINGS BANK & TRUST COMPANY v. HOWSON.

Opinion delivered July 12, 1926.

1. APPEAL AND ERROR—ACCEPTANCE OF INCONSISTENT BENEFITS BY APPELLANT.—By causing a sale of mortgaged land under foreclosure decree and purchasing it, the mortgagee did not waive his right of appeal from that part of the decree which held that the wife who signed the mortgage note with her husband was not personally liable.
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—The Supreme Court is bound by the chancellor's findings of fact unless they are clearly against the preponderance of the evidence.
3. HUSBAND AND WIFE—FRAUD AND MISREPRESENTATION—EVIDENCE.—Evidence *held* to support finding that a mortgagee was not guilty of fraud or misrepresentation inducing a wife to sign her husband's note and mortgage.
4. MORTGAGORS—MISTAKE IN SIGNING.—One who signed her husband's note and mortgage, without fraud or misrepresentation by the mortgagee, will not be relieved from personal liability because she thought she was merely releasing her dower in the mortgaged land.

Appeal from Jefferson Chancery Court; *H. R. Lucas,* Chancellor; reversed.

Bridges & McGaughey, for appellant.

R. W. Wilson and *Danaher & Danaher,* for appellee.

McCULLOCH, C. J. Appellee is a married woman, and her husband, L. G. Howson, was the owner of a farm in Jefferson County, and mortgaged the same to appellant to secure a note in the sum of $20,000, jointly executed by himself and appellee. The mortgage contained a recital that "the said L. G. Howson is justly indebted to the People's Savings Bank & Trust Company, evidenced by his promissory note of even date herewith." The mortgage also contained a recital that it was to secure additional advances in the sum of $5,000, to be evidenced by notes, but later, when the advances were made, two notes, one for $3,000 and the other for $2,000, were signed by L. G. Howson alone. This mortgage was executed subject to a prior one held by the Maxwell Investment Company. This action was insti-

tuted to foreclose the mortgages on the land, default having been made in the payment of the interest, which, under the acceleration clause contained in the mortgage, made the principal and interest both due and payable, and appellant in its complaint prayed for a personal decree against both of the defendants, L. G. Howson and the appellee. L. G. Howson made no defense, but appellee answered, alleging that she signed the note under a previous arrangement with appellant that she would not be bound for the debt and would sign only for the purpose of relinquishing her dower in the land, and that she was misled by the statements of appellant's agent, which induced her to sign the note under the belief that she was merely relinquishing her right of dower. A decree by default was rendered against L. G. Howson for the foreclosure of the mortgage, and the court heard the cause upon the issue between appellant and appellee as to her personal liability on the note, and rendered a decree in favor of appellee.

Since the transcript was lodged here, counsel for appellee have filed a motion to dismiss the appeal on the ground that appellant waived its right of appeal from the decree in favor of appellee by causing a sale to be made by the commissioner under the foreclosure decree and purchasing the land at the sale. The contention is that this constituted an acceptance of benefits under the decree and waived the right to prosecute the appeal. That question, however, is decided against the contention of appellee in the recent case of *McCown* v. *Nicks, ante* p. 260.

The cause was heard on oral testimony adduced before the court, and in the decree the court recited a finding that appellee signed the note, and that "her signature thereon was not procured by any fraudulent representations on the part of the People's Savings Bank & Trust Company or its officers or agents, or through any mistake on behalf of the People's Savings Bank & Trust Company, its officers or agents, and that defendant, Charlie May Howson, signed said note believing that it was necessary to do so in order to release her dower

rights in the land conveyed in the deed of trust executed by L. G. Howson and herself on that date, and believing that she would not be individually liable thereon; that there was no meeting of the minds of the parties at the time of the entering into the purported contract evidenced by said note."

It is undisputed that appellee signed the mortgage and the note in the suit, and that she was aware at the time that she signed the note as well as the mortgage. There is, however, a conflict in the testimony as to other features of the transaction. L. G. Howson testified that, in prior transactions with appellant as a banking institution, his wife had signed his notes with him for borrowed money, and that in most instances there were no other securities given, but he stated, in substance, that, when he negotiated with Mr. Hightower, appellant's agent, for borrowing this money, he declined to have his wife sign the note, and made an arrangement with Hightower that they would make the loan on the sole security of a mortgage to be executed on his land. Appellee testified that she had declined signing any more notes for her husband, and was informed by him, before they went to the bank to sign up the papers, that she was not to make herself liable, but was merely to sign the mortgage for the purpose of relinquishing her dower in the mortgaged land. Hightower testified that he made no arrangement to lend the money on the land as security without appellee signing the note as she had done theretofore, but that, on the contrary, the board of directors of appellant bank had required him to exact as security for the loan a mortgage on the land and the signature of appellee. This was also proved by other officers of the bank. There is therefore a sharp conflict between the testimony of L. G. Howson and of Hightower with respect to the previous arrangements for the loan. After the loan had been arranged for, it is undisputed that appellee and her husband together went to the bank to sign the papers, and there is practically no conflict as to what occurred there. Mr. Hightower was handling the

matter for appellant bank, and had the papers ready for execution when appellee and her husband went in. It appears that she stood on the outside while her husband went in and signed the note and the mortgage, without anything being said. The husband then walked to one side, and appellee either went up to the desk, or the papers were handed to her at the window, and she signed both the note and the mortgage. She testified as to that herself, and said she knew at the time that she was signing the note. She testified that nothing was said between her and Hightower at the time the papers were signed. Hightower testified that, when the papers were handed to appellee to sign, she manifested some hesitation, and he said to her, "Go ahead; Garrett (referring to her husband) will come out all right this year." Appellee did not testify with reference to this remark, but, on the contrary, said that nothing was said by Hightower to induce her to sign the note.

Appellant objected to the testimony of L. G. Howson on account of his being the husband of appellee, but the court admitted the testimony as competent. We find it unnecessary to determine whether or not the husband's testimony was competent on the ground that he was acting as appellee's agent. We are disposing of the appeal on grounds which render a decision of that question immaterial.

There is an express finding by the chancery court that none of appellant's agents or officers were guilty of any fraud or misrepresentation or that appellant did anything to mislead appellee or to induce her to sign the note upon an erroneous impression as to its legal effect. We are bound by that finding, unless it is against the preponderance of the evidence, and, upon careful consideration of the evidence, we are convinced that the court's finding was not contrary to the preponderance of the evidence. There is not the slightest suggestion of fraud or misrepresentation of facts on the part of appellant's agents found anywhere in the testimony of appellee herself. If we treat the testimony of L. G. Howson as com-

petent, it is in direct conflict with that of Hightower, who is corroborated by the testimony of the president of the bank, who related conversations with L. G. Howson long afterwards in regard to the payment of the note, in which he failed to mention the fact that his wife was not liable, and this under circumstances when it would seem probable that he would have mentioned that fact if he was laboring under the impression that his wife was not responsible.

Counsel for appellee insist that the recitals of the mortgage itself tend to show that it was not intended for appellee to sign the note, for the recital of the mortgage was that it was to secure a note executed by L. G. Howson. Now, this circumstance would be of some probative force if there were a dispute as to whether or not appellee signed the note, but it is undisputed that she did sign the note, and did so knowingly. She does not contend that she was misled by any recital in the mortgage or by any statement or remark made by Hightower or any other agent of appellant. The court found that there was no mistake on the part of the agents of the bank as to the form the transaction was to take or the intention in procuring the note of appellee as well as that of her husband, and the fact that there is a conflicting recital in the mortgage to the effect that the secured note was to be that of L. G. Howson alone is unimportant.

Another circumstance urged by appellee's counsel is that appellee was not called on to sign the notes subsequently executed for the additional advances. This is explained by witnesses for the bank, who testified to the effect that those were short-time notes, to be paid out of the crop for that year, and it was not considered important enough to insist upon appellee signing the notes.

Our conclusion is, as before stated, that the finding of the chancellor exonerating the agents of appellant from all of the charges of fraud and misrepresentation concerning the effect of the mortgage is sustained by the evidence. That being true, we think that the court erred, notwithstanding this finding, in rendering a decree

in favor appellee on the ground that she was mistaken as to the legal effect of the note. Ignorance on the part of appellee as to the effect of the note affords no ground for relieving her from liability. There was no mutual mistake of the parties—none contended for—and the court expressly found that there was no mutual mistake. It is a principle of almost universal application that a mistake of one of the parties to a contract concerning its legal effect will not, in the absence of fraud or misrepresentation, afford grounds for relief against performance of the contract. *Rector* v. *Collins,* 46 Ark. 167; *Maledon* v. *Leflore,* 62 Ark. 387, 35 S. W. 1102; *Colonial & U. S. Mortgage Co.* v. *Jeter,* 71 Ark. 185, 71 S. W. 945; *Hubbert* v. *Fagan,* 99 Ark. 480, 138 S. W. 1001. In *Colonial & U. S. Mortgage Co.* v. *Jeter, supra,* this court quoted with approval the following from the decision of the Supreme Court of the United States in *Upton* v. *Tribilcock,* 91 U. S. 50: "It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission."

In the absence of fraud or misrepresentation, we must follow the settled principles and hold that there is no relief merely because there was a misconception in the mind of one of the parties as to the legal effect of the contract.

The decree is therefore reversed, and the cause remanded with directions to render a decree against appellee in favor of appellant for the amount of the note and interest, after crediting the net proceeds of the sale of the land under the foreclosure.

REEVES v. WILLIAMS.

Opinion delivered July 12, 1926.

BILLS AND NOTES—INDORSEMENT IN BLANK—EVIDENCE.—The indorser in blank of a negotiable instrument may show by parol evidence that the indorsement was merely to pass the title, and not guaranty of payment, especially where the indorsement was ambiguous on its face.

Appeal from Hot Spring Circuit Court; *Jabez M. Smith,* Special Judge; affirmed.

H. B. Means, for appellant.

John L. McClellan, for appellee.

McCULLOCH, C. J. Appellant instituted this action against appellee before a justice of the peace in Hot Spring County on four promissory notes, each for the sum of fifty dollars, it being alleged that appellee is liable as an indorser and guarantor. Each of the notes was executed by J. C. Owens to appellee, and by the latter indorsed in the following words: "Transferred on February 22 to second party to said T. W. Reeves. Transfer attached to instrument. (Signed) By F. M. Williams." It is alleged in the complaint that demand had been made upon Owens for payment and that payment had been refused. Appellee answered, alleging that the notes in suit were secured by a chattel mortgage, executed by Owens to him; that he had sold the notes and mortgage to appellant, and that the assignment was made upon express agreement with appellant that it was solely for the purpose of passing title and without liability on the part of appellee as indorser.

On the trial of the cause on appeal to the circuit court, appellant testified concerning the purchase of the notes from appellee and the assignment of them, and denied that there was any agreement restricting the liability of appellee under his indorsement. Appellant also testified that he knew nothing about a chattel mortgage having been executed to secure the notes, and that it had never been delivered to him.

Appellee testified that he made the indorsements on the notes and also assigned the mortgage to appellee by

indorsement thereon, and that this was done with the express understanding with appellant that he (appellee) had nothing more to do with the notes or mortgage, and that the indorsements were made merely to pass the title. The court submitted that issue to the jury, and the verdict was in favor of appellee. Appellant asked for a peremptory instruction, which the court refused, and the sole question presented on this appeal is whether the court erred in admitting appellee's testimony about the oral agreement between him and appellant, and in giving the instruction submitting the issue to the jury.

The facts of the case seem to bring it within the decisions of this court in *First National Bank* v. *Reiman,* 93 Ark. 376, 125 S. W. 443, and *Ellis* v. *First National Bank of Fordyce,* 163 Ark. 471, 260 S. W. 714, holding that it is competent for an indorser in blank of commercial paper to show that it was done merely to pass the title to the indorsee and not as a guaranty of payment. In addition to that, the indorsement in this instance was an ambiguous one, so as to let in proof of the actual intention of the parties. The indorsement is ambiguous on its face, and refers to the indorsement of another instrument which does not appear in the record. This is explained in his testimony to the effect that there was a chattel mortgage which he indorsed so as to pass the security to appellant.

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

NELSON v. HALL (1).

DOVER v. BICKLE (2).

1. PARDON—REQUISITES.—Under Acts 1903, p. 270, § 2 (Crawford & Moses' Dig., §§ 3370-4), regulating the granting of pardons, a pardon granted without proof of publication of application being filed, and without recital that they were granted without application by an attorney or paid representative of the recipient of the pardon, *held* void.
2. PARDON—REFORMATION.—A pardon may not be reformed, both because it is a voluntary instrument and because it is executed in performance of a statutory power.
3. REFORMATION OF INSTRUMENTS—VOLUNTARY INSTRUMENT—PARDON.—The merits of the applicant are not a consideration justifying the reformation of a defective pardon, since a pardon is an act of grace on the part of the Governor.
4. REFORMATION OF INSTRUMENTS—EXERCISE OF STATUTORY POWER.—An instrument imperfectly executed in performance of a statutory power cannot be reformed, where the element of a contract is lacking.
5. HABEAS CORPUS—INVALIDITY OF PARDON.—The invalidity of a pardon may be raised by habeas corpus proceedings wherein the pardonee asserts immunity from the judgment of conviction.
6. PARDON—EFFECT OF REPRIEVE.—A convicted felon who has secured a reprieve is not exempt from arrest on the ground that the period of sentence had expired while he was out of the penitentiary, as a reprieve merely suspends the sentence.

(1.) Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor. (2). Appeal from Polk Chancery Court; *C. E. Johnson,* Chancellor; No. 1 reversed; No. 2 affirmed.

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

Gaughan & Sifford, for appellee Hall.

Norwood & Alley, for appellee Dover.

MCCULLOCH, C. J. M. J. Dover was convicted of felony in the circuit court of Polk County, and the judgment of conviction was affirmed on appeal to this court. 165 Ark. 496, 265 S. W. 76. Before he began serving his term in the penitentiary under the affirmed judgment of conviction, the Governor issued a suspension, or reprieve,

for a period of three months. Two other such suspensions were issued by the Governor, which extended beyond October 29, 1925, and on that day S. B. McCall, president of the Senate, who was acting as Governor in the absence of the chief executive, issued a full and free pardon to Dover. On the return of the Governor to the State he ordered the rearrest of Dover, which was accomplished by the sheriff of Polk County, and Dover instituted an action in the chancery court of that county against the sheriff, praying for a writ of habeas corpus to the end that he might be released from custody, and the prayer of the complaint was that the instrument of writing purporting to be a full and free pardon issued to him be amended so as to incorporate a recital that the pardon "was granted by the Governor without application therefor being made to him by any attorney or paid representative of the person pardoned." On the hearing of the cause the chancery court dismissed the complaint for want of equity, and an appeal has been duly prosecuted to this court.

W. H. Hall was convicted of felony in the Pulaski Circuit Court, and, on appeal to this court, the judgment of conviction was affirmed. 161 Ark. 453, 257 S. W. 61. He began serving his term in the penitentiary under the affirmed judgment, and continued to do so until October 28, 1925, when the President of the Senate, as acting Governor, issued to him a full and free pardon. The Governor, on his return to the State, ordered the rearrest of Hall, which was done, and the latter instituted an action in the chancery court of Union County to reform the pardon issued to him by the insertion of the words quoted above, as in the Dover case; and there was also a prayer in the complaint that the sheriff of Union County and other officers of the State be enjoined from arresting Hall for the enforcement of the original judgment of conviction. On the hearing of the cause the court granted all of the relief prayed for in Hall's complaint, and an appeal has been duly prosecuted to this court.

The two cases stand in the same attitude, and may therefore be disposed of in one opinion.

In the pardons granted to each of the parties the recital quoted above was omitted, and in each case the prayer of the complaint was that the instrument be reformed so as to incorporate the same, the allegation in each complaint being that this recital was omitted by mistake. In each case it was proved and conceded that there was no publication of notice of the application for pardon, as required by § 2 of the act of 1903 (p. 270), Crawford & Moses' Digest, § 3370. In each case it was proved that the acting Governor issued the pardon without solicitation or application made by an attorney or paid representative of the pardonee. In Hall's case he introduced as a witness Mr. McCall, President of the Senate, who testified that, in issuing the pardon, he followed the printed form which had always been used by former Governors; that he was not aware of the legal necessity for inserting the recital quoted above, but would have incorporated the same if his attention had been called to such necessity. In Dover's case he asked for a continuance in order to procure the attendance of Mr. McCall as a witness to prove the same facts which had been proved by that witness in the Hall case. If the testimony of McCall was material, the pardonee was entitled to procure his attendance as a witness. Therefore the two cases, as we have already said, stand before us in the same attitude and with similar questions presented to us for determination.

Section 4 of the act of 1903, *supra* (Crawford & Moses' Digest, § 3373), provides that the "Governor, acting upon his own motion, or being prompted thereto by the result of investigation made at his instance, shall have the right to grant a pardon in any case without the publication provided for herein; but all such pardons so granted by the Governor shall state on the face of the certificate thereof that the same was granted by the Governor without application therefor being made to him by an attorney or paid representative of the person

pardoned." It was decided by this court in the recent case of *Horton* v. *Gillespie,* 170 Ark. 107, 279 S. W. 1020, that all of the provisions of the act of 1903, *supra,* are mandatory, and that a pardon issued by the chief executive without proof of publication of the notice of application having been filed, or unless the pardon contains the recitals sought to be incorporated in the instruments presented in these cases, is void. It was also held in that case that the question of validity or invalidity of the pardon on account of noncompliance with the statute "can be raised in a proceeding by habeas corpus where the pardonee asserts his immunity from the consequence of the judgment from which the pardon attempts to absolve him." It is thus seen that the pardons issued to Dover and to Hall come squarely within the decision of this court in *Horton* v. *Gillespie,* and that, as they now stand, they are each void, and the only question left undecided with respect to these pardons is whether or not they can be reformed by decree of a court of chancery.

It seems clear that, in the application of settled principles of equity, there can be no reformation of a pardon. This is true for two reasons: There can be no reformation of a voluntary instrument executed without consideration, and there can be no reformation of the imperfect execution of a statutory power. Each of those principles has been clearly recognized in the decisions of this court. We have often held that a voluntary conveyance, executed as a mere gratuity and lacking in the elements of a contract, cannot be reformed. *Smith* v. *Smith,* 80 Ark. 458, 97 S. W. 439; *Johnson* v. *Austin,* 86 Ark. 446, 111 S. W. 455; *Jackson* v. *Wolfe,* 127 Ark. 54, 191 S. W. 938; *Peters* v. *Priest,* 134 Ark. 161, 203 S. W. 1042. It is contended, however, by learned counsel that a pardon is not a mere gratuity, but that it is, or should be, an instrument founded upon a lawful and sufficient consideration—namely, by the merits of the applicant for pardon. In other words, it is contended that, if the applicant is entitled to a pardon according to the circumstances of his particular case, his merits in this regard form a

sufficient consideration for the act of clemency on the part of the executive, and that the pardon is founded upon a consideration. We cannot agree with counsel in this contention. A pardon by the sovereign from the effects of conviction of crime has always been regarded as purely an act of grace. Chief Justice Marshall, in the case of *United States* v. *Wilson*, 7 Pet. 160, defined a pardon as "an act of grace proceeding from the power intrusted with the execution of the law." This is the substance of every definition given of the exercise of the pardoning power. The merits of the applicant do not in any sense afford a consideration to justify a reformation of the instrument to cure defects, nor do the circumstances of a particular case have the effect of introducing the element of contract into the execution of the instrument, but those circumstances merely appeal to the executive in determining whether or not clemency should be extended. After all, and regardless of the reasons which appeal to the executive, his act in extending clemency is merely one of grace—a gratuity—a favor which may be arbitrarily extended or withheld.

This court has also decided that a court of equity will not lend its aid in the reformation of an instrument imperfectly executed in the performance of a statutory power, the elements of contract being absent. *Tatum* v. *Croom*, 60 Ark. 487, 30 S. W. 885; *Landon* v. *Morris*, 75 Ark. 6, 86 S. W. 672; *Dunnivan* v. *Hughes*, 86 Ark. 443, 111 S. W. 271. The controlling principle, however, which runs through both of the grounds for refusing reformation under such circumstances is that there is no contractual relation between the parties, hence a court of equity will lend its aid to compel performance only of these things which the parties to the instrument have obligated themselves to do. In other words, it is the imperfect execution of a previous contract which may be reformed so as to require each party to do that which he is under contract to do.

Counsel for Hall insist with much earnestness that the attitude of the State in this proceeding constitutes

a collateral attack upon the pardon, that a pardon is impervious to such collateral attack, and that this point was not directly decided in the case of *Horton* v. *Gillespie, supra.* The contention is that the pardon is not void on its face, and that it can only be avoided by a direct attack in a suit by the State to cancel it. With all due deference to the argument of learned counsel, we must say that we disagree with him as to the effect of the decision in *Horton* v. *Gillespie,* for in that case it was directly decided that the question of the validity of the pardon could be raised on habeas corpus proceedings, and that the pardon under consideration in that case, which was in the same form as the one in the present case, was void.

In Dover's case learned counsel contend that the period of Dover's sentence has expired and that he cannot be rearrested, on the ground that the case falls within the doctrine announced by this court in the recent case of *Williams* v. *Brents, ante,* p. 367, 284 S. W. 56. The cases are not, however, at all similar. In the Brents case the various instruments executed by the chief executive and denominated as "furloughs" were, in effect, conditional commutations which covered the whole period of the judgment of conviction, and we decided that the commutation could not, after the expiration of the term of punishment, be revoked by the Governor on account of a breach of the conditions. In the present case there was no commutation of sentence, as the instruments were merely suspensions of execution of judgment—reprieves, in other words, as expressly authorized by the Constitution, which merely postponed the execution of sentence and did not operate as commutations.

Our conclusion in each of the cases is that the pardons cannot be reformed, and that the unexpired sentence of each of the pardonees can now be enforced.

The decree of the Polk Chancery Court in the Dover case is therefore affirmed, and the decree of the Union Chancery Court in the Hall case is reversed, and the complaint dismissed.

It is so ordered.

THOMPSON v. STEPHENSON.

Opinion delivered July 12, 1926.

HIGHWAYS—EFFECT OF FAILURE TO COMPLY WITH SPECIAL ACT.—Where the county judge failed to comply with the mandatory provision of Acts 1925, p. 89, suspending the operation of Acts 1915, p. 1400, by appointment of the commissioners within 20 days after the act became effective, the contemplated road district failed, and subsequent creation of a district covering the same territory under the general law was valid.

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

William West, for appellant.

W. W. Grubbs, for appellee.

WOOD, J. The General Assembly of 1925 duly enacted act No. 34, entitled "An act creating and establishing the Eudora-Kilbourne Road Improvement District of Chicot County, Arkansas, and for other purposes." The first section of the act, after declaring that the lands described therein are made an improvement district, provides, among other things, that the county judge of Chicot County, within twenty days after the act becomes effective, shall appoint three commissioners for the district. Section 4 of the act provides, in part, as follows: "The commissioners or directors of said road improvement district, within thirty days after they have qualified by making and filing the oath of office with the county clerk as herein provided, shall call an election of all owners of real property situated in said district hereinafter provided for in this section of this act. And said commissioners or directors shall not proceed with the construction of the improvement, and shall not issue any bonds to secure funds therefor, unless a majority in number and in value of the landowners in fee simple in said district, voting at said election, shall express by their ballots a desire that the construction of said improvement be proceeded with." The act contains the emergency clause, and took effect February 9, 1925.

The commissioners were not appointed by the county judge, as provided by § 1 of the act, and hence no election

was called as required by § 4. The territory embraced in the district created by act No. 34, *supra,* was afterwards organized into a district under act 338 of the Acts of 1915, commonly known as the Alexander Road Law. The organization of this district was in all things legal and regular. The terminus of the road provided for under the act of 1925 connects with the Arkansas-Louisiana highway a little over a quarter of a mile north of the point of intersection of the road provided for by the district created under the general law, and the road laid out by the special act of 1925 is approximately two miles longer than the road provided for under the general law. The road laid out under the general law is perfectly straight, while the road provided for by the special act has many abrupt, dangerous and unnecessary curves in it. The State Highway Department and the Federal Department of Roads have refused to grant aid in the construction of the road as laid out by special act No. 34, *supra.* But the State Highway Department has allotted to the road laid out under the general law fifty per cent. of its estimated cost.

This action was instituted by C. L. Thompson, a property owner in the district, hereafter called the appellant, against the commissioners of the district (hereafter called the appellees) created under the general law. In his complaint the appellant sets up the creation of the district under act No. 34 of the Acts of 1925, and alleges that the road district subsequently created under the general law is void because it embraces the same territory as that described in act No. 34, *supra.* He alleges that the appellees, unless restrained, will proceed to make the improvement contemplated by the creation of the district under the general law, and that they will issue bonds and let contracts to that end, which will constitute a cloud upon his title. He therefore prays that the appellees be restrained from making such improvement. The appellees answered, setting up in defense to the action substantially the above facts, and alleging that act No. 34, *supra,* had never been put in operation and never could

be. The cause was heard upon the above facts presented to the trial court under an agreed statement. The court entered a decree dismissing the appellant's complaint for want of equity, from which decree he duly prosecutes this appeal.

Act No. 34 of the acts of 1925 during the time, under its provision, that it could have been put in operation, was a suspension of the operation of the Alexander Road Law, act 338 of the Acts of 1915, as to the creation of an improvement district covering precisely the same territory and for the construction of a highway practically over the same territory as that embraced in act No. 34, *supra.* But when the county judge of Chicot County failed to perfect the organization of the improvement district created by act No. 34, *supra,* and no steps were inaugurated to complete the establishment of the district according to the requirements of the act, the act, under its own terms, was never made effectual. The agency designated by the Legislature, and the only agency that could put in motion the machinery by which act No. 34 could be made effectual, failed or refused to put such machinery in motion, and therefore the act was never put in operation, and the project contemplated by it has been abandoned. Unquestionably, the provisions of the act requiring the county court to act by the appointment of commissioners within twenty days, and requiring these commissioners to hold an election within thirty days after their appointment, were mandatory provisions. Not being complied with, the act necessarily fails, and the district contemplated by it was never in fact established.

The abandonment of this project leaves the creation and operation of the district under the general road law intact and in full force and effect. The decree of the chancery court so holding is correct, and it is therefore affirmed.

PAVING DISTRICTS NOS. 2 AND 3 OF BLYTHEVILLE v. BAKER.

Opinion delivered June 28, 1926.

1. MUNICIPAL CORPORATIONS—ASSESSMENT IN IMPROVEMENT DISTRICT—COLLATERAL ATTACK.—An action to restrain the enforcement of special assessments in improvement districts after expiration of 30 days from the passage and publication of an ordinance is a collateral attack on the assessment, which can be set aside only when obviously and demonstrably erroneous on its face.
2. MUNICIPAL CORPORATIONS—EFFECT OF INCLUDING LANDS IN IMPROVEMENT DISTRICT.—The inclusion of lands in a municipal improvement district by a city council in organizing the district raises no presumption that the lands included are benefited, as the council has no authority to determine the benefits, that being the function of the board of assessors.
3. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—AUTHORITY OF ASSESSORS.—Crawford & Moses' Dig., § 5658, authorizing the board of assessors in an improvement district to assess the value of the benefit to accrue to each tract of land in the district, carries by implication the authority to determine whether any benefits will accrue to any particular tract, and, if so, to what extent.
4. MUNICIPAL CORPORATIONS — IMPROVEMENT DISTRICT — OMISSIONS FROM ASSESSMENT.—The fact that property within a paving improvement district is omitted from the assessment does not, regardless of the situation of the property or its extent in comparison with the whole area embraced in the district, demonstrate a mistake rendering the assessment void.
5. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—OMISSIONS FROM ASSESSMENT.—The fact that maps of a paving improvement district show that lots similarly situated to those assessed are omitted from the assessment list does not necessarily demonstrate erroneous omissions invalidating the assessment, especially where it appears that a portion of the proposed improvement contiguous to the omitted lands was made by another improvement district.
6. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—OMISSIONS OF LOTS—PRESUMPTION.—The omission of lots within an improvement district from the assessment list raises the presumption that the omitted lots were found not to be benefited.
7. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—VALIDITY.—Failure of a municipal improvement district to construct part of the improvement in territory overlapping a rural district does not affect the validity of the district, where the construction of the improvement by the rural district benefited owners of the property in the district.

8. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—REVISION OF ASSESSMENTS.—Revision of the assessments in an improvement district is a statutory duty, under Crawford & Moses' Dig., § 5664, and not one which may be the subject of contract between the commissioners and owners of the property, and hence no claim can be made on a contract to reassess benefits.

Appeal from Mississippi Chancery Court, Chickasawba District; *J. M. Futrell,* Chancellor; reversed.

Frank C. Douglas and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Nelson & Crawford, for appellee.

McCULLOCH, C. J. This litigation involves the validity of the assessment of benefits in two street improvement districts in the city of Blytheville, and it also involves, to some extent, the validity of the organization of one of the districts. Both of the districts were organized under general statutes by ordinances of the city council in the year 1923. There was an assessment of benefits in each district, money was borrowed, bonds issued, and the several improvements were completed, with the exception of a portion of one of the streets, which will be referred to later in this opinion. Appellees are owners of property in each of the districts, and they instituted this action against the commissioners to restrain them from enforcing the special taxes. On a final hearing of the cause the chancery court decided that the assessments of benefits were void except as against the bondholders, and the court ordered a reassessment.

The principal attack on the validity of the assessments is that a large area in the district was entirely omitted from the assessment list—that no benefits were assessed against the lots and blocks in this area, and that this rendered the assessment on its face discriminatory and void. This action was brought long after the expiration of thirty days from the passage and publication of the ordinance levying the special taxes on the assessed benefits, hence it is a collateral attack on the validity of the assessments, and not a direct attack. In

that kind of an attack the court can only set aside the assessment list when it appears on its face to be obviously and demonstrably erroneous. *Board of Improvement* v. *Pollard*, 98 Ark. 543; *Gannaway* v. *Street Improvement District*, 164 Ark. 407.

It is contended that the inclusion of lands in a municipal improvement district by the city council in organizing the district raises a conclusive presumption that such lands are benefited to some extent, and that a failure of the assessors to estimate any benefit makes the assessment void on its face. Counsel rely upon the decision of this court in *Little Rock* v. *Katzenstein*, 52 Ark. 107, and later cases following it, where it was held that the action of a city council in including property in a district is "conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake." Counsel are mistaken in their estimate of the effect of those decisions, for the act of the city council in including property does not raise a conclusive presumption of actual benefits. It is merely conclusive of the validity of the action of the council in determining that the lands adjoin the district and may be benefited. The policy of our statute on this subject is to leave the question of benefits to an actual estimate or ascertainment by a board appointed for that purpose after the creation of a district. The city council is not authorized, under our statute, to determine the extent of the benefits, but it is authorized merely to create the district, and this necessarily implies the power to ascertain what property adjoins the district and may be benefited. The statute (Crawford & Moses' Digest, § 5658) provides that the board of assessors "shall assess the value of the benefit to accrue to each" of the units of real property in the district. The statute does provide for an actual estimate, not a theoretical one or one based upon the presumption arising from the inclusion of property in the district. The authority conferred by the statute upon the assessors to estimate the benefits necessarily carries by implication the authority to deter-

mine whether or not any benefits at all will accrue to a given unit of property, and, if so, to what extent. The fact that property is omitted from the assessment does not, regardless of the situation of the property or its extent in comparison with the whole area embraced in the district, demonstrate a mistake which renders the assessment void. It is not made to appear that there are any demonstrable errors in the assessment. It is not shown on the face of the assessment list that intervening property abutting on any portion of the improvement is omitted whilst other property farther removed is included in the assessment of benefits so as to bring the case within our decision in *Heinemann* v. *Sweatt,* 130 Ark. 70, and like cases.

It is true that the maps of the districts and the assessment lists show that lots or tracts similarly situated, apparently, to those assessed are omitted, but that does not necessarily demonstrate erroneous omissions. There may have been reasons, not apparent from a mere inspection of the lists and maps, why the omitted lots were not in fact benefited. This is a collateral attack on the validity of the assessments, and we can look only to the face of the papers to discover whether or not there is demonstrable error in the assessments. *House* v. *Road Improvement District,* 158 Ark. 357. One of the extensive areas omitted from the assessment list was property abutting on a portion of one of the improved streets where the improvement was constructed, not at the expense of this district, but by a certain rural improvement district, which extended into the city of Blytheville and overlapped the territory of these two districts. It appears from the record in this case that a portion of Chickasawba Street, which was embraced in the rural improvement district, was improved through that agency, and not at the cost of either of these improvement districts. The evidence shows that the Board of Improvement of District No. 2 permitted the rural improvement district, under special agreement, to improve that portion of Chickasawba

Street which was embraced in the rural district. The fact that that part of the improvement was not made by the municipal district involved in this litigation, but at the expense of another district, doubtless formed the basis of the judgment of the board of assessors in failing to assess the property abutting on or contiguous to that portion of Chickasawba Street. At least we cannot say that the omission of that property was obviously and demonstrably erroneous, so as to render the whole assessment list void.

Again, it is contended that the assessment is void because certain lots shown on the maps as being within the boundaries of the districts were entirely omitted from the assessment lists. Counsel rely on the decision of this court in *Capps* v. *Judsonia & Steprock Road Imp. Dist.,* 154 Ark. 46, but that case does not bear out the contention. That case was not one where property was omitted from the assessment list, but the point involved was whether or not the failure of the assessors to complete the assessment before the list was filed and notice thereof published rendered the assessment invalid. The statute creating this district (act No. 8, Extraordinary Session of 1920, § 7) requires only the assessed property to be listed, and the omission of lots from the list raises the presumption on collateral attack that the omitted property was found by the assessors not to be benefited. The omission therefore does not invalidate the assessment. Under the provisions of the statute, owners of property were given an opportunity to challenge the correctness of the assessments, but there were no timely protests, and it is too late now to attack the assessments except for errors demonstrable on the face of the lists and maps.

Counsel for appellees call our attention to act No 20, enacted at the extraordinary session of the General Assembly in 1923, providing that "no road improvement district within this State shall in any way affect the validity of any municipal improvement which was organized for the purpose of paving streets over which

any road improvement district may pass." Counsel argue that the effect of this statute is to withdraw the authority of a road improvement district over the territory embraced in a municipal district, and that the integrity of the municipal district is destroyed by a failure to proceed with that part of the improvement. Counsel rely on our decision in *Moore* v. *Improvement District,* 161 Ark. 323. That case involved a controversy between the owners of property and a municipal district in which the authority of the latter to construct the improvement which was previously embraced in the rural district was challenged. When the litigation arose, and when our decision was rendered, that particular part of the improvement had not been constructed by either of the two agencies, and the question involved in the case related to the authority of the improvement district to construct the improvement, and we held that the statute withdrew the authority of the rural district and authorized the municipal district to make the improvement. In the present case the question raised is whether or not the validity of the municipal district organization or the assessments thereunder are affected by a failure of the district to construct this part of the improvement. We think that the failure of the municipal district to make this part of the improvement does not affect its validity, for the construction of the improvement in accordance with the plans formed by the municipal district resulted in benefit to the owners of property in the district. We are not called on in this case to review any question of assessment of benefits in the rural district, assuming that all property adjoining the locality was included in the district and that benefits were assessed. This situation, however, confirms the correctness of our views, already expressed, that, the attack on the assessment being collateral, we can discover no demonstrable mistake, and the assessment must therefore stand.

The decree of the chancery court is also defended by counsel for appellees on the ground that there was a previous action instituted by appellees and other prop-

erty owners against the district, which was dismissed on the express agreement with the commissioners that the percentage of the annual installments of taxes should be lowered and that there should be a reassessment of benefits, which agreement was not carried out by the commissioners. The statute (Crawford & Moses' Digest, § 5664) provides for revision or readjustment of assessments by the commissioners of a district, but this is a statutory duty and not one which may be the subject of a contract between the commissioners and the owners of property. If the property owners are entitled to compel a revision or adjustment, it must be a right conferred by the statute, and not by contract entered into with the commissioners.

We have reached the conclusion that the chancery court erred in declaring the list of assessments to be void and ordering a new assessment, and the decree is therefore reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

ARKANSAS WESTERN RAILWAY COMPANY v. ROBSON.

Opinion delivered July 12, 1926.

1. CARRIERS—TRANSPORTATION OF LIVE STOCK—JURY QUESTIONS.—Issues, in an action against a carrier, as to the condition of cattle when received, as to their condition when delivered, as to whether this condition was caused by the carrier's negligence, and as to the market value of the cattle, were for the jury.
2. CARRIERS—CONCLUSIVENESS OF BILLS OF LADING.—Bills of lading are not conclusive of their recitals, because they evidence both a receipt of the articles and a contract for carriage, since, as receipts, they may be explained, and as contracts of carriage they are to be construed according to their terms.
3. EVIDENCE—BILL OF LADING—PAROL EVIDENCE TO EXPLAIN.—Notation on a bill of lading concerning the condition of cattle received for shipment may be explained by parol evidence, as they pertain to that part of the bill of lading which constitutes a receipt.
4. EVIDENCE—PAROL EVIDENCE OF FRAUD OR MISTAKE IN WRITING.—Evidence tending to prove that notations on bills of lading relat-

ing to the condition of cattle when received for shipment were placed thereon after the bills were signed *held* admissible as tending to show fraud or mistake in such notations.

5. CARRIERS—BILLS OF LADING—EFFECT OF SIGNING.—Where shippers were given opportunity to read bills of lading before signing them, they are bound by them, so far as they express the terms of the contract of shipment.

6. CARRIERS—NEGLIGENCE IN CARRIAGE OF LIVESTOCK—BURDEN OF PROOF.—Shippers who accompanied cattle had the burden to show that damage to the shipment was due to the railroad's negligence, where the bill of lading stipulated that they take care of the stock while being transported, and hence an instruction placing the burden on the carrier to show that damage was not caused by its negligence was erroneous.

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

Joseph R. Brown and *James B. McDonough,* for appellant.

A. F. Smith, for appellee.

WOOD, J. This is an action by the appellees against the appellant to recover the sum of $845, damages alleged to have accrued to the appellees by the alleged negligent handling of cattle which the appellees had delivered to, and which were accepted by, the appellant, for shipment from Waldron, Arkansas, to Nowata, Oklahoma. The appellees alleged in substance that, after accepting the cattle for shipment, the appellant disregarded its contract to ship the same in safety to their destination, "handling the same in a manner so rough and with such carelessness and negligence that 26 head thereof arrived at their destination dead;" that 18 head were steers of the value of $35 per head, that three head were bulls of the value of $30 per head, five were cows of the value of $25 per head, making a total valuation of $845, for which the appellees prayed judgment.

The appellant denied all the material allegations of the complaint, and set up as affirmative defenses that whatever injury was done to the cattle was due wholly to their poor and weak condition, of which the appellant's agents were not aware at the time the animals were

accepted for shipment; that the animals were shipped in violation of the quarantine laws and regulations of the United States and of the Interstate Commerce Act. The appellant also set up the contract of shipment providing that the carrier shall not be liable for damage to the animals as caused by the default of the shipper or owner or agent thereof, and shall not be liable where the owner has overloaded or crowded the animals for shipment, and alleged that the damage was caused solely by the default of the shipper in failing to care for the animals during and after shipment. The appellant attached to its answer a copy of the contract of shipment, and alleged that its agent was without knowledge that the quarantine regulations of the United States had been violated at the time he received the animals for shipment, and that such agent indorsed on the contract of shipment that the animals were poor and weak, and were received for shipment at the risk of the appellees. The appellant further alleged that the appellees failed to comply with the provisions of the contract requiring notice to be given the appellant of injury to the live stock.

After the testimony had been adduced by the respective parties, the appellant asked the court to instruct the jury to return a verdict in its favor, which the court refused, and this is the first ground of appellant's contention that the judgment should be reversed. Counsel for the appellant argue that the undisputed testimony shows that the cattle were not delivered and accepted by the appellant in good condition, and that the appellees wholly failed to show that the appellant was negligent in the handling of the cattle, and wholly failed to prove the amount of their damages. These were purely questions of fact, and it suffices to say that the testimony on these issues was sufficient to sustain the verdict.

Fleming, one of the appellees and owners, testified in substance that the cattle, when they arrived at Waldron for shipment, were good, thrifty cattle. None of them manifested any weakness in driving or dipping. They were poor, but they had been fed corn, clover hay and

oat hay and every kind of feed that would strengthen them.

G. W. Robson, another one of the appellees and owners, testified that the cattle were in good average condition, and well fed. They were as good as any cattle at that time of the year. None of them were any weaker or poorer than ordinary cattle. He did not observe anything at all in loading or shipping that would indicate that the cattle were weak. The witness went with the cattle. They were handled very well until they got to Sallisaw. He stated that it was the roughest train he ever rode on, and that he had shipped quite a few cattle in his life. He was asked what he meant by the train being handled roughly, and answered, "I suppose in jerking the engine." A railroad man came along where this witness was lying down in the caboose, and said, "If you don't want to get knocked into the wall, you had better get up from there." He was afraid that the witness might go through the wall if he didn't get up. When the cattle arrived at their destination, one car was in a very bad condition. Part of the cattle were killed, part of them bruised, and a few piled up over each other—some dead. They did not appear as though they had horned or injured each other. This witness was asked if the cattle had been moved in violation of the United States quarantine laws, and answered that he obtained permission from the supervisor of the quarantine regulations to move the cattle from Pope County to Scott County. If he had not obtained permission from the Federal authorities, he would not have moved the cattle. The cattle were certified out in a manner satisfactory to the railroad agent and also to the agent of the Government.

Other witnesses for the appellees testified that they saw the cattle when they were being driven through the country on the way to the station at Waldron, and that the cattle seemed to be in fair condition for the season. One witness stated that, taking them as a whole, they were a fair bunch of cattle. He didn't see any weak ones

in the bunch. He remembered seeing some nice ones. Another witness stated that he would have considered it a good bunch of cattle for the time of the year. None of them manifested any signs of weakness in driving them. They got to Waldron one day, were dipped the next, and were shipped the next day. The testimony of the appellees was to the effect that, at the time they signed the waybills, they were in a hurry, and didn't observe any notations on the waybills or bills of lading. They denied the testimony of the appellant's station agent as to the notations that the cattle were poor and weak being on the waybills at the time they signed the same. They stated that they had no knowledge of any notations. It could serve no useful purpose to set out in detail and discuss further the testimony of witnesses for the appellees.

The testimony of the appellant's station agent at Waldron was to the effect that he issued the bills of lading evidencing the shipment. These bills of lading are sometimes called live-stock contracts. These four bills of lading were signed by the appellees in witness' presence. He had placed certain notations on these bills of lading at the time they were signed by the appellees. He discussed the condition of the cattle before they were accepted, and he stated that one of the appellees told him that the cattle were poor and weak and some of them too weak to be shipped. Witness agreed to accept the cattle that were too weak to be shipped if they would place the same in one car. This was done, and witness placed on that car the notation, "10 cows, 6 steers, loaded under protest on account of being poor and weak." On the issue as to the value of the cattle, there was testimony on behalf of the appellees tending to prove that the steers and bulls were worth from thirty to thirty-six dollars per head and that the cows were worth twenty dollars per head at Nowata, Oklahoma.

1. The court did not err in refusing appellant's prayer for a directed verdict. As to whether or not the cattle, at the time they were received, were in good con-

dition, and as to whether or not they were delivered at their destination in a bad condition, and as to whether or not this condition was caused by the negligence of the appellant, as well as the issue as to the market value of the cattle, were all questions of fact which the appellees were entitled to have submitted to the jury. Bills of lading are not conclusive of their recitals, because they evidence both a receipt of the articles and a contract for carriage. As receipts, they are susceptible of explanation and may be contradicted. As contracts for carriage, they are to be construed according to their terms. The notations on these bills of lading were concerning the condition of the cattle when they were received for shipment, and pertained to that part of the bill of lading which constituted a receipt and not to that part constituting a contract for carriage. See *Prescott & Northern Ry Co.* v. *Davis,* 126 Ark. 366, 191 S. W. 210; *Little Rock & Fort Smith Ry. Co.* v. *Hall,* 32 Ark. 699. The testimony therefore as to the notations on the waybills and bills of lading as to the condition of the cattle was susceptible of explanation, and the parol testimony on that issue was permissible for that purpose. Furthermore, the testimony of the appellees tending to prove that the waybills were presented to them and required to be signed by them when they had no opportunity to examine the same, and that they had no knowledge of any notations being placed thereon, was sufficient to submit the issue to the jury as to whether these notations were on the waybills and bills of lading at the time same were signed by the appellees. This testimony was competent on the ground that, if these notations were placed on the waybills and bills of lading after they were signed by the appellees, such notations were a fraud on their rights, and they were not bound thereby, and it was relevant for them to prove the circumstances under which these written instruments were signed as tending to prove fraud or error in these notations. To be sure, if the circumstances were sufficient to warrant the conclusion that the appellees were given an

opportunity to read the bills of lading, then they would be bound by the written instruments so far as they expressed the terms of the contract of shipment. See *St. L. I. M. & S. Ry. Co.* v. *Weakley,* 50 Ark. 394, 8 S. W. 134; *Prescott & Northern Ry. Co.* v. *Davis, supra.*

2. Among other instructions, the court gave the following at the instance of the appellees: "You are further instructed that the burden is upon the defendant company to prove by a preponderance of the evidence that the cattle were killed by their own inherent vices, weakness and natural propensities to injure each other, and not upon account of the negligence or carelessness of the defendant company." The court erred in giving this instruction. In *St. Louis-San Francisco Ry. Co.* v. *Wells,* 81 Ark. 469, 99 Ark. 534, we held, quoting syllabus, "the rule that, where a shipper of live stock accompanies the car in which the stock is transported, and has charge thereof, there is no presumption of negligence against the carrier arising merely from the death of the animal, has not been altered by act of March 26, 1895, p. 64, requiring carriers to furnish shippers of live stock free transportation to and from the point of destination."

The bills of lading or live-stock contracts for shipment in this case contain, among other, the following provision: "The shipper, at his own risk and expense, shall load and unload the live stock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. In case any person shall accompany the live stock in charge of same, he shall take care of, feed and water the live stock while being transported, whether delayed in transit or otherwise," etc. Under the provisions of the bills of lading and the admission by the appellees that they accompanied these cattle in the shipment, the burden was upon the appellees to prove that the injury and damage sustained by the appellees resulted from the negligence of the appellant's servant. *St. L. I. M. & S. Ry. Co.* v. *Weakley, supra; St. L. I. M. & S. Ry. Co.* v. *Wells, supra.* The court erred there-

fore in granting appellees' prayer for instruction No. 7. It cannot be said that the uncontroverted testimony shows that the injury to the appellees' cattle and the resultant loss and damage was caused through the negligence of appellant's servant. This was an issue for the jury under the evidence, and should have been submitted under instructions which placed the burden upon the appellees to prove negligence, instead of upon the appellant to exonerate itself from the charge of negligence.

We find no other reversible error in the record, but, for the above, the judgment is reversed, and the cause is remanded for a new trial.

MEADORS v. STATE.

Opinion delivered July 12, 1926.

1. CORPORATIONS—PROOF OF EXISTENCE.—Where, in a larceny case, a corporation is alleged to be the owner of stolen property, proof of its *de facto* existence is sufficient.
2. CORPORATIONS.—Where a corporation is alleged to be the owner of stolen property, an employee's testimony that he knew it was a corporation was admissible to prove its corporate character, as the fact of corporate existence may be proved by reputation or by the oral testimony of a witness who has knowledge of the fact.
3. LARCENY—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to support a conviction of grand larceny.
4. CRIMINAL LAW—QUESTIONS FOR JURY.—The credibility of witnesses and the weight of their testimony are for the jury.
5. LARCENY—INSTRUCTION.—An instruction to find the defendant guilty if he "did unlawfully and feloniously steal, take and carry away," etc., was not defective in failing to add "with the intent to steal."
6. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Refusal of an instruction covered by one given was not error.
7. CRIMINAL LAW—INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE.—Refusal of an instruction on circumstantial evidence was not error where the State did not rely upon evidence of that character for conviction.

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

Roy Gean, for appellant.

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

WOOD, J. The appellant was indicted in the Sebastian Circuit Court in two counts for the crimes of burglary and grand larceny. He was tried on both counts, and convicted of the crime of grand larceny and sentenced to one year's imprisonment in the State Penitentiary. From that judgment he appeals. We will dispose of the assignments of error for reversal in the order in which they are presented by counsel for the appellant.

1. The second count of the indictment charged that the money alleged to have been stolen was the property of the Gibson Oil Company, a corporation. Leon Johnson testified that he was employed at the filling station which was operated by the Gibson Oil Company; that the Gibson Oil Company is a corporation; that the appellant took the money belonging to the Gibson Oil Company out of the cash drawer, where it was kept at the Speedway Filling Station in Fort Smith. Counsel for appellant contends that the above testimony was not competent to prove that the Gibson Oil Company is a corporation. In the case of *Brown* v. *State*, 108 Ark. 336, 339, 157 S. W. 934, we held, quoting from 3 Bishop's New Criminal Procedure, § 72, that "if a corporation is alleged as owner, only its *de facto* existence need be shown in evidence." See 7 R. C. L., p. 103, paragraph 79.

We have held in several cases that the existence of a corporation may be proved by general reputation. See *Fleener* v. *State*, 58 Ark. 98, 23 S. W. 1; *Pearrow* v. *State*, 146 Ark. 182, 225 S. W. 311; *Kelly* v. *Stearns Pub. & Novelty Co.*, 147 Ark. 383, 227 S. W. 609. These cases do not hold that the existence of a corporation may not be proved by oral testimony of a witness who has knowledge of the fact. Here the *de facto* existence of the corporation was proved by the testimony of Leon Johnson, to the effect that he knew that the Gibson

Oil Company was a corporation, and that it operated the filling station and owned the money which appellant took. In 3 Ency. of Evidence, p. 604, the rule is stated as follows: "In criminal prosecutions for offenses charged to have been committed upon the property of a corporation, the fact of corporate existence may be proved by reputation, or by the oral testimony of a witness who has knowledge of the fact." See also *Reid* v. *State,* 15 Ohio, 217; *Norton* v. *State,* 74 Ind. 337.

2. Counsel urge that the testimony was not sufficient to sustain the verdict. Leon Johnson, who was operating the filling station, testified in substance that, after opening the filling station about 6:40 or 6:45 A. M., he put the change in the money drawer, and had his back to the door when he opened same, looked around, and there was a fellow standing there. He came in and drew his gun, and witness realized what was up. He faced witness, and told him to put his hands up, and kept his mouth closed tight, and nodded to witness two or three times. He then said to witness, "Stand still," when witness discovered his gold tooth, his light eyelashes and blue eyes. These attracted witness' attention. The gold tooth was in his upper jaw on the right side of his mouth. He had a cap on, and it looked as if he had taken the stopper to an ink bottle and dotted it around under his eyes. Witness was in a position to see the person closely. A big bright light was hanging in the center of the station. The witness was then asked, "Is this the man here?" (indicating the defendant), and answered, "Yes sir." He was asked, "You are positive that he is the man?" and answered "I would be safe in saying positive—could not be mistaken."

Several witnesses for the appellant testified to the effect that the appellant was seen at certain places on Friday morning, which would have made it physically impossible for him to have been present and to have robbed the filling station operated by Leon Johnson in Fort Smith at 7 or 7:02 o'clock A. M., that morning, as testified to by Leon Johnson. The credibility of all these

witnesses and the weight of their testimony was for the jury. Certainly the testimony of the witness Johnson for the State was sufficient to justify the jury, if they credited his testimony, which they did, in returning a verdict of guilty against the appellant. This testimony proving the identification of the appellant was something more than mere suspicion or conjecture. It was the positive statement that Johnson recognized the appellant, and he stated the facts establishing the identification.

3. The court gave the following instruction: "The court further instructs the jury, if you believe from the evidence, beyond a reasonable doubt, that the defendant Bob Meadors, in the district, county and State aforesaid, $13.36 gold, silver or paper money, the property of the Gibson Oil Company, a corporation, unlawfully and feloniously did steal, take and carry away, then you should convict the defendant of grand larceny; otherwise you should acquit him on this charge." The appellant interposed a general objection to this instruction. Counsel insist that the instruction is inherently defective because it does not contain the phrase, "with the intent to steal," after the words "unlawfully and feloniously did steal, take and carry away." It will be observed that the court told the jury, in the above instruction, that it was necessary for them to find from the evidence, beyond a reasonable doubt, that the appellant did "unlawfully and feloniously steal, take and carry away," etc. It is wholly unnecessary, after the use of these words, for the court to have added the words "with the intent to steal." To have added them would have been useless redundancy, because, if the appellant "feloniously did steal, take and carry away" the money, he necessarily did so with the *animo furandi* essential to constitute larceny. See *Cox* v. *State*, 72 Ark. 544, 81 Ark. 1056.

4. The appellant prayed the court to instruct the jury as follows: "You are instructed that, while the burden of showing an alibi is on the defendant, but if, on the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was com-

mitted, he should be acquitted. The burden in the whole case is upon the State to prove, beyond a reasonable doubt, that the defendant was present and committed the offense as alleged in the indictment." The subject-matter of this instruction was fully covered by instruction No. 6, which the court gave in the language of an instruction approved by this court on the defense of alibi in *Ware* v. *State,* 59 Ark. 379, 386, 392, 27 S. W. 485, and many subsequent cases.

5. The appellant prayed the court to instruct the jury as follows: "You are instructed as a matter of law that, when a conviction for a criminal offense is sought upon circumstantial evidence alone, the prosecution must not only show beyond a reasonable doubt alleged facts and circumstances are true, but they must show by such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the defendant, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant." The court refused this prayer, and the appellant duly excepted to that ruling. The ruling of the court was correct. The State did not depend for conviction upon circumstantial evidence, and the instruction really had no place in the case. Furthermore, the court fully covered the subject-matter of the rejected prayer by its instruction No. 7.

6. We have already disposed of the contention that the testimony was not sufficient to sustain the verdict and that the court should have granted the appellee's prayer for a peremptory instruction at the conclusion of the testimony in the whole case.

7. The court gave instruction No. 9 in regard to the testimony of the defendant and the weight to be given his testimony. This instruction followed the language that has been approved by this court in numerous cases since *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885, where we held that the giving of such instruction, although not to be approved as a precedent, was nevertheless not reversible error. An instruction in this form has been

brought before this court in many subsequent cases, but we have never changed the ruling in *Vaughan* v. *State supra.*

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

REED *v.* PAVING DISTRICT NO. 2 OF JEFFERSON COUNTY.

Opinion delivered July 12, 1926.

1. HIGHWAYS—IMPROVEMENT DISTRICT—INVASION OF COUNTY COURT'S JURISDICTION.—Acts 1923, p. 84, as amended by Acts 1923, p. 538, authorizing certain county courts to create suburban improvement districts, on petition of a majority of property owners in the territory adjacent to the proposed improvement, *held* not invalid as invading the jurisdiction of the county court, in that the owners might impose public roads on the county court, since it might refuse to create a district if the road to be improved was not already a highway.
2. HIGHWAYS—PETITION—WITHDRAWAL OF SIGNATURE.—In proceedings for establishment of an improvement district for grading and paving a highway, it was not error to exclude a letter attempting to withdraw the writer's name from the petition for the improvement after it was filed, since this signature could not be withdrawn without leave of court.
3. HIGHWAYS—PETITION—RIGHT TO WITHDRAW SIGNATURE.—Under Acts 1923, pp. 84, 538, providing for creation of suburban improvement districts, and that "any number of identical petitions may be circulated and identical petitions with identical names may be filed at any time until the county court acts," *held* not to authorize a petitioner to withdraw his signature after the petition had been filed but before the court acted.
4. HIGHWAYS—JUDGMENT AFFIRMING EXISTENCE OF DISTRICT—VALIDITY.—A judgment of the circuit court affirming a judgment of the county court establishing an improvement district for grading and paving a highway, which recites "that such district is validly organized in all respects as is provided by law", is sufficient.

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

Rowell & Alexander, for appellant.

A. F. Triplett, for appellee.

WOOD, J. On March 3, 1926, certain persons claiming to be the owners of a majority in value of the real property described in the petition, filed the same in the Jefferson County Court, praying that the court lay off the territory therein described into an improvement district under the provisions of act No. 126 of the Acts of the General Assembly of 1923, approved February 15, 1923, and the acts amendatory thereof, for the purpose of grading and paving with concrete, asphalt, or such other suitable paving material as the commissioners of said district may determine, including the construction of all necessary concrete or other suitable gutters, culverts and drains. The street and highway to be improved is described in the petition as follows:

"Twenty-fifth Avenue, in the said city of Pine Bluff, extended west from the west line of Mulberry Street to a line drawn from the northwest corner of block 59 of Austin & Taylor's Addition to the city of Pine Bluff to the southwest corner of block 56 in said addition, said extension being itself commonly known and called Twenty-fifth Avenue, from the west line of Mulberry Street to the east line of Hazel Street."

They asked that the work be done according to the plans and specifications adopted by the commissioners of the district, and that the cost of the improvement be assessed upon the real property within the district; that the district be designated as Paving District No. 2 of Jefferson County, and that the same embrace the property described in the petition, which the petitioners alleged is adjacent to, and no part thereof within, the city of Pine Bluff.

The county court entered an order noting the filing of the petition, and set March 22, 1926, for its hearing, and directed the clerk of the court to give notice to all persons interested, who might wish to be heard upon the question of the creation of the district, to appear on that day. On the day set for the hearing, certain persons, in person and by their attorney, appeared, and, at their

instance, the hearing on the petition was reset for March 29, 1926. On March 29, 1926, certain persons, through their attorneys, filed a remonstrance against the creation of the district, setting up, among other things, that they already had a good street; that the property was not of sufficient value, and that the creation of the district would be confiscatory on the owners of the property therein; that the district would cost more than it would benefit the property; that the property was already in a sewer district, and that this would increase the tax on the property; that the property was mostly vacant, and there was no sale for same, and that, on account of the conditions, they requested the court not to grant the petition. It was further alleged in the remonstrance that the act under which it was proposed to create the district was unconstitutional and void, both under the State and Federal Constitutions. Among others signing this counter-petition or remonstrance was O. W. Clark. O. W. Clark's name also appeared on the original petition filed March 3, 1926. The clerk of the county court certified that the petition in remonstrance of the creation of the district was filed before the hearing in the county court at which the original petition was taken up and granted by the court. The order of the county court creating the district recites that all the requirements of the law necessary to give the court jurisdiction had been complied with, as to the filing of the petition, the fact that it contained a majority in value of the owners of the territory embraced therein, and that it was wholly adjacent to, and no part of, the city of Pine Bluff, and that no part of the territory embraced therein was included within the corporate limits of any town or city; that the city of Pine Bluff had a population of more than 10,000 inhabitants and Jefferson County more than 60,000 inhabitants, according to the last Federal census; that notice had been given as prescribed by law of the time of the filing and of the time for the hearing on the petition.

The court's order recited that "the persons signing said petition constitute a majority in value of the owners of real property in the proposed district, as shown by the latest county assessment records for general taxes." The court thereupon granted the petition, and created the district as prayed for therein, appointed the commissioners, and directed that the improvement be done according to the plans and specifications adopted by them, and that the cost of such improvement be assessed and charged against the real property in the district. The remonstrants excepted, and prayed an appeal to the circuit court, which was granted. The circuit court heard the cause upon the transcript of the appeal and the testimony of R. H. Williams, E. G. Weems and Exhibit A to his testimony, John Mason and L. T. Sallee, from which the court found that the petition for the formation of the district contained a majority in value of the owners of real property situated therein, as shown by the last county assessment, and that the district had been in all respects validly organized, and entered its judgment reciting that the said order of the county court establishing and laying off the district be and the same is hereby affirmed, and directed the clerk to certify a copy of the judgment to the county court. Two of the property owners and remonstrants excepted to the judgment of the court, and duly prosecute this appeal.

The constitutionality of the act and amendments thereto under which the district was created has been passed upon in the recent case of *Newton* v. *Altheimer*, 170 Ark. 366, 280 S. W. 641, where we said: "The statute authorizes the county court to create suburban improvement districts on petition of a majority of the owners of property in the territory adjacent to the proposed improvement. The authority relates to different kinds of improvements, among others 'grading, drainage, paving, curbing and guttering streets and highways,' and there is no authority for formation of a district for the improvement unless it is a public highway * * * The statute, for this reason, does not constitute an inva-

sion of the jurisdiction of the county court, and the validity of the statute in this respect is ruled by our decision in the case of *Sallee* v. *Dalton,* 138 Ark. 549, and numerous other cases following it."

There is no contention in the case at bar that the order creating the district was to improve an avenue or street that was not already a public highway. So the question could not arise in this case as to the invasion by the act of the jurisdiction of the county court over public highways. The first sections of act No. 126 and of act No. 645, amendatory thereof, provide for the filing of petitions for the creation of improvement districts in territory adjacent to cities having more than 10,000 inhabitants. Section 2 of the original act and the amendatory act provides in part as follows: "Any number of identical petitions may be circulated, and identical petitions with additional names may be filed at any time until the county court acts." Learned counsel for appellant contend that, under the peculiar wording of this statute, the jurisdiction of the county court is not called into play until the day the court acts on the petition. At the trial the appellants offered to introduce a letter written by O. W. Clark, one of the signers of the original petition for the creation of the district, dated March 26, 1926, addressed to the county judge of Jefferson County, as follows: "In regard to proposed paving of West 25th Avenue: Several weeks ago a petition was presented to me favoring paving of said street. I signed same, believing the majority of the home owners were in favor of said paving. After having signed said petition, another petition was presented against said paving, and I signed this petition, for the reason my lots are vacant lots and it is immaterial with me at the present time as to whether pavement is constructed. I wish to withdraw my name from both petitions, and will leave the matter entirely with the home owners in said district." The trial court refused to allow the introduction of this letter, to which ruling the appellants duly excepted.

Counsel for appellants contend that the court erred in excluding the above letter, for the reason that it proves that O. W. Clark had withdrawn his name from the original petition three days before the county court called the petition and considered the same, and, on such hearing, granted the petition and entered the order creating the district. The certificate of the clerk of the county court of Jefferson County showed that, before the county court took up the original petition for the creation of the district, there was on file in the county clerk's office a remonstrance or counter-petition against the creation of the district, signed, with others, by O. W. Clark. It is conceded by counsel for the appellees that, if O. W. Clark's name should be eliminated from the original petition, under the facts as stated, then such petition would not contain a majority in value of the property owners of the district and that the district was therefore illegally established. We do not find anything in the language of the statute *supra,* upon which the appellants rely, to distinguish this case in principle from the cases of *O'Brien* v. *Root,* 167 Ark. 119, 266 S. W. 931; *Pope* v. *Nashville,* 131 Ark. 429, 199 S. W. 101; *Bordwell* v. *Dills,* 70 Ark. 175, 66 S. W. 646.

In the case of *O'Brien* v. *Root, supra,* there was a clause in the statute which reads as follows: "Said order of exemption may be rescinded or modified at any time, upon petition of a majority of the qualified electors in the affected territory, as in the original petition for exemption." In that case we said: "This clause of § 11 does not contemplate that those who have signed the petition for exemption provided for in the first part of the section and who have filed the same with the clerk of the county court, and thus given the court jurisdiction to hear the petition, shall thereafter withdraw and erase their names from the petition without leave of the court. Those who have signed the original petition for exemption will not thus be permitted 'to march up the hill' to give the court jurisdiction, and then 'march down again' to destroy such jurisdiction in the same proceeding. The

signers of the original petition for exemption should not be allowed, as is said in *Bordwell* v. *Dills, supra,* 'to play fast and loose with the interest of society'. The law makes no provision for protests and remonstrances, for signing and counter-signing. The clause quoted, upon which counsel relies, does not permit a change of heart in the same proceeding after the jurisdiction of the court has attached by the filing of the petition for exemption."

The reason expressed in the above cases for holding that, when petitions upon which the jurisdiction of the court is predicated are once filed, they cannot thereafter be changed by the erasure of names without leave of the court, obtains with as much force here as in those cases. As is said in *Bordwell* v. *Dills, supra*: "The law makes no provisions for protests and remonstrances, for signing and counter-signing. It only provides for the petition." The provision of the act above, authorizing any number of identical petitions to be circulated and additional names to be filed at any time until the county court acts, has reference to the filing of petitions for the creation of the district. It does not contemplate that, when property owners have once signed and had the petition filed for creating the district, they may then change their minds for any reason whatever and have their names erased from the original petition and placed on a petition protesting against the creation of the district. The doctrine of the above cases is against such procedure, and it is sound.

It is urged by counsel for appellant that the judgment of the circuit court is fatally defective because it does not contain all the essentials required by law before creating the district, and is, in effect, only an affirmance of the judgment of the county court creating the district. This contention is not tenable, for the reason that the recitals of the trial court's judgment show that it heard the cause upon the transcript of the judgment of the county court and the testimony of witnesses with the exhibits thereto. In other words, the recitals are tantamount to showing that the circuit court heard the case

de novo and found that the petition for the formation of the district was signed by a majority in value of the property owners therein, and the recitals of the judgment show that "such district is validly organized in all respects as provided by law, and that the order of the said county court organizing, establishing and laying off such district should be affirmed." Certainly, it cannot be said, from the recitals of the trial court's judgment, that the judgment it rendered was not its own judgment but rather that of the county court. While the recitals show that the trial court agreed with the county court in all of its findings and judgment, nevertheless the findings in all the essentials for the creation of the district under the statute were made and entered by the trial court. Indeed, the finding and recital in the judgment of the trial court "that such district is validly organized in all respects as is provided by law" was all that was necessary for such judgment to contain, since further procedure was wholly within the jurisdiction of the county court, to which the cause was by the trial court duly certified.

There are no reversible errors in the record, and the judgment is therefore affirmed.

HART, J., dissents.

BANDY v. BANDY.

Opinion delivered July 12, 1926.

DIVORCE—PREMATURE DECREE—WAIVER OF DEFENSE.—A petition to set aside a decree of divorce on the ground that it was prematurely rendered after the case had been postponed to give petitioner an opportunity to defend, *held* properly refused where petitioner was in the court room and made no defense when the case was called.

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

STATEMENT OF FACTS.

On the 2d day of December, 1924, Joe Bandy filed a petition in the chancery court of Lawrence County to set aside a divorce decree against him rendered by said court on October 31, 1924.

According to the allegations of his petition and the proof made by him, on September 19, 1924, his wife, Fredea Bandy, filed a complaint for divorce against him on the statutory ground that he had offered such indignities to her person as to render her condition in life intolerable.

On October 28, 1924, Joe Bandy filed an answer in which he denied the allegations of the complaint. On the 31st day of October, 1924, the chancery court tried the case upon the complaint and answer and the oral testimony introduced by the plaintiff. It was decreed that the plaintiff, Fredea Bandy, be divorced from the defendant, Joe Bandy. No appeal was taken from this decree.

The motion to set aside the divorce decree was filed at a subsequent term to its rendition.

Joe Bandy has duly prosecuted an appeal from an order or decree of the chancery court denying his petition to set aside the divorce decree against him.

Cooley, Adams & Fuhr, for appellant.

Smith, Jackson & Blackford, for appellee.

HART, J., (after stating the facts). Joe Bandy filed his motion to set aside the divorce decree in favor of his wife, on the second day of December, 1924, and it was overruled by the court on January 5, 1925, which was during the same term of the court. The sole ground relied upon to set aside the divorce decree was that it was prematurely rendered. The record shows that it was the practice of the court to hear divorce cases on oral testimony; and the case against the defendant, Joe Bandy, was postponed for the purpose of giving him an opportunity to defend the suit.

When the case was called for hearing, the defendant, Joe Bandy, was present in the courtroom, and made no defense to the action. Under these circumstances,

his presence in court amounted to a consent that the case should be heard and determined. He had the opportunity to make any defense to the action that he might have, and, having failed to do so, he is not in an attitude to complain that the court refused to set aside the divorce decree.

The record shows that the plaintiff, Fredea Bandy, acted throughout in the utmost good faith, and, since the decree of divorce was determined, has married another man in the State of Missouri.

It follows that the decree of the chancery court refusing to set aside the divorce decree should be affirmed, and it is so ordered.

PICTORIAL REVIEW COMPANY *v.* ROSEN.

Opinion delivered July 12, 1926.

1. EVIDENCE—PAROL EVIDENCE RULE.—As a general rule, a written contract cannot be contradicted or varied by evidence of a contemporaneous or antecedent oral agreement.
2. CONTRACTS—FRAUD IN REDUCING TO WRITING.—Where a party's agent, who was trusted to write a contract, omits some of its terms, or inserts provisions not agreed to by the parties, such conduct constitutes fraud, and makes the contract void.
3. SALES—FRAUD OF SELLER'S AGENT.—Where a buyer, upon discovering that the seller's agent had fraudulently written a sales contract different from that agreed upon, notified the seller not to ship the goods, he could decline to receive and refuse to pay for the goods.

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

STATEMENT OF FACTS.

The Pictorial Review Company, Inc., brought this suit against H. Rosen and A. Schuman, doing business in the name of the New Leader, to recover $396.29 alleged to be due it for merchandise.

The defendants filed an answer in which they admit that they signed a contract for the purchase of merchandise from the plaintiff, but pleaded that the contract is void on account of the fraud of the plaintiff's agent.

According to the averments of the answer, the traveling salesman of the plaintiff called upon the defendants at their store in the town of Pocahontas, in Randolph County, Arkansas, and made a contract with them to purchase goods from them to be delivered in monthly shipments. It was agreed that the total shipments would be $150 and that the monthly shipments would not exceed $8. The traveling salesman of the plaintiff explained to the defendants that he was in a hurry to catch the next train, and told them that, if they would sign a printed form of contract in blank, he would fill it in according to their agreement and send it to his company. The defendants had confidence in the statement of the plaintiff's agent and relied upon his representations. It was agreed that a copy of the contract should be sent to the defendants.

When the defendants received a copy of the contract, they ascertained that it provided for the purchase of $300 worth of goods by them, and that each shipment would be $60. They at once wrote the plaintiff that this was not according to their agreement with the plaintiff's agent, and notified the plaintiff not to ship the goods. The plaintiff shipped the goods according to the terms of the contract sent in by its agent, and the defendants refused to receive them.

The plaintiff filed a demurrer to the answer, which was overruled by the court. The plaintiff then introduced in evidence the written contract for the shipment of the goods signed by the defendants, and proved that the goods had been shipped in accordance with the terms of the written contract and that the defendants had refused to receive the goods or to pay for them.

The defendants, over the objections of the plaintiff, introduced witnesses and proved by them the facts alleged in their answer.

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

John L. Bledsoe, for appellant.

Pope & Bowers, for appellee.

HART, J., (after stating the facts). The sole reliance of the plaintiff for a reversal of the judgment is that the court erred in overruling its demurrer to the answer of the defendants and in permitting the defendants to introduce evidence to sustain the allegations of their answer.

In making this contention the plaintiff relies upon the general rule that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of the execution of such contract. This general rule has been often applied by this court, but exceptions to the general rule have also been recognized by the court.

According to the allegations of the answer and the proof made by the defendants, the traveling representative of the plaintiff was trusted to reduce the contract for the purchase of the goods to writing, and he was bound to do it truly. In such cases this court has recognized that, where the party who was trusted to write the contract omits some of its terms, or inserts provisions not agreed to by the parties, such conduct constitutes fraud and makes the contract void. *Barton-Parker Mfg. Co.* v. *Taylor,* 78 Ark. 586, 94 S. W. 713; *Main* v. *Oliver,* 88 Ark. 383, 114 S. W. 917; *William Brooks Med. Co.* v. *Jeffries,* 94 Ark. 575, 127 S. W. 960; *White Sewing Mach. Co.* v. *Atkinson & Son,* 126 Ark. 204, 190 S. W. 111; and *J. I. Case Threshing Mach. Co.* v. *Southwestern Veneer Co.,* 135 Ark. 607, 205 S. W. 978.

According to the allegations of the answer, the agent of the plaintiff fraudulently wrote the contract different from the one really made, and, as soon as the defendants found this out, they countermanded the order and notified the plaintiff not to ship the goods. Nevertheless, the plaintiff shipped the goods, and the defendants, as they

had a right to do, declined to receive and refused to pay for them.

The evidence of the defendants was not a contradiction of the writing, but showed what it should have contained as the real agreement between the parties. If this were not so, the rule that fraud vitiates everything would become the exception instead of the rule itself.

It follows that the judgment of the circuit court was correct, and it will therefore be affirmed.

TERRY v. COOPER.

Opinion delivered July 12, 1926.

1. TRADE NAME—RESTRAINING USE OF NAME.—Injunction will lie to restrain the use by one corporation or firm of the name of a prior corporation, which tends to create confusion and to enable such corporation or firm to obtain, by reason of the similarity of names, the business of the other corporation.
2. TRADE NAME—SALE OF BUSINESS.—The sale by a corporation of "all furniture, fixtures, abstract books, accounts receivable, automobile, all records and property, and all assets of every kind and description," *held* to include its trade name.
3. TRADE NAME—RESTRAINING USE OF NAME.—An abstract company which, by purchase, became entitled to use a certain trade name, but voluntarily abandoned it and used another trade name and did business thereunder, *held* not entitled to restrain the seller from conducting a similar business under his former trade name, where the resulting confusion was slight, notwithstanding the abstract company still used letter heads with the old trade name and the new name stamped thereon as successor.

Appeal from Mississippi Chancery Court, Chickasawba District; *J. M. Futrell,* Chancellor; reversed.

STATEMENT BY THE COURT.

The plaintiff seeks in this action to restrain the use by the defendant of its corporate name, "The Terry Abstract Company," on the ground that such use is an invasion of the rights of the plaintiff to the corporate name, "The Terry Abstract Company."

The suit was originally brought by George N. Bickner against E. M. Terry, but Raymond Cooper, having purchased the interest of Bickner, has been substituted as the plaintiff in the suit. The suit was defended on the ground that the plaintiff had no right to the use of "The Terry Abstract Company" as its trade name, and that the defendant had not in any way tried to interfere with or to injure the business of the plaintiff.

The facts are that The Terry Abstract Company was organized as a corporation on the 18th day of October, 1911, with an authorized capital stock of $10,000. E. M. Terry was one of the incorporators. The corporation was organized for the purpose of abstracting titles in Mississippi County, Arkansas, and at once began to conduct the business for which it was organized. In September, 1917, the Farmers' Bank and Trust Company owned 200 shares of the capital stock of The Terry Abstract Company, and E. M. Terry and five other persons owned one share each of the par value of $25. In 1922 J. W. Rhodes, Jr., C. F. Rhodes and J. A. Pigg acquired all the capital stock of this corporation. In January, 1923, G. N. Bickner acquired a controlling interest in the corporation, and on the 11th day of June, 1923, the name of the corporation was changed to Chickasawba Abstract & Investment Company, Inc., and the certificate of the Secretary of State authorizing the change was duly issued in the manner provided by law. The corporation operated under its new name until February 25, 1924, when a resolution was adopted authorizing the corporation to sell and convey its assets to J. W. Rhodes, Jr., and this was done. Rhodes sold and conveyed the business to George N. Bickner. At the same meeting a resolution was adopted authorizing the corporation to surrender its charter, and a formal dissolution was had on February 25, 1924. The bill of sale to George N. Bickner contained the following:

"All furniture, fixtures, abstract books, accounts receivable, automobile, all records and property and all

assets of every kind and description formerly owned by the Chickasawba Abstract & Investment Company."

J. W. Rhodes Jr. and George N. Bickner conducted the business for a time under the firm name of Chickasawba Abstract Company. The letterheads printed for The Terry Abstract Company were used by the Chickasawba Abstract & Investment Company and by the Chickasawba Abstract Company. A rubber stamp was used to show the new name of the company, and the letterheads would read as follows: "Chickasawba Abstract & Investment Company, Inc., successors to The Terry Abstract Company."

In 1924 E. M. Terry, who is an abstracter of long experience, formed a partnership with Ray Worthington for the purpose of abstracting titles in Mississippi County, and conducted their business in the name of Terry Abstract Company. Other facts will be stated in the opinion.

The chancellor found that The Terry Abstract Company changed its corporate name to Chickasawba Abstract & Investment Company; that said last named corporation sold its property and assets to J. W. Rhodes, Jr., and surrendered its charter; that J. W. Rhodes, Jr., sold the property and assets of the business to George N. Bickner; that Bickner and his predecessors in title continued to use the name The Terry Abstract Company upon their stationery, and that Bickner was entitled to the trade name of said corporation, The Terry Abstract Company.

It was decreed that the defendant E. M. Terry be restrained from using in any manner the name The Terry Abstract Company, or any name closely resembling it.

The case is here on appeal.

T. J. Crowder and *George Vaughan,* for appellant.

Reed & Campbell, for appellee.

HART, J., (after stating the facts). At the outset it may be stated that, in respect to corporate names, the same rule applies as to the names of firms or persons, and an injunction lies to restrain the use by one corporation

or firm of the name of a prior corporation which tends to create confusion, and to enable the later corporation or firm to obtain, by reason of the similarity of names, the business of the prior one. *Chas. S. Higgins Co.* v. *Higgins Soap Co.,* 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42; *Brunson* v. *Reinberger & Collier,* 134 Ark. 211, 203 S. W. 269; *McLean* v. *Fleming,* 96 U. S. 245; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118; *Donnell* v. *Herring-Hall-Marvin Safe Co.,* 208 U. S. 267; and *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.,* 208 U. S. 554.

In the case last cited it was held that, although the trade name may not be mentioned in the sale of a business taken over as a going concern, a deed conveying trademarks, patent rights, trade rights, good will, property, and assets of every name and nature, is broad enough to include the trade name under which the vendor corporation and its predecessors had achieved a reputation. So it may be said that the general language used in the bill of sale to Bickner was broad enough to include the trade name of the corporation selling its assets to him and his associates.

The principle of the cases upon the subject of enjoining a person from using the trade name of another person or corporation proceeds upon the theory that it is a fraud on a person or corporation which has established a trade name and carries on its business under that name, that some other person or corporation should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him or it in the belief that they are dealing with a person or corporation which has given a reputation to the name.

In applying the rule to the facts and circumstances shown in the record in this case, we do not think there is sufficient evidence to justify the issuance of an injunction. The stockholders of The Terry Abstract Company, of their own volition, changed the name of that corporation to the Chickasawba Abstract & Investment Company, and thereafter conducted its business under that name.

It is true that the printed stationery of The Terry Abstract Company was used, but a rubber stamp was used which made the letterheads read, "Chickasawba Abstract & Investment Company, Inc., successors to The Terry Abstract Company." This manifested an intention upon the part of the stockholders of the corporation not only to change the name of the corporation, but to conduct its business under the new name, and to inform those doing business with it of that fact. In the very nature of things the stamping of the words, "Chickasawba Abstract & Investment Company, Inc., successors to," before the printed words, "The Terry Abstract Company," would show to persons receiving the letters that it was the intention of the corporation to carry on its business under its new name. The use of the words, "successors to," would notify those receiving letters that the new corporation had purchased the business of the old corporation and would thereafter carry the business on under its new corporate name.

On this point Bickner testified that the name was changed because the defendant, E. M. Terry, had been receiving mail addressed to the corporation under its old corporate name, and thereby interfered with its business. On this point, however, Terry denied having, in any manner, interfered with the business of the plaintiff. He admits that, on several occasions, he received letters which were intended for the plaintiff, but said that he delivered them to the plaintiff. He testified, however, that in no instance did he use the mail of the plaintiff to secure business for himself.

Be that as it may, the fact remains that the plaintiff changed its name from The Terry Abstract Company to the Chickasawba Abstract & Investment Company, and later to the Chickasawba Abstract Company. There is no similarity whatever between these names, and nothing which would tend to confuse the minds of those wanting to do business with the plaintiff, and to make them believe that the Chickasawba Abstract & Investment Company intended to carry on its business under its old

name, The Terry Abstract Company. If such had been its intention, no good reason appears why it should have changed its name at all; or, if it intended that the words, "successors to The Terry Abstract Company," be a part of its new name, it should have made it a part thereof in its articles of association and had the same certified as its new name under the statute by the Secretary of State, instead of simply saying that it had changed its old name, The Terry Abstract Company, to the Chickasawba Abstract & Investment Company.

The testimony does not show that any confusion resulted, except in a very few instances, and these instances were not numerous enough or sufficiently continuous as to have warranted the court in granting an injunction in the matter.

The result of our views is that the decree of the chancery court will be reversed, and the complaint of the plaintiff dismissed for want of equity.

PINE BLUFF v. ARKANSAS TRAVELER BUS COMPANY.

Opinion delivered July 12, 1926.

1. MUNICIPAL CORPORATIONS—CONTROL OF STREETS.—Municipal corporations have control and supervision of the streets within their limits.
2. AUTOMOBILES—REGULATION.—The State can regulate and control the use of motor vehicles, except in so far as it has granted such right to other governmental agencies.
3. MUNICIPAL CORPORATIONS—REGULATION OF MOTOR VEHICLES.—Under the provisions of the motor vehicle law (Acts 1911, p. 94), the State has recognized the exclusive right of municipal corporations to make and enforce rules and regulations for motor vehicles to be used for public hire.
4. CONSTITUTIONAL LAW—POLICE POWER.—Private property devoted to public use is subject to regulation under the police power.
5. CARRIERS—REGULATION—DELEGATION OF POWER.—In the absence of constitutional limitations, the Legislature can regulate the business of common carriers, and may delegate such power to municipal corporations.

6. MUNICIPAL CORPORATIONS—REGULATION OF BUS LINES.—An ordinance requiring bus lines, with permits from the Railroad Commission, to establish stations at designated places, and prohibiting busses from stopping on streets to take on or discharge passengers, except at stations, *held* valid.

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

STATEMENT OF FACTS.

The city of Pine Bluff prosecutes this appeal to reverse the judgment of the circuit court holding invalid an ordinance regulating the operation of motor busses in the city of Pine Bluff. The record shows that the city of Pine Bluff passed an ordinance that public busses operating in and out of the city should be required to establish stations at their own expense, at designated places within the city, for the purpose of taking on and discharging passengers.

Section 2 of the ordinance provides that such public busses be further prohibited from stopping on the streets of the city for the purpose of taking on or discharging passengers, except at the stations to be provided by them under the ordinance.

Section 3 provides that any firm or corporation violating any provisions of the ordinance shall, upon conviction, be fined as prescribed by the ordinance.

The Arkansas Traveler Bus Company is an intercity bus line operating between the cities of Pine Bluff and Little Rock, and has been granted a permit to engage in such business by the Railroad Commission of the State of Arkansas. It violated the provisions of such ordinance, and was adjudged to pay a fine of $25 in a prosecution in the municipal court of Pine Bluff.

The Arkansas Traveler Bus Company duly prosecuted an appeal to the circuit court, and that court, under the facts stated, held the ordinance to be invalid, and the defendant was ordered discharged.

From the judgment rendered the city of Pine Bluff has duly prosecuted an appeal to this court.

L. Dewoody Lyle, for appellant.

HART, J., (after stating the facts). In *Willis* v. *City of Fort Smith,* 121 Ark. 606, 182 S. W. 275, it was held that, under our statutes, municipal corporations have expressly been given control and supervision of the streets and highways within their limits. It was further held that the State has a right to regulate and control the use of motor vehicles except as it has granted such right to other governmental agencies, and that, under the provisions of our motor vehicle law, the State has recognized the exclusive right of municipal corporations to make and enforce rules and regulations for motor vehicles to be used for public hire.

It is a rule of universal application in this country that, when private property is devoted to a public use, it is subject to regulation under the police power. It is well settled that, in the absence of constitutional limitations, the Legislature has the right to regulate and prescribe the rules according to which the business of common carriers may be conducted, and this power may be delegated to municipal corporations to be exercised for the promotion of the public convenience. Hence it is well settled that the right of a citizen to travel upon the streets and transport his property thereon in the ordinary course of things is wholly different from that of a common carrier who makes the streets his place of business and uses them for private gain in the running of motor busses. The former is the common right of every one, and the latter is a special or exceptional use of the streets not common to all the citizens of the State. See *Dickey* v. *Davis* (W. Va.), 85 S. E. 781, L. R. A. 1915F, 840; *Hadfield* v. *Lundin* (Wash.), 168 Pac. 516, L. R. A 1918B, 909; *Commonwealth* v. *Kingsbury* (Mass.), 85 N. E. 848, L. R. A. 1915E, 264; *Cummins* v. *Jones* (Ore.), 155 Pac. 171; *Peters* v. *San Antonio,* 195 S. W. 989; *Memphis* v. *State,* (Tenn.), 179 S. W. 631, L. R. A. 1916B, 1151; *Allen* v. *Bellingham* (Wash.), 163 Pac. 18; and *State* v. *Spokane* (Wash), 186 Pac. 864.

The Arkansas Railroad Commission was established, among other things, for the purpose of regulating motor

busses, but there is no inconsistency between its powers and the power given cities to control their streets. Indeed, one of the rules of the Arkansas Railroad Commission provides for the loading and unloading of passengers of public busses operating as common carriers at only privately owned depots in the cities and towns requiring it by valid ordinances.

The result of our views is that the circuit court erred in holding the ordinance in question to be invalid, and for that error the judgment will be reversed, and the cause remanded for a new trial.

FULLER v. STATE.

Opinion delivered July 12, 1926.

1. CRIMINAL LAW—EVIDENCE—STATEMENTS OF CONSPIRATOR.—In a prosecution for larceny, testimony as to the conduct and statements of an alleged co-conspirator, done and made in defendant's absence and after commission of the larceny, *held* erroneously admitted.
2. CRIMINAL LAW—EVIDENCE—POSSESSION OF STOLEN ARTICLE.—Evidence showing possession by an alleged accomplice of a car answering to the description of one stolen, and as to his aiding in recovery of the stolen car, is admissible, and not contrary to the rule against admitting statements of a co-conspirator made in defendant's absence and after the commission of the offense.
3. CRIMINAL LAW—INSTRUCTION—HARMLESS ERROR.—Where the jury reported their inability to reach a verdict and stated that they stood 10 to 2, an instruction that, if the majority was for defendant, the minority should doubt their judgment, although erroneous, was not prejudicial, though the verdict was against the defendant.

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

John P. Roberts and *Evans & Evans,* for appellant.

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

SMITH, J. Appellant was indicted for burglary and grand larceny, alleged to have been committed by break-

ing and entering the garage of one E. B. Brown and stealing therefrom an automobile. The indictment contained two counts, the first charging burglary and the second grand larceny. Appellant was acquitted on the burglary count and convicted on the grand larceny count, and has appealed.

It was the theory of the State that appellant broke and entered into the garage and stole the automobile therefrom, and was assisted by one Hubert Smith in disposing of the car after it had been stolen.

Much testimony was offered, over the objections and exceptions of appellant, touching the conduct and statements of Smith, in the absence of appellant, after the larceny had been committed. The purport of this testimony was to the effect that Smith had come into the possession of the car some weeks after the larceny, through a man named Allen, who, it was contended, had received the car from appellant. Such, at least, was the effect of the testimony concerning the declaration and admissions of Smith.

The Attorney General confesses error in the admission of this testimony, and we think properly so. The testimony was incompetent. In the case of *Stroud* v. *State*, 167 Ark. 502, it was said that "after the accomplishment of the enterprise, the acts or declarations of a co-conspirator are not evidence against the others unless done or made in their presence." It was there further said "that acts and declarations of a co-conspirator done and made after the accomplishment of the enterprise are not evidence against any one of the conspirators except himself."

Objection was made to certain testimony showing that Smith was in possession of a Ford car, which was slightly used, and such a car as was stolen from Brown; and testimony was also admitted, over appellant's objection, to the effect that Brown went with Smith to Wichita, Kansas, where the stolen car was recovered. The admission of this testimony does not offend against the rule just quoted. It was competent for the State to show

what became of the car, and who was seen in possession of it, and where it was found, if such testimony tended to connect appellant with the larceny of the car; but this is an entirely different matter from proving the declarations and admissions of Smith made after the larceny was complete and in the absence of appellant. Any admission or declaration of Smith, in the absence of appellant, and after the completion of the crime, was merely hearsay evidence, and was inadmissible for that reason.

Exceptions were saved to certain proceedings in the trial had on Sunday, but, as these exceptions relate to matters which are not likely to recur on the retrial, we do not discuss them.

The jury reported several times their inability to reach a verdict, and were asked each time they reported how they stood. Without stating whether the majority was for the State or the defendant, it was answered that they stood ten to two. The court then gave, over appellant's objection, an instruction numbered 11, which is very similar to an instruction condemned in the case of *McGehee & Co.* v. *Fuller,* 169 Ark. 920. The concluding part of this instruction reads as follows: "And, on the other hand, if a majority are for the defendant, the minority ought to seriously ask themselves whether they (doubts) may not be reasonable, and ought to doubt the correctness of their judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

It appears that the language quoted is very similar to the portion of the instruction condemned in the case of *McGehee & Co.* v. *Fuller, supra.* In that case the jury found for the defendant, and, in condemning the portion of the instruction similar to the language quoted from the instruction given in the present case, we said: "Now, it is evident that this part of the instruction is materially different from that which just precedes it. It specifically tells the jury that, if a majority is for the defendant, the minority ought to doubt the correctness of its judgment,

which is not concurred in by its associates, and distrust the weight of the evidence which fails to carry conviction to the minds of their fellows. This constitutes advice by the court for the minority to yield to the majority, if the majority is for the defendant, and this, without considering whether their own conclusions are reasonable, in the view of the fact that majority believes the other way."

But, unlike the case of *McGehee & Co.* v. *Fuller, supra,* where the verdict was for the defendant, the verdict here was against the defendant. So, while the instruction was erroneous, it was not prejudicial here, as it was there, for the reason that the error was in favor of the defendant, who prevailed in the former case.

For the error indicated in the admission of the testimony concerning the acts and declarations of Smith after the completion of the crime, and in the absence of appellant, the judgment of the court below must be reversed, and the cause remanded for a new trial, and it is so ordered.

WESTERN ASSURANCE COMPANY *v.* WHITE.

Opinion delivered July 12, 1926.

1. INSURANCE—LIMITATION OF CONCURRENT INSURANCE.—A fire insurance policy may properly limit the total concurrent insurance and invalidate the policy if that amount is exceeded.
2. INSURANCE—LIMITATION OF CONCURRENT INSURANCE—WAIVER.—While a clause in a fire insurance policy limiting the total concurrent insurance in the property is valid, it may be waived by the insurer; and where there was evidence that the insurer's agent knew of the excess of insurance, and the insurer's subsequent conduct was such as to imply a purpose not to insist upon a forfeiture on that account, a verdict finding that there was a waiver of this provision is conclusive.
3. INSURANCE—SOLE OWNERSHIP.—A husband who is tenant by the curtesy is not the sole owner within a fire insurance policy requiring to have the sole ownership, since his wife has a right to an equal and separate enjoyment of the proceeds derived from such an estate.

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

McMillen & Scott, for appellant.

John E. Miller, Cul L. Pearce and *John D. DeBois,* for appellee.

SMITH, J. The appellant insurance company issued to appellee individually a policy of insurance on a building owned by appellee and his wife as tenants by the entirety for the sum of $1,500. The policy contained a provision limiting the concurrent insurance on the building to $4,000. Additional insurance on the building was taken out by appellee, so that, at the time of the fire which destroyed the building, there was $5,500 insurance on it. The policy contained a clause which provided that it should be void if the total concurrent insurance exceeded $4,000. The policy also contained a provision that it should be void "if the interest of the insured be other than unconditional and sole ownership."

The insurance company denied liability upon two grounds: first, because insurance in excess of the concurrent insurance allowed by the policy sued on had been taken out; second, because appellant was not the sole and unconditional owner of the building.

There was a verdict and judgment for the owner, and the insurance company has appealed.

The validity of a clause in an insurance policy limiting the total concurrent insurance and invalidating the policy if that amount is exceeded has been frequently recognized by this court; indeed, it is recognized and enforced universally, but it has been held by this and all other courts that, while the clause is valid, it may be waived. That such a provision may be waived was declared by this court in the case of *German-American Ins. Co.* v. *Harper,* 75 Ark. 98, 86 S. W. 817, and that case has since been several times followed.

Without setting out the testimony showing knowledge of the excess of insurance, it may be said that the testimony warranted the jury in finding that the agent of the appellant company had such knowledge of this

fact, and that its conduct was thereafter such as to reasonably imply a purpose not to insist upon a forfeiture of the policy on that account, and, this being true, the verdict of the jury finding that there was a waiver of this provision is conclusive of that fact. *Ark. Mutual Fire Ins. Co.* v. *Claiborne,* 82 Ark. 150, 100 S. W. 751.

Upon the second question, it may be said that the undisputed testimony shows that appellant and his wife were the owners of the insured property as tenants by the entirety, and there was no testimony charging the insurance company, or its agent, with knowledge of that fact, so that it cannot be contended, in fact it is not insisted, that there was any waiver of the provision of the policy that it should be void "if the interest of the insured be other than unconditional and sole ownership." On the contrary, the insistence is that appellant, as a tenant by the entirety, was the sole and unconditional owner.

We do not agree with counsel in this insistence. If being a tenant by the entirety made appellant the sole and unconditional owner, then his wife, the other tenant by the entirety, would also be the sole and unconditional owner, and we would have the anomalous condition of two persons each being the sole and unconditional owner, for her interest is as great as his, and she has the same right to the use and possession of the property and the same right to share in the rents and profits thereof. In the recent case of *Moore* v. *Denson,* 167 Ark. 134, 268 S. W. 609, we had occasion to consider the nature of the respective rights of the holders of an estate of this kind. In that case a judgment had been recovered against the husband, and we held that his interest in the estate might be sold under execution subject to the wife's right of survivorship.

This holding followed from the prior holding of this court in the case of *Branch* v. *Polk,* 61 Ark. 388, where the court considered the effect on estates by the entirety of the provisions of our Constitution and statutes which had enlarged the rights of married women. Mr. Justice RID-

DICK, speaking for the court, said: "In this State a married woman has full control of her separate property, and may convey and dispose of it as if she were a *feme sole.* Our Constitution and statute have excluded the marital rights of the husband therefrom during the life of the wife; Const. 1874, art. 9, § 7; Sandels & Hills' Digest, § 4945; *Neelly* v. *Lancaster,* 47 Ark. 175, 1 S. W. 66, 58 Am. Rep. 752; *Roberts* v. *Wilcoxson,* 36 Ark. 355. We think that the effect of these provisions was to give the wife control of all the property owned by her, including her interest in an estate by the entirety as well as other real estate. To say that it did not apply to an estate by entirety would be to deprive her of a share in the rents and profits of such an estate during the life of her husband, and would establish an exception to the operation of the Constitution and statute resting on no valid principle or reason. *Hiles* v. *Fisher,* 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 766. On the other hand, to say that neither she nor her husband could convey any interest in such an estate except by a joint deed would tie up the estate and prevent either of them from controlling or disposing of his or her interest without the consent of the other. It would also result in placing it beyond the reach of the creditors of either of them, and such is the rule followed in several of the States. *McCurdy* v. *Canning,* 64 Pa. St. 39; *Chandler* v. *Cheney,* 37 Ind. 391; *Naylor* v. *Minock,* 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595, and note."

The learned justice there also said: "The rational construction of these provisions of our Constitution and statute, which 'uprooted principles of the common law hoary with age,' swept away the marital rights of the husband during the life of the wife, and gave enlarged powers to married women, is, not that they lessen the power of the husband over his own interest in an estate by entirety, but, that they deprive him of the control over the interest of the wife which he formerly exercised *jure uxoris,* and confer upon the wife the control of her own interest. The right of the wife to control and convey her

interest, we think, is now equal to the right of the husband over his interest. They each are entitled to one-half of the rents and profits during coverture, with power to each to dispose of or charge his or her interest, subject to the right of survivorship existing in the other. *Hiles* v. *Fisher*, 144 N. Y. 306; 43 Am. St. Rep. 762; *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52."

It follows therefore that the husband has no longer, as at common law, control over the interest of his wife in an estate by the entirety, but she has the right to an equal and separate enjoyment of the proceeds derived from such an estate.

The language, "unconditional and sole ownership," appearing in the policy sued on, has been many times defined in the textbooks on insurance and in the reported cases as follows: "An insurance ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition." *Royal Ins. Co. Ltd.*, v. *Shirley*, 106 Sou. (Miss.) 884.

Under this definition a tenant by the entirety does not qualify as a sole owner. Indeed, we have found no case holding that a tenant by the entirety was a sole owner and entitled to recover as such where the policy of insurance required that the insured be the sole owner. The rule is stated to the contrary in 26 C. J., chapter Fire Insurance, § 219, page 180, where it is said: "When the title is in husband and wife jointly, the husband cannot insure as sole and unconditional or absolute owner." We have examined the cases cited in the note to the text quoted and we find they fully sustain the text.

The case of *Turner* v. *Home Ins. Co.*, 189 S. W. 626, is cited as an apparent exception to the rule. This was a decision by a Court of Appeals of Missouri, but it was recognized and stated in that case that "where the assured's title is under a deed, making him only a tenant by the entirety with his wife, he is not the sole and unconditional owner." The court further said: "If this had been all that was shown in this case as to the title, we

would be inclined to hold the policy void, in view of what the Supreme Court (of Missouri) held as to the wife having a substantial interest when holding as a tenant by the entirety, in *Holmes* v. *Kansas City,* 209 Mo. 513, 108 S. W. 9, 1134, 123 Am. St. Rep. 495."

But that court said that the undisputed testimony in that case showed that the husband had purchased and paid for the property without any intention that any interest in it be conveyed to his wife, and that therefore there was a resulting trust in the husband's favor, and he was therefore the equitable owner of the property. It therefore appears that this case is not in fact out of line with other cases on the subject.

We conclude therefore that appellee was not the sole and unconditional owner of the property, and, as it was not shown that the insurance company had waived this provision of the policy, it follows that a right to recover on the policy was not shown. 2 Joyce on Insurance, § 1048A; 6 Cooley's Briefs on Insurance, § 1382 (J); *Clawson* v. *Citizens' Mutual Fire Ins. Co.,* 121 Mich. 591, 80 N. W. 573, 80 Am. St. Rep. 538; *Schroedel* v. *Humboldt Fire Ins. Co.,* 27 Atl. 1077; Ostrander on Fire Insurance, § 63; *Ætna Ins. Co.* v. *Resh,* 40 Mich. 241; *Genesee Falls Assn.* v. *U. S. Fire Ins. Co.,* 16 App. Div. N. Y., 44 N. Y. S. 979.

The judgment of the court below will therefore be reversed, and the cause remanded.

SHEWMAKE v. HUDSON.

Opinion delivered July 12, 1926.

1. DRAINS—ORGANIZATION OF SUBDISTRICTS.—Under Crawford & Moses' Dig., § 3650 and § 3651, as amended by Acts 1917, p. 1446, a subdistrict of land wholly or partly within a drainage district may be organized and become part of the principal district, though such district was created by Sp. Acts 1919, p. 972, and has been completed.
2. DRAINS—CREATION OF SUBDISTRICT.—A subdistrict, which is to become part of a drainage district created by Sp. Acts 1919, p. 972, may be organized under the general law provided by Crawford & Moses' Dig., § 3650 and § 3651 as amended by Acts 1917, p. 1446.
3. DRAINS—SUBDISTRICT A SEPARATE ENTITY.—A subdistrict organized under Crawford & Moses' Dig., § 3650, as part of a drainage district organized under Sp. Acts 1919, p. 972, becomes a separate entity, so far as the assessment of benefits necessary to construct it is concerned.
4. DRAINS—AUTHORITY OF COMMISSIONERS.—The commissioners of the drainage district created by Sp. Acts 1919, p. 972, have no authority to do anything not authorized by such act, but the commissioners of a subdistrict, created under the general law (Crawford & Moses' Dig., §§ 3650, 3651, as amended by Acts 1917, p. 1446), derive their authority from the general law, and not from the special act.
5. DRAINS—JURISDICTION TO CREATE SUBDISTRICT.—Where the principal drainage district was created by Sp. Acts 1919, p. 972, jurisdiction to create a subdistrict embracing lands wholly in one county is in the county court.

Appeal from Jefferson Chancery Court; *H. R. Lucas*, Chancellor; affirmed.

Wooldridge & Wooldridge, for appellant.

Rowell & Alexander, for appellee.

SMITH, J. Appellant is the owner of lands within a proposed subdistrict to the Salt Bayou Drainage District, in Jefferson and Arkansas counties, a district created by special act No. 658 of the Acts of 1919 (Special Acts 1919, page 972), and by this suit he attacks the organization of the subdistrict and prays an injunction to restrain the collection of the taxes assessed against his lands in and for the subdistrict.

The commissioners of the subdistrict, who are the defendants in the suit, are the commissioners of the district created by the special act of the General Assembly, and were appointed the commissioners of the subdistrict by an order of the county court of Jefferson County, and, pursuant to this appointment, made the assessment of betterments against appellant's lands the collection of which he seeks by this suit to enjoin.

It was alleged in appellant's complaint that the order creating the subdistrict was entered upon the petition of a majority of the owners of land in said subdistrict pursuant to the provisions of § 3650, C. & M. Digest, and that appellant's property was situated within the boundaries of the proposed subdistrict, and are in Jefferson County, as are all the lands within the subdistrict.

It is alleged that the special act creating Salt Bayou Drainage District conferred jurisdiction over all matters pertaining to said district upon the circuit court of Jefferson County, and that all proceedings had in the organization of the subdistrict were had in the county court of Jefferson County, which court, appellant alleges, was without jurisdiction to create said subdistrict.

A demurrer to the complaint was sustained and the cause was dismissed, and this appeal is prosecuted to reverse that decree.

For the reversal of this decree appellant makes two contentions: First, that there is no statute under which a subdistrict can be created to a district created by a special act of the General Assembly, and that therefore the order creating the subdistrict is void because no court has jurisdiction to create a subdistrict to a special district. Second, that, if this contention is not sound, the order creating the subdistrict is void for the reason that the county court of Jefferson County had no jurisdiction; that the act creating Salt Bayou Drainage District, in Jefferson and Arkansas counties, vested jurisdiction of all matters pertaining to the district in the Jefferson Circuit Court, and, under act No. 270 of the General Assembly for the year 1917 (volume 2, Special Acts 1917,

page 1446) of the Special Acts of 1917, the petition for the organization of the subdistrict should have been filed in the circuit court of the county within which the main district was organized.

In support of the first contention, counsel for appellant cites the case of *Pumphrey* v. *Road Imp. Dist. No. 1 of Grant County,* 125 Ark. 422, 189 S. W. 59. But we think the case cited does not support the contention made. There a road improvement district created by a special act, which was complete in itself, sought to enlarge its powers in the matter of issuing bonds to complete the proposed improvement by assuming the benefit of a general law which had been enacted before the creation of the road district. The cost of the proposed improvement would have exceeded the assessed betterments unless there was read into the special act the provision of a prior general law relating to improvement districts, that deferred installments of the assessed benefits should bear interest. It was held in the case cited that this could not be done, because no general law in force at the time of the enactment of the special act could have the effect of enlarging the powers of the commissioners of the road district created by the special act.

That question is not presented here. The improvement provided for in the special act creating Salt Bayou Drainage District has been completed, and the question is whether a subdistrict may be organized and become a part of this special district.

We think § 3650, C. & M. Digest, confers this power. This section of the Digest was § 18 of act 177 of the Acts of 1913 (Acts 1913, page 749), which amended the drainage act of 1909. By this section it is provided that three or more owners of real property wholly within, or partly within and partly without, a drainage district may petition the county court to establish a subdistrict embracing their property; and, by § 19 of the Acts of 1913, which appears as § 3651, C. & M. Digest, it is provided that, if the prayer of the petition is granted, the county court "shall appoint the commissioners of the drainage district

in which the subdistrict, or the greater part thereof, shall lie," to act as commissioners for the subdistrict, and that the proceedings thereafter shall conform in all respects to the provisions of the law relating to the creation of the original district.

Section 3651, C. & M. Digest, was amended by act 270 of the Acts of 1917, page 1446, and by this amendatory act it is provided that, when the county or circuit court establishes a subdistrict, it shall appoint the commissioners of the main district of which the subdistrict is to become a part to act as commissioners of the subdistrict, and that the proceedings thereafter shall conform to the provisions of the act amended, that is, the general drainage law. It is further provided in the amendatory statute that, where the main drainage district of which the proposed subdistrict is to become a part, shall have been organized by the circuit court, the petition for the proposed subdistrict shall be presented to such circuit court and all subsequent proceedings had therein, and that, "where the main drainage district of which the proposed subdistrict shall embrace lands lying in another or other counties, the petition for the organization of the proposed subdistrict shall be filed in the circuit court of the county in which the main district was organized, and all subsequent proceedings shall be had in such court."

The insistence of appellant is that, under the statutes quoted and referred to, there is (a) no provision for the creation of the subdistrict to the district created by a special act of the General Assembly; and (b), if so, the proceedings so to do would have to be in the circuit court, for the reason that the lands composing the original district lie partly in Arkansas County and partly in Jefferson County, and, under the special act, all proceedings relating to the assessment of benefits, etc., in the special district were to be had in the circuit court of Jefferson County. It is admitted that all the lands lying within the proposed subdistrict are in Jefferson County.

It appears that the proposed Salt Bayou Drainage District is now a completed project, and it is not pro-

posed to organize the subdistrict under the provisions of the special act which created that district. The landowners proceeded under the general law in organizing the subdistrict, and we perceive no reason why they may not do so. Subdistricts become separate entities so far as the assessment of the benefits necessary to construct them is concerned, and the language of § 3650, C. & M. Digest, appears to be sufficiently comprehensive to permit owners of real property "wholly within a drainage district, or partly within and partly without such district," to petition for the establishment of a subdistrict, even though the principal district was created by a special act of the General Assembly.

The commissioners of the district created by the special act have no authority under that act to do anything not therein authorized, but they did not initiate this proceeding under the special act, and the proposed subdistrict will not be constructed pursuant to its provisions, and the construction of the subdistrict is a new and separate proceeding whereby the subdistrict becomes attached to the main district.

In the case of *Mahan* v. *Wilson,* 169 Ark. 117, 273 S. W. 383, we reviewed the statute authorizing the creation of subdistricts, and said that the only limitation expressed in the statute with regard to a subdistrict is that it must be formed of lands "wholly within a drainage district, or partly within and partly without such district," and pointed out that it could not be composed of lands wholly outside of the district. We also said that it is necessarily implied that the improvement contemplated by a subdistrict must be such that it can be treated as part of the same unit as the improvement provided for in the original district, and not an independent improvement. There is no showing here that these conditions do not prevail concerning the district created by the special act and the subdistrict organized under the statute.

The commissioners of the subdistrict, although commissioners of the special district, derive their authority from the general law, and not from the special act, and,

if there is authority for the creation of the proposed subdistrict—and we are of the opinion that there is—the question then arises whether the proceedings for that purpose should be in the county court of Jefferson County or in the circuit court of that county. As we have said, all of the lands within the proposed subdistrict are situated in Jefferson County, and the county court of that county would therefore have jurisdiction. It is true, as appears from the quotation herein from the amendatory act of 1917, where the main drainage district has been organized by the circuit court, the proceedings to organize a subdistrict thereto shall be in the circuit court, but the Salt Bayou Drainage District was not organized by the circuit court of Jefferson County. It was created by a special act of the General Assembly, which conferred jurisdiction on the circuit court because the lands embraced in that district were partly in Jefferson County and partly in Arkansas County.

Inasmuch as the main district was not organized in the circuit court, and as all the lands in the subdistrict are situated in Jefferson County, we conclude that jurisdiction over the subdistrict was in the county court of Jefferson County.

The court below so held, and that decree is affirmed.

CLEMMONS v. MISSOURI STATE LIFE INSURANCE COMPANY.

Opinion delivered July 12, 1926.

USURY—WHEN LOAN NOT USURIOUS.—Where a borrower contracted for a loan of $100,000 at 6 per cent. for seven years, receipt of $90,000, instead of $100,000, did not make the loan usurious, since the amount which the borrower would have had to pay on $90,000 at 10 per cent. would have exceeded the amount payable on the above contract by $11,000.

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

Wooldridge & Wooldridge, Pace & Davis and *J. C. Marshall*, for appellant.

W. D. Jones, for appellee.

SMITH, J. This suit was brought by appellees to foreclose a deed of trust on lands belonging to appellants, who answered and admitted the execution of the instrument sought to be foreclosed, but they alleged the same was void for usury, and, by way of cross-complaint, prayed the cancellation of the deed of trust sought to be foreclosed. The court below found the fact to be that there was no usury in the transaction, and dismissed the cross-complaint and ordered the foreclosure of the deeds of trust, and this appeal is from that decree.

Appellees made appellants a loan through the intervention of a local brokerage concern engaged in negotiating farm mortgages, known as the American Farm Mortgage Company, and hereinafter referred to as the mortgage company, and the principal question of fact in the case is, whose agent was the mortgage company? The original deed of trust taken recited a loan of $100,000, and it is an admitted fact that only $10,000 was deducted at that time, and there is much testimony as to the purpose for which this deduction was made, it being the insistence of appellants that it was a brokerage fee, which was divided equally between the mortgage company and appellee insurance company. It is the insistence of the appellees that an application was made to it for a loan of $100,000 to appellants, but the application was declined because the rate of interest proposed was only 6 per cent., whereas, at the time the loan was made, appellee was making no farm loans at a less rate than 7 per cent., and the mortgage company, being advised of this fact, proposed to appropriate $5,000 of its commission to appellees, which should be treated as the equivalent of a loan at 7 per cent., and that proposition was accepted, and the remaining $5,000 which was not paid to appellants out of the proceeds of the loan were reserved by the mortgage company as a brokerage fee for its services in negotiating the loan.

We find it unnecessary to determine the issue of fact concerning the $10,000 not paid to appellants, for its deduction did not render the loan usurious, as appears from calculations in the brief of appellees.

The original loan, as evidenced by the deed of trust securing it, was for a period of seven years, at 6 per cent. interest, and if the contract covering this loan had been carried out in accordance with its terms the result would have been as follows:

Appellants contracted to pay:	
Principal	$100,000
7 years at 6%	42,000
Total	$142,000

But if the appellees be charged with the whole $10,000 which appellants did not receive, it is undisputed fact that they did receive $ 90,000.00
and interest on that sum for 7 years at 10 per cent would be 63,000.00

Total $153,000.00

It therefore appears that appellants contracted to pay a sum $11,000 less than the amount they admit receiving, with interest calculated at 10 per cent., so that there could have been no usury in the original loan.

This calculation takes no account of a $1,000 item which will be discussed in connection with the calculation to determine whether or not the second loan was usurious. In other words, the first loan is not usurious even though that item is not taken into account.

The proceeds of the loan were disbursed by the mortgage company, a large part of it being used in discharging outstanding liens and incumbrances against the lands mortgaged to appellees, but it is conceded that appellants received from this loan at the time it was made $90,000.

The original loan was made April 1, 1920, and in the fall of that year it became necessary for appellants to borrow more money. Their live stock and farming

implements had been mortgaged to a local bank, and this mortgage had been foreclosed, and appellants advised appellee that they would be unable to cultivate the land unless an additional loan were made with which to purchase stock and tools and feed and to pay certain other expenses. Application was made for an additional loan of $30,000, but appellee declined to make an additional loan for that amount. However, an additional loan of $15,000 was made, and the original deed of trust and the note it secured were canceled and a new deed of trust was given to secure both the original and the new loan. The new loan was made at 8 per cent., and the date of final maturity was made the same as that of the original loan.

The second deed of trust was dated December 1, 1920, and recited the execution of two notes signed by appellants and payable to the order of appellees, one being for $100,000 payable 4-1-1927, and the second for $15,000, due 12-1-1921.

It appears that, after the consummation of the original loan, appellee paid appellants by check $1,000, and took from appellants a note for that amount, payable one year after date, without interest until after maturity. The explanation of this transaction offered by the managing officer of appellee was that they did not want it to appear that more than 10 per cent. interest had been charged in any one year, although the interest for the entire period of the loan would have been less than 10 per cent. per annum.

It is an undisputed fact that appellants received this $1,000, and that they executed their note for the $1,000, but this note was not paid, because, before its maturity, the new loan was negotiated. The proceeds of the new loan were also disbursed by the mortgage company. This additional loan was used in purchasing mules, feed, seed, paying taxes, insurance, and for other purposes, and checks were introduced—and not questioned—which showed the disbursement of this money. It was out of this $15,000 that the interest on the old loan to the date of the new loan was paid.

Interest was calculated on the original loan of the $100,000 from its date to the date of the new loan, and this interest, with the disbursement made by the mortgage company, totaled $15,047.63, exclusive of the $1,000 returned to appellants by appellees. Appellants say this $1,000 should not be taken into account, because it was not a part of the original loan, being nothing more than a private loan of $1,000 for a year, and not a part of the secured loan, and that the loan of this $1,000 ran only for one year.

If appellants were not correct in their contention as to the account to be taken of this $1,000, the transaction was not usurious, even though they are correct in all the other contentions made by them.

We do not decide these contentions, among which are these: That the mortgage company was the agent of appellee, and not the agent of appellants. And that the loan was an Arkansas, and not a Missouri, contract, although it was payable in the latter State.

The following calculations show what the result of the second loan would have been if it had been fully carried out, charging appellee with the $10,000 alleged brokerage fee and crediting it with the $1,000:

Principal note		$100,000.00
Interest on this note 6 1/3 years at 8%		50,666.66
Principal note		15,000.00
Interest on this note 1 year at 8 per cent		1,200.00
		$166,866.66

Amount borrowers would pay on money actually received at 10 per cent:

Principal advanced 4-1-1920		91,000.00
Interest at 10 per cent. for 7 years		63,700.00
Principal advanced 12-1-1920	$15,000.00	
Less interest on original loan to date of new loan	3,665.16	
	$11,334.84	11,334.84
Interest on net proceeds new loan 1 year at 10 per cent		1,133.48
		$167,168.32

It appears therefore that the sum which appellants would have been required to pay, had the contract been fully completed, was $301.66 less than would have been paid had the interest on all money received by appellants, including the $1,000, been calculated at 10 per cent. The inclusion or exclusion of the $1,000 as a part of the loan therefore becomes decisive of the case when considered only on the facts in issue.

We perceive no reason why the $1,000 should not be included in the calculation. It is undisputed that appellants received it, and did not repay it. It was not a gift, and cannot be considered as a transaction apart from the original loan and the enlargement thereof.

We have assumed, in the calculations made, that the insurance company wrongfully reserved $10,000 and paid appellants only $90,000, when they should have received $100,000; but, even so, the $1,000 was received, so that it is obvious that appellants received, not $90,000, as they insist, but $91,000, when this $1,000 is included in the calculation, as we think it should be.

The $1,000 could have been deducted from the $15,000 additional loan, as it might have been, or credited on the sum charged as broker's fee, but it is a mere matter of accounting to treat it as a part of the original loan, making that loan $91,000, as we have done in the above calculations, and we think it should be so treated, because it was received at the same time, or very shortly after, the $90,000 was received. In other words, it is an undisputed fact that appellants received, not $90,000, but $91,000, when the original loan was consummated. If this $1,000 is taken into the account and figured as a part of the original principal debt, as we think it should be, there was no usury in the transaction, and the court below was correct in so holding, and the decree of the court below is therefore affirmed.

STERNBERG DREDGING COMPANY v. BOYD.

Opinion delivered July 12, 1926.

1. DAMAGES—BREACH OF CONTRACT.—In a suit by a contractor against dredging company for anticipated profits and money earned under a contract for clearing a right-of-way for a drainage district, alleged to have been wrongfully annulled by the dredging company, evidence *held* to sustain allowance made by the master in favor of plaintiff.
2. CONTRACTS—CONSTRUCTION.—A provision for a bond in a contract to clear a right-of-way *held* mandatory, unless waived.
3. CONTRACTS—PERFORMANCE—WAIVER OF BREACH.—Where a dredging company continually insisted upon the execution by a contractor of a bond which he agreed to give for performance of his contract to clear a right-of-way, it did not waive its right thereto by permitting the contractor to work more than a year without executing it.

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

Costen & Harrison, for appellant.

J. T. Coston, for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the chancery court of Mississippi County, Chickasawba District, to recover $15,000 for anticipated profits and for money earned under the contract for clearing the right-of-way of a drainage district, alleged to have been wrongfully annulled by appellant. The jurisdiction of the court was not questioned, presumably for the reason that the issue between the parties involved an intricate accounting. Appellant filed an answer to the bill, denying the material allegations therein, and a cross-bill seeking to recover $4,511.08 alleged to have been advanced by appellant to appellee in excess of the contract price upon work performed by said appellee.

Appellee filed answer to the cross-bill, denying the material allegations therein, and the cause was submitted by consent to the court in vacation upon the pleadings and testimony. The court found it necessary, under his view of the law applicable to the facts in the case, to refer the matter to a special master for a statement

of account between the parties, in accordance with declarations of law announced by the court. Hon. Archer Wheatley, an ex-chancellor of broad experience, was appointed special master, with directions to consider the testimony already taken and such additional proof as might be offered by the parties. In conformity with the declarations of law, the special master carefully reviewed the evidence, which is too voluminous to set out even in substance in this opinion, and filed an itemized report showing a net balance due from appellant to appellee for work actually performed under the contract of $1,987.66.

Three specific exceptions were filed to the report of the master as follows:

"First: The master's report shows the amount cleared May 13, 1921, as shown by the defendant's exhibit No. 30, to have been 153.98 acres. This should have been 152.93 acres.

"Second: The special master credits the plaintiff with the difference between the work 40 per cent. complete, as shown by exhibit 30, and 50 per cent., as shown by testimony of witness Cohen to have been paid for by the district. This finding is erroneous for the reason that the witness Cohen's testimony relates to payments made by Sternberg Dredging Company for the construction of the muck ditch on the area of improvement No. 28, and there is no testimony upon which the special master could base his finding as to this item.

"Third: The special master credits plaintiff with the sum of four hundred thirteen dollars and sixty cents ($413.60), which he says is the amount paid by plaintiff on what is known as the Laxon camp. Testimony with respect to this showed that, if any payments were made, same were made a considerable time after the breach of contract herein, and defendants would not be properly chargeable therewith.

"Wherefore defendants pray that said sums be stricken out and said report be restated, and for all proper and equitable relief."

On February 3, 1925, the cause was finally heard by the court on the report of the special master and exceptions thereto, which resulted in an approval of the report and the rendition of a decree against appellant for $2,405.50, including interest, from which is this appeal.

Appellant contends for a reversal of the decree upon the three following grounds:

First, that appellee was overpaid by appellant in the sum of $3,579.59.

Second, that the special master erroneously included the credits set forth in subdivisions B and C of paragraph 2 of his report.

And third, that the decree of the chancery court rendered in accordance with the terms of the report of the special master was erroneous.

(1). We have determined that the court correctly declared the law relative to the work actually done under the contract, and agree with the master and the chancellor that appellant had not overpaid appellee. Overpayments for work actually done were not embraced in the exceptions to the master's report, and, after a very careful examination of the evidence, we are not able to discover where the advances exceeded the estimates.

(2). The objection to appellee's allowance of 5.75 acres additional between stations 202 to 226, 233 to 265, and 280 to 350, at $70 per acre, is that the master allowed and the chancellor approved it upon the misconception that witness Cohen testified that the clearing between the stations referred to had been cleared 50 per cent. instead of 40 per cent. Appellant is correct in his assertion that witness Cohen did not testify relative to the percentage of clearing between the stations, but incorrect in its contention that the master based his finding on Cohen's testimony. On the contrary, the master based his finding upon the fact that appellant's exhibit 30 shows that the clearing of the right-of-way between said stations had been completed between forty and fifty per cent. The finding of the master as to this item was therefore supported by the evidence.

The objection to appellee's allowance of $413.60 for clearing at Laxon camp is that the work was done after the contract was terminated in August, 1921. In the first place, considerable work was done and accepted after appellant notified appellee that the contract had been breached by failure to give bond, and, in the next place, for aught that the record discloses, the work may have been done before the notice was given and paid for by appellee in November and December, 1921. Appellee did not testify when the work was done, but said that expenditures in that amount were made by him in November and December, 1921, for work performed at said camp. It was impossible to determine the exact acreage or percentage of clearing done at the Laxon camp, so the master only allowed appellee for the amount he was actually out. This allowance was more favorable to appellant than it was entitled to, since labor was cheaper when the work was done than when the contract was entered into. There is testimony therefore in the record to support the finding of the master.

(3). Our construction of the testimony convinces us that the decree is supported by the weight of the evidence.

This brings us to a consideration of whether appellee is entitled on his cross-bill to profits which he would have made had he been permitted to fulfill his contract. The contract provided for clearing 345 acres of right-of-way at $70 an acre. Appellee cleared 159.73 acres, when he was compelled to quit because he did not execute a bond with security. The contract contained the following provision for a bond:

"Second party (appellee) hereby agrees to furnish reliable personal or surety bond equal to the sum of thirty (30) per cent. of the total amount of this contract, to guarantee the faithful performance of his work."

This bond was never given, and not tendered until seven days before appellee instituted his suit, which was several months after appellant notified appellee not to proceed further under the contract on account of his

failure to give the bond. We think the provision for a bond was mandatory, and that appellee was bound to give it unless waived by appellant. Appellee contends that appellant waived its right to the bond because it permitted him to work, furnished him estimates, and made payments under the contract for more than a year without requiring him to execute it. The record reflects that, although permitted to work under the contract for the time mentioned, appellant continually insisted by word and letter upon appellee executing the bond. Under these circumstances, it cannot be said appellant waived its right to the bond.

No error appearing, the decree is affirmed.

RHODES *v.* HOPE.

Opinion delivered July 12, 1926.

1. SUNDAY—SALE OF GASOLINE.—Under a municipal ordinance prohibiting the sale of goods, wares and merchandise on Sunday, the sale of gasoline to physicians, officers, tourists and patrons of defendant's garage is not within the exception allowing sales in cases of necessity or charity.
2. SUNDAY—BURDEN OF PROVING NECESSITY.—In a prosecution for selling gasoline on Sunday in violation of a city ordinance, the burden is on the defendant to bring himself within the exception in cases of sales for charity or necessity.

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

Steve Carrigan, for appellant.

U. A. Gentry and *J. D. Montgomery*, for appellee.

HUMPHREYS, J. Appellant was convicted in the mayor's court of Hope for violating a Sunday closing ordinance which prohibited, under penalty, the sale of goods, wares, and merchandise on the Sabbath day, except for charity or necessity. It was subsequently provided in the ordinance that charity or necessity on the part of the consumer might be shown in justification of such sales. The cause was appealed to the circuit

court of Hempstead County, where the jury was instructed to return a verdict of guilty upon the testimony adduced in the trial of the cause, which was accordingly done. From the consequent judgment of conviction an appeal has been duly prosecuted to this court.

The record reflects that appellant conducted a filling station in Hope, which he kept open on the Sabbath day to dispense gasoline to physicians, officers of the law, tourists, and patrons of his garage, which he ran in connection with the filling station. Before selling gas to these persons, he required each one to sign a statement that it was necessary for him to have it, and then only sold to the ones he believed signed the statement in good faith. The record does not show the particular circumstances under which the sales were made. In fact, no effort was put forth to show that the sales were made on account of unavoidable emergencies, bringing them within the rule of necessity in Sunday observance statutes.

Appellant contends for a reversal of the judgment on the theory that, this being the motor age, the sale of gasoline on Sunday is an inherent, essential, and vital necessity. It will be observed that the ordinance does not attempt to exempt from its provisions any particular commodity. It does not pretend to except the sale of gasoline from the penalties imposed. On the contrary, it penalizes one who sells any goods, wares, and merchandise on Sunday. The exception in the ordinance is that "charity or necessity on the part of the customer may be shown in justification of the violation of this ordinance." Food is as essential to the life of man as gasoline is to the activity of an automobile, yet this court ruled, in *Petty* v. *State*, 58 Ark. 1, 22 S. W. 654, that it was unlawful to keep a butcher shop open on Sunday for the purpose of selling meats and vegetables. It has never been the law in this State that one can sell gasoline on Sunday, within the meaning of Sunday restrictive laws, because automobiles are generally and almost universally used for traveling upon its highways.

Appellant also contends for a reversal of the judgment upon the theory that the exemption clause in the ordinance allowing sales of goods, wares, and merchandise in cases of necessity included sales to physicians, officers, tourists, and persons who kept automobiles in appellant's garage over night. This court had an exemption clause of this character in a Sunday restrictive law before it for construction in the case of *State* v. *Goff*, 20 Ark. 290, and in construing the clause said: "The husbandman should look forward to the ripening of his grain as an event which must happen, and should make such timely provision for the harvest as not to violate the Sabbath. This is a duty enjoined alike upon the poor and the rich." The classes referred to above were not within the exception of the necessity clause contained in the ordinance, and no such emergency was shown by the testimony as brought them within the exception, so appellant violated the Sabbath by selling them gasoline on Sunday. The undisputed testimony disclosed a violation of the ordinance by appellant, hence the court did not err in peremptorily instructing a verdict of guilty. The burden was upon appellant to bring himself within the exception. The judgment is affirmed.

MILLER AND GREGSON v. STATE.

Opinion delivered September 27, 1926.

1. INTOXICATING LIQUORS—POSSESSION OF STILL.—Evidence *held* sufficient to sustain a conviction for possessing an unregistered still, contrary to Acts 1921, p. 372.
2. INTOXICATING LIQUORS—POSSESSING STILL—EVIDENCE.—In a prosecution for possessing an unregistered still, where defendant, arrested at the still, denied ownership or possession thereof, evidence that defendant's son was seen on the same morning in the vicinity of the still with sacks of sugar, "shorts", and fruit jar lids, was competent in considering whether defendant was at the still by accident or for the purpose of operating it.

3. CRIMINAL LAW—COMPETENCY OF EVIDENCE OF ANOTHER CRIME.—In a prosecution for possessing a still, testimony that a witness bought whiskey from one defendant, being taken to his house by his codefendant, *held* competent.

4. WITNESSES—IMPEACHMENT ON CROSS-EXAMINATION.—In a prosecution for possessing a still, it was competent, as affecting his credibility, to cross-examine defendant as to his having been caught at another still after his arrest.

Appeal from Craighead Circuit Court, Jonesboro District; *G. E. Keck,* Judge; affirmed.

Hawthorne, Hawthorne & Wheatley, for appellant.

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

McCULLOCH, C. J. Appellants were separately indicted for the statutory offense of keeping in possession an unregistered still (Acts 1921, p. 372), and on the trial of the two cases together, by consent of parties, both of the appellants were convicted and sentenced to the penitentiary.

The first and principal contention is that the evidence is not sufficient to sustain the verdict of conviction.

The sheriff of the county and two citizens who accompanied him on a raid testified that, early one morning, they found a distillery out in the woods, at which there were ten or twelve barrels of mash ready for use in the distillation of alcoholic spirits. They testified that they waited at the still, in hiding, for several hours, and that, about eight o'clock in the morning, the two appellants, George Miller and Bill Gregson, came up and walked in among the barrels of mash near the distillery. The officers commanded them to hold up their hands, which they did, and they were placed under arrest. Miller claimed, according to the testimony of the witnesses, that he had come there to make a run of the distillery for a man named Gaither, who, with others, was operating the still, and that it was Gaither's day to make a run. Gregson was standing a few feet away, and made no response to this statement of Miller, but Gregson, according to the testimony of the witnesses, made the statement that he

was not worried, as it did not mean "but a year anyway, and maybe six months."

The sheriff testified that, shortly afterwards that morning, he arrested Miller's son and another young man in a car about half a mile from the distillery, and that the boys had two sacks of sugar and a sack of "shorts," or bran meal, some fruit-jar lids and rubbers.

Miller denied that he made the statement to the officers to the effect that he was there for the purpose of operating the still. He testified that he had arranged with a man by the name of Freeze, who owned land there, to cut cordwood, and that, when arrested by the officers, he was merely walking down into the woods to find the boundary line of the land on which he was to cut the wood. He testified that he did not know that the distillery was there until the officers called out to him to hold up his hands. Gregson testified to the same effect, saying that he accompanied Miller into the woods to see about the timber, as he expected to haul it when cut by Miller.

We are of the opinion that the evidence was legally sufficient to sustain the verdict. The presence of the accused at the distillery, which was ready for operation, together with the statements made to the officers, constituted sufficient evidence that appellants had appeared there for the purpose of taking possession of the still and operating it.

Assignments of error are also made with respect to the court's ruling in admitting testimony. It is insisted that the court erred in permitting the sheriff to testify concerning Miller's son having the sacks of sugar and "shorts" and the fruit-jar lids in the vicinity of the distillery. The articles in possession of Miller's son were such as are customarily used in the manufacture and distribution of alcoholic liquors, and the fact that those things were in the possession of Miller's son was competent in considering whether or not Miller was at the distillery by accident or for the purpose of operating the distillery. Appellant contended that the boy had been

sent to purchase those articles for use in preserving and canning fruit, but it was a question for the jury to determine whether the boy, as a member of Miller's family and under his control, had procured the things at Miller's request for use at the distillery.

Again, it is insisted that the court erred in permitting witnesses Moore and Lyttel to testify that they bought whiskey from Miller and that they had been carried to Miller's house by Gregson to procure the liquor. This was competent for the purpose of showing that both of the appellants were engaged in the liquor traffic and as corroborative of the proof that they were interested in the operation of the distillery at which they were found by the officers.

Error is assigned in the ruling of the court permitting the prosecuting attorney to interrogate Miller, on cross-examination, as to his being caught at another distillery in the neighborhood since he was arrested. This was competent for the purpose of discrediting Miller as a witness. The fact that he was asked about an occurrence since he was arrested does not lessen its competency for the purpose of testing the credibility of the witness.

There are other assignments, which are not of sufficient importance to discuss.

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

VINCENT v. STATE.

Opinion delivered September 27, 1926.

1. INTOXICATING LIQUORS—POSSESSING STILL—EVIDENCE.—Evidence *held* to sustain conviction of possessing an unregistered still, in violation of Acts 1921, p. 372.

2. INTOXICATING LIQUORS—POSSESSION OF STILL—INSTRUCTION.—An instruction asked by defendant that the mere fact that accused was found asleep at a distillery would not sustain a conviction of possessing a still, and that it was necessary for the State to show that defendant was owner or in possession of the still, *held*

properly modified by adding that defendant would be guilty if he was exercising control and dominion over the still.

3. CRIMINAL LAW—INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE.—An instruction that, before defendant could be convicted of possessing a still, all facts and circumstances, when taken together, must be inconsistent with any reasonable hypothesis except that he was guilty, *held* properly refused, where conviction did not rest on circumstantial evidence alone.

4. CRIMINAL LAW—INSTRUCTIONS—APPLICATION TO CASE.—Refusal of defendant's requested instruction that his admissions to officers must have been voluntary was not error where there was no evidence that they were not voluntary.

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

Gautney & Dudley, for appellant.

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

McCULLOCH, C. J. Appellant was indicted for the statutory offense of keeping in his possession an unregistered still (Acts 1921, p. 372), and on the trial of the cause he was convicted and sentenced to the penitentiary. An appeal has been duly prosecuted to this court, and the principal contention is that the evidence adduced at the trial was not sufficient to sustain the verdict of conviction.

Three witnesses were introduced by the State, one of whom was an officer, and the other two were citizens who accompanied the officer. These witnesses testified that they went out in search of a whiskey distillery which was reported to be in operation about eight miles distant from the town of Rector, in Clay County, and that, about eleven o'clock at night, they found the distillery, and found appellant there, alone and asleep, with his head resting on a sack of sugar. They testified that, when they awakened appellant from his sleep, he admitted that he was operating the still, and had been doing so for five or six years, and that he had purchased the stillworm from a man named Lancaster, paying forty dollars therefor. Appellant also told the men, according to their testimony, that he had made a run of whiskey that

afternoon about three or four o'clock, and showed them some of the whiskey that he had manufactured.

Appellant testified in his own behalf, and admitted that he was asleep at the distillery, as testified to by the State's witnesses, but he claimed that he had nothing to do with the still, and merely went there to get some whiskey, and that the man in charge of the distillery gave him whiskey, which he drank, and became intoxicated. He denied that he made any statement to the officers admitting that he had operated the still or purchased the worm, or had anything to do with the operation of the still.

The evidence seems to be abundantly sufficient to sustain the verdict. The presence of appellant at the distillery and his admissions that he had purchased the worm and had been operating the distillery afforded evidence sufficient to sustain the conviction.

There are assignments of error with reference to the rulings of the court in denying some of appellant's requests for instructions.

Instruction No. 4, requested by appellant, was, in substance, that the mere fact that the accused was found asleep at the distillery would not be sufficient to sustain a conviction, and that it was "necessary for the State to show by the evidence, beyond a reasonable doubt, that the defendant was the owner or in possession of the still." The court modified this instruction by an addition which stated, in substance, that the length of time the still was kept in possession was not material, but that the defendant would be guilty if it was shown that he was "exercising control and dominion over the still, or stillworm, at the time testified to by the prosecuting witnesses." The modification was not improper, and the instruction, taken as a whole, correctly stated the law on the subject.

The court refused to give requested instruction No. 5, stating, in substance, that, before there could be a conviction on the charge of possessing a still, "all of the facts and circumstances, when taken together, must be inconsistent with any reasonable hypothesis except that he is guilty." The conviction did not rest on circum-

stantial evidence alone, and for this reason, if for no other, the instruction was erroneous. *Bartlett* v. *State*, 140 Ark. 553.

In requesting instruction No. 6, appellant's counsel sought to have the jury told that the admissions of appellant to the officers must have been free and voluntary in order to be admissible as evidence. There was no question about the alleged admissions being voluntary. The officers testified that appellant voluntarily made the statements, and appellant denied that he made the statements at all. There was nothing tending to show that the admissions made, as claimed by the officers, were not voluntary.

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

WHITTAKER v. STATE.

Opinion delivered September 27, 1926.

1. RAPE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of rape.
2. CRIMINAL LAW—PROVINCE OF JURY.—The jury are the judges of the evidence and of the credibility of witnesses.
3. WITNESSES—IMPEACHMENT OF ACCUSED ON CROSS-EXAMINATION.—In a prosecution for rape, it was proper to permit defendant to be cross-examined as to other offenses, where such testimony was limited by the court's rulings to the purpose of testing defendant's credibility.
4. CRIMINAL LAW—CROSS-EXAMINATION OF DEFENDANT—HARMLESS ERROR.—In a prosecution for rape, cross-examination of defendant as to other offenses *held* not prejudicial, where his answers entirely exonerated him from any culpability or any immoral or reprehensible conduct in connection with the particular matters about which he was examined.
5. CRIMINAL LAW—INVITED ERROR.—If it was error to instruct the jury either to find the defendant guilty of rape or acquit him, instead of submitting the crime of assault with intent to rape, defendant cannot complain where he asked an instruction to the same effect.

6. RAPE—INSTRUCTION.—An instruction either to find defendant guilty of rape or not guilty of any offense was not erroneous where the testimony of the prosecutrix tended to prove that defendant was guilty of rape and defendant's testimony tended to prove that he was not guilty of any offense.

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

Bogle & Sharp, for appellant.

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

WOOD, J. Appellant was convicted in the Monroe Circuit Court of the crime of rape, and sentenced by the judgment of the court to imprisonment in the State Penitentiary for life. The judgment was based upon the verdict returned by the jury finding appellant guilty and fixing the term of imprisonment in the State Penitentiary for life.

The alleged victim of appellant was one Ruth Kennison, who testified, giving the circumstances of the alleged assault in detail, which we deem it unnecessary to set forth, inasmuch as we are convinced that the testimony of the prosecutrix and other witnesses for the State was amply sufficient to sustain the verdict. After detailing the facts and circumstances of the assault, the prosecutrix concludes her testimony by saying that he (the appellant) "grabbed me and jerked me across the road, slammed me down on the ground, and said, 'Lay down here, or I will kill you.' He held my arms, forced my legs open, wrestled with me until he penetrated me, actually raped me as brutally and harshly as he could." Appellant, in his testimony, denied positively that he assaulted the woman, and there was testimony of another witness in his behalf tending to corroborate his testimony. But the jury were the sole judges of the evidence and of the credibility of the witnesses, and it appears from their verdict that they believed the testimony of the prosecutrix rather than that of the appellant and his witness.

1. The court, over the objection of appellant, permitted the attorneys for the State to ask the appellant, on cross-examination, the following questions: "Q. What did you do to that Raymond girl about four or five years ago? A. I didn't do anything to the Raymond girl. Q. Didn't you rape her? A. No sir. Q. Didn't hurt her? A. No sir. Q. What about Tennessee Sawyer, what did you do to her?"

The appellant objected to the questions, and the attorney for the prosecution stated: "I want to show his immoral tendency. Court: Do you mean to ask by that question if he assaulted this party named with the intention of having intercourse with her? The attorney for the State: The Ramsey girl, yes sir. Q. What did you do to Tennessee Sawyer? A. She got shot accidentally. Q. Who got shot? A. Tennessee. Q. You shot her, didn't you? A. Yes sir."

Here the attorney for the appellant again objected to the questions and answers, and asked the court to exclude the same from the jury. The court stated: "Any evidence establishing or connecting him with immoral crimes of a serious nature would shed light on his reputation."

The attorney for the prosecution stated that the purpose of the questions was to test his credibility.

The court refused to exclude the testimony, to which ruling the appellant duly excepted.

The prosecuting attorney further interrogated the appellant, on cross-examination, as follows: "Q. You know the Ramsey girl that lived over on the Mr. Bateman place two or three years ago? A. No sir. Q. Do you know a family named Ramsey? I will ask you if you didn't rape a girl there, and you and your daddy paid them some money and kept it down? A. No sir."

The court further permitted the prosecuting attorney to ask the appellant, on cross-examination, the following questions: "Q. Didn't you shoot this girl? A. Yes

sir. Q. Didn't you shoot another negro last fall? A. Yes sir."

The court stated that the only purpose of the testimony was to aid the jury in determining the degree of credit to attach to appellant's testimony, and further stated that this testimony was not evidence of his guilt of this particular charge.

There was no error in the rulings of the court. The testimony, as shown by the statement of the court in making its rulings, was admitted for the purpose of testing the credibility of the witness. The questions propounded to the appellant, and his answers thereto, were proper when limited, as the court ruled, to the one purpose of testing the credibility of the appellant as a witness.

In the leading case of *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41, this court, through Mr. Justice HEMINGWAY, approved the general doctrine announced by the Supreme Court of Michigan in *Wilbur* v. *Flood,* as follows: "It has always been held that, within reasonable limits, a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. The court has a discretion as to how far propriety will allow this to be done in a given case, and will or should prevent any needless or wanton abuse of the power. But, within this discretion, we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility."

The court also cited and quoted with approval from *Real* v. *People,* 42 N. Y. 270, as follows: "A witness, upon cross-examination, may be asked whether he has been in jail, the penitentiary or State prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places."

Our own court has steadily adhered to the rule announced in *Hollingsworth* v. *State, supra,* and the following cases may be examined as authority on this subject: *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684; *Turner* v. *State,* 128 Ark. 565, 195 S. W. 5; *Webb* v. *State,*

138 Ark. 465-469, 212 S. W. 567; *Turner* v. *State,* 155 Ark. 443-448, 195 S. W. 5; *Tong* v. *State,* 169 Ark. 708-712, 276 S. W. 1004; *Mays* v. *State,* 169 Ark. 332-334, 275 S. W. 659; *Ogburn* v. *State,* 168 Ark. 396-400, 270 S. W. 945; *Wray* v. *State,* 167 Ark. 54-57, 266 S. W. 939; *Lytle* v. *State,* 163 Ark. 129-131, 259 S. W. 394; *Middleton* v. *State,* 162 Ark. 530-539, 258 S. W. 995; *Sweeney* v. *State,* 161 Ark. 278-286, 256 S. W. 73; *Bank of Hatfield* v. *Chatham,* 160 Ark. 531-541, 255 S. W. 31; *Turner* v. *State,* 153 Ark. 40-46, 239 S. W. 373; *Shinn* v. *State,* 150 Ark. 215-220, 234 S. W. 636; *Pearrow* v. *State,* 146 Ark. 201-206, 225 S. W. 308; *Paxton* v. *State,* 114 Ark. 393-396, 170 S. W. 80.

It follows, from the doctrine of the above cases, that the court did not err in permitting the attorneys for the State, in the cross-examination of the appellant, to propound the questions set forth above, and did not err in permitting the answers thereto. The State was bound by the answers of the appellant to the questions, and these answers entirely exonerated the appellant from any culpability or any immoral or reprehensible conduct in connection with the particular instances designated by the attorneys for the State. Therefore no prejudice could have resulted to appellant from the cross-examination to which objection is urged.

2. The court instructed the jury as follows: "1. The defendant in this case, gentlemen of the jury, is charged with the crime of rape. Rape is defined by the statute as the carnal knowledge of a female, forcibly and against her will. In order to constitute guilt, under the indictment laid here against the defendant, it is incumbent upon the State to prove beyond a reasonable doubt the following allegations in this indictment: first, that this defendant, some time prior to the return of this indictment, and in Monroe County, Arkansas, unlawfully, feloniously and forcibly, and against the will of the prosecuting witness, had carnal knowledge of her person by penetrating her privates. It must be done, as stated, forcibly and against her will and without her consent. If these allegations are proved, and that beyond a rea-

sonable doubt, there is but one form of verdict that would be responsive, that is, guilty as charged in the indictment, the punishment of which is death in the electric chair or life imprisonment. Under the evidence in this case you would have to find the defendant either guilty of rape or not guilty of any offense; there is no evidence here that would authorize this court in submitting any other offense whatever than that laid in the indictment, which is rape."

The appellant objected generally to the giving of this instruction, and also specifically, "for the reason that the court should not have told the jury that they could only find defendant guilty of rape, but should have told it that he could be guilty of assault with intent to rape."

Among other prayers for instruction by the appellant was the following, which the court gave: "The jury are instructed that, although you may believe from the evidence that the defendant has been guilty of assault and battery, or assault with intent to commit rape, or any other offense, still you cannot convict defendant unless you believe that he is guilty, and that beyond a reasonable doubt, of the crime with which he is charged in the indictment."

The court did not err in instructing the jury that, under the evidence in the case, they would have to find the defendant either guilty of rape or not guilty of any offense. The appellant did not present any prayer (except the above) for instruction on the offense of an assault with intent to commit rape, which offense is embraced in an indictment for rape. On the contrary, the prayer for the instruction *supra*, on the part of appellant, which the court gave, was to the effect that the appellant could not be convicted under this indictment, although the jury might believe, under the evidence, that he was guilty of an assault with intent to commit rape. Therefore appellant is certainly in no attitude to complain of the ruling of the court in giving instruction No. 1 *supra*. If the ruling was error, the appellant

waived it by the prayer for the instruction which he asked, and which the court gave. Moreover, there was no testimony to justify the court in giving an instruction allowing the jury to return a verdict for an assault with intent to commit rape. The testimony of the prosecutrix certainly tended to prove that the appellant was guilty of the crime of rape, and nothing less. On the other hand, the testimony of the appellant himself tended to prove that the appellant was not guilty of any offense. Therefore the court correctly instructed the jury that, under the testimony in the case, they should either find appellant guilty of the crime of rape as charged, or they should acquit him altogether.

There is no reversible error in the record, and the judgment is therefore affirmed.

SULLIVAN v. STATE.

Opinion delivered September 27, 1926.

1. HOMICIDE—EVIDENCE—MOTIVE FOR KILLING.—In a prosecution for murder, testimony of deceased's children that, about a week before the killing, their father told defendant that he was liable to get in trouble about having forged deceased's name to a note, was relevant to prove the State's theory that the defendant's motive was fear of prosecution for forgery.
2. HOMICIDE—MOTIVE FOR KILLING.—Where the purpose of evidence is to disclose a motive for the killing, the courts are very liberal in permitting its introduction, and anything and everything that might have influenced the prisoner to act may, as a rule, be shown.
3. CRIMINAL LAW—RES GESTAE.—In a prosecution for murder, testimony that deceased told witness, when he started from home on the day that he was killed, that he was going to see defendant about a bill of lumber was competent as part of *res gestae.*
4. WITNESSES—IMPEACHMENT ON CROSS-EXAMINATION.—In a prosecution for murder, it was not error to permit defendant to be cross-examined as to how many men he had shot at, if he was permitted to explain the circumstances of the shooting.
5. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—An instruction that, to justify homicide, it must appear that the circumstances were

sufficient to excite the fear of a reasonable person, acting without fault or carelessness, and that the party killing really acted on their influence and not in a spirit of revenge, *held* correct, and a requested modification that "it must appear that the circumstances were sufficient to excite the fears of the defendant acting as a reasonable person" was properly refused.

6. HOMICIDE—SELF-DEFENSE.—Whether defendant acted as a reasonable man and without fault or carelessless must be determined by the jury from the facts and circumstances in the case from the viewpoint of the defendant, or as they might have appeared to the defendant.

7. HOMICIDE—SELF-DEFENSE—INSTRUCTION.—An instruction that, if defendant, armed with a deadly weapon, sought or brought on, or voluntarily entered into, a difficulty with deceased with felonious intent to take his life, he could not invoke the law of self-defense, no matter how imminent the peril in which he found himself placed, unless he abandoned or attempted to abandon the conflict before the mortal shot was fired, *held* applicable to the facts proved by the State.

8. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—It was not error to refuse a requested instruction which was covered by other instructions given.

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

Pratt P. Bacon, for appellant.

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

WOOD, J. Appellant was convicted in the Miller Circuit Court on an indictment which correctly charged him with the crime of murder in the first degree in the killing of one John Gibson. He was found guilty by the jury of the crime of murder in the first degree, and his punishment fixed at life imprisonment in the State Penitentiary.

From a judgment sentencing the appellant according to the verdict, he prosecutes this appeal.

The testimony of H. L. Burton, for the State, was substantially as follows:

The witness was with Gibson, the deceased, on December 25, 1925, from about 12 o'clock noon until he was killed. The witness met Gibson at his home. They

went to Ravana in witness' car. Gibson asked the witness to stop at Sullivan's house, and witness drove by Sullivan's house and stopped his car. Gibson got out of the car, and went into the house. The witness heard the report of a gun. The witness sat in the car, and saw Sullivan come out of the south end of his house, which was the back part. The house faces the road north. Sullivan met his wife, 20 or 30 steps from the house, and said to her, "I killed him. I shot him through the heart." The witness then went in the house and found Gibson in the room, dead. He was leaning against the bed, shot through the heart. His hands were down by his side. The witness' car was about 50 steps from where Sullivan met his wife. Sullivan did not have a gun when the witness saw him. The witness described the house where Sullivan and his family lived. The house faced the road, and there were two rooms 16x16, with a hall between. The killing occurred in Miller County, Arkansas.

Over the objection of appellant the court permitted Jasper, Eva, Addie and Effie Gibson, children of the deceased, to testify to remarks made by their father in a conversation with Sullivan on the 19th day of December, 1925, which is as follows:

"Well, Mr. Sullivan, I want to see you about that feed bill you owe up there at Mr. John Simmons' that I stood for. It's about time it was being paid off. I owe a bill up there myself, and I would love for you to see if you can't dig me up some money on that. I thought I would drop down and see if you could dig me up some money on that feed bill. It's about time it was being paid. While I think about it, Willis jumped me about that note you forged my name on up there. You ought to see something about that. You are liable to get in trouble about it. I ain't got nothing to do with it myself; that is left up to you and Willis."

The defendant duly excepted to the ruling of the court in admitting the above testimony.

Over the objection of appellant, the court permitted Jasper Gibson to testify that, on the day of the killing, his father went to appellant's house to see him about some lumber. The witness stated that he knew this from what his father told him.

The appellant duly excepted to the ruling of the court.

The witness, Fred Brimmer, over the objection of appellant, was permitted to testify that he was at the home of John Gibson, the deceased, on the morning that he left for Ravana, the day that he was killed. Gibson had started to Ravana to see Sullivan, the appellant, about a bill of lumber. The witness was asked, "How do you know that?" and answered, "He told me."

The appellant duly excepted to the ruling of the court in admitting this testimony.

Over the objection of the appellant he was asked, on cross-examination, "How many different men have you shot or shot at?" The court ruled that the appellant might answer the question, and that the jury might consider that "only in passing on this man's credibility as a witness."

The appellant duly excepted to the ruling of the court.

Over the objection of appellant the court, among other instructions, gave the following:

"6. The bare fear of those offenses to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fear of a reasonable person, acting without fault or carelessness on his part, and that the party killing really acted on their influence and not in a spirit of revenge."

The appellant asked the court to amend the above instruction by adding the following: "It must appear that the circumstances were sufficient to excite the fears of the defendant, acting as a reasonable person."

The appellant duly excepted to the ruling of the court in giving the instruction, and in refusing to add the qualification.

Over the objection of appellant the court gave the following instruction, to which appellant duly excepted:

"11. If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, armed with a deadly weapon, sought or brought on or voluntarily entered into the difficulty with deceased, with felonious intent to take his life, then the defendant cannot invoke the law of self-defense, no matter how imminent the peril in which he found himself placed, unless he abandoned or attempted to abandon the conflict before the mortal shot was fired."

The appellant's prayer for instruction No. 14 is as follows:

"If you believe from the evidence that the defendant was in his home, and in good faith, and as a reasonable man, believed that deceased intended to kill him or do him some great bodily harm, and, while so in his home, deceased came there and entered the house in a violent and threatening manner, thrust his hand into his pocket, and if defendant, as a reasonable man, believed that deceased intended to kill him, or do him some great bodily harm, and, acting under the influence of such belief, defendant fired the fatal shot, the killing would be justifiable, in viewing the circumstances from defendant's standpoint, if it appeared to him, as a reasonably prudent man, acting without fault or carelessness, he believed that it was necessary to kill deceased in order to save his own life or prevent great bodily harm being done him."

The court refused his prayer, to which ruling the appellant duly excepted.

We will consider the above assignments of error in the order urged by appellant's counsel in their brief.

1. It was not error to permit the Gibson children to testify that, on the 19th of December, 1925, in a conversation between their father, the deceased, and appellant, they heard their father use the language to the appellant as already set forth.

One of the witnesses for the defendant testified that, just as Gibson came along in the car, the witness saw the defendant, Sullivan, come through his house with what looked like a shotgun in his hand.

One of the witnesses for the State testified that Sullivan told the witness, on the morning before the killing occurred, that "they thought that they had him in their boat, but, before he would go to the penitentiary over anything, he would kill the whole bunch."

Another witness for the State testified that, on Christmas Eve night, Sullivan told the witness to tell John Gibson, the deceased, "to come down to his house tomorrow, that he wanted to see him on some particular business." The witness further testified that he went by John Gibson's home that night and delivered the message.

It was the theory of the State that the motive of appellant in killing the deceased was because he feared he would be prosecuted for the crime of forgery, and, if so, the deceased would be a material witness against him.

It appears from the testimony of the witnesses just quoted that this theory of the State was justified, and therefore the testimony of the children of Gibson as to the conversation between him and the defendant, Sullivan, a few days before the killing as above detailed, was relevant to the issue. The appellant himself, on cross-examination, was asked the following question, "And you killed him because he came to your house, did you, that night?" He answered, "I reckon I did. I told him not to come to my home. He came there. What else was I going to do—go off and leave her in the house?"

It was the contention of appellant, as shown by his testimony, that he killed Gibson because he feared that illicit relations existed between him and appellant's wife, and because he had told the deceased to stay away from his home, and because the deceased came to appellant's home and was making a demonstration at the time appellant shot him, as though he was going to draw a weapon from his pocket.

In *Sneed* v. *State,* 159 Ark. 65-74, 255 S. W. 895, 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 always is 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."

It will be observed that there was a sharp conflict between the appellant and the State as to the motive actuating appellant in the killing of Gibson. The testimony of Gibson's children, as above detailed, was relevant testimony tending to prove that the motive of the appellant in the killing of Gibson was as contended by the State, and the court therefore did not err in admitting the same.

In 13 R. C. L., 910, § 214, it is correctly declared that: "Where the purpose of evidence is to disclose a motive for the killing, the courts are very liberal in permitting its introduction, and anything and everything that might have influenced the prisoner to commit the act may, as a rule, be shown." Many cases are cited in the note to sustain the text.

See also 30 C. J. 179, § 406, and *Stokes* v. *State,* 71 Ark. 113, and at p. 117, 71 S. W. 248, where we quoted from Mr. Wills on Circumstantial Evidence as follows: "It is indispensable, in the investigation of imputed guilt, to look at all the surrounding circumstances which connect the actor with other persons and things, and may have operated as motives and influenced his actions."

2. The testimony of Fred Brimmer to the effect that the deceased, Gibson, told him, when he started from his home on the day that he was killed, that he was going to Ravana to see Sullivan about a bill of lumber, was relevant testimony, and the court did not err in admitting the same under the doctrine announced by this court in *Spivey and Lynch* v. *State,* 114 Ark. 267-175-276, 169 S. W. 949.

In the above case, at p. 275, we cited cases holding "that statements of one starting on a journey as to where he came from and where he was going, are ordinarily admissible in evidence as a part of the *res gestae;*" and we said, on p. 276, under the cases relied upon by the Attorney General, "it was permissible to prove the declarations of the deceased to the effect that he was going to the home of the defendant, Lillie D. Lynch, to visit her."

In addition to the authorities cited in *Spivey and Lynch* v. *State, supra,* see *State* v. *Pearce,* 87 Kan. 457, 124 P. 814, 30 Ann. Cas. 1913E, p. 358, and numerous cases cited in note; *Kilgore* v. *Stanley,* 90 Ala. 523, 8 So. 130; and *Harris* v. *State,* 96 Ala. 24, 11 So. 255.

In *Harris* v. *State, supra,* it is held, quoting from syllabus: "In a trial for homicide, declarations of the deceased, made just before he started to the place where he was killed, of his object in going there, are admissible as part of the *res gestae.*"

3. The court did not err in permitting the prosecuting attorney to ask the appellant, on cross-examination, the following question: "How many different men have you shot at?" nor in permitting the appellant to answer the question.

In the recent case of *Stanley* v. *State, ante,* p. 536, the appellant was asked, on cross-examination, the following questions: "How many men did you shoot before that? Tell the jury how many men you shot before that." Answer: "I have shot two men before this." In that case the majority of the court said: "These questions were asked for the purpose of affecting the credibility of appellant, upon the theory that his testimony might be discredited or impeached by specific acts committed by him in the past which may have been crimes, but not necessarily so. This court has adopted the rule that witnesses, including the accused, may be impeached on cross-examination by drawing out the fact that they have committed other crimes and immoralities of various kinds. *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41; *Shinn* v.

State, 150 Ark. 215, 234 S. W. 636; *Bullen* v. *State,* 156 Ark. 148, 245 S. W. 493; *Lytle* v. *State,* 163 Ark. 129, 259 S. W. 394. Although committed to this liberal rule for impeaching witnesses, including the accused, this court has said that the rule has its limitations, one being that the witness cannot be asked about a mere accusation or an indictment preferred against him for the purpose of attacking his credibility, because a mere accusation or indictment raises no legal presumption of guilt. *Jordan* v. *State,* 165 Ark. 502, 265 S. W. 71. We think the same reason should apply to questions touching specific acts of a witness which are not necessarily crimes. A homicide is not necessarily a crime. The killing may have been an accident or entirely justifiable. The court erred in requiring appellant to answer the questions propounded by the prosecuting attorney relative to shooting other men prior to shooting the deceased."

In so holding we inadvertently, and without express mention, overruled the case of *Turner* v. *State,* 128 Ark. 565-568, where, upon a precisely similar question, we said: "The next assignment of error is that the court erred in permitting the State to prove by defendant, on his cross-examination, that he had once killed another man in that county. The defendant objected to that testimony, but the court admitted it, with the privilege to the defendant of stating circumstances under which the former killing occurred, which he did, showing that he was justified and that he had been acquitted. We think the testimony was competent as affecting the credibility of the witness in his own behalf."

Now, in the case of *Stanley* v. *State,* above, our attention was not drawn to the case of *Turner* v. *State, supra.* It was not our purpose, in the case of *Stanley* v. *State, supra,* to overrule, either expressly or by implication, the case of *Turner* v. *State, supra.* It is manifest that the two cases are in irreconcilable conflict. If we adhere to the holding in *Stanley* v. *State, supra,* then we necessarily, by implication, overrule the case of *Turner* v. *State, supra.* We therefore return to the doctrine

announced in *Turner* v. *State, supra,* and expressly overrule the doctrine anounced in *Stanley* v. *State, supra.*

In the case at bar the appellant, after stating, in answer to the questions asked him on cross-examination, that he had shot at three different men, was permitted to give full explanation of the shots he had fired, and in doing so he fully exonerated himself.

The majority of the court, in the case of *Stanley* v. *State,* above, was of the opinion that it was improper to permit the defendant, on cross-examination, and for the purpose of testing his credibility, to be asked any questions the answer to which might not involve any moral turpitude on the part of the witness. But we are now convinced, upon a more careful consideration, that it is proper to ask the appellant, on cross-examination, for the purpose of testing his credibility, any questions the answer to which may, or may not, connote a lack of moral character, and to allow the witness to answer such questions.

This holding we now believe to be in accord with *Turner* v. *State, supra,* and many previous decisions of this court, which we have today collated in the case of *Whittaker* v. *State, ante,* p. 762, just handed down. See the cases were cited.

It follows, as already stated, that the court did not err in permitting the prosecuting attorney to ask, and the appellant to answer, the questions above set forth.

4. The court did not err in giving instruction No. 6, nor in refusing to modify the same as requested by the appellant. The instruction, without the modification, in legal effect was the same as it would have been if modified and given as requested by the appellant. The instruction as given was substantially in the language of the statute, and in conformity with the many previous decisions of this court.

As to whether or not the defendant has acted as a reasonable man, and without fault or carelessness on his part, under the statute, must be determined by the jury from the facts and circumstances in the case, from the

viewpoint of the defendant, or as they might have appeared to the defendant. *Smith* v. *State,* 59 Ark. 132, 26 S. W. 712; *Magness* v. *State,* 67 Ark. 594, 50 S. W. 554, 59 S. W. 529. The instruction, as we interpret it, was in accord with this view.

Instruction No. 11 given by the court was a correct interpretation of the law, and applicable to the facts which the testimony for the State tended to prove.

It was not error to refuse appellant's prayer for instruction No. 14, for the reason that the subject-matter of that instruction was fully and correctly covered by other instructions given by the court.

Since there is no reversible error in the rulings of the court, the judgment is affirmed.

EDWARDS v. STATE.

Opinion delivered September 27, 1926.

1. CRIMINAL LAW—OBJECTION NOT RAISED BELOW.—Objection that the name of a member of the grand jury was indorsed on an indictment for burglary as a State witness, and that he was cashier of the bank which was burglarized, cannot be raised for the first time on appeal by one who, being held to answer a criminal charge, was in the courtroom when the grand jury was impaneled and was afforded an opportunity to challenge any member of the panel.
2. BURGLARY—INDICTMENT—INTENT TO COMMIT GRAND LARCENY.—An indictment which charged that defendant unlawfully and feloniously entered a bank with unlawful intent to commit grand larceny by stealing and carrying away the personal property of the bank *held* sufficient without describing the particular goods which defendant intended to steal or alleging their value.
3. INDICTMENT AND INFORMATION—BILL OF PARTICULARS.—In a prosecution for burglary and grand larceny, refusal to require the prosecuting attorney to furnish defendant with a bill of particulars *held* not error.
4. CONTINUANCE—ABSENCE OF WITNESSES.—It was not error to refuse a postponement of the trial for a few hours until some of defendant's witnesses should arrive, where defendant announced ready for trial without such witnesses being present.

5. CONTINUANCE—SURPRISE.—Defendant was not surprised, so as to be entitled to a continuance until some of his witnesses should arrive, by an accomplice testifying for the State and implicating him in the robbery, where the indictment served on defendant apprised him that the accomplice was jointly indicted with him, thereby putting him on notice that the accomplice might testify that defendant was present and assisting in the burglary.
6. BURGLARY—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of the offenses of burglary and grand larceny.
7. CRIMINAL LAW—CONFESSION.—A voluntary statement of defendant, while incarcerated in jail, to his wife to borrow money because, when he got out, he would rob another bank and have plenty of money, made in presence of a deputy sheriff, *held* admissible as in the nature of a confession.
8. CRIMINAL LAW—PROOF OF CORPORATE EXISTENCE.—In a prosecution for burglary and grand larceny from a bank, testimony of the cashier is admissible to prove the existence of the corporation.

Appeal from Hempstead Circuit Court; *James H. McCollum,* Judge; affirmed.

W. K. Oldham, Jr., for appellant.

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

HART, J. Ray Edwards prosecutes this appeal to reverse the judgment of conviction against him for the crime of burglary and grand larceny.

The first assignment of error is that the court erred in not sustaining the defendant's motion to quash the indictment. The ground upon which this motion is predicated is that J. W. Butler, who was a member of the grand jury which indicted him, was indorsed on the indictment as a witness for the State, and was cashier of the bank which was charged to have been burglarized. The record shows that the defendant was in the courtroom when the grand jury was impaneled, and was afforded an opportunity to challenge any member of the panel, but did not do so. Section 3005 of Crawford & Moses' Digest provides, in effect, that every person held to answer a criminal charge may object to the competency of any one summoned as a grand juror for certain specified causes; and this court has held that, upon his fail-

ure to do so, he cannot raise the objection upon appeal. *Hudspeth* v. *State,* 50 Ark. 534, 9 S. W. 1; *Baker* v. *State,* 58 Ark. 513, 25 S. W. 603; and *Fox* v. *State,* 122 Ark. 197, 182 S. W. 906.

It is next contended by counsel for the defendant that the court erred in overruling the demurrer to the indictment. Two counts are contained in the indictment—one for burglary, and the other for grand larceny. The count for burglary charges that the defendant unlawfully and feloniously did break and enter the house of the Washington State Bank, with the unlawful intent to commit a felony, namely, grand larceny, by stealing and carrying away the personal property of said bank. It is contended that the indictment is defective because it does not describe the particular goods which the defendant intended to steal nor allege their value. This court has expressly held that, in indictments for burglary with the intent to commit larceny, it is not necessary to specify the particular goods which the defendant intended to steal, and said that such want of specification would not prevent a plea of former acquittal or conviction. *Davis and Thomas* v. *State,* 117 Ark. 296. For like reason, it is sufficient to allege that the defendant intended to commit grand larceny, which is a felony under our statute; and the indictment need not allege the value of the goods intended to be stolen.

It is next contended by counsel for the defendant that the trial court erred in not requiring the prosecuting attorney to furnish the defendant with a bill of particulars. There is no statutory provision requiring the prosecuting attorney to furnish the defendant with a bill of particulars, and such practice does not obtain in this State. Under our criminal code, the proceedings of the grand jury are required to be kept secret, but the minutes of the proceedings and the evidence kept by the grand jury may be delivered to the prosecuting attorney, but he is not required to disclose the same to the defendant.

The next assignment of error is that the court erred in refusing to postpone the trial for a few hours until some of the defendant's witnesses arrived. The record shows that one of the parties engaged in the burglary was a witness for the State, and testified that the bank was burglarized by himself, the defendant, and two other persons, acting together. The defendant interposed the defense of an alibi. Joe Mayfield had testified for the State that he was wounded while escaping after the bank robbery, and that the defendant had accompanied him to Little Rock and was present when he was treated by two physicians. The defendant claimed that he could prove by these physicians that he was not present on the occasion in question. The defendant claimed that he could also prove by the other absent witness that he was in Fort Smith, Arkansas, at the time of the burglary. The bank was entered on December 16, 1925, and the defendant was arrested in a few days, charged with having committed the burglary. An indictment was returned against him and Joe Mayfield, jointly, on the 8th day of April, 1926. The trial was commenced on the 14th day of April, 1926. The defendant announced ready for trial without the presence of the witnesses above named. If he intended to interpose the defense of an alibi, he should not have announced ready for trial until his witnesses to establish such defense were present. The defendant claims that he was surprised at Joe Mayfield testifying for the State and implicating him in the robbery. The indictment which was served upon the defendant informed him that Joe Mayfield was jointly indicted with him, and this put him upon notice that Joe Mayfield might testify that he was present and assisting in the burglary, if such was the fact. Under these circumstances, the trial court did not err in refusing to postpone the trial of the case.

The next assignment of error is that the evidence is not legally sufficient to support the verdict. The jury returned a verdict of guilty on both counts.

J. W. Butler was a witness for the State. According to his testimony, the Washington State Bank was a banking corporation situated in Hempstead County, Arkansas, and he was the cashier of it. The Washington State Bank was burglarized on the 16th day of December, 1925, and $7,000 in money and about $3,000 worth of Liberty bonds were stolen.

Joe Mayfield was also a witness for the State, and he testified that the defendant, two other persons, and himself committed the burglary and grand larceny charged in the indictment. He testified in detail about the commission of the crimes. It is earnestly insisted by counsel for the defendant that Joe Mayfield was an accomplice, and that his testimony was not corroborated as required by the statute.

Robert Evans, constable for the township in which Hope, Hempstead County, Arkansas, is situated, was also a witness for the State. According to his testimony, he saw the defendant and Joe Mayfield in Hope on the 15th day of December, 1925. This was on the day before the burglary, which occurred in the town of Washington, Hempstead County, Arkansas. The defendant and Mayfield stayed around the railroad station a good deal that afternoon. The witness recognized the defendant as being one of the parties he had seen in Hope, as soon as he went to the jail after the defendant had been arrested for the bank robbery.

R. A. Carrigan, a deputy sheriff of Hempstead County, was also a witness for the State. After the defendant had been arrested and placed in jail, charged with the burglary of the Washington State Bank, his wife visited him in jail several times. On one occasion she told the defendant she was tired of coming to see him, because she was having to borrow money to make the trips. The defendant replied, "Just go ahead and borrow some more money. When I get out of here, I'll rob another bank, and we will have plenty of money." This statement of the defendant to his wife was voluntarily made in the presence and hearing of the deputy sheriff,

and was in the nature of a confession. *Sutton* v. *State,* 162 Ark. 438, 258 S. W. 632.

The testimony of the deputy sheriff and of the constable tended to connect the defendant with the commission of the crime, and sufficiently corroborated the testimony of Joe Mayfield. *Brewer* v. *State,* 137 Ark. 243, 208 S. W. 290; *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Cummins* v. *State,* 163 Ark. 24, 258 S. W. 622; *Stout* v. *State,* 164 Ark. 553, 262 S. W. 649; *Brooks and Gregory* v. *State,* 169 Ark. 770, 276 S. W. 858; and *Kelley* v. *State,* 169 Ark. 289, 273 S. W. 11.

It is also insisted that the evidence is not legally sufficient to support the verdict because the indictment alleges that the Washington State Bank is a banking corporation, and there is no testimony to establish that fact. J. W. Butler, who was cashier of the Washington State Bank, testified that it was a banking corporation, and this court has held that parol evidence is admissible to prove the existence of a corporation. *Sturdevant* v. *Ka-Deene Medicine Co.,* 169 Ark. 535, 275 S. W. 921; *American Trust Co.* v. *Netherlands-American Bank,* 169 Ark. 867, 276 S. W. 1010; and *Kelley* v. *Stern Publishing and Novelty Co.,* 147 Ark. 383, 227 S. W. 609.

The court told the jury that Joe Mayfield was an accomplice of the defendant, and gave the usual instructions with regard to the corroboration of the testimony of an accomplice required by our statute, as repeatedly construed by this court. The respective theories of the State and of the defendant were fully and fairly covered in the instructions given by the court.

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

KETCHUM v. VANSICKLE.

Opinion delivered September 27, 1926.

CRIMINAL LAW—AUTHORITY TO SUSPEND SENTENCE.—Where the circuit court without authority suspended the execution of a sentence for one year in the penitentiary, to which suspension the defendant consented, the court had authority, more than a year later, to direct that the suspended sentence be enforced.

Appeal from Garland Chancery Court; *Earl Witt*, Special Chancellor; affirmed.

Cobb & Cobb, for appellant.

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

SMITH, J. On the 10th day of December, 1924, appellant entered a plea of guilty in the Garland Circuit Court to the crime of manufacturing whiskey, and the court entered a judgment sentencing him to a term of one year in the penitentiary. After directing that appellant be remanded to the custody of the sheriff of the county, to be delivered to the keeper of the penitentiary, the judgment concluded with the following recital: "It is further considered, ordered and adjudged by the court that this judgment and sentence be suspended upon the condition that said defendant does not violate any of the prohibition or gambling laws, nor carry concealed weapons; he shall remain in some useful employment, and shall pay all the costs of this action."

On the 14th day of May, 1926, appellant was again brought before the Garland Circuit Court, and, in a proceeding then had, it adjudged that appellant had violated the condition recited under which the sentence had been suspended, and the court revoked the suspension of the sentence and directed that appellant be confined in the penitentiary in discharge of the original judgment, and appellant sought by habeas corpus to obtain his release, upon the alleged ground that the circuit court did not have the jurisdiction to make this order, for the reason that more than a year had expired since the original sentence was pronounced. The chancellor heard the petition

for habeas corpus, and denied the relief prayed, and remanded appellant into the custody of the sheriff of Garland County, to be carried to and confined in the penitentiary, and we treat this appeal as a proceeding by certiorari to review these orders of court.

As appears from what we have said, the chief insistence is that the circuit court had no jurisdiction to revoke the suspension of the sentence after the expiration of the year from the time of the rendition of the original judgment sentencing appellant to one year's imprisonment.

Appellant says the proceeding wherein the sentence was pronounced, from which he has appealed, was not had under act 76 of the Acts of 1923 (General Acts 1923, pages 40 *et seq.*). Section 1 of this act gives the circuit judges, when it is deemed best for a defendant who has pleaded guilty or been convicted, and not harmful to society, the right "to postpone the pronouncement of final sentence," upon such conditions as shall be deemed proper; and § 2 of the act confers the authority upon a circuit judge, at any time the court may be in session, "to revoke the suspension and postponement" of sentence authorized by § 1 of the act, whenever that course shall be deemed for the best interest of society and such convicted prisoner.

We think counsel is correct in saying that the proceeding was not had pursuant to the provisions of this act, for the reason that the sentence was not postponed. Sentence was pronounced and a final judgment rendered, after which the pronounced sentence and judgment was suspended.

The original sentence was a suspended sentence, and, this being true, the case of *Davis* v. *State,* 169 Ark. 932, affords full authority for the action taken by the circuit judge in directing that the sentence be executed. In this case, as in that, the postponement of the imprisonment was done with the consent of the accused, and it may be said here, as it was said there, that the accused cannot object to being called upon to serve the sentence. It was there further said: "It does not make

any difference that more than a year has elapsed since the sentence of one year's imprisonment in the penitentiary was imposed. While at large under the void orders of the circuit court, to which he assented, the defendant was in the same situation that he would have been had he escaped from custody. A sentence of imprisonment is satisfied, not by lapse of time after it is pronounced, but by actual suffering of the imprisonment imposed by it. The reason is that the time at which a sentence shall be carried into execution is not provided by statute and forms no part of the judgment of the court. *Massey* v. *Cunningham, ante,* p. 410."

Appellant also insists that he is entitled to his discharge under the authority of the case of *Williams* v. *Brent, ante,* p. 367.

That case, however, has no application here. The facts in that case were that Brents had been sentenced to three years in the penitentiary, and, by due process of law, was committed as a prisoner in the State Penitentiary to serve said sentence, and thereafter, by a series of commutations, which had been termed furloughs, respites were granted by the Governor for periods of time sufficient to cover the entire sentence, and we held, in effect, that, by these commutations of sentence, Brents' term of imprisonment had been expiated. In the instant case there was no attempt to commute any portion of appellant's term of imprisonment. Indeed, the circuit judge possesses no such authority, and the case presented is that of the right of a circuit judge to direct that a suspended sentence be served by the person against whom it was pronounced.

As we have seen, the Davis case confers authority upon the circuit judge to so direct, and the certiorari will therefore be quashed and the judgment affirmed.

HALL v. STATE.

Opinion delivered September 27, 1926.

1. AUTOMOBILES—SERIAL NUMBER OF TIRE—MUTILATION.—In a prosecution for possessing an automobile tire on which the serial numbers had been mutilated, under Crawford & Moses' Digest, § 7437, it was not error to instruct that, if defendant kept such tire in his possession after he knew that the serial number had been mutilated, he would be guilty.
2. CRIMINAL LAW—COMPARISON OF HANDWRITING.—Where defendant admitted that he had signed a writing before the grand jury, the court properly allowed it to be introduced for purpose of comparison with an unsigned writing of incriminating character claimed to be in defendant's handwriting.

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

Pratt P. Bacon, for appellant.

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

HART, J. J. T. Hall prosecutes this appeal to reverse a judgment of conviction against him for the crime of possessing an automobile tire upon which the numbers had been mutilated.

It is insisted by counsel for the defendant that the court erred in instructing the jury that, if the defendant kept the automobile tire in his possession after he knew that the serial number had been mutilated so that it could not be read, he would be guilty. The indictment was returned under § 7437 of Crawford & Moses' Digest, which reads as follows: "It shall be unlawful for any person, firm or corporation to have in its possession an automobile, automobile tires or gasoline engine, the motor and serial number of which have been mutilated to the extent that same cannot be read. Where any automobile, automobile tires, or gasoline engine has been stolen and recovered, and serial numbers found mutilated, the court where such case may be tried shall have power to authorize the rightful owner of such automobile tires or accessories to continue the use of same. The court shall also direct that the owner of such car have the

original serial numbers restenciled on the engine or motor car."

The section of the statute in question was passed in exercise of the police power of the State for the protection of the public. In *People* v. *Fernow*, 286 Ill. 627, 122 N. E. 155, the Supreme Court of Illinois, in giving the reason for the passage of acts of this sort, said: "The purpose of the act is to prevent the defacing, covering, or destruction of the manufacturer's serial number or distinguishing mark, so as to preserve the identity of motor vehicles and thereby protect the public against violations of law. The motor vehicle has become the most common and efficient agency for the commission of crime and the chief instrumentality employed by criminals to avoid detection and escape punishment, and one of the methods employed is to destroy the evidence of identity. Motor vehicles have also become very frequent subjects of larceny, and the removal or change of the serial number is a convenient method for preventing identification and recovery. One committing a crime, even the most serious, and escaping in an automobile, would be more difficult of apprehension if the serial number or identification mark should be removed. The section is a legitimate and proper exercise of the police power."

It was also pointed out in the opinion that, where a specific intent is not an element of a crime, it is not always necessary that a criminal intent should exist. In discussing this phase of the case, the court said: "In the exercise of the police power for the protection of the public, the performance of a specific act may constitute the crime, regardless of either knowledge or intent, both of which are immaterial on the question of guilt. For the effective protection of the public, the burden is placed upon the individual of ascertaining at his peril whether his act is prohibited by criminal statute. The law in that regard has most frequently arisen in police regulations of the liquor traffic, but it has been applied in precisely the same way in other cases coming within the same rule and reason, such as a sale of imitation butter, a sale of

milk below a prescribed quality, the obstruction of a public highway by a railroad corporation for longer than a specified time, the admission of a minor to a pool-room, driving an unregistered automobile, killing for sale an animal under a designated age, carriage by an express company for transportation beyond the State line of fish or game, and in prosecutions for bigamy." Several decisions are cited, and the case has been followed in this court in *Ogburn* v. *State,* 168 Ark. 396, 270 S. W. 945. Hence we hold this assignment of error not to be well taken.

The next assignment of error relates to the admission of evidence. The defendant testified as a witness in his own behalf, and said that he bought the casings in question from a young man who was not known to him, and that he paid ten dollars for them. A note was found in a bottle upon a house-roof, fifteen or sixteen feet from the cell in the jail where the defendant was confined after being arrested. The note was not signed, and reads as follows: "Say Gordon if King or any of them ask you about them casings tell them you don't no who the man was and tell Red to do the same, for they said they aimed to make him make a sworn statement about it. Tell him to stay away from them if he can. If you all don't do that it will sure mess me up, for we have done told the court that we didn't no who the other man was."

The defendant was a witness in his own behalf, and, over the objection of his counsel, the prosecuting attorney was allowed to ask the defendant, on cross-examination, if he had not signed, as his testimony before the grand jury, the following: "I bought these casings from a man claiming to live near New Boston. Red Henderson, Vernie Norton, J. T. Hall." The defendant admitted that he had signed the writing, and the court allowed it to be introduced in evidence for the purpose of comparing it with the unsigned letter copied above, which the prosecuting attorney claimed was in the defendant's handwriting. It is claimed by counsel for the defendant that the signature to his testimony before the grand jury was

not a paper in the case, and that a comparison with a writing not already in the case but which is proved for the purpose of such comparison is not admissible, under *Miller* v. *Jones*, 32 Ark. 337.

In this connection it may be stated that, by the act of Congress approved February 26, 1913, it was provided that, in any proceeding before a court or judicial officer of the United States, where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceedings, to prove or to disprove such genuineness.

Our more recent decisions have followed this rule without any statute on the subject, and any admitted or proved handwriting of the person, the genuineness of whose handwriting is involved, is now made competent as a basis for comparison. *Caldwell* v. *State*, 69 Ark. 322, and *Walker* v. *State, ante*, p. 375.

The general rule in the United States has always been that, where there are other writings, admitted to be genuine or already in evidence for other purposes in the case, comparison may be made between such writings and the instrument in question. If such a comparison is conducive to the ends of truth and is allowable, there would seem to be but little reason for refusing to allow a comparison with other writings admitted to be genuine, although not in evidence for other purposes. *Morrison* v. *Porter*, 35 Minn. 425, 29 N. W. 54.

Whatever may be the rule elsewhere, it is now the practice in this State to give in evidence other signatures of the same person, admitted or proved to be genuine, to writings not otherwise competent evidence in the case, to enable the court or jury, by an examination and comparison of the genuine writings with the one which is controverted, to form an opinion whether the latter be or be not genuine.

The defendant was a witness in his own behalf, and, upon cross-examination, denied writing the unsigned

paper copied above. The admission of writings for the purpose of comparison is the same in criminal as in civil cases, and, where a defendant, who has taken the stand in his own behalf, denied writing the paper which is offered in evidence against him, he may be called upon, on cross-examination, to write in open court, in order that the jury may compare such writing with the writing controverted. Wharton's Crim. Ev. (10th ed.) § 550; 3 Jones' Com. on Ev., § 550 (563); *Bradford* v. *People,* 22 Col. 157, 43 Pac. 1013; and *State* v. *David* (Mo.), 33 S. W. 28.

No other assignments of error are relied upon for reversal of the judgment, and the judgment will therefore be affirmed.

McKENZIE v. RUMPH.

Opinion delivered September 27, 1926.

1. HOMESTEAD—ABANDONMENT.—While a husband cannot convey the homestead unless his wife joins in executing the conveyance, as required by § 5542, C. & M. Dig., it is within his power, when he has not deserted his wife and abandoned his family, to abandon his homestead, without obtaining his wife's consent.
2. HOMESTEAD—ABANDONMENT.—Where the owner of a homestead verbally agreed to convey it to another, and delivered possession of a portion of the house to his grantee, but became ill and died before executing a deed, he will be *held* to have abandoned his possession as homesteader.
3. FRAUDS, STATUTE OF—ORAL SALE OF LAND—PART PERFORMANCE.—A parol agreement to convey land is valid against the statute of frauds, where the grantor surrendered possession, but died before making a deed.
4. EQUITY—LACHES.—Where a son, having the legal title to land, orally agreed to convey the land to his mother, but died before executing a conveyance, and his heirs conveyed the land to defendants, heirs of the mother relying upon such verbal sale, who waited 15 years after their rights as heirs had accrued, and nearly seven years after defendants' deed was on record, will be *held* guilty of such laches as barred them from asserting title.

5. VENDOR AND PURCHASER—IMPUTED KNOWLEDGE.—The knowledge of one of two jointly interested purchasers as to the condition of the title to land is imputed to the other.

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

Saxon, Davidson & Wade, for appellant.

Gaughan & Sifford and *Harry Meek,* for appellee.

SMITH, J. On the 13th day of June, 1889, Mrs. Ely M. Neeley obtained patent from the United States to two eighty-acre tracts of land in Ouachita County, and thereafter occupied the land as her home until March 1, 1891, at which time she conveyed it to her son, James T. Neeley, for the consideration of $450, of which $25 was paid in cash, and a lien was retained to secure the balance of the unpaid purchase money. This deed was duly recorded.

Mrs. Neeley was the mother of four children, to-wit: James T. Neeley, Mary Neeley Haines, Mattie Neeley McKenzie, and Nannie Neeley Powell.

On January 27, 1917, the widow and heirs of J. T. Neeley, who had died February 23, 1898, conveyed the land, by warranty deed, to G. S. Rumph and George Williams, and later Mrs. Nannie Neeley Powell executed to Rumph and Williams a quitclaim deed for her interest in the land. Thereafter Tom Jinks was constituted attorney-in-fact for the heirs of Mary Neeley Haines and Mattie Neeley McKenzie, both of whom had died, and on June 6, 1923, Jinks, as attorney-in-fact, brought this suit to recover an undivided half interest in the land and to require an accounting of the rents and profits. The heirs of Mary Neeley Haines and Mattie Neeley McKenzie were made parties plaintiff.

It was alleged in their complaint, and testimony was offered tending to show, that J. T. Neeley was unable to pay the balance of the purchase money, and proposed to reconvey the land to his mother, Mrs. E. M. Neeley, and it was agreed that J. T. Neeley should move off the land and that Ben Powell, who was the husband of Nannie Neeley Powell, should move in the house which was

occupied by Mrs. E. M. Neeley and the family of J. T. Neeley. This was the only house on the land. This agreement was consummated, but the deed from J. T. Neeley to his mother was never executed, for the reason that J. T. Neeley became ill about a week after the contract to reconvey was made, and, after an illness of two weeks, died without ever having executed the deed as agreed. Pursuant to this agreement, however, J. T. Neeley actually vacated two of the rooms in the house, and these were occupied by Ben Powell and his family. Immediately after the death of J. T. Neeley, his wife and family left the place, pursuant to the agreement J. T. Neeley had made with his mother.

After the death of J. T. Neeley in 1898, Mrs. E. M. Neeley remained in possession of the land until her death, which occurred March 11, 1908, sharing the only residence on the land with her son-in-law, Powell, who was her tenant. The taxes on the land were paid by Mrs. E. M. Neeley in her own name until the time of her death.

After the death of Mrs. E. M. Neeley, her son-in-law, Powell, remained in possession until his death, which occurred January 27, 1909, and thereafter his widow, Mrs. Annie Neeley Powell, remained in possession of the land until it was conveyed, as hereinbefore stated, to Rumph and Williams. Only a small portion of the land was in cultivation when Mrs. E. M. Neeley died, and Mrs. Powell continued in the exclusive and sole possession of the land until she and the J. T. Neeley heirs conveyed to Rumph and Williams, and paid the taxes thereon in her individual name. The other heirs of Mrs. E. M. Neeley received nothing from the land during Mrs. Powell's occupancy, and paid nothing on the taxes, their testimony being that the use of the land equaled in value the amount of the taxes.

The testimony was devoted chiefly to establishing the fact that there was an oral sale of the land by J. T. Neeley to his mother, under which the possession was surrendered to and retained by Mrs. Neeley until the time of her death. In opposition to this contention it is

insisted that there could have been no valid oral sale of the land for the reason that it was the homestead of J. T. Neeley, and it was therefore essential to a valid conveyance of it that his wife should have joined in the execution of the deed conveying it, and, inasmuch as it is conceded that Mrs. J. T. Neeley did not join in the execution of a deed, there was no valid conveyance.

By § 5542, C. & M. Digest, it is provided that no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, certain liens, and unpaid purchase money, unless the wife joins in the execution of such instrument, and acknowledges the same.

We will not review the testimony tending to show that there was an oral sale of the land to Mrs. Neeley by J. T. Neeley in satisfaction of the debt for the unpaid purchase money. We think the testimony establishes the fact that there was such a sale, and that it was valid, notwithstanding the statute referred to.

While a husband cannot convey the homestead unless the wife joins in the execution of the conveyance, it is in his power, when he has not deserted his wife and abandoned his family (*Montgomery* v. *Dane,* 81 Ark. 154, 98 S. W. 715), to abandon his homestead. This results from the fact that, as head of the family, he has the right to determine where his home shall be. That the husband has the right to abandon his homestead without obtaining the consent of his wife is settled by the decisions of this court in the cases of *Newman* v. *Jacobson,* 108 Ark. 297, 158 S. W. 134; *Pipkin* v. *Williams,* 57 Ark. 242, 21 S. W. 433; *Brown* v. *Brown,* 104 Ark. 313, 149 S. W. 330; *Stewart* v. *Pritchard,* 101 Ark. 101, 101 S. W. 505; *Farmers' Bldg. & Loan Assn.* v. *Jones,* 68 Ark. 76, 56 S. W. 1062; *Vestal* v. *Vestal,* 137 Ark. 309, 209 S. W. 273; *Brignardello* v. *Cooper,* 116 Ark. 103, 172 S. W. 1030; *Mason* v. *Dierks Lbr. & Coal Co.,* 94 Ark. 107, 125 S. W. 656; *Newton* v. *Russian,* 74 Ark. 88, 85 S. W. 407.

When the homestead has been abandoned, it becomes subject to execution and the right to convey, as if it had

never been the homestead. *Pipkin* v. *Williams, supra; Stewart* v. *Pritchard, supra.*

We think the homestead had been abandoned as such by J. T. Neeley before his death, although he was residing there at the time of his death. The testimony shows that most of his household effects had been packed up, preparatory to moving, when he became ill, and that he actually vacated two rooms of the small house in which he resided, and that Powell had moved into these rooms and had taken possession of the place in the lifetime of J. T. Neeley. In other words, Neeley had surrendered possession, and Powell had occupied and taken possession.

The converse of the proposition here stated was declared in the case of *Gill* v. *Gill,* 69 Ark. 596, 65 S. W. 112. The syllabus in that case reads as follows: "Where the owner of a house, being a resident of this State and a married man, moved part of his furniture into it, with intention to occupy it as a homestead, but was taken sick and died before the moving was completed, and before any of his family had actually resided therein, and after his death his wife completed the moving and took up her residence there, the house was 'occupied as a residence', within art. 9, § 5, of the Constitution, so as to entitle his wife and minor children to claim the same as a homestead."

In the case of *Stewart* v. *Pritchard, supra,* Mr. Justice FRAUENTHAL said that "the abandonment of a homestead is almost, if not entirely, a question of intent."

There was a clear intent here on the part of J. T. Neeley to abandon his homestead, and this intent was so far executed that his brother-in-law, with his consent, had taken possession of the home.

The land having ceased to be the homestead of J. T. Neeley, was therefore subject to conveyance as if it had never been a homestead, and the widow of J. T. Neeley testified that she assented to its reconveyance to Mrs. E. M. Neeley and was a party to that agreement.

The statute of frauds is pleaded to defeat this reconveyance. But we think the statute was met by the actual surrender of possession under the parol agreement to reconvey. That agreement was fully consummated by the surrender of possession, and the conveyance was therefore valid. *Phillips* v. *Jones,* 79 Ark. 100, 95 S. W. 164; *Bostleman* v. *Henkel,* 152 Ark. 628, 239 Ark. 30; *Freer* v. *Less,* 159 Ark. 509, 252 S. W. 354.

Another disputed question of fact is whether Rumph and Williams were innocent purchasers of the land. But assuming, without deciding, that they were not, we think plaintiffs cannot recover, notwithstanding we have also concluded that the reconveyance of the land to Mrs. E. M. Neeley was valid, for the reason that we think they have been guilty of laches which bars this right.

It will be remembered that the plaintiffs are seeking to enforce an equitable title, for Rumph and Williams have the legal title to the land through a chain of conveyances which includes only a patent from the United States to Mrs. Neeley and her deed to J. T. Neeley and the deed from the widow and heirs of J. T. Neeley to Rumph and Williams.

Plaintiffs rely on a verbal resale of the land made in 1898, and the suit brought to establish and assert that title was not filed until the 6th day of June, 1923. It is true that Mrs. Neeley did not die until 1908, but this last date was fifteen years before the institution of this suit. It is true that Mrs. Powell, who remained in possession, was a daughter of Mrs. E. M. Neeley, and had the right to remain in possession as an heir-at-law; and it is also true that there was a presumption that her possession was not adverse to her cotenants, the other heirs-at-law of Mrs. E. M. Neeley, but the inaction of these plaintiffs under the facts of this case is a proper circumstance to consider in determining whether they were guilty of laches in asserting their title after the land had been conveyed to Rumph and Williams by the heirs of J. T. Neeley and by Mrs. Powell.

Such knowledge as Rumph had of the interest of the plaintiffs in this land is imputed to him through the knowledge of Williams, who was jointly interested with him in the purchase of the land, and who became, after its purchase, his cotenant. *Krow & Neumann* v. *Bernard,* 152 Ark. 99, 238 S. W. 19; *Neff* v. *Elder,* 84 Ark. 277, 105 S. W. 260; *Steele* v. *Robertson,* 75 Ark. 228, 87 S. W. 117.

Williams testified that he applied to Rumph to assist him in the purchase of the land. He knew the different heirs of Mrs. Neeley, and supposed they were the owners of the land, and he negotiated with them for its purchase, and had agreed on the price to be paid, but, when an abstract of the title was made, it appeared that the title was in the heirs of J. T. Neeley, and the deed was taken only from those heirs. This deed purported to convey the entire title, and Williams testified that he paid the J. T. Neeley heirs the full purchase price for the land. Later he and Rumph took a quitclaim deed from Mrs. Powell, because she was in possession, and paid her $5 for the deed.

The Haines and the McKenzie heirs knew that Rumph and Williams had declined and failed to consummate the agreement to purchase the land from them, and yet they took no action in the matter until plaintiff Jinks became their attorney-in-fact and instituted this suit. It is true this suit was brought within seven years of the date of the deed to Rumph and Williams, but only a short time less than the seven years, and during all this time there was on record a deed which apparently vested the title in J. T. Neeley. Rumph testified that, when it came to closing up the trade, he was advised by his attorney that it was only necessary to secure a deed from the heirs of J. T. Neeley, and that he paid these heirs the full value of the land on the assumption that he would acquire what the deed purported to convey, the entire title. Acting upon this assumption, he, two years later, bought from Williams the half interest which Williams owned, he kept the taxes down, and, shortly before the institution of this suit, sold an oil lease on the land.

Under these circumstances we think the plaintiffs are barred by laches. If they had taken any interest in the land, or had made any inquiry about it, they would have learned that, in 1891, their ancestor had deeded the land to their uncle, and, although they may have relied upon an oral reconveyance of the land and the possession of their ancestor, and, after her death, the possession of Mrs. Powell as being that of a tenant in common, the fact remains that for thirty-two years the legal title was in J. T. Neeley and his heirs, and was allowed to so remain without question until the institution of this suit, and that nearly seven years of this time was allowed to so expire after they knew that Rumph and Williams had not purchased from them. Their negligent delay resulted in Rumph paying Williams full value for an undivided half interest in the land and later executing an oil ease. The complaint does not even allege that the Haines and McKenzie heirs, who are all *sui juris,* were ignorant of the purchase of Rumph and Williams.

The inaction of these heirs was such as to lead Rumph to believe, and he testified that he did believe, that he and Williams acquired the whole title under the deed from the J. T. Neeley heirs, and, thus believing, to pay full value for the half interest which he supposed Williams owned, and, still later, to execute an oil lease, which evidently was the circumstance which enlisted the interest of Jinks, an entire stranger to the title, and who brought this suit for them and for himself.

In the very recent case of *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970, we said: "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."

The doctrine of that case is applicable here, and we hold that appellants are barred by laches, and the decree of the court below dismissing their complaint as being without equity is affirmed.

SIMS v. STATE.

Opinion delivered September 27, 1926.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—In a prosecution for murder, evidence *held* to sustain a conviction for murder in the second degree.
2. HOMICIDE—EXCLUSION OF EVIDENCE—HARMLESS ERROR.—In a prosecution for murder, the error of excluding evidence of prior difficulties between deceased and defendant was cured by the subsequent admission of such testimony.
3. HOMICIDE—EVIDENCE—GENERAL REPUTATION OF DEFENDANT.—In a prosecution for murder involving self-defense, exclusion of evidence of defendant's reputation for truth and honesty was not error, as the proper inquiry was as to his reputation for peace and quiet.
4. CRIMINAL LAW—INSTRUCTIONS.—Refusal of instructions that were either abstract or covered by others given was not error.

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

Sheffield & Coates, for appellant.

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

HUMPHREYS, J. Appellant was indicted and tried in the circuit court of Phillips County for the crime of murder in the first degree. He was convicted of murder in the second degree and adjudged to serve a term of twelve years in the State Penitentiary as a punishment therefor; from which is this appeal.

The first and second assignments of error urged for a reversal of the judgment are that the verdict is contrary to the law and the evidence. These assignments of error will be considered together.

The testimony introduced by the State was, in short, as follows: Appellant and deceased resided with their respective families near each other, either upon the same or adjoining plantations south of Helena, in Phillips County. They had known each other over eighteen months before the tragedy occurred. Julia Graham, the widow of the deceased, William Graham, testified that appellant and her husband had never had a fuss or squabble, to her knowledge, and that their relationship had been friendly until Thursday, April 6, 1926, before the tragedy, at which time deceased ordered appellant to leave their home because he had asked her to be his sweetheart. William Graham left home, unarmed, about 8 o'clock A. M. on the day of the killing, to plant corn for his father-in-law upon another place. Upon his return he met appellant in the public road near their respective homes. They talked awhile, and, during the time thus engaged, deceased pointed his finger at appellant. They then separated and walked in different directions for about fifteen feet, then turned and went toward each other again. Deceased had his hand up, and lowered it to his side, but did not move it backward toward his hip pocket. He had nothing in his hands. At this juncture appellant pulled his pistol and shot deceased twice, whereupon deceased ran a little piece across the field and fell. The shots were fired pretty close together. Immediately afterward appellant left the scene. An examination of the dead body disclosed that deceased was unarmed and in his shirtsleeves when shot. Also that both shots had entered the body, one passing through the heart, and that a gash had been inflicted upon his head, apparently by a lick with the pistol.

Jess Smith, one of appellant's witnesses, testified, on cross-examination, that he told him that he and the deceased had some words, and that, the very next time they got into it, he, appellant, was going to kill him.

Appellant testified in his own behalf to the effect that the deceased initiated four quarrels with him during their acquaintanceship, and had threatened to kill him

more than once, and on one occasion had drawn a Winchester on him. On cross-examination he admitted that deceased could have killed him at that time if he had wanted to, and that deceased had had opportunities after that to kill him but did not do it.

Several witnesses were introduced by appellant, who testified that the general reputation of the deceased was bad, and that he was a violent and turbulent man.

Appellant was the only witness who testified that deceased made a hip-pocket play at the time he shot him. The eye-witnesses for the State testified that deceased had nothing in his hand, had thrown his hand to his side but not toward his hip pocket, when appellant shot him. The verdict in the case indicates that the jury did not believe the testimony of the appellant to the effect that he shot deceased in necessary self-defense, but, on the contrary, believed the testimony of the State's witnesses to the effect that he killed deceased without justification.

An analysis of the testimony fails to disclose the elements necessary to reduce the homicide to manslaughter. The homicide was not the result of a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible. It follows that the admitted intentional homicide must have been murder in the first or second degree. Appellant was extremely fortunate in being convicted of murder in the second degree instead of the first degree, for, upon appeal, the evidence is sufficient to sustain a conviction for either. The verdict was not contrary to the evidence and law.

The third assignment of error urged for a reversal of the judgment is that the court erred in refusing to permit Frank Smith to testify to a difficulty over fruit, between appellant and deceased, in a certain peach orchard. Although this testimony was excluded when first offered, it was subsequently admitted, which cured the error, if any.

The fourth assignment of error urged for a reversal of the judgment is that the court erroneously refused to admit Robinson to testify as to a certain threat made by

deceased against appellant. This piece of testimony was first excluded, but subsequently admitted, which cured the error, if any.

The fifth assignment of error urged for a reversal of the judgment is that the court erred in refusing to admit the testimony of witnesses Robinson and Pillow, who testified to the general reputation of appellant in the community where he lived, for truth and honesty. Appellant's truth and honesty were not an issue in the case. Inquiry should have been directed to appellant's reputation for peace and quiet. The testimony was properly excluded.

The other assignments of error urged for a reversal of the judgment consist in the refusal of the court to give his requested instructions numbers 4, 6, 7, 8, 9, 12, 15, 16, 19, 20 and 21. Instructions numbers 16 and 19 were properly refused on account of being abstract. We have carefully examined the other instructions and compared them with the instructions given, and find that they are virtually covered by the instructions which were given by the court.

No error appearing, the judgment is affirmed.

ADAMS v. SUBDRAINAGE DISTRICT NO. 3, ETC.

Opinion delivered October 4, 1926.

1. DRAINS—JURISDICTION OF COUNTY COURTS OVER ASSESSMENTS.—Since the county court of the Osceola District of Mississippi County has jurisdiction to organize a drainage district situated in both the Osceola and Chickasawba districts, it likewise has jurisdiction over the matter of assessments on all lands in the district, whether situated in the Osceola or the Chickasawba district.
2. CERTIORARI—SCOPE OF REMEDY.—Certiorari cannot be used as a substitute for appeal.

Appeal from Mississippi Circuit Court, Osceola District; *G. E. Keck,* Judge; affirmed.

Davis & Costen, for appellant.

J. T. Coston, for appellee.

McCULLOCH, C. J. The district involved in this controversy comprises lands in Mississippi County, situated both in the Osceola District and the Chickasawba District. It was organized by order of the county court of the Osceola District, and all the proceedings have been had in that court. The validity of the district and the proceedings thereunder have been under review by this court in two other cases. *Mahan* v. *Wilson,* 169 Ark. 117, 273 S. W. 383; *Hudson* v. *Simonson,* 170 Ark. 243, 279 S. W. 780.

After the adoption of plans, the assessment of benefits was completed and filed in the county court, and notice was given to property owners. The county court made an order changing the plans by striking therefrom several of the lateral ditches, and the assessments were adjusted and approved by the court. The assessments on some of the lands, including lands of appellants, were materially reduced, presumably on account of the exclusion of laterals. No appeal was prosecuted from the order of the county court with respect to change in plans or to the adjustment of assessments, but appellant, who separately owned lands in the Chickasawba District, brought the proceedings up for review by the circuit court on certiorari, and, on hearing the cause in the circuit court, a judgment was rendered quashing that part of the order of the county court which changed the plans by striking out laterals, but refusing to quash the order with respect to the adjustment of the assessments. At the hearing in the circuit court, appellees (the subdrainage district itself and the commissioners) conceded that that part of the order of the county court which sought to change the plans was without jurisdiction and void, and there was no contest in the circuit court on that question. Appellants have prosecuted their appeal to this court for a review of the circuit court's judgment in refusing to quash the assessments.

It is also contended, in the first place, that the whole proceedings with respect to the assessment of benefits in the county court at Osceola on lands in the Chickasawba District were void—that the Osceola court had no jurisdiction over lands in the Chickasawba District. That contention, however, has been settled against appellant by the decision of this court in *Mahan* v. *Wilson, supra.* It is true that the decision in that case related to the jurisdiction of the Osceola court to organize the district, but it necessarily follows that, if the Osceola court possessed jurisdiction for that purpose, it also had jurisdiction over the matter of the assessments on all the lands in the district, whether situated in the Osceola District or the Chickasawba District.

The principal contention is that the circuit court erred in refusing to quash the whole of the order of the county court with respect to the assessment of benefits as well as to the change in the plans. Counsel for appellant invoke the rule announced by some of the courts that, on review by certiorari, "where the several parts of the proceedings are so connected and dependent on each other that one part cannot be quashed without leaving the other incomplete or more extensive than it should be, the whole of the proceedings in all its separate parts must be set aside." 11 C. J. 210. The answer to this contention is that, in this instance, the separate orders of the county court are not necessarily interdependent one upon the other, with respect to their validity and correctness. The two orders might not, according to the facts presented to the county court, have been so connected and dependent upon each other that they stood or fell together. But, in these proceedings, the facts upon which the order of the county court is based are not before us and we are not at liberty to consider them. Certiorari cannot be used as a substitute for appeal (*Hudson* v. *Simonson, supra*), and the orders are not brought up on appeal for correction of error. If it had been desired that the court's order upon the facts adduced be reviewed, the remedy

was by appeal to the circuit court, so that any error in the different parts of the proceedings could be corrected.

The circuit court did not err in refusing to quash the assessment list, and the judgment of that court is therefore affirmed.

BLAND v. BENTON.

Opinion delivered October 4, 1926.

1. ELECTIONS—PRIMARY ELECTION CONTEST—CONDITIONS PRECEDENT.—Under Crawford & Moses' Digest, § 3772, a contest of a primary election must be instituted within the time fixed and be prosecuted without unnecessary delay, and a complaint setting forth a *prima facie* case, supported by an affidavit of at least 10 reputable citizens, is a prerequisite.
2. ELECTIONS—PRIMARY ELECTION CONTEST—AMENDMENT OF COMPLAINT.—Where the complaint in a Democratic primary election contest alleged that persons not entitled to vote in such primary were permitted to cast their votes for contestee, it was not an abuse of discretion to refuse to permit the complaint to be amended at the trial to allege mistakes of the election officers in the count and tabulation of votes and to ask for a recount; such amendment stating a new cause of action, and not being filed within the time fixed by Crawford & Moses' Dig., § 3772, nor supported by the affidavits of 10 reputable citizens.

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

George Brown, J. H. Davis and *R. W. Wilson*, for appellant.

T. D. Wynne, for appellee.

WOOD, J. This action was instituted by the appellant against the appellee on the tenth day of August, 1926. The appellant alleged, in substance, that he and the appellee were rival candidates for the nomination of sheriff and collector of Dallas County, Arkansas, on the Democratic ticket, at the primary election held in that county on Tuesday, August 10, 1926; that, upon the face of the returns made by the election officers, the appellant received 959 votes and the appellee 1,250; that of this number 600 were illegal votes, which should be

cast out and deducted from the vote received by the appellee, and that when this is done the appellant will have a majority of the legal votes cast. The appellant alleged that he filed a petition with the Democratic central committee on the 14th of August, asking the committee to cast out all illegal votes, which petition the committee refused, and accepted the vote as returned by the election officers, and thereupon certified the appellee as the nominee of the Democratic Party for sheriff and collector of Dallas County. The appellant alleged that, at the various voting precincts where the primary election was held, many persons were permitted to vote for the appellee and against the appellant who had not assessed a poll-tax for the year 1925, and whose names were not included on the list of poll-tax payers filed by the clerk of Dallas County on the second Monday of September, 1925, and whose names were not added to the assessment list for the year 1925. A list of these alleged illegal votes was attached to the complaint and marked Exhibit A. The complaint further alleged that the election officers permitted many persons to cast their votes for appellee and against the appellant whose names did not appear on the certified list of legal voters of Dallas County. The names of these alleged illegal voters were attached to the complaint and marked Exhibit B. The complaint alleged that the election officers permitted many persons who were nonresidents to cast their ballots for the appellee and against the appellant. A list of these alleged illegal voters was attached to the complaint, marked Exhibit C. The complaint further alleged that the election officers permitted persons who were not qualified to vote to cast ballots for the appellee and against the appellant. A list of these was attached to the complaint, and marked Exhibit D. It was further alleged that the election officers permitted various persons who were Republicans and not affiliated with the Democratic Party to vote for the appellee and against the appellant. A list of these was attached to the complaint, and marked Exhibit E. The complaint

alleged that, if all of these alleged illegal votes had not been cast or counted for the appellee and included in the returns of the election officers, the Democratic central committee would have issued the certificate of nomination to the appellant instead of the appellee. The prayer of the complaint was in part as follows: "That the court proceed at once to hear testimony as to fraudulent votes and ballots cast in said election at each and every precinct in said county, in so far as same were cast for either defendant or plaintiff for the nomination of the office of sheriff and collector, and that the court cast out all votes or ballots cast by persons who are not qualified to vote for any reason above set out and whose names are mentioned in any of the exhibits attached; that it then count the true and legal votes and find the number cast for the plaintiff and for the defendant for the nomination of sheriff and collector of Dallas County, and if it be found that the plaintiff has a majority over the defendant, W. R. Benton, for such nomination, the plaintiff then prays that this court make an order canceling the certificate of nomination issued to the defendant, W. R. Benton, and that an order be made declaring plaintiff the Democratic nominee for the office of sheriff and collector of Dallas County, and that he be so certified and his name so placed on the ticket to be voted on at the general election to be held in October, 1926."

The answer specifically denied all the allegations of the complaint as to the alleged illegal votes cast for the appellee. The appellee alleged that the Democratic central committee of Dallas County accepted the returns of election officers of the primary election held on August 10, 1926, and, according to these returns, certified the appellee as the nominee for the office of sheriff and collector of Dallas County, and concluded with a prayer asking that the appellant's petition be denied.

The judgment of the trial court recites, among other things, that the circuit court convened in special session on September 6, 1926, pursuant to the order of the circuit judge in vacation; that the court heard the cause

upon the complaint and the exhibits thereto and the answer of the defendant and the exhibits thereto; that the court, upon convening in the forenoon of September 6, 1926, prescribed the manner and method of examining the election returns for ascertaining the illegal ballots cast in said election and for determining the true number of illegal votes cast for the parties, as follows: "The plaintiff shall select one person to act as clerk, whose duty it shall be to keep count of each ballot cast for the plaintiff and each ballot cast for the defendant, and shall select one other person whose duty it shall be to examine each ballot and ascertain from inspection thereof for whom said ballot was cast and to declare the same. The defendant shall in like manner select two persons to act for him in the same manner as those selected by the plaintiff. When the number of illegal votes that have been cast in any box or voting precinct under examination shall have been ascertained, the clerk shall open the ballots of said precinct and deliver them to the representatives of the plaintiff and defendant as aforesaid, who shall, in open court and in the presence of the judge and the parties, examine each of the illegal ballots and count said ballots for the party for whom said ballot was cast, and, when all of the illegal ballots shall have been examined, the number of such illegal ballots that were voted for the plaintiff shall be deducted from the total number of votes certified by the county central committee as cast for him, and the number of votes remaining shall be deemed to be the true number of legal votes cast for the plaintiff at said election. And in like manner when all of the illegal ballots shall have been examined, the number of such illegal votes as were cast for the defendant shall be deducted from the total number of votes certified by the county central committee as cast for him, and the number of votes remaining shall be deemed to be the true number of legal votes cast for the defendant at said election. And that, after said illegal votes shall have been ascertained and deducted as aforesaid, then the person receiving the

majority of the legal votes cast shall be deemed to be the nominee of the Democratic Party for the office of sheriff and collector of said county."

Before prescribing the above mentioned method for ascertaining the legal votes, the court declared the law to govern the representatives of the respective parties as above selected in determining who had received a majority of the legal votes cast. The court thereupon adjourned until September 7, at nine o'clock A. M., for the purpose of ascertaining who had received a majority of the legal votes cast, according to the above prescribed method. The court reconvened at nine o'clock, September 7, 1926, at which time the parties had not completed the list of votes to be counted, and the court took a recess until three o'clock P. M., in order to give them further time. Upon the reconvening of the court in the afternoon, and immediately before the count of the ballots and their examination began, the appellant offered to file the following amendment to his complaint:

"Comes J. A. Bland, and states that he is informed, has reason to believe, and therefore alleges that there were mistakes in addition of the votes, that many votes were miscalled, and mistakes in the tabulation of the votes as cast for the nomination of sheriff of Dallas County, and that said mistakes in addition, in the miscalling of the votes, and in the tabulation of the votes, were in favor of the defendant and against this plaintiff, and that a recount of the following boxes will show that he received more votes than were credited him, and that his opponent, W. R. Benton, received a far less number than were given him by the counting, calling, addition and tabulation, and that a recount will change the result at said precincts. Plaintiff prays as in his original complaint for a count of the ballots, the true and legal ballots after all illegal ballots have been cast out, as to all precincts, and now especially asks for a recount, readdition and retabulation of the vote as cast at box No. 1, town of Fordyce; box or ward No. 2, Fordyce; precinct or box No. 3, town of Fordyce; Fordyce box, Fordyce Township;

Ivan precinct, Southall Township; Manchester Township; Dalark precinct, Sisson precinct, Jackson Township; and Eaglette precinct, Holly Springs Township."

The court refused to allow the amendment to be filed, holding that "said amendment was another and different cause of action to that stated in the complaint filed, which was the basis of this proceeding and upon which the parties had prepared their case." The court thereupon proceeded to the trial of the cause upon the original complaint and answer and the exhibits attached thereto and the amended and additional exhibits filed, and permitted both parties, during the hearing of said cause, to further amend their exhibits and lists by the addition of names of other persons than those already named whose votes they might desire to challenge as *illegal*. The court thereupon found as follows: "That the total number of illegal ballots cast at said election was 728, of which the plaintiff, J. A. Bland, received 248, and the defendant, W. R. Benton, received 480; that, after deducting the number of illegal votes received by plaintiff from the total number certified as cast for him, there remained 711 legal votes cast at said election for said J. A. Bland, and after deducting the number of illegal votes received by W. R. Benton from the total number of votes certified as cast for him, there remained 771 legal votes cast for the said W. R. Benton; that the majority of the defendant W. R. Benton was sixty legal votes." At this juncture the appellant reoffered the amendment to his complaint as above set forth, and prayed the court to proceed further with the examination in accordance with the allegations and prayer of such amendment. The court again refused to consider the amendment. The court thereupon entered a judgment declaring that the appellee was the nominee of the Democratic Party for the office of sheriff and collector of Dallas County, to be voted on at the next general election, and declared that his certificate of nomination by the Democratic central committee was valid and in full force and effect. The appellant duly excepted to the findings of law and fact by the court,

and duly prosecutes this appeal from the judgment as above rendered.

1. This action to contest the certification of nomination and the certification of votes as made by the county central committee was instituted under § 3772, C. & M. Digest. That section, among other things, provides: "The complaint shall be supported by the affidavits of at least ten reputable citizens, and shall be filed within ten days of the certification complained of. * * * The complaint shall be answered within ten days." The provisions of the above and of the two following sections show that it was the intention of the lawmakers, if an election contest were contemplated, that same should be instituted and prosecuted without unnecessary delay. It was the purpose of the lawmakers to require the party who instituted the contest to file a complaint in which a *prima facie* case should be set forth and that the cause of action or grounds of contest set forth in the complaint should be supported by the affidavits of at least ten reputable citizens as a prerequisite to the jurisdiction of the court to entertain the contest. *Logan* v. *Russell,* 136 Ark. 217-221. This court, in the above and other cases therein cited, holds that contest proceedings under the statute are not civil actions within the meaning of our Code of Civil Practice, but are special proceedings governed by the statute authorizing and regulating them.

Now, the allegations of the original complaint show that the appellant predicated his right to contest upon the following grounds:

(a). Because the election officers did not comply with the provisions of the law concerning the assessment, listing, and payment of poll taxes. See §§ 3738-3741 inclusive, C. & M. Digest.

(b). Because persons were permitted to cast their ballots for appellee whose names did not appear upon the official list of legal voters of Dallas County filed by the collector. Section 3742, C. & M. Digest.

(c). Because persons were permitted to cast their ballots for the appellee who were nonresidents of Dallas County.

(d). Because persons were permitted to cast their ballots for appellee who were minors.

(e). Because persons were permitted to vote for the appellee who were Republicans and not affiliated with the Democratic Party.

The answer was filed to this complaint within ten days, and specifically denied that illegal votes were permitted as alleged. The answer and the complaint raised the issue that illegal votes were cast at the election, and upon this issue the court declared the law as to what constituted a legal voter, and directed the parties and their representatives to proceed to count the ballots cast at the election, eliminating such votes as were found to be illegal under the law as declared by the court. The court permitted the respective parties, while thus canvassing the ballots, to add any names other than those already mentioned to the exhibits which the parties might desire to challenge as being illegal voters. Before the count was completed and the result announced under the issue thus joined, the appellant, at this juncture, asked to amend his complaint by setting up that the election officers had made mistakes in addition of the votes, in miscalling of the votes, and in the tabulation of same, and asked for a recount, readdition and retabulation of certain boxes and precincts, naming them.

The trial court was correct in holding that the proffered amendment stated a cause of action different from that set up in the original complaint and upon which the parties had prepared their case and proceeded with the hearing, and did not abuse its discretion in refusing to allow the amendment to be filed. Indeed, an examination of the proffered amendment will discover that its allegations are entirely too general to form the basis of a contest. It alleges that there were mistakes in addition of the votes, that many votes were miscalled, and mistakes were made in the tabulation of the votes in four different wards of the town of Fordyce and in four voting precincts in rural townships. The amendment, in this form, is aptly characterized by the counsel for the appel-

lees as an effort on the part of the appellant *"to do a little fishing,"* to have the results as shown by the certified returns of the election officials reviewed in order to ascertain whether they had made some mistakes in the addition, calling, and tabulation of the votes that would perchance result in appellant's favor. The amendment, in this form, was not sufficiently definite to state a *prima facie* cause of action; and, if it were, the circuit judge, *in limine,* would have been justified in refusing to convene a special term of the court for the purpose of hearing an election contest. The amendment was not supported by the affidavits of ten reputable citizens, and, as it states entirely different grounds for contest from that of the original complaint, the court was warranted in treating it as demurrable for that reason as well as for its general indefiniteness. The appellant does not lay his finger upon any specific mistake in any particular precinct in the counting, calling, adding and tabulating of the votes. The proposed amendment was only tantamount to a sweeping allegation that there were irregularities and derelictions on the part of the election officers, but it does not specify any particulars.

In the case of *Ferguson* v. *Montgomery,* 148 Ark. 83, the charge was made by the contestant that certain illegal votes had been cast for the contestee in certain townships. The contestee answered that certain illegal votes had likewise been cast for the contestant in certain other townships. It developed at the hearing that certain illegal votes were cast in other townships than those named either in the complaint or answer; and the contestant was allowed to amend his complaint so as to embrace the illegal votes in other townships. The court, in the case at bar, permitted both parties, during the hearing, to further amend their exhibits and lists by the addition of names of other persons than those already named whose votes they might desire to challenge as *illegal.* The court therefore, in the present case, as in the case of *Ferguson* v. *Montgomery supra,* permitted amendments that did not change the grounds of contest.

In the case of *Ferguson* v. *Montgomery supra,* we stated the rule as to amendments as follows: "It is impossible to state with precision the rule with regard to amendments of the pleadings. Much must be left to the discretion of the court, or the very object of the statute will be defeated. On the other hand, the contestant should not be allowed to make amendments which would necessarily unduly delay the trial of the contest, and, on the other hand, he should be allowed to make amendments in all cases where no such delay would result and where the amendment was made for the purpose of presenting the issues with due diligence." And we quoted from *Mann* v. *Cassidy,* 1 Brewster (Pa.) 11, as follows: "The rule must not be held so strict as to afford protection to fraud, by which the will of the people is set at naught; nor so loose as to permit the acts of sworn officers, chosen by the people, to be inquired into without an adequate and well-defined cause."

In the case at bar it will be seen that the court permitted the returns of the election officers in all the voting precincts of the county to be reviewed for the purpose of eliminating therefrom any illegal votes that might have been cast for either party. But the court refused to allow the election returns challenged upon the other general and independent grounds alleged in the proposed amendment. In this ruling the court was correct. In *Cain* v. *CarlLee,* 169 Ark. 887-900, we said: "The presumption is that election officers have done their duty and obeyed the provisions of the Constitution and statutes in holding an election. Hence the returns made by them showing the result of an election are *prima facie* correct, and are not to be overturned except by proof to the contrary. Thus it is that in all election contests the returns of the election officers in the various precincts challenged will not be set aside as a whole except upon proof tending to show a course of conduct upon the part of the election officers, or some of them, indicating that they were guilty of such fraud in conducting the election as to make it impossible to fairly ascertain who received

the majority of the votes cast. * * * But, unless such fraud is shown upon the part of the election officers, the returns should only be purged of illegal ballots, and the remainder counted as shown by these returns."

2. Furthermore, the trial court did not abuse its discretion in refusing to allow the proposed amendment because it was not presented in apt time. As already stated, the amendment proposed different grounds of contest from those made by the complaint and answer which raised the issue of contest within the time prescribed by § 3772, C. & M. Digest. The amendment, if allowed, would have injected into the cause independent grounds of contest after the time limit for a contest prescribed by statute had expired. In McCrary on Elections, at § 443, p. 321, the author says: "As we have already seen, there are strong reasons for requiring the parties to an election contest to use great diligence in preparing for an early trial. In accordance with this rule, it is held that an amended pleading setting up new facts will only be allowed where it affirmatively appears that such facts are new; that they were first discovered after the service of the original notice; and that by the use of due diligence they could not have been discovered before such service."

In *Harmon* v. *Tyler*, 112 Tenn. 8-24, the Supreme Court of Tennessee, in an exhaustive opinion in which numerous authorities are cited, passing upon a similar question, among other things said: "The evident purpose of the Legislature in creating a special tribunal, with no other jurisdiction, to try these contests, and requiring them to be promptly instituted and speedily heard and determined, was to prevent the strife and animosities which necessarily attend public elections from being continued in the courts, and to prevent those whom the people have elected to the offices from being deprived of their possession, and denied the right to exercise the functions and enjoy the emoluments of the office, and from being harassed and disturbed in the discharge of their public duties, by prolonged litigation. These wholesome and

just purposes would be entirely defeated under any other construction. If the original contest, or a new one by an amended or supplemental pleading, could be commenced a month after the expiration of the time prescribed, it could be done at any later period, and the litigation in this way prolonged, in many instances, until the term of office had expired."

In 20 Corpus Juris, Elections, at § 310, under the title of "New Matter" it is said: "Except in jurisdictions where election contests are governed by the general rules of chancery practice, the general rule is that the notice or pleadings cannot be amended so as to introduce new parties or new grounds of contest, at least after the time for filing the original pleading or notice has expired, and it is especially true where no good reason is given for not presenting the new matter in the original pleading." Cases to sustain the text are cited in note.

We conclude therefore that the trial court did not abuse its discretion, and did not err in refusing to allow the proposed amendment to appellant's complaint, and did not err in the methods pursued by it to determine the result of the primary election for the nomination for the office of sheriff and collector of Dallas County, and in declaring that the appellee was the nominee of the Democratic Party, and that his certificate of nomination was valid, and in entering a judgment dismissing appellant's complaint, and for costs against him.

The judgment is therefore affirmed.

CROW OIL & GAS COMPANY *v.* DRAIN.

Opinion delivered October 4, 1926.

1. ASSIGNMENTS—EVIDENCE.—In an action on defendant's acceptance of an order of a drilling company to pay to plaintiff $300 for each well drilled, it was not error to admit in evidence the note and mortgage given by the drilling company to plaintiff, as such testimony tended to prove that there was a consideration for such acceptance.
2. ASSIGNMENTS—CONDITIONS.—Where defendant accepted an order of a drilling company, obligating it to pay to plaintiff $300 upon the drilling of each well for defendants, upon condition that the money should be earned by the drilling company, defendant cannot escape liability, in case the drilling company earned that amount, because liens against the drilling company for labor and materials had been enforced against all money in defendant's hands belonging to the drilling company.
3. CORPORATIONS—CAPACITY TO CONTRACT.—Whether a corporation's contract is *ultra vires* will not be considered on appeal, in absence of evidence of its charter powers.
4. JUDGMENT—RES JUDICATA.—In a suit to recover $300 on an accepted order, a former judgment for the same amount in a suit between the plaintiff's assignor and the defendant will not be *res judicata* where the pleadings in the former suit are not set forth and it does not appear that plaintiff was a party thereto, or that the same issues were involved or might have been determined in that case.
5. JUDGMENT—RES JUDICATA—BURDEN OF PROOF.—The burden is on the defendant to sustain his plea of *res judicata.*
6. APPEAL AND ERROR—PRESUMPTIONS.—The Supreme Court cannot set aside a finding of the trial court on the issue of *res judicata* by mere implications and intendments.

Appeal from Crawford Circuit Court; *James H. Cochran,* Judge; affirmed.

E. L. Matlock, for appellant.

Cravens & Cravens, for appellee.

WOOD, J. This action was instituted by the appellee against the appellant on the following instrument:

"Fort Smith, Ark., March 20, 1923.

"Crow Oil & Gas Company,
Fort Smith, Arkansas.

"Gentlemen: The Fort Smith Drilling Company is indebted to Mrs. D. S. Drain in the sum of $3,500, evi-

denced by three notes, dated February 23, 1922, the first for $1,000, due in six months, the second for $1,000, due in twelve months, and the third for $1,500, due in eighteen months, all bearing interest from date at the rate of eight per cent. per annum, and you are hereby authorized and directed to pay to Cravens & Cravens, attorneys for Mrs. D. S. Drain, at the completion of each well drilled for you, the sum of three hundred dollars ($300), until the full amount of these notes, together with interest, is paid.

"Yours truly,

"H. L. Thompson."

"We hereby accept the above order, and agree with Mrs. D. S. Drain to pay to her or her attorneys, upon the completion of each well for us by the Fort Smith Drilling Company, the sum of three hundred dollars ($300), in accordance with the above order, provided we do not bind ourselves to pay any amounts not earned by the Fort Smith Drilling Company under its present agreement or future agreements.

"Crow Oil & Gas Company."

The appellant denied liability. The cause, by consent of parties, was tried by the court sitting as a jury.

The appellee testified, and introduced in evidence the instrument set out above. She further introduced in evidence, over the objection of appellant, three notes dated February 23, 1922, in the aggregate sum of $3,500, purporting to have been executed by the Fort Smith Drilling Company to the appellee; also a mortgage of same date to secure these notes on certain oil well drilling machinery. The appellant also introduced in evidence certain correspondence between the appellant and Cravens & Cravens, attorneys for the appellee. One of the letters was dated February 12, 1923, in which the appellee stated that it was its intention to drill approximately a dozen wells in the Alma field during the following spring and summer; that it expected to give the majority of the work to the Fort Smith Drilling Company, and that it was willing to make the payments for complete wells as

directed by that company. Further correspondence shows that the Crow Oil & Gas Company paid to Cravens & Cravens the sum of $300 on the accepted order, and had failed to make any other payments upon demand of Cravens & Cravens. The correspondence concluded with a letter from Cravens & Cravens of November 16, 1923, notifying the appellant that they considered it liable on the order and its acceptance.

Ben Cravens testified, identifying the above correspondence. He identified and introduced in evidence a memorandum which reads as follows: "This check is to be given to Mrs. D. S. Drain, and is in accordance with a letter dated March 20, 1923, from H. L. Thompson, ordering the Crow Oil & Gas Company to pay to Mrs. D. S. Drain the above amount upon the completion of each well drilled by Mr. Thompson for this company." The witness further stated that this memorandum was attached to a check sent him by the appellant for $300. The appellee made further demand on the appellant for $300, which was refused. The witness did not know which wells the above correspondence referred to, but stated that he received $300 for the drilling of the first well. Witness did not know whether the drilling company had completed any well.

Witness C. R. Jones testified for the appellant that he was its secretary and treasurer at the time the transactions mentioned were had with the Fort Smith Drilling Company. At the time the order in controversy was accepted by the appellant, the Fort Smith Drilling Company was drilling or preparing to drill for the appellant. The drilling company had a contract to drill three wells. It completed the Boren well, and Mrs. Drain was paid $300. The drilling company did not complete the Wood well, and no money was paid Mrs. Drain because that well was lost. The Byars well was not completed, but the appellant would have paid for it if it had been permitted to do so by the chancery court. A suit was filed by various parties against the drilling company and the appellant, claiming liens on the Byars well, and the

appellant paid the amount earned by the drilling company, to-wit, $4,555.85, into the chancery court in that suit. The appellant finished the well. The appellant had orders from the drilling company for four or five times as much money as was coming to it. It accepted these orders conditionally just the same as the Drain orders. Suit was brought by Pugh and others against the drilling company and others before the Byars well was completed and was shut down by attachment, and the parties bringing that suit afterwards received their money under the order of the chancery court. The appellant received no benefit from the giving of the order by the drilling company to the appellee and its conditional acceptance by the appellant. There was no resolution of the board of directors authorizing the witness to accept the order. The conditional acceptance was just an effort to help persons with whom appellant had dealings in a business matter between themselves. The appellant paid into court, in the case mentioned, all the money due the drilling company on the Byars well. The witness did not know that the drilling company was indebted to the appellee until the order was brought to witness. Thompson told the witness that Mrs. D. S. Drain was pressing the drilling company for payment. If Mrs. Drain had taken possession of the outfit, the drilling company could not have drilled the wells. The appellant could have got fifty other contractors to drill the wells, but wanted to help the drilling company. The appellant advanced to the drilling company $1,000 before it did anything, and it advanced it in all the sum of $2,200 between June 14 and November 28, 1923, inclusive. This amount, with the amount paid into court, made the sum of $6,738 due the drilling company for footage. The appellant paid the City National Bank the sum of $500 as an accommodation to the drilling company. Witness did not know whether this was for material used in drilling the well or not. Witness would have paid Mrs. Drain out of the $4,555.85 due on the Byars well, but was prevented by the suit of laborers and materialmen

for prior liens. The order of the drilling company accepted by the appellant was given before the drilling company had any contract to drill for the appellant. The materials paid for by the appellant were added to the drilling company's rig used in drilling the Byars well, on which machinery Mrs. Drain had a mortgage. The appellant put in evidence a certified copy of a decree of the Crawford Chancery Court, which decree recites as follows:

"On this day this cause comes on to be heard, the plaintiffs appearing in person and by their respective attorneys, the defendant, Fort Smith Drilling Company, appearing by its attorneys, Warner, Hardin & Warner, the defendants, Industrial Oil & Gas Company and Crow Oil & Gas Company, appearing by their attorney, E. L. Matlock, and the issues are presented to the court at chambers by consent of all the parties, it being agreed that the findings and orders of the court may be on this day made with the same effect as if heard at Van Buren in term time, and that said order may this day be entered with that force and effect.

"The court finds, the parties consenting thereto, that the defendant Crow Oil & Gas Company is indebted to the defendant Fort Smith Drilling Company upon a contract for the drilling of a well known as the Byars No. 3 in the sum of $4,555.85, which sum said Crow Oil & Gas Company tenders into court. And the court finds, all parties consenting thereto, that the defendant, Fort Smith Drilling Company, is indebted to the following persons in the sum set opposite their names, respectively, to-wit: (Here follow certain names and amounts due certain parties for labor and material furnished).

"And the court further finds, all the parties hereto consenting thereto, that the said Fort Smith Drilling Company is indebted to the following named persons in the amounts set opposite their respective names: (Among the list of names here following appears that of D. S. Drain with the amount of $300 opposite).

"It is therefore by the court considered, ordered and adjudged and decreed that each of said persons above mentioned do have and recover of and from the Fort Smith Drilling Company, defendant herein, the amount herein above found to be due them, respectively.

"It is further ordered that the said sum of $4,555.85 tendered into court by the defendant, Crow Oil & Gas Company, be paid by said company into the treasury of the court and to W. A. Bushmaier, clerk of said court. It is further ordered that the persons referred to as having liens for labor done hereinabove be and they are hereby declared to have first or prior liens paramount and superior to all other liens of persons on the fund so paid into court, and it is ordered that said clerk pay first to such persons said amounts respectively, and accept their receipts therefor, and that said receipts be filed with the papers in the case."

The decree further ordered that the clerk pay out of the sum of $4,555.85 in his hands, first, the parties who had been adjudged liens for labor and materials furnished, and that the remainder be held in his hands to await further orders of the court.

Ben Cravens was recalled, and testified that, at the time the order in controversy was given and accepted, his firm had the notes given by the drilling company to the appellee for collection, and the appellee had been threatening to foreclose the mortgage given by the drilling company to secure the same.

Upon the above facts, the court rendered judgment in favor of the appellee in the sum of $300, with interest at the rate of six per cent. from Nov. 1, 1923, from which judgment is this appeal.

1. The court did not err in permitting the appellee, over the objection of appellant, to introduce in evidence the notes and mortgage given by the Fort Smith Drilling Company to the appellee. This testimony was relevant. The appellant had made itself a party to the order which is the foundation of this action by accepting the same.

The notes and mortgage tended to prove the transaction between the drilling company and the appellee upon which the order was based, and the consideration moving from the appellee to the drilling company for such order. This testimony was likewise relevant to the issue raised by the appellant in its answer, to the effect that the appellant received no benefit from the giving of the order, and the acceptance thereof was without any consideration moving from either of the parties to the appellant, and purely for the accommodation of the appellee and the drilling company.

The appellant's secretary testified, among other things, that the representative of the drilling company told him that the appellee was pressing the drilling company for payment, and that if the appellee had taken possession of the outfit of the drilling company it could not have drilled the wells. One of the attorneys for the appellee testified that his firm had been threatening to foreclose the mortgage on the machinery of the drilling company. The secretary of the appellant further testified that, at the time the order was given, the appellant had a contract with the drilling company to drill three wells.

It occurs to us that the introduction of the notes and mortgages was pertinent to the issues raised by the pleadings and the testimony of appellant's secretary. This testimony tended to prove that the appellant did not accept the order purely for accommodation, but that there was a consideration moving from the drilling company and the appellee to the appellant for the order and its acceptance. The court had a right to conclude from this testimony that the appellant accepted the order for the reason that it was interested in having the drilling company perform its contract in the drilling of the wells, which the testimony of appellant's own secretary shows could not have been done if the machinery of the drilling company had been taken over by the appellee under its mortgage.

2. The contention of learned counsel for appellant that the acceptance of the order by the appellant was conditional, and that the condition upon which the order was accepted had failed or had not arisen, cannot be sustained. The only condition in the order and acceptance was that the money should be paid by the appellant when the same was earned by the drilling company in the drilling of the wells for the appellant. The testimony of appellant's secretary shows that the drilling company had complied with this condition by the drilling of a well, on which there was due the drilling company by the appellant, at the time this action was instituted, the sum of $4,555.85. True the appellant secretary stated that the well at that time had not been completed, but that the appellant did not object to the payment on that ground, and would have paid the amount to the appellee under its acceptance "if it had been permitted to do so by the chancery court." The undisputed testimony of appellant's secretary proves that, as between the appellant and the drilling company, the latter had earned, by the drilling of wells for the appellant, far more than was called for by the acceptance, and that the appellant, at the time the $300 in controversy was demanded, had waived the noncompletion of the well by the drilling company. It thus appears that the appellant would have paid the appellee the $300 in controversy under its acceptance had it not been directed by order of the chancery court to pay into the registry of that court the sum which had been earned by the drilling company in the drilling of the second or Byars well for the appellant. Counsel for appellant contends that, although the drilling company had drilled the wells and earned thereby the sum of $4,555.85, nevertheless the condition specified in the order and acceptance had not been met, for the reason that the drilling company had not paid those who had furnished labor and material for the drilling of the wells; that the drilling company had not earned the amount called for by the acceptance of the order until these claims, which were prior liens, had been paid and

discharged. We cannot agree with counsel upon this construction of the acceptance of the order. The drilling company which had the contract with the appellant for the drilling of the wells had complied with the condition of the acceptance on its part by drilling a well, and had earned, as the appellant's secretary concedes, the money as between it and the appellant. The fact that suit had been brought by laborers and materialmen against the appellant and the drilling company for labor and materials furnished, cannot avail the appellant as a defense in appellee's action against it, for the reason that the payment of these claims by the drilling company was not made a condition to the acceptance of the order in controversy by the appellant. So far as the appellant and the drilling company and the appellee are concerned, the only condition of the acceptance was that the money should be earned by the drilling company, which the undisputed testimony proves was the fact.

In the recent case of *Oliver Construction Co.* v. *Union Trust Co., ante,* p. 482, we said: "The undisputed evidence shows that the sum due Stebbins from appellant under his contract with it amounted to more than the face of the order on October 12, 1923, unless appellant had the right to deduct the amount it had paid the laborers employed by Stebbins before paying anything on the order and acceptance. The language of the order and acceptance is unambiguous, and means that appellant will pay appellee the sum of $1,000 out of the estimate to be rendered on October 12, 1923, if it should amount to that much or more. The order and acceptance did not provide for payment out of any balance which might be due Stebbins on that date, but for payment out of the estimate which would be due on that date. There being no ambiguity in the order and acceptance, which imported absolute liability upon the sole contingency of the estimate being sufficient to cover the order, the court properly excluded the testimony of Oliver tending to contradict the written contract."

The above case is applicable to the facts here, because, under the terms of the order and the acceptance thereof, the payment of the amounts due by the drilling company to the laborers and material furnishers was not made a condition upon which the order was accepted. Therefore we conclude that the only condition or requirement specified in the order and the acceptance thereof upon which payment to the appellee was to be made, had been fully met and complied with.

3. The contention that the signing of the acceptance by the appellant, through its secretary, was an *ultra vires* act, cannot be sustained, for the reason that there is no testimony in the record to show that the execution of such an acceptance was beyond the charter powers of the appellant. The appellant's charter was not in evidence, and, as we have already shown, the trial court was warranted in holding that the acceptance of this order was for the benefit of the appellant, and that it enabled the drilling company, with whom the appellant had the contract to drill wells, to proceed in the performance of that contract, and, for aught the record shows to the contrary, this was an act pursuant to the appellant's charter powers.

4. The proceedings of the Crawford Chancery Court in evidence in this record do not prove that the decree of the court in that action was *res judicata* of the present action, as contended by counsel for appellant. The recitals of that decree only show that D. S. Drain had a claim allowed in that action in the sum of $300 against the drilling company. The pleadings in that case are not set forth, and it cannot be determined from the mere recitals of the decree that the same issues were involved, or might have been determined in that case, between the appellant and the appellee, as were raised and determined between them in the present action. The recitals of the decree of the Crawford Chancery Court in evidence here do not show that the appellee intervened in that cause

and asked judgment against the drilling company. The only recital as affecting the appellee is as follows: "All the parties hereto consenting thereto, that the said Fort Smith Drilling Company is indebted to the following persons in the amounts set opposite their respective names. (Here, among others, naming D. S. Drain and setting opposite the name the sum of $300). "It is therefore by the court considered, ordered, adjudged and decreed that each of said persons above mentioned do have and recover of and from the Fort Smith Drilling Company, defendant herein, the amounts herein above found to be due them, respectively."

In the absence of the pleading filed by the appellee in that cause, it cannot be said that the trial court erred in finding that the proceedings of the chancery court were not *res judicata* of appellee's present action. For it cannot be said that the mere recitals of the decree prove that the appellee did ask, or could have properly asked, for judgment against the appellant in that action. The recitals are sufficient to show that D. S. Drain presented, and was allowed, a claim against the drilling company in the sum of $300, but that is far from proving that Mrs. D. S. Drain, the appellee, filed in that suit a claim for $300 against the appellant, or that she, under the pleadings in that case, could have presented a claim against the appellant for the amount which she here seeks to recover. The appellee has proved her claim and right to recover against the appellant in the present action. The burden of proof was upon the appellant to sustain its plea of *res judicata.* In the absence of any showing in the record to the contrary, every presumption must be indulged in favor of the findings of the trial court. On the issue of *res judicata* raised by the appellant, we do not find any testimony in the bill of exceptions except the recitals of the decree of the Crawford Chancery Court, as above set forth, and these recitals are not sufficient to overturn the finding of the trial court on that issue. This court cannot set aside the finding of the trial court on the

issue of *res judicata* by mere implication and intendments. The record wholly fails, as we view it, to sustain the appellant's plea of *res judicata*.

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

PENNINGTON v. KARCHER.

Opinion delivered October 4, 1926.

1. APPEAL AND ERROR—HARMLESS ERROR—PARTIES.—That several plaintiffs improperly joined in a suit to enforce contribution from defendant was not ground for reversal of the decree, since, under the Civil Code, the court might have consolidated actions separately brought by them.
2. PRINCIPAL AND SURETY—RIGHT TO CONTRIBUTION.—The reciprocal obligations of sureties to contribute proportionately to the principal debt does not depend upon the express contract between them, but is founded upon the principles of equity, as a liability growing out of their mutual relationship.
3. LIMITATION OF ACTIONS—SUIT FOR CONTRIBUTION.—A suit between sureties to compel contribution is governed by the three-year statute of limitations (Crawford & Moses' Dig., § 6950).
4. LIMITATIONS OF ACTIONS—CONTRIBUTION—WHEN ACTION ACCRUES.—As affects limitations, a right of action for contribution accrues when one surety pays more than his share of the common liability.
5. PRINCIPAL AND SURETY—RIGHT TO CONTRIBUTION.—Where plaintiffs as sureties executed their note in satisfaction of their principal's indebtedness, and same was accepted by the creditor, this constituted a payment by plaintiffs, entitling them to recover his proportionate share of the liability from a cosurety who refused to sign the note.

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

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellant for contribution. The facts are substantially as follows:

Appellant and appellees were directors of a building and loan association in the city of Little Rock, and

L. E. Walther, who died some months prior to the rendition of the decree in this case, was its secretary. An audit of the books of the association in 1918 showed a shortage in the secretary's accounts of $20,663.69, which was caused by the payment of building association stock before it had fully matured. The directors, believing themselves to be liable for the amount of the shortage, borrowed the amount thereof from the Southern Trust Company of Little Rock, Arkansas, and delivered to said bank their note for $20,663.69, dated February 3, 1918, payable six months after date.

L. E. Walther did not sign the note, but paid the interest at its maturity. A renewal note was executed by L. E. Walther and by appellant and appellees. Walther paid the interest on this note when it matured, and a new note for the principal was executed February 3, 1919, by Walther, and by appellant and appellees.

On the 4th day of August, 1919, when this note matured, Walther paid the interest and $63.69 on the principal. On August 4, 1919, Walther, appellees and appellant, all signed a new note for $20,600, payable six months after date to the Southern Trust Company. Walther paid nothing further on the indebtedness except $588.72, realized from the proceeds of a bauxite lease owned by him.

Appellees continued to reduce the principal of the indebtedness to the Southern Trust Company and to pay the interest on the renewal notes until the 12th day of September, 1921, when the indebtedness was reduced to $10,600.

During all this time appellant had signed the renewal notes, but did not pay any part of the principal or interest. On September 12, 1921, appellant refused to sign a renewal note for the balance of the indebtedness due the Southern Trust Company. Appellees paid the balance of the indebtedness, and brought this suit in the Pulaski Chancery Court against the appellant on the 26th day of March, 1924, to enforce contribution.

L. E. Walther was not made a party to the suit because he was regarded as insolvent. The evidence shows that L. E. Walther was insolvent at the time the first note was executed, and continued to be insolvent until his death.

The chancellor found the issues in favor of appellees, and it was decreed that appellant should pay them his proportionate part of the indebtedness for which the original note and the renewal notes were executed.

The case is here on appeal.

Mehaffy & Mehaffy, for appellant.

Buzbee, Pugh & Harrison, for appellee.

HART, J., (after stating the facts). The first ground relied upon for a reversal of the decree is that appellees could not join in one suit to recover the amount alleged to be due them by appellant, for contribution. Assuming counsel for appellant are right in this contention, it does not call for a reversal of the decree, since, under our Civil Code, the trial court might have consolidated the actions if they had been brought separately. *Earl* v. *Ellison,* 138 Ark. 166, 210 S. W. 346.

It is next contended by counsel for appellant that the court erred in refusing to sustain their plea of the statute of limitations. The reciprocal obligations of sureties to contribute proportionately to the principal debt does not depend upon the express contract between them, but is founded upon the principles of equity, as a liability growing out of their mutual relationship. *Weaver-Dowdy* v. *Brewer,* 127 Ark. 462, 192 S. W. 902; *Reed* v. *Rogers,* 134 Ark. 528, 204 S. W. 903; and *Bank of Searcy* v. *Baldock,* 153 Ark. 308, 240 S. W. 399.

It is contended that the three-year statute of limitations, applicable to implied contracts not in writing, rules the present case, and such is our holding in *Cooper* v. *Rush,* 138 Ark. 602. It was also expressly held in that case that the right of action for contribution accrues when one surety pays more than his share of the common liability. This is in accordance with the general rule, that a party acquires the right of contribution as soon as

he pays more than his share, but not until then, and consequently the statute of limitations does not begin to run until then. *Richter* v. *Blassingame,* 110 Cal. 530, 42 Pac. 1077; *Durbin* v. *Kuney,* 19 Ore. 71, 23 Pac. 661, and 13 C. J. 833.

When the appellees executed the note for $10,600, on the 12th day of September, 1921, which appellant refused to sign, and the Southern Trust Company accepted the note of appellees, this constituted a payment by appellees, and is equivalent in law to a payment in cash. *Green* v. *Anderson,* 102 Ky. 216, 43 S. W. 195; and 13 C. J. 823, and cases cited.

The present suit was commenced on the 26th day of March, 1924, which was less than three years from September 12, 1921, when the note by appellees was executed and accepted by the bank in full satisfaction of the demand due by the obligors. It is obvious that the statute did not begin to run until September 12, 1921, because the payments made by the appellees prior to that time did not amount to as much as their proportionate part of the indebtedness. The record shows that, each time a payment was made, each appellee paid his own proportionate part thereof, and these sums did not amount to as much as his proportionate share of the liability.

Hence the chancellor properly held that the action of appellees against the appellant for contribution was not barred by the statute of limitations. Therefore the decree is affirmed.

FEE-CRAYTON HARDWOOD LUMBER COMPANY *v.* FEE-CRAYTON HARDWOOD COMPANY.

Opinion delivered October 4, 1926.

1. PARTNERSHIP—PARTICIPATION IN PROFITS.—Mere participation in the profits of a business will not make the participant a partner, as the question whether a partnership exists depends upon the intention of the parties, to be gathered from the contract construed in the light of all the facts and circumstances.
2. TRADE-MARKS—PROPERTY RIGHTS.—A trade-mark or trade emblem is property, and may have value.

3. TRADE-MARKS—ABANDONMENT.—Abandonment of a trade-mark and emblem *held* not proved, and a suit to restrain defendants from using same was improperly dismissed.

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

Mehaffy & Mehaffy, for appellant.

SMITH, J. This suit was brought by appellants for the purpose of preventing the appropriation and use of a certain trade-mark and trade emblem by appellee.

One F. F. Fee was engaged for many years in exporting lumber, and employed in this connection a certain trade-mark and a trade emblem. His business was finally incorporated under the name of the Fee-Crayton Hardwood Lumber Company. Fee owned 75 per cent. of the capital stock of the corporation, less two shares, one of which was owned by B. S. Nixon and the other by W. A. Kone. The remaining 25 per cent. of the stock was acquired from another owner by Mrs. Mamie Fee, the wife of F. F. Fee, so that Fee and his wife owned all the stock except two shares, and the stock was thus owned at the time of Fee's death, which occurred on the 14th day of January, 1923.

Nixon and Kone were valued employees of the corporation, and were given an interest of one-fourth each in the net earnings of the corporation, in addition to a monthly salary. Fee's health failed, and, for the last year or two of his life, the business was conducted by Nixon and Kone. The corporation ceased to file reports, and the last report which it was required to file with the clerk of the county court of the county of its *situs* was filed in 1921. After the death of Fee, his wife took as dower one-third of the stock which he had owned, thus making her the owner of half the stock, and, on the final settlement of the estate, she took the remaining half of the stock, less the two shares mentioned, in part satisfaction of her dower claim.

At Fee's death he was survived by his widow and several children, all of whom were minors, including the eldest son, whose initials were F. F. F., these being the

initials of his father, and these initials were part of the trade emblem which the corporation had used.

After the death of Mr. Fee, the business was wound up by Nixon and Kone, who alleged in their answer that the corporation had ceased to function as such, and its assets and affairs had been acquired and taken over by a copartnership composed of themselves and Mr. Fee, and that, as surviving partners, they had disposed of the partnership assets. It was denied in their answer that the trade-mark or trade emblem possessed any value, and were treated as being without value in winding up the copartnership affairs.

In August, 1923, following Fee's death in January of that year, a corporation known as the Fee-Crayton Hardwood Company was organized, and both Nixon and Kone were stockholders and officers in that corporation. There was testimony that Mrs. Fee was desirous of having this last corporation organized, although she owned no stock in it, as a useful instrumentality in winding up the affairs of the original corporation, which was succeeded by the copartnership, which had operated under the name of the original corporation, and upon the organization of the last corporation it had adopted the trade name and trade emblem of the original corporation as things without value to any one and which no one was then using.

The principal question in the case is one of fact, whether the assets and affairs of the Fee-Crayton Hardwood Lumber Company had been acquired by a partnership which operated under what had been the corporate name.

We do not set out the testimony on this subject, as it would serve no useful purpose to do so, but announce our conclusion, after carefully considering the testimony, to be that there was never any partnership between Fee and Nixon and Kone. A partnership was proposed, but declined by Fee. It is true Nixon and Kone were given a half interest in the profits made, but they did not testify that they were to become responsible for

any losses sustained. They advanced no money or property, and put into the business only their services, but for these services they were to be paid a salary and a per cent. of the profits.

In the case of *Wilson* v. *Todhunter,* 137 Ark. 80, it was held (to quote a head-note) that "mere participation in the profits and losses of the business alone will not make the participant a partner."

Here we have a participation in profits alone, and we think this was merely a plan devised to compensate Nixon and Kone for their services.

It may be said that the conduct of the business after Fee's health failed was such as to make all the participants in the business liable as partners to a third person who had dealt with them as a copartnership. But that question is not in this case. The question is, whether there was in fact a copartnership, and upon this question we quote another head-note in the case of *Wilson* v. *Todhunter, supra,* which reads as follows: "Whether a partnership exists depends on the intention of the parties, to be gathered from the contract construed in the light of all the facts and circumstances."

That a trade-mark or a trade emblem may have value and become a property right is settled by all the cases on the subject, and that the trade-mark and trade emblem here in litigation have value is shown by the fact that the parties have litigated the right to use them. Indeed, the undisputed testimony shows that they have large value.

Mrs. Fee testified that, although she was not in the export business and did not intend to re-enter it, she desired to preserve the trade-mark and trade emblem under which her husband had operated for many years, and which had been used by the original corporation, for the use of her son when he attained his majority. Since the institution of this suit her son, F. F. Fee, has attained his majority and has been made a party plaintiff, and has entered the same business in which the original corpora-

tion was engaged, and his testimony shows the subject-matter of this litigation is very valuable.

The court below dismissed the complaint as being without equity, and we think this was error. We do not think there was any abandonment of the trade name and trade emblem; on the contrary, we think the ownership thereof continued in the original corporation, which does not appear even yet to be dissolved, and the trade name and trade emblem belong to it, and the plaintiffs in the case had the right to maintain this suit to prevent the use of the trade name and trade emblem by the defendant.

The decree of the court below is therefore reversed, and the cause will be remanded with directions to grant the injunction prayed for.

HUMPHREYS, J., not participating.

STOCKS v. STATE.

Opinion delivered October 4, 1926.

1. CRIMINAL LAW—EXECUTION OF SENTENCE.—The expiration of a period of time greater than the length of a sentence does not expiate it.
2. CRIMINAL LAW—EXECUTION OF SENTENCE.—A sentence of imprisonment is satisfied, not by lapse of time after it is pronounced, but by actual imprisonment, because the time in which a sentence shall be carried into execution is not provided by statute and forms no part of the judgment of the court.
3. CRIMINAL LAW—EXECUTION OF SENTENCE—LIMITATION.—Where a sentence of imprisonment was suspended in 1910 with defendant's consent, and was imposed in 1926, *held* that the sentence was not barred by the statute of limitations.
4. CRIMINAL LAW—LIMITATION.—Crawford & Moses' Dig., § 6959, relating to actions on judgments, and § 6960, limiting time of all actions not included in the preceding sections, have no application to criminal proceedings.
5. CRIMINAL LAW—SUSPENSION OF SENTENCE—RIGHT TO COMPLAIN.—Where a sentence of imprisonment was suspended during good behavior by defendant's consent, he is in no position to complain of its subsequent enforcement upon his violating the condition of the suspension.

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

Edward Gordon, for appellant.

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

SMITH, J. Appellant was indicted at the October, 1909, term of the Conway Circuit Court for the crime of grand larceny, and at the ensuing March, 1910, term of the court entered a plea of guilty, and was sentenced to a term of one year in the penitentiary. After being so sentenced, the judgment further recited that, by consent, the sentence was suspended and the cause continued until the following October term of the court, and appellant was allowed to stand on his bond. At the October, 1910, term, a judgment against appellant was rendered, which recited that he appeared in open court and pleaded guilty to the indictment against him, and, upon this plea, he was given a sentence of one year in the penitentiary. At a later day of the same term it is recited that appellant appeared and moved the court to set aside the judgment of the court sentencing him to a term in the penitentiary and to suspend and postpone sentence for and during his good behavior. The prayer of this motion was granted, and it was ordered that the sentence be set aside, and the cause was continued, and appellant was permitted to remain at large on his own recognizance for and during his good behavior, "the right and judgment of the court herein being hereby expressly retained to pass sentence herein and commit said defendant at any succeeding term, should he again violate any of the criminal laws of this State."

In March, 1926, appellant entered a plea of guilty in a court of a justice of the peace to a charge of possessing intoxicating liquors, and on May 24, 1926, an adjourned day of the March term of the circuit court, appellant was cited to show cause why sentence should not be pronounced on him pursuant to the judgment above mentioned, and, upon a hearing then had, the court adjudged that appellant had violated the condition

on which the sentence had been suspended, and sentenced him to a term of one year in the penitentiary, and this appeal is from that judgment.

It may be first said that the plea of guilty entered by appellant was not a conditional plea, and therefore does not fall within the case of *Wolf* v. *State,* 102 Ark. 295, 144 S. W. 208. It was such a plea as was entered in the case of *Joiner* v. *State,* 94 Ark. 198, 126 S. W. 723.

Appellant insists, however, that, when the court sentenced him at the March, 1910, term of the court, and later suspended the sentence and continued the cause until the October, 1910, term, the court lost jurisdiction to subsequently impose sentence, as the order of suspension of the March term was void.

In support of this contention it is argued that, at the time the sentence was imposed upon appellant, circuit courts did not have authority even to continue causes for judgment, and, as this sentence was therefore in effect, appellant is now entitled to his discharge, as a much greater period of time has since elapsed than the term of the sentence. It also insisted that the right now to impose this sentence is barred by the statute of limitations.

The case of *Davis* v. *State,* 169 Ark. 932, 277 S. W. 5, and the more recent case of *Ketchum* v. *Vansickle, ante* p. 784, 286 S. W. 948, are against the contention that the expiration of a period of time greater than the length of the sentence expiates it. In the case of *Ketchum* v. *Vansickle, supra,* we quoted from the case of *Davis* v. *State, supra,* the following statement of the law: "It does not make any difference that more than a year has elapsed since the sentence of one year's imprisonment in the penitentiary was imposed. While at large under the void orders of the circuit court, to which he assented, the defendant was in the same situation that he would have been had he escaped from custody. A sentence of imprisonment is satisfied, not by lapse of time after it is pro-

nounced, but by the actual suffering of the imprisonment imposed by it. The reason is that the time at which a sentence shall be carried into execution is not provided by statute and forms no part of the judgment of the court. *Massey* v. *Cunningham, ante* p. 410."

Nor do we think the right of the court to impose sentence is barred by any statute of limitations. Section 6959, C. & M. Digest, is cited. This section provides that "actions on all judgments and decrees shall be commenced within ten years after cause of action shall accrue, and not afterwards." Section 6960, C. & M. Digest, is also cited. This is a section which follows other sections prescribing various periods of limitation for different causes of action, and provides that "all actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued." It is sufficient to say that both of these sections relate exclusively to civil actions, and have no application to criminal proceedings.

In the case of *Barwick* v. *State,* 107 Ark. 115, 153 S. W. 1106, a plea of guilty was entered at one term and the sentence was pronounced at a subsequent term, and it was there contended that the case had been abandoned and that the prosecution was barred by lapse of time. This contention was there answered as follows: "As before stated, no judgment was rendered, and the court continued the case for further proceedings. It was not abandoned, and no statute is brought to our attention which would operate as a bar, on account of lapse of time, to the exercise of the court's power to render judgment after lapse of several terms."

An unusually long period of time elapsed here between the entry of the plea of guilty and the final pronouncement of sentence. But there was no showing that this was not done with appellant's consent and for his benefit. On the contrary, the judgment complained of recites that, after the sentence had been pronounced, the sentence was, with appellant's consent and on his motion,

suspended during his good behavior. He is therefore in no position to complain.

No error was committed, so the judgment must be affirmed.

HART, J., dissents.

BOARD OF IMPROVEMENT OF AUDITORIUM IMPROVEMENT DISTRICT NO. 46 *v.* MOORE.

Opinion delivered October 4, 1926.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—AUDITORIUM.—A city has no authority to pass an ordinance creating an improvement district to construct an auditorium, and such an ordinance is subject to collateral attack after expiration of the time for review.
2. MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES.—The validity of a municipal ordinance may be collaterally attacked where the ordinance is void for lack of power to enforce it.

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

J. M. Carter and *B. E. Carter,* for appellant.

G. G. Pope, for appellee.

SMITH, J. This is an appeal by an improvement district from a decree of the Miller Chancery Court holding the district void and enjoining any further steps toward the making of the contemplated improvement, a suit for that purpose having been brought by appellee, an owner of real estate within the proposed district.

The district was organized in the city of Texarkana under the general statutes of the State governing the formation of improvement districts in cities and towns. No question is made concerning the regularity of the procedure whereby the district was established, including the passage and publication of the ordinance levying the assessment of benefits, and no suit was filed within the thirty days allowed by law for attacking such proceedings.

The proceeding to organize the district was begun on May 12, 1925, by the filing of a petition, containing the signatures of more than ten resident owners of real property in the proposed district, with the city council, praying the council to lay off certain territory in the city into an improvement district for the purpose of building a municipal auditorium. This was more than five months prior to the rendition of the opinion of this court in the case of *Lipscomb* v. *Lenon,* 169 Ark. 610, 276 S. W. 367.

The testimony of a number of witnesses was offered to the effect that a municipal auditorium would enhance the value of the property of the city within the district; but an objection to this testimony was sustained upon the ground that the power of the council to organize an improvement district to construct an auditorium was one of law, and not one of fact.

For the reversal of the decree of the court below holding the improvement district invalid and enjoining all proceedings thereunder, it is insisted that, when the petitions asking for the creation of the district and that the improvement be made were filed with the city council, there was presented to the council a mixed question of law and fact as to whether a municipal auditorium was a local improvement that would confer special and peculiar benefit on the real property of the district; that the law provides for a direct attack upon the decision of this question by the council, and provides that a failure to appeal from that decision within the time limited by law forever precludes any attack on the correctness of the action taken by the council, unless that action was so palpably arbitrary that no reasonable tribunal could have honestly reached the conclusion that the prayer of the petition should be granted.

In support of this contention it is argued that neither the section of the Constitution authorizing local improvement districts nor the statute enacted in aid thereof undertakes to say what is or is not a local improvement that can be constructed by the improvement district method, and that the decision of the question is therefore

left for the decision of the council in the first instance, and that this decision may be reviewed by the courts if a suit for that purpose is brought within the time allowed by law, and, if not brought within that time, the statute makes the finding of the council final and conclusive.

In support of this argument the case of *Hewes* v. *Glos,* 170 Ill. 436, 48 N. E. 922, is cited. This is a decision by the Supreme Court of the State of Illinois. It had previously been held by the Supreme Court of that State that the construction of a municipal waterworks system for fire protection and general uses was not a local improvement within the meaning of the statute of that State authorizing cities and towns to construct local improvements by the assessment of betterments against the property in the district where the proposed improvement was located.

The village of Winnetka, in that State, passed an ordinance for the construction of a system of waterworks for fire protection and for domestic use by the inhabitants of the district, and for other purposes, and the levy of the assessment of the benefits was approved by the county court of the county in which the village was situated, as was required by the law of that State. No property owner appealed from the order of the county court within the time allowed by law in which suits might be brought to attack an ordinance of that kind. After the expiration of the time allowed by statute for the institution of such suits, a suit was brought by a property owner in which the validity of the improvement district was questioned. The court held (to quote a head-note): "A village ordinance levying a special assessment for the construction of a general waterworks system, the village having power to construct such system, is not absolutely void, but void only as being an improper exercise of corporate power; and assessment proceedings had thereunder cannot be attacked in an action to annul them, but only on review, by appeal or writ of error, of the judgment of the county court confirming the same."

The court said the proceeding was a collateral attack on the order of the county court approving the assessments, which could not be sustained because the action of the council and the order of the county court were voidable, and not void. The court stated, however, that, if the action of the council was void because of lack of jurisdiction, then the order of the county court confirming the assessment of benefits could be collaterally attacked. In other words, the decision in that case rested on the answer to the question whether the action of the city council in passing the ordinance was merely erroneous or was void for lack of jurisdiction.

When the effect of the decision of this court in the case of *Lipscomb* v. *Lenon, supra,* is considered, it is apparent that the Illinois case from which we have quoted affords no authority for reversing the decree of the chancellor from which this appeal is prosecuted. This is true because, under the authority of the Lipscomb case, the ordinance was void on account of a lack of power in the council to pass it.

In the Lipscomb case the court reviewed the prior decision of this court in the case of *Matthews* v. *Kimball,* 70 Ark. 451, where it was held that an improvement district might be organized to acquire a city park, and the court said that, while the doctrine of that case had never been impaired, it approached the verge of constitutional sanction in holding that the entire real estate within the city limits might be included within an improvement district for the purchase and maintenance of a city park. The majority then proceeded to say: "Certainly, the doctrine there announced should not be so extended by interpretation as to confer authority upon the Legislature to itself create or delegate to other agencies the power to create improvement districts, such as we now have under review, to be paid for solely by the owners of real property in such districts."

Thus, we have an express holding that neither the Legislature itself nor any agency created by it has authority to create an improvement district to construct

an auditorium, to be paid for by the owners of real property in the proposed district.

It is true the improvement district created to construct an auditorium which was held invalid in the Lipscomb case was created by a special act of the General Assembly, and not by a city council upon the petition of a majority of the property owners, as was done in the instant case; but this difference does not operate to deprive the Lipscomb case of controlling effect here.

If the Legislature could not itself determine that the construction of an auditorium could be the subject of an improvement district, it follows that it could not delegate to a subordinate agency the power to determine that it was. So also, if it is a demonstrable abuse of power for the General Assembly to determine that an auditorium might be constructed as a local improvement, it necessarily follows that no power so to do inheres in an agency created by the Legislature to pass upon the question. In other words, the General Assembly could confer no greater power than it possesses itself, and, if the General Assembly had no power to authorize the creation of an improvement district to construct an auditorium, no agency created by the General Assembly could have that power.

As the majority of the court have no disposition to recede from the holding in the Lipscomb case, it necessarily follows that the council of the city of Texarkana had no authority to pass an ordinance creating the improvement district, and the court was therefore correct in refusing to consider the testimony offered in the case.

It must be conceded that the suit below is a collateral attack on the validity of the district, but, as was stated in the Illinois case upon which appellant relies, such an attack may be maintained where the ordinance attacked is void for the lack of power to pass it.

The decree of the court below is therefore affirmed.

LEWIS-GOODWIN OIL & GAS COMPANY v. HOLMES.

Opinion delivered October 4, 1926.

MINES AND MINERALS—FORFEITURE FOR NONPAYMENT OF RENT—WAIVER.—Where a lessee's delay in payment of rent worked a forfeiture, whereupon the lessor conveyed the land to another, the subsequent acceptance of the rent by the lessor did not invalidate his grantee's title, as the lessor had no power to waive the forfeiture.

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

Mahony, Yocum & Saye and *J. N Saye,* for appellant.

Gaughan & Sifford, for appellee.

HUMPHREYS, J. On the 5th day of April, 1924, John P. Holmes, the fee owner of the south half of the northwest quarter of the northwest quarter of section 15; Elizabeth Holmes, the fee owner of the south half of the northeast quarter of the northeast quarter of section 16; Martha Holmes, the fee owner of the northwest quarter of the southwest quarter of section 15 and the northeast quarter of the southeast quarter of section 16; the Smackover Oil & Gas Company, owner of an oil and gas lease covering the northwest quarter of the southwest quarter of section 15, and J. T. Sifford, trustee, owner of an oil and gas lease covering the southeast quarter of the southeast quarter of the northeast quarter of section 16, all of said lands being in township 16 south, range 16 west, in Union County, Arkansas, appellees herein, filed a joint suit in the chancery court of Union County against Lewis-Goodwin Oil & Gas Company, appellant herein, to cancel and correct the oil and gas lease executed by Joe McGruder and his wife to it on March 7, 1921, and recorded on June 3, 1922, purporting to correct the description contained in an oil and gas lease executed by the McGruders, April 23, 1919, to J. K. Mahony, trustee, and recorded May 19, 1919, so as to correctly describe the lands aforesaid, which lease was assigned by J. K. Mahony to appellant on October 23, 1920, and recorded the same date.

On April 1, 1923, prior to the institution of this suit, John P. Holmes sold an oil and gas lease on the south half of the southwest quarter of the northwest quarter of section 15, township 16 south, range 16 west, in said county, being a part of the 120-acre tract aforesaid, to the Gulf Refining Company for $10,181.80 cash and certain oil payments to be made, but, when the abstract was delivered, appellant's lease from the McGruders was discovered, whereupon the Gulf Refining Company refused to accept the lease and make the cash payment. In order to consummate the deal and clear the title to the Gulf Refining Company, John P. Holmes and appellant herein entered into an agreement to the effect that the cash payment should be placed in the First National Bank of El Dorado, Arkansas, to be paid to appellee, John P. Holmes, or appellant, according as the title to the oil and gas lease holding rights on said land should be judicially determined. This suit was brought pursuant to the agreement and for the purpose of testing the validity of the corrected lease from the McGruders to the appellant.

The appellant filed an answer, denying the material allegations of the bill attacking the validity of its lease, and interposed the further defense, by way of cross-bill, that, when made by the McGruders to its assignor, J. K. Mahony, trustee, Joe McGruder was in possession of the land by purchase from John P. Holmes, appellee herein, under a deed erroneously describing the land as being in range 15 west instead of 16 west, through a mutual mistake in drafting and accepting the deed, and that, on this account, it was entitled to a reformation thereof, for which it prayed. It also alleged that the deed referred to recited that there was an unpaid balance of $1,500 on the purchase price of the 120-acre tract of land, which was evidenced by McGruder's promissory note, due and payable on January 1, 1920. It tendered into court $2,300, the amount due upon said note to that date, and asked that it be subrogated to the rights of Holmes in said warranty deed, and that the lien retained therein be foreclosed and the land sold, subject to the oil and gas lease

owned by appellant. On motion of appellant, the McGruders were made parties to the suit.

Appellees filed a reply, denying *seriatim* the material allegations of the cross-bill.

The cause was heard by the court upon the pleadings and the testimony adduced by the respective parties, which resulted in a decree quieting the title of each of the appellees to their alleged respective interests in the land, as against all claims on the part of appellant, denying it the rights of reformation and subrogation, and adjudging John P. Holmes to be the owner of the sum of $10,181.80 deposited by agreement in the First National Bank of El Dorado, Arkansas, and to all of the benefits accruing to the lessor under and by virtue of said oil and gas lease executed in favor of the Gulf Refining Company, covering the south half of the southwest quarter of section 15, township 16 south, range 16 west, in said county, from which is this appeal.

According to the above recital of the facts, J. P. Holmes was the owner of the 120-acre tract on March 3, 1919, when he sold same to Joe McGruder by an erroneous description, and of the 20-acre tract, which was a part of the 120-acre tract, on April 1, 1923, when he contracted to lease it to the Gulf Refining Company by correct description. On January 17, 1921, Joe McGruder conveyed the 120-acre tract back to J. P. Holmes by the same erroneous description. Though not recited in the statement above, J. P. Holmes conveyed all of the land to Frank M. Pugh on March 9, 1921, by correct description; but Pugh had reconveyed it to him by correct description at the time he contracted a leasehold estate therein to the Gulf Refining Company. As Holmes owned the land at the time he sold same to McGruder and also when he proposed to lease 20 acres to the Gulf Refining Company, the question of an innocent purchaser is not involved in this suit. It was developed by undisputed testimony adduced in the case that there was a mutual mistake as to description in the deed from Holmes to McGruder, in the lease from McGruder to J. K. Mahony,

in the assignment of the lease from J. K. Mahony to appellant, and in the deed from McGruder back to Holmes in settlement of the lien retained for the purchase money.

In view of this undisputed fact, McGruder would have been entitled to a reformation of the deed made by Holmes to him had he not conveyed the land back to Holmes, and his lessees, Mahony and appellant, were entitled to the same relief by virtue of their lease from McGruder, if the lease was in force and effect when the agreement was made between Holmes and appellant to clear the title to the Gulf Refining Company. As we understand the agreement itself, and the construction placed upon it by learned attorneys in their respective briefs, the sole question to be determined on this appeal is whether appellant had a valid lease on the 120-acre tract of land at the time Holmes and appellant agreed to clear the title to the 20-acre tract in the Gulf Refining Company and litigate over the proceeds. In other words, it was agreed that, if appellant's lease was in force and effect at that time, it should have $10,181.80 deposited with the court, and, if not, it should be paid to Holmes.

The record reflects that the first payment of the rental upon appellant's lease was deposited in the designated bank three days late. This failure on the part of the appellant to pay the rent on time automatically worked a forfeiture of the lease, and the only way to revive it was for Joe McGruder to waive the forfeiture by subsequently accepting the rents deposited in the bank, or by some other method of waiving the forfeiture. He did not waive the forfeiture by any other method, but accepted the rental money in September, 1921. At the time he acepted the rental, however, he had conveyed the land back to J. P. Holmes and had become Holmes' tenant. He had been Holmes' tenant eight or nine months when he received the rent from the bank. He had no interest in the land at that time, as he had conveyed it back to Holmes for a consideration. It does not appear in the record that Joe McGruder accepted the rent by and with the consent of Holmes, his grantee, and the

burden rested upon appellant to prove a waiver of the forfeiture, for Holmes obtained the title thereto during the time the lease was null and void on account of said forfeiture. In other words, Holmes took the land free of any outstanding claim under the lease when Joe McGruder conveyed it to him, and no subsequent independent act of Joe McGruder could thereafter ratify the lease so as to bind Holmes. It does not appear in the abstract that the delayed payment of the rent, or the subsequent payments, had been brought to McGruder's attention before he conveyed the land back to Holmes so that it could be said that he waived the forfeiture by silent acquiescence while he owned the land.

No error appearing, the decree is affirmed.

ELROD v. BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 45.

Opinion delivered October 4, 1926.

1. STATUTES—RETROACTIVE OPERATION—PRESUMPTION.—Statutes are to be construed as having only a prospective operation, unless the purpose and intention of the Legislature to give them a retrospective operation is expressly declared or is necessarily implied from the language used.
2. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—LIMIT OF COST.—Acts 1925, p. 548, limiting the cost of an improvement to 50 per cent. of the assessed valuation, did not apply where a petition for an improvement district, signed by a majority in value of the property owners, was filed before the act became effective, though the petition was not acted upon by the city council until after the act went into effect.

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

B. E. Carter, for appellant.

G. G. Pope, for appellee.

HUMPHREYS, J. Pursuant to a petition filed with the city council of Texarkana, Arkansas, on the 10th day of February, 1925, conforming to the general laws of the

State of Arkansas, relating to improvement districts in cities and towns, said council passed an ordinance on March 10, 1925, laying off and creating Improvement District No. 45 in said city. After the passage of said ordinance, in accordance with the law, a petition signed by a majority in value of the owners of real property in said district was filed and duly presented to the city council on May 26, 1925, in which it was specified that the cost of the improvement should not exceed 195 per centum of the assessed value of the district, in conformity to act 395 of the acts of the Legislature of 1921, which provided that any improvement might be undertaken which should not exceed in cost the percentage specified in said petition of the value of the real property in the district as shown by the last county assessment.

The council set the petition down for hearing on the 23d day of June, 1925, notice was given in accordance with law, and, on the day set, the council heard the petition and found that the majority in value of the property owners in the district had signed it, whereupon said council elected Bernard Finley, E. C. Black and Milton Oats as members of the board of improvement, who qualified by taking the oath as prescribed by law. Plans were then made for the improvement, which were approved by the council. The city council then elected three resident electors of the district to assess the benefits to be received on account of the improvement of each lot, block or parcel of real property in the district, who certified and made an assessment of benefits based upon the majority petition in value, in which it was specified that the cost of the improvement should not exceed 195 per centum of the assessed value of the property in the district as shown by the last county assessment. On February 23, 1926, the city council passed an ordinance levying and assessing the benefits against each piece of real property in the district in accordance with the report of the assessors.

At this juncture in the proceedings this suit was instituted by the appellant, a real estate owner in the

district, to prevent appellee from enforcing the assessment against the property in the district, upon the alleged ground that, under the law, the cost of the improvements could not exceed the sum of 50 per centum of the assessed valuation of the property in the district according to the last county assessment, whereas the estimated cost of the improvement is more than 100 per centum of said assessed valuation. The facts set out above constituted the gist of the bill filed by appellant.

The appellee filed a demurrer to the bill, which was sustained by the court, and, upon his failure and refusal to plead further, his bill was dismissed for the want of equity, from which is this appeal.

Appellant's sole contention for a reversal of the decree is that, after the majority petition in value of the property owners in the district had been set down for hearing by the city council, and after notice of the hearing had been given, but before it was finally heard on June 23, 1925, act 184 of the Acts of the General Assembly of 1925, amending act No. 395 of the Acts of the General Assembly of 1921, had become effective and was applicable to the district. Act 395 of the Acts of 1921 provided that any improvement might be undertaken which did not exceed in cost the percentage of the value of the real property in the district specified in the petition, and the petition specified that the cost of the improvement should not exceed 195 per centum of the assessed value of the property in the district. Act 184 of the Acts of 1925 limited the cost of the improvement to 50 per cent. of the assessed valuation, except in cases where 75 per cent. in value signed the petition, in which case the cost was limited to 100 per cent.

The soundness of appellant's contention must depend upon whether said act of 1925 was retroactive in effect. It made a substantive change in the law, and was not entirely remedial in its nature. "The presumption is that all legislation is intended to act prospectively, and not retrospectively." *Black* v. *Special School Dist. No. 2*, 116 Ark. 472, 173 S. W. 846, 1104. There is no declara-

tion in the act that it should have a retroactive effect, and no language is used therein from which such effect is necessarily implied.

The following rule has been recently announced by this court: "It is presumed that all legislation is intended to act only prospectively, and all statutes are to be construed as having only a prospective operation unless the purpose and intention of the Legislature to give them a retroactive effect is expressly declared or necessarily implied from the language used." *State* v. *K. C. & Memphis Ry. & Bridge Co.*, 117 Ark. 606, 174 S. W. 248; *Special School District of Texarkana* v. *Board of Improvement of Paving District No. 13 of Texarkana*, 127 Ark. 341, 181 S. W. 918.

The court is also committed to the following rule: "No statute will be given retroactive effect if it is susceptible of any other construction." *Rhodes* v. *Cannon*, 112 Ark. 6, 164 S. W. 752.

The basis for the formation of local improvement districts in cities and towns is the consent of the majority in value of the owners therein, so the petition is the foundation for the improvement. When the petition is signed by the majority in value of the property owners and filed with the city council, that body must consider it with reference to the statutes then existing in order to carry out the intention of the Constitution. *Sembler* v. *Water & Light Imp. Dist.*, 109 Ark. 90, 158 S. W. 972; *Bell* v. *Phillips*, 116 Ark. 167, 173 S. W. 864; *Skipper* v. *Street Imp. Dist. No. 1*, 144 Ark. 41, 221 S. W. 866.

Certainly the purpose of act 184, Acts 1925, could not have been to destroy the foundation or basis of districts in the process of formation in the State. It was clearly passed to govern districts which should be organized after it became effective.

No error appearing, the decree is affirmed.

MAXEY v. WILSON.

Opinion delivered October 11, 1926.

1. SALES—NECESSITY OF DELIVERY OF POSSESSION.—One claiming as buyer of machinery for drilling oil wells under bill of sale *held* not to have title as against judgment creditor of seller, where the property was not at the place specified in the bill of sale and there was no delivery, either actual or constructive.
2. SALES—SUFFICIENCY OF DELIVERY OF POSSESSION.—Where a bill of sale of machinery described it as located on the seller's premises at a certain place, the subsequent shipment of machinery to such place to replace similar articles worn out was not a delivery to the buyer.

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

C. M. Wofford, for appellant.

E. L. Matlock, for appellee.

McCULLOCH, C. J. This is an action of replevin, instituted by appellee to recover possession of a lot of personal property constituting the equipment, tools and machinery for drilling an oil well, all of the property being situated in Crawford County, Arkansas. Appellant Maxey is the sheriff of the county, who took possession of the property under a writ of execution on a judgment in favor of appellant Harry E. Pane. Maxey was defendant below, and Pane was an intervener in the action. There was a trial and judgment below in favor of appellee, and both the defendant and the intervener appealed.

Appellee asserts title under an alleged sale to her by the B. P. L. Oil Company, a corporation, and Martin F. Pane and Charles W. Pane, who were officers of the corporation. Appellee introduced in evidence, in support of her claim, a written bill of sale from said corporation and the two parties mentioned above, in consideration of the sum of $2,000, conveying property described as follows:

"Personal property located in Crawford County, Arkansas, near the town of Cove City, at which site the

above-named parties are and have been drilling for oil, to-wit: One derrick complete, cables, sand-lines, engines, boilers, casings, water-lines, steam-lines, belts, blowers, generators, eight-wheel lumber wagon, one 1923 Gray automobile, all lumber on the ground for the purpose of building a shack; stems, sinkers, bailers, bits, rimmers, and all other tools, wrenches, and equipment of every kind and description, including tool-boxes and all containers that are now on the above named premises and the property of the B. P. L. Oil Company, a corporation, and Martin Pane and Charles W. Pane."

The instrument above referred to was executed and dated December 18, 1923. Appellant Harry E. Pane is a brother of the two grantors of that name in the bill of sale, and they were all formerly stockholders and officers in the B. P. L. Oil Company, which was a foreign corporation domiciled at Tulsa, Oklahoma. The corporation was dissolved, and Harry E. Pane retired from the business, and the property and business of the corporation were taken over by his brothers, Martin F. and Charles W. At that time the corporation was engaged in drilling an oil well near the town of Cove City, in Crawford County, Arkansas, and the equipment mentioned in the bill of sale was on the ground at that place, as specified in the bill of sale. Harry E. Pane instituted an action in the circuit court of Crawford County against said corporation to recover compensation for services performed, and obtained a judgment for the recovery of a considerable sum of money. He caused execution to issue, which the sheriff levied on the property involved in this controversy, composed of a long list of machinery and other equipment for drilling, such as boiler, engine, generator, drilling-line, wagons, and various other things. According to the testimony adduced at the trial, none of the property which the sheriff took under execution was at the place mentioned in the bill of sale (the town of Cove City) at the time of the execution of that instrument, and therefore did not fall within the description specified therein. The

log wagon taken under execution was in the State of Mississippi at that time, and was shipped to Arkansas long after the execution of the bill of sale; and all of the other articles involved were at Tulsa, Oklahoma, and were not shipped to Arkansas until some time in May, 1924.

Appellee is the mother of the Panes, and, according to the testimony adduced in her behalf, the property in controversy was purchased by the corporation with money borrowed from her. At the time of the execution of the bill of sale, the property at Tulsa had been purchased from the International Supply Company, but was being withheld from shipment until payment should be made. Thereafter the property was paid for out of funds borrowed from appellee, and it was then, as before stated, shipped to Arkansas.

The contention of appellants is that the evidence is not sufficient to support the judgment, in that it does not show a completed sale so as to pass the title to appellee as against creditors of the corporation. An analysis of the testimony in the case leads us to the conclusion that this contention of appellants is sound. Delivery, either actual or constructive, is essential to the consummation of a sale of chattels, and the title does not pass until there has been a delivery. *Brown & Hackney* v. *Loveless,* 152 Ark. 540, 239 S. W. 21, and cases therein cited. Now, there is no testimony of any kind of delivery of the property involved in this controversy. It is plain that the property is not described in the bill of sale, for that instrument covers property "located in Crawford County, Arkansas, near the town of Cove City." The property in controversy was then at Tulsa, Oklahoma, and in the State of Mississippi, and therefore could not have been at the place named above so as to bring it within the terms of the bill of sale. There is some proof to the effect that the property held at Tulsa was paid for with money borrowed from appellee, but there is no proof of delivery, either actual or constructive, to appellee. The property in controversy, subsequent

to the execution of the bill of sale, was shipped to Crawford County and delivered to the place where the oil well was in process of being drilled, but this did not constitute a delivery to appellee, for she was not in possession of the premises and never at any time had any control over this property. It is true, as contended by counsel for appellee, that most of the property in controversy—not all of it—was shipped there to take the place of other property which had been worn out in conducting the drilling operations, but this did not constitute a delivery to appellee. The engine and boiler were used, according to the testimony, to replace similar articles worn out, and most of the other articles and property in controversy were shipped there for the same purpose. But the mere fact that they were to be used in the place of articles worn out did not bring them within the terms of the bill of sale or constitute a delivery so as to pass the title to appellee.

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

BUCHANAN v. RODDY.

Opinion delivered October 11, 1926.

1. BOUNDARY—PAROL AGREEMENT.—Where there is uncertainty as to the boundary, or the owners of adjoining lands are in dispute as to the dividing line, the parol agreement of such owners as to the boundary establishes the line, and, when followed by possession with reference thereto, is conclusive on them.
2. BOUNDARY—PAROL AGREEMENT—EVIDENCE.—In an action involving a dispute as to a boundary line, it was error to exclude the testimony of a witness in whose presence a dispute as to such boundary had been settled by a verbal agreement of the owners, establishing the line as claimed by defendant.

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

W. J. Dungan, for appellant.

J. F. Summers, for appellee.

WOOD, J. This action was instituted by the appellees against the appellant. The appellees alleged that they are the owners of the south half of the southeast quarter of the northwest quarter of section 30, township 7 north, range 3 west, and the east half of the northeast quarter of section 25, township 7 north, range 4 west, Woodruff County, Arkansas. They deraigned title from the United States Government through mesne conveyances to Ed Roddy and as beneficiaries under the will of Roddy. They alleged that, in 1923, the appellant constructed a fence inclosing 3½ acres of appellees' land, describing the lands so inclosed; that the appellant and her tenants are in possession of the land without the consent of the appellees. They prayed judgment for possession, and for damages.

The appellant answered, denying the allegations of the appellees' complaint, and alleged that she was the owner and has the right of possession to the northwest quarter of the southwest quarter of section 30, township 7 north, range 3 west, and also to the northeast quarter of the southeast quarter of section 25, township 7 north, range 4 west. The appellant deraigns title through the will of her grandmother, Sallie J. Mason, devising the lands to appellant and appellant's sister, Eva Moore, and a deed from Eva Moore to appellant. The appellant alleged that, about 28 years ago, her grandmother and Ed Roddy, then owner of the lands claimed by the appellees, entered into an oral agreement by which a boundary line was established between their lands, as described in the complaint and answer, running from a stake driven at the northeast corner of the northwest quarter of the southwest quarter of section 30, township 7 north, range 3 west, running west to an old fence-row separating the lands of Sallie J. Mason and Ed Roddy; that the fence which appellees alleged to be on their lands runs south of the boundary line as above established, and is on appellant's land. The appellant alleged that the line established by agreement as above alleged had been recognized by Roddy, the appellees' predecessor in title,

for more than twenty years, and that the appellant and those under whom she claims had been in the actual, adverse, open and notorious possession of the lands for more than twenty years.

There was an agreement of counsel in the record as follows: "It is agreed that the deeds mentioned in the pleadings may be treated as in evidence and that each party is the owner of the respective lands mentioned in the complaint and answer, and that the question is whether the fence moved is on the land of the plaintiff or the defendant."

Mrs. Mamie Wilkes, if she had been permitted to testify, would have stated that, 28 years ago, in her presence, Mr. Ed Roddy and her mother, Mrs. Sallie Mason, settled a dispute over the line between their lands, which is the line herein involved, by having said line located by a surveyor, and that the land south of the agreed line has since been recognized by the owners of the lands on each side for more than 20 years, or since this agreement; that the fence in controversy in this suit is south of this agreed line, and would be on Sallie Buchanan's land. There was testimony tending to prove that a certain fence, designated by witnesses and marked on certain maps and plats in evidence as "new fence," was on the land in controversy claimed by the appellees. The court refused to permit the offered testimony of Mrs. Wilkes to be introduced, to which ruling the appellant duly excepted.

At the conclusion of the testimony, and at the request of counsel for appellant, the court instructed the jury as follows: "You are instructed that, if you believe from a preponderance of the evidence that the fence which has been designated as 'new fence' is on the plaintiff's land, you will find for the plaintiff. If the fence is on the defendant's land, you will find for the defendant."

The jury returned the following verdict: "We, the jury, find for the plaintiff." Judgment was entered in favor of the appellees, from which the appellant duly prosecutes this appeal.

The court erred in not admitting the testimony of the witness, Mrs. Mamie Wilkes, offered by the appellant. In *Taylor* v. *Rudy,* 99 Ark. 128, 137 S. W. 574, we held, quoting syllabus: "Where there is uncertainty as to the boundary, or the owners of adjoining lands are in dispute as to the dividing line, the parol agreement of such owners as to the boundary establishes the line, and, when followed by possession with reference thereto, is conclusive on them."

And in *Cox* v. *Daugherty,* 75 Ark. 395, 36 S. W. 184, we held, quoting syllabus: "Persons owning adjacent lands may, by agreement, establish the boundaries between their lands, regardless of the lines of the government survey."

Under the doctrine of the above cases, Mrs. Wilkes was a competent witness and her testimony was relevant to the issue. This testimony should have been admitted and considered by the jury in connection with the agreement of counsel and all the other testimony adduced in evidence. The agreement of counsel, to-wit: "That the deeds mentioned in the pleadings may be treated as in evidence, and that each party is the owner of respective lands mentioned in the pleadings, and that the question is whether or not the fence is on the land of the plaintiffs or on the land of the defendant," should be interpreted in connection with the pleadings and all the other evidence in the cause. When this is done, it is obvious that the parties meant by the "agreement of counsel" to treat the deeds, mentioned in the pleadings of the respective parties, as muniments of their title to the lands described therein, about which there was no controversy; that the only question was whether the "new fence," referred to by the witnesses and marked on the plats in evidence as the "new fence line now being erected," was on the land of the plaintiffs or the land of the defendant, as claimed by them in their respective pleadings. In other words, the issue between the parties, as shown by the pleadings, was the title and right of possession to a parcel of land of three and one-half acres, situated on

the boundary line of the adjoining owners, appellees and appellant.

Appellees claimed that, according to the true boundary line, they were entitled to the land in controversy which appellant had inclosed by the "new fence," which was on appellees' land, while appellant claimed that the boundary line which had been established by the predecessors in title of the respective parties as the true line between them, would bring the land in controversy within her inclosure, and that the "new fence" was erected on her land, and that she and her predecessors in title had been in the adverse possession of the parcel of land in controversy for more than twenty years.

The entire record makes a typical case for the application of the doctrine announced in *Taylor* v. *Rudy* and *Cox* v. *Daugherty, supra.*

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

BANK OF HUNTER *v.* GROS.

Opinion delivered October 11, 1926.

1. BANKS AND BANKING—NEGLIGENCE IN COLLECTING DRAFT.—Under Acts 1921, p. 514, § 14, a bank receiving for collection a draft payable in another city is not liable for failure to make such collection where it employed reasonable care in selecting a proper correspondent.
2. BANKS AND BANKING—NEGLIGENCE IN COLLECTING DRAFT.—Where a draft payable in another city was, by mistake of correspondent bank, returned to the collecting bank unprotested and uncollected, and, by the drawer's direction, was again sent for collection and was returned protested, the collecting bank was not shown to be negligent in selecting a correspondent or in forwarding the draft, and was not liable for the amount of the draft.

Appeal from Woodruff Chancery Court, Southern District; *A. L. Hutchins,* Chancellor; reversed.

STATEMENT OF FACTS.

J. B. Gros brought this suit in the circuit court against the Bank of Hunter to recover $2,261.45, alleged to be due him on checking account, and in the sum of $5,000 for damages for the wrongful refusal of said bank to cash his checks when he had sufficient funds on deposit with which to pay the same. The Bank of Hunter became insolvent, and the State Banking Commissioner was substituted as the defendant in the action. Without objection, the case was transferred to equity, and tried there. Before the trial J. B. Gros died, and Loretta O'Keefe Gros was appointed administratrix of his estate. The material facts are as follows:

In January, 1920, J. B. Gros was a rice buyer in the vicinity of Hunter, Arkansas. On the 29th day of January, 1920, J. B. Gros purchased a car of seed rice from Dr. Burns. Gros shipped the car of rice to C. Snoke, Loreauville, Louisiana, and drew a draft on him for $4,754.45 in payment of the car of rice. The draft on Snoke was attached to the bill of lading, and the same was deposited to his credit in the Bank of Hunter. The Bank of Hunter issued to him a deposit slip, showing the amount of the deposit. A check was at once drawn against this account, payable to Dr. Burns, for $4,080.22, which was the purchase price of the rice in question. The Bank of Hunter immediately forwarded the draft to J. B. Gros for collection to its correspondent, the American Bank of Commerce & Trust Company of Little Rock, Arkansas.

About the 1st of March, 1920, the draft, with the bill of lading attached, was returned to the Bank of Hunter by its correspondent. The cashier of the Bank of Hunter communicated with J. B. Gros, and Gros, after looking over the draft and bill of lading, requested the cashier of the Bank of Hunter to return the draft with the bill of lading attached to the bank at Loreauville, Louisiana. The draft was then returned to the Bank of Hunter, duly protested, for the reason that Snoke

refused to receive the car of seed rice, claiming that it was not up to sample. The cashier of the bank at Loreauville, Louisiana, wrote the Bank of Hunter that the draft was returned by it the first time to the correspondent of the Bank of Hunter, because the rice was not received by Snoke on account of not being up to sample.

With the knowledge and consent of J. B. Gros, the car of rice was sold for what it would bring, and the proceeds were credited to an overdraft to the account of J. B. Gros in the Bank of Hunter. J. B. Gros had other transactions with the Bank of Hunter, and drew checks on the bank on the theory that the bank was liable to him for the full amount of his draft on C. Snoke for the car of rice. The bank refused to pay the checks on the theory that it was only responsible to J. B. Gros for the amount which he received for the sale of the car of rice at Loreauville, Louisiana, which was sold with the knowledge and consent of Gros.

The chancellor found the issues in favor of the plaintiff, and rendered a decree against the defendant for $2,939.85. An appeal was duly prosecuted to this court.

Roy D. Campbell, for appellant.

Bogle & Sharp, for appellee.

HART, J., (after stating the facts). The correctness of the decree of the chancellor depends upon the construction to be given to an act of the General Assembly of 1921, amending the original act for the organization and control of banks. General Acts of 1921, page 514. Section 14 of the act is set out in full in *Farmers' & Merchants' Bank* v. *Ray,* 170 Ark. 293, 280 S. W. 984, and need not be repeated here.

In this case the court held that, under the section referred to, a bank receiving for collection a check or draft payable in another city or town, and having employed reasonable care to select a proper correspondent, is not liable for the default or negligence of such correspondent in the collection of the check or draft. The evidence in this case was not sufficient to warrant the chancellor in finding that the Bank of Hunter

was guilty of any negligence in the selection of its correspondent, and it did not warrant a finding that there was any negligence on the part of the Bank of Hunter in forwarding the draft for collection.

The undisputed evidence shows that the Bank of Hunter forwarded the draft for collection through its correspondent in Little Rock in the regular course of business, and that the draft was at first returned uncollected without being protested, but that this was not through any default on the part of the Bank of Hunter. It happened simply through a mistake in the Louisiana bank to which the Little Rock correspondent of the Bank of Hunter had forwarded the draft for collection. Immediately on the return of the draft, the Bank of Hunter notified Gros, and, pursuant to his directions, sent the draft to the Louisiana bank for collection. The draft was then returned by the Louisiana bank, duly protested for nonpayment because Snoke refused to receive the car of rice and pay for same, claiming that it was not up to standard.

These facts show that there was no negligence whatever on the part of the Bank of Hunter, and for that reason, under the rule in the case above cited, the Bank of Hunter was not liable to Gros.

It follows that the decree of the chancery court must be reversed, and, inasmuch as the facts appear to have been fully developed, the cause of action will be dismissed.

GOODE v. PIERCE OIL CORPORATION.

Opinion delivered October 11, 1926.

1. EXPLOSIVES—JURY QUESTION.—Whether, under the evidence, defendant was guilty of negligence in selling a mixture of gasoline and kerosene for the latter *held* for the jury.
2. EVIDENCE—JUDICIAL KNOWLEDGE.—It is matter of common knowledge that refined kerosene is used to furnish light, and as fuel for oil stoves, and in lighting fires.
3. EXPLOSIVES—CONTRIBUTORY NEGLIGENCE.—Where plaintiff held a kerosene can about one and a half inches from the top of a stove containing fire and poured a liquid supposed to be kerosene but which contained gasoline also, and an explosion followed, injuring her, *held*, in an action for negligence in selling the mixture, that plaintiff was guilty of contributory negligence, as matter of law.

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

STATEMENT OF FACTS.

Rachael Goode instituted this action against the Pierce Oil Corporation and another to recover damages for injuries received by her, alleged to have been caused by the negligence of the defendants. It was claimed that the Pierce Oil Corporation negligently sold to H. B. Smith, a retail grocer, a mixture of kerosene and gasoline for refined coal oil.

According to the evidence of the plaintiff, she was injured on January 19, 1924. She had some green wood in her stove, and it was burning a little bit. She thought she would increase the flame by pouring coal oil on it. She had a large can, which would contain five or ten gallons of oil, and which had about a gallon and a half of oil in it. There was a small blaze in the wood, and she wanted to increase it. She held the can about an inch and a half from the top of the stove and began to pour the oil on the blaze. When she had poured out about a tablespoonful of oil, there was an explosion, and the flame ran out from the top of the can and burned her hand. It seemed to be an explosion. At any rate, the

oil in the can caught on fire, ran out of the spout, and burned her hand.

She had purchased the oil from H. B. Smith for kerosene, and he, in turn, had purchased it from the Pierce Oil Corporation for kerosene. Some of the oil remained in the can after the explosion. It was examined by a chemist, and found to be a mixture of gasoline and kerosene. The United States specifications for kerosene provided that it must not flash at less than 140 degrees Fahrenheit. The oil in question flashed at 60 degrees F.

The circuit court directed a verdict in favor of the defendants, on the ground that the plaintiff was guilty of contributory negligence. From a judgment rendered in favor of the defendants, the plaintiff has duly prosecuted an appeal to this court.

J. T. Coston, for appellant.

Malcolm W. Gannaway and *A. Carlyle Gannaway*, for appellee.

HART, J., (after stating the facts). Plaintiff's cause of action is based upon the negligence of the defendants in selling to her what she had a right to assume was standard kerosene, when the oil purchased was a mixture of kerosene and gasoline.

The evidence was sufficient to allow the question of negligence of the defendants to be submitted to the jury. It tended to show that the oil, which was purchased by the plaintiff for kerosene, was a mixture of kerosene and gasoline, which flashed at 60 degrees Fahrenheit. According to the United States specifications, kerosene should not flash at a point lower than 140 degrees F.

It is a matter of common knowledge that refined kerosene is used to furnish light and as fuel for oil stoves. It is also commonly used in kindling fires. Hence, in the absence of contributory negligence by the plaintiff, the evidence for the plaintiff was sufficient to allow a recovery by her. 11 R. C. L. 671 and 672, and cases cited, and 25 C. J. 202, and cases cited.

We are of the opinion, however, that, under the plaintiff's own testimony, we are compelled to say, as

a matter of law, she was guilty of contributory negligence. It is true that she purchased the oil in question for standard kerosene, but she poured the oil in the stove, knowing that there was a small flame in the fire burning there. She held the can only about one and a half inches from the top of the stove, and knew that there was between a gallon and a gallon and a half of oil in it.

While the evidence for the plaintiff tends to show that standard kerosene is not exploded by being poured onto a flame, still the undisputed evidence shows that it would explode if poured upon live coals. The plaintiff testified that there was only a small flame to the wood in the stove, and she might have expected that, in pouring the oil on it, she would extinguish the flame and thereby cause the kerosene to explode. It will be remembered that she only held the can about one and a half inches from the top of the stove.

The decided cases and the authorities above cited hold that it is not negligence, as a matter of law, to use kerosene in kindling a new fire. The reason is that, in such a case, there is no possibility of causing an explosion by pouring kerosene on the wood. The wood is not ignited until after the person has ceased to pour the kerosene on it. A flame is then applied to the wood, and by no sort of means could this have caused an explosion of the oil in the can.

The case is quite different when the oil is being poured from the can onto live coals or even a small flame. As we have already seen, the pouring of the kerosene onto the small flame might extinguish it and thereby cause the coal-oil which came in contact with the burning wood to explode. In such a case, the better reasoning is to hold that the party using the kerosene is guilty of such contributory negligence as to bar him from recovery. *Morrison* v. *Lee* (N. D.), 113 N. W. 1025; *Du Bois* v. *Luthmer* (Iowa), 126 N. W. 147; *Riggs* v. *Standard Oil Co.*, 130 Fed. 199; and *McLawson* v. *Paragon Refining*

Co., 198 Mich. 222, 164 N. W. 668. Other authorities bearing on the question will be found in the volumes of Ruling Case Law and Corpus Juris referred to above.

It follows that the trial court was right in directing a verdict for the defendants, and the judgment will therefore be affirmed.

MUTUAL AID UNION *v.* HOLLANDSWORTH.

Opinion delivered October 11, 1926.

1. INSURANCE—RELEASE—BURDEN OF PROOF.—In an action on a benefit certificate of insurance, where plaintiff had executed a release in settlement for the death claim, the burden was on her to show that such release was invalid.
2. INSURANCE—CONCLUSIVENESS OF SETTLEMENT.—Where defendant insurance company's adjuster had represented that the company was not liable on its benefit certificate and offered a small settlement, which plaintiff did not accept until she had made a full independent investigation, the settlement was binding, even though plaintiff thereby surrendered rights which the law would have sustained.
3. INSURANCE—LIABILITY OF ASSESSMENT COMPANY.—A fraternal benefit society is not estopped to deny liability on a certificate because the deceased's death claim was included in a list for which assessments were levied, where there was no showing that the company made any false entry on its books as to the amount paid to the claimant in settlement, and under its system of operation there was no way to provide funds to pay her claim except by assessments on surviving members.

Appeal from Sharp Circuit Court, Southern District; *John C. Ashley*, Judge; reversed.

J. V. Walker and *Duty & Duty*, for appellant.

S. M. Bone, for appellee.

SMITH, J. This is an action instituted by appellee on a benefit certificate of insurance in the sum of $1,000 to recover an unpaid balance alleged to be due, there having already been paid a part of the sum named in the certificate. Appellant, a fraternal mutual insurance company, hereinafter referred to as the company, defended on the ground that there was no liability at all, on

account of the fact that the certificate had lapsed for the nonpayment of dues, and also on the ground that there had been a settlement of the disputed claim and that appellee had executed a release in consideration of the sum agreed upon, and which had been paid her.

To this answer appellee filed a reply in which she denied that the certificate had lapsed, for the reason that the assessment which the insured had failed to pay had not been levied by any officer of the company authorized so to do, and she alleged that the alleged release was obtained through the fraud of an agent of the company by reason of certain false statements made to her.

The method of operation of the company is fully set out in the opinion in the case of *Mutual Aid Union* v. *Perdue,* 162 Ark. 551, 258 S. W. 375, which was a suit against the appellant company, and need not be repeated here. One of the by-laws of the company provided that, if an assessment was not paid within the time limited for that purpose, the benefit certificates should become void, but there was a provision in the by-laws by which the insurance might be reinstated provided, at the time of reinstatement, a certificate was furnished showing that the insured was then in good health.

The certificate here sued on was made an exhibit to the complaint, and was dated February 1, 1912, and the insured died on the 15th day of April, 1924. Between those dates the certificate of the insured had lapsed more than once, but had been reinstated upon a certificate being furnished, as required by the by-laws of the company, to the effect that the insured was in good health at the time of his reinstatement. When the insured died, proof of his death was furnished, and it appeared from this proof that the insured had been in bad health for several years —was, in fact, suffering from tuberculosis and other ailments and was so afflicted at the time of the last reinstatement, that date being June 27, 1923.

With this information before it, the company took the position that there was no liability under the cer-

tificate, and its adjuster so advised appellee, but, after some negotiation with appellee, the adjuster agreed to pay her the sum of $253 in full settlement of all claims or demands based on the benefit certificate. This sum was arrived at by adding all the assessments paid by the insured, and calculating interest thereon to the time of his death, and adding $60 to cover funeral expenses, and, upon delivery of the check to appellee, she executed a receipt or acquittance in proper form of all claims under the certificate.

The only false representation claimed to have been made to appellee by the adjuster to secure the settlement evidenced by the receipt was the statement that the company was not liable because the reinstatement had been induced by a false statement of the insured concerning the condition of his health. It was not contended that the appellee lacked mental capacity to understand the effect of the receipt, nor was there any claim of duress, nor was it contended that she was deceived as to the character of the instrument she signed or the effect of its execution. The contention is merely that the adjuster falsely advised her that the certificate had lapsed and that nothing could be recovered by a suit on it, whereas the certificate had not lapsed, for the reason that no valid assessment had been levied which the insured had failed to pay.

The contention that there had been no omission to pay a valid assessment is based upon the failure of the company to offer proof that the alleged delinquent assessment had been properly levied by the directors of the company, which we held, in the case of *Mutual Aid Union* v. *Perdue, supra,* the company must show to sustain the defense there made that the certificate had lapsed because of the omission to pay a delinquent assessment.

No testimony was offered at the trial from which this appeal comes concerning the manner in which the assessment in question was levied, but there was offered in evidence the application of the insured for reinstate-

ment, which recited that his certificate had become delinquent for nonpayment of an assessment, and the application also contained the following statement: "And for the purpose of again placing same in good standing, I hereby certify that I am in good health, and authorize you to attach this certificate to my application for membership, and agree that it shall become a part thereof. I am in good health, as I have been for past few years." The undisputed evidence, including that of appellee herself, is to the effect that, on the date when this statement was made, it was not true, as the insured was then in bad health.

Appellee admitted that, after receiving the check, she did not cash it for four or five weeks, and that her reason for not doing so, as stated by herself, was that "I did not know whether that was all I would get or not, and I did not know whether to cash it or not, and I just held it." Appellee also admitted that, during the time she held the check, she consulted with her neighbors as to what she should do, and finally advised with an attorney as to what action she should take, after which she cashed the check. She did not advise with the attorney until after she had executed the receipt and had received the check, but she admitted that the check was not cashed until after she had consulted with the attorney.

The validity of the provision of the by-laws of the company whereby a certificate forfeits for failure to pay assessments is not questioned; the contention is that the company did not prove that any valid assessment had been levied, and that it was therefore in no position to assert that the certificate had forfeited, although it was shown that assessments had not been paid, and that it was a fraud for the adjuster to represent to appellee that the certificate had forfeited.

The case was submitted to a jury under instructions to which numerous exceptions were saved, and there was a verdict and judgment for appellee, from which is this appeal. We do not discuss these instructions, for the

reason that no right to recover was shown by appellee, when the testimony is viewed in the light most favorable to her.

The doctrine of the case of *Security Life Ins. Co.* v. *Leeper, ante* p. 77, and that of *Mutual Aid Union* v. *Whedbee,* 168 Ark. 1017, 272 S. W. 255, are both applicable here, and the doctrine of either case would prevent a recovery.

It will be remembered that appellee had executed a receipt and full acquittance of all demands under the certificate sued on, and the burden was therefore on her to show that this receipt was void. Until this fact was shown, she had no right to sue. She undertook to discharge this burden by alleging that the company had not shown that any valid assessments had been levied. The only proof offered on this allegation was the statement contained in the insured's application for reinstatement, which recited that the policy had lapsed. Appellee failed therefore to show that the execution of the receipt had been procured by fraud.

In the Perdue case *supra,* the insurer set up the affirmative defense that the policy had lapsed, and the burden was therefore on it to show that fact. There was no question of settlement in that case. Here the first question which arises is whether the execution of the receipt was obtained by fraud, and that fact was not shown. The statement of the adjuster made to appellee may have been true. The policy may have lapsed. The only testimony offered on the question is to the effect that the policy had lapsed. There was a failure therefore to show that the receipt was void.

The case of *Mutual Aid Union* v. *Whedbee, supra,* is applicable here, for the reason that it does not appear that appellee relied upon the representations of the adjuster, certainly not in cashing the check. According to her own testimony, she was not satisfied that she could recover only the amount of the check. She took four or five weeks to consider the question, during which time she consulted her neighbors, and finally her attorney,

after which she took the affirmative step of cashing the check. In the Whedbee case, *supra,* the syllabus reads as follows: "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."

It is true this court held, in the case of *Industrial Mutual Indemnity Co.* v. *Thompson,* 83 Ark. 575, 104 S. W. 200, that, where a release of the insurer's liability on a policy was obtained by fraud, the beneficiary was not required, as a prerequisite to the maintenance of his suit, to tender the consideration paid for such release, but the amount so paid could be deducted at the trial from the amount to which the beneficiary was entitled. But the insured in that case had done no affirmative act after the discovery of the fraud. Here appellee, after making the settlement, took counsel as to whether she should cash the check, and, after an independent investigation, she ratified the settlement by cashing it.

It is finally insisted that the company is estopped from denying liability for the reason that the death claim of appellee's husband was included in a list of claims for which assessments were levied to raise money from the holders of benefit certificates. There is no showing or contention that the company made any false entry on its books as to the amount paid appellee. The company did pay appellee a substantial amount, and, under its system of operation, there was no way to provide funds to pay this and other claims except by assessments on surviving members.

Appellee has shown no reason which would warrant a court or jury in setting aside and annulling her voluntary settlement, and the judgment of the court below must therefore be reversed, and, as the case appears to have been fully developed, it will be dismissed, and it is so ordered.

ROSE CITY MERCANTILE COMPANY v. MILLER.

Opinion delivered October 11, 1926.

1. LANDLORD AND TENANT—RIGHT TO LIEN.—Where, after leasing a farm, the owner conveyed the land to her two daughters, they were entitled to enforce their lien for the rents subsequently accruing.
2. PRINCIPAL AND AGENT—ESTOPPEL.—An agent who collected rents for a landlord cannot question the authority under which he acted.
3. CORPORATION—LIABILITY FOR ACTS OF PRESIDENT.—Where a corporation, whose president as agent for a landlord collected and converted rents by applying them to pay debts due by the tenant to the corporation, the corporation is liable for such rents.
4. LANDLORD AND TENANT—WAIVER OF LIEN.—By authorizing a mortgagee of a tenant's cotton to sell it and apply the proceeds to the payment of rents, the landlord does not waive his lien in favor of such mortgagee, though the cotton has passed to purchasers free from such lien.
5. LANDLORD AND TENANT—ENFORCEMENT OF LIEN.—Equity has jurisdiction of a suit by a landlord against a mortgagee of the tenant's crop, which, having authority to sell the tenant's crop and apply the proceeds to payment of rent, wrongfully converted a portion of such proceeds.
6. LANDLORD AND TENANT—CONVERSION OF CROP—LIABILITY.—Where the president of a corporation, which was a mortgagee of a tenant, sold the tenant's crop on which there was a landlord's lien, the corporation, by appropriating a part of the proceeds, became liable to the landlord for an amount not exceeding the rent.

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

Wills & Strangways, for appellant.

J. C. Marshall, for appellee.

SMITH, J. Certain preliminary pleadings and motions were filed in this cause and are discussed in the briefs, but a stipulation filed upon the submission of the case in the court below renders it unnecessary to consider them. In this stipulation it was agreed "that this cause shall be tried as a suit brought for the purpose of enforcing the rent lien of plaintiffs against defendant for cotton appropriated by it on which the rent had not been paid"

In support of this cause of action the plaintiffs offered testimony to the following effect: Mrs. H. T. Urquhart, by written contract, leased her farm to two tenants. One portion of the farm was leased to Son Lewis, and another portion to Crawford Romus. The rent of one tenant was $1,750, and the rent of the other was $1,250. After executing these lease contracts, Mrs. Urquhart conveyed the farm to her two daughters, Mrs. Miller and Mrs. Ragland, who are the plaintiffs in this suit. W. H. Miller, the husband of one of the plaintiffs, was agent for both the plaintiffs in the collection of the rents. The Rose City Mercantile Company, hereinafter referred to as the company, a corporation, of which J. L. Atkins was president, made advances of money and supplies to sharecroppers of Lewis and Romus to enable them to make a crop during the year 1923, and, to secure these advances, took a mortgage on the crop of these sharecroppers.

Miller testified that Atkins stated to him that he would like to handle the crop to protect the interest of the store, which both understood to mean the Rose City Mercantile Company, and that, pursuant to this conversation, he wrote Atkins the following note:

"Little Rock, Ark., August 7, 1923.

"Mr. John L. Atkins,
North Little Rock, Arkansas.

"Dear Sir: Referring to our conversation, please find below memo of various rent notes maturing on or before November 1, 1923.

Crawford Romus	$1,250.00
Son Lewis	1,750.00
Wm. Holman	250.00

"You are authorized to collect the above rent notes out of the first cotton, when picked, ginned and sold, you to furnish the Union Trust Company of Little Rock, Arkansas, each Monday morning, weekly, with statement showing amount of cotton ginned and sold and to whom sold, and to deliver the proceeds as collected to the Union

Trust Company, to be credited on the above notes until final payment is made."

Miller further testified that he later went away on a trip, assuming that the cotton would be sold by Atkins and the proceeds applied to the payment of the rent, but, upon his return, he found that, after selling the cotton, Atkins had applied only one-half the proceeds of the crop of the sharecroppers to the accounts of the plaintiffs at the bank. The other half had been credited to the accounts of the sharecroppers with the company. This suit was brought against the company to recover the proceeds of the sale of the sharecroppers' cotton.

There are but few questions of fact in the case, the principal one being the capacity in which Atkins acted in selling the cotton, it being one of the contentions of the company that Atkins was a mere trustee, whose actions herein set out did not render it liable for the proceeds of the sharecroppers' cotton, although this money was received and applied by it to the credit of the sharecroppers' accounts.

Another statement of this contention is that the company had nothing to do with the cotton or proceeds of the sale, except that Atkins placed cash in the hands of the company as trustee to hold and pay out on the order of Atkins, who bought cotton for the Lesser-Goldman Cotton Company, when Atkins made out tickets showing the sum due for cotton purchased and to whom the money should be paid, and that, in selling the cotton pursuant to the authority conferred in the note from Miller, set out above, Atkins was not the agent of the company, and the company is not therefore liable for the destruction of the plaintiffs' landlord's lien.

It is also contended that the plaintiffs did not show such ownership of the land as authorized them to maintain this suit for conversion, there being no relation of landlord and tenant between the plaintiffs and the company, and further, that it was not shown that the plaintiffs had not been paid their rent.

It is finally insisted that, as the cotton had been sold to a purchaser having full knowledge of the existence of a landlord's lien, and that the rent had not been paid, the plaintiffs should have attached the cotton in the hands of the purchaser, and therefore the cause, which was brought in equity, should have been transferred to law and the plaintiffs required to proceed against the purchaser of the cotton.

The chancellor held the company liable for the conversion of the half interest in the crop belonging to the sharecroppers, and this appeal is from the decree entered in accordance with that holding.

It may be first said that we think the undisputed testimony shows that the plaintiffs were the owners of an undivided half each of the land on which the crops were grown, and they therefore had a landlord's lien on the crops to secure the payment of their rent. Moreover, Atkins was constituted agent for the plaintiffs to collect their rents, and, having acted in that capacity, he must account to his principals as such. Under the agreement Atkins undertook to collect the rent for the plaintiffs, and, under this authority, he sold the cotton and paid them one-half of the proceeds, and he will not be heard to question the authority under which he acted.

We think it a mere play upon words to attempt to distinguish between Atkins and the company in the conversion of this cotton. Miller testified that it was understood in his conversation with Atkins, prior to writing the note set out above, that Atkins was the president of the company, and the purpose of the arrangement was to enable Atkins to protect the interests of the company. The undisputed testimony shows that, after each sale of cotton, the company remitted one-half of the proceeds to the Union Trust Company, the depository designated in the Miller note, and these letters were written and signed by the company by Atkins as president. Moreover, the undisputed testimony shows that the proceeds of the sale of the interests of the sharecroppers were

credited on the books of the company to the accounts of these sharecroppers, so that there can be no question but that the company was a party to and the beneficiary of the conversion of the cotton.

As to the proposition that the testimony did not show that the rent had not been paid, but little need be said. Atkins handled and sold all the cotton, and the statement rendered by the company of the sales of the cotton showed that the total proceeds of all the cotton paid only a small part of the rent.

It is conceded that the sharecroppers were liable only for the pro rata portion of the rent due on the land cultivated by them, but the proceeds of the sale of their cotton were insufficient to pay that part. During the progress of the trial the court stated that the plaintiffs would have to make a showing that the rent due upon the land of each subtenant was more than the amount of rent received by the plaintiffs, whereupon counsel for the company stated: "Counsel: It is much less. I will make a statement for the stenographer. The amount of cotton raised by each subtenant produced less revenue than the amount of rent due from each said subtenant." This admission was evidently made to avoid the delay of proving what was obviously a fact easily susceptible of exact proof.

There was no waiver here of the landlord's lien in favor of Atkins or the company. The agreement authorized Atkins to sell the cotton, and the title to the cotton passed to the purchasers free of the landlord's lien, but that fact did not deprive the plaintiffs of their right to sue for the money paid for the cotton. The company was a mortgagee, and authority to it to sell the cotton and apply the proceeds to the payment of the landlord's rent was not a waiver of the lien. *Bigham* v. *Cross,* 69 Ark. 581, 65 S. W. 101; *Foster* v. *Bradney,* 143 Ark. 319, 220 S. W. 811; *First Nat'l Bank* v. *DuVall,* 156 Ark. 377, 246 S. W. 471.

Under the facts stated, the proper action was brought to impress the lien on the proceeds of the cotton. The

sale of the cotton was authorized by the plaintiffs, and a suit at law by attachment to enforce the lien against the purchasers who had bought with knowledge of the landlord's lien would have involved a repudiation of the contract of agency under which the cotton was sold, even though the cotton could have been found.

The right here asserted is that of the landlord to sue one who has knowingly converted cotton upon which a lien exists, for the proceeds of such conversion, to the extent of the debt secured by the lien. This right was asserted in the early case of *Reavis* v. *Barnes,* 36 Ark. 575, and has since been frequently reaffirmed. Two of the later cases on the subject are *Sledge & Norfleet Co.* v. *Hughes,* 156 Ark. 481, 247 S. W. 1077, and *Walker* v. *Rose,* 153 Ark. 599, 241 S. W. 19, and these last cases cite other intervening cases.

In the case of *Walker* v. *Rose, supra,* it was said: "When the bank, through its cashier, advised Walker (a tenant) to ship cotton to a cotton factor out of the State, the cashier knowing at the time that the appellee (the landlord) had a lien on such cotton for rents and supplies, and when the cashier received from Walker a draft on the factor for the proceeds of such cotton and used such drafts in paying Walker's indebtedness, the bank by these acts converted to its own use the proceeds of the cotton with full knowledge of the fact that the appellee had a lien upon such cotton, or its proceeds, for rents and supplies. The decree of the court holding the bank liable to the appellee for such proceeds under the circumstances was correct, as disclosed by the above proof. Having knowledge of the appellee's lien, it must be held that the conduct of the bank was tantamount to a destruction by it of such lien. (Citing numerous cases)."

The principle there announced is controlling and conclusive of this case. Here the testimony shows that Atkins, the president of the company, sold cotton upon which the plaintiffs had a landlord's lien, and the pro-

ceeds were paid to and appropriated by the company, and it is therefore liable for the sum thus appropriated, the amount not exceeding the rent.

The court allowed the company credit for $99, the expense of picking and marketing the cotton, and rendered judgment against the company for $383.05, the net balance of the proceeds of the sale of the interests of the sharecroppers, and, as this is less than the pro rata part of the rent due on the land cultivated by them, the decree is correct, and it is therefore affirmed.

GADDY v. PENDLETON.

Opinion delivered October 11, 1926.

DEDICATION—RECORDING PLAT.—Filing and recording of an addition to a city which fails to describe the land involved, or to locate or show the size of lots, streets, or alleys embraced therein, *held* not to constitute a dedication of streets, or to establish an easement in such streets for the use of purchasers of lots.

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

Frank M. Betts, for appellant.

Marsh & Marlin, for appellee.

HUMPHREYS, J. Appellee instituted this suit in the first division of the Chancery Court of Union County, on June 27, 1923, against appellant, to cancel the plat of Triangle Subdivision of El Dorado which had been duly filed on March 15, 1923, and recorded on June 9, 1923, in the circuit clerk's office of Union County, Arkansas. This plat covered about seventeen acres of land particularly described as all that part of the southeast one-quarter of the northwest one-quarter of section 29, township 17 south, range 15 west, lying north of El Dorado and Mount Holly public road, in said county, which appellant had bought for $2,700 in cash from M. G. Murphy,

who conveyed same to her by warranty deed on September 11, 1918, which she immediately recorded in the clerk's office aforesaid. The land described in her deed and platted by her was fenced and in cultivation when she purchased and occupied it, and had been under fence and in cultivation by her grantors since the year 1903.

Appellee purchased block 17 in Ouachita Subdivision to El Dorado, Arkansas, from T. A. Wroton, on August 19, 1919, who purchased it from E. A. Wood on September 26, 1918, E. A. Wood having purchased it from M. G. Murphy on December 22, 1911. In an attempt to make the description in his deed good, on June 9, 1923, appellee had a plat of Ouachita Subdivision to El Dorado, Arkansas, refiled and recorded in the circuit clerk's office of said county, upon which there appeared a filing mark of date July 21, 1909. The only things on the face of the drawing purporting to designate it as a plat of the division of El Dorado, Arkansas, are the following words in one corner thereof: "Ouachita Subdivision to El Dorado, Ark." It contains what appears to be lots and blocks carrying numbers adjacent to avenues and streets which are named. It joins Mount Holly Highway on the north and west side thereof, but contains nothing to indicate what particular part of the highway it adjoins. It contains no scale of measurement by which the size of the lots, or the width of the avenues, streets and alleys can be determined. There is no marking on the lots, streets and avenues themselves to indicate their respective widths and lengths. The plat does not show on its face the lands embraced therein by government calls.

The oral testimony revealed that the purported plat had been filed in the circuit clerk's office by J. J. Hudson on July 21, 1909. In the year 1908 the board of trade of El Dorado undertook to locate a Presbyterian College near the city, and, pursuant to its plan, purchased, on credit, certain lands from several different parties, lying north of El Dorado and Mount Holly-Lisbon public road. The several deeds were executed to J. J. Hudson, trustee

for the El Dorado Board of Trade, and contained a provision authorizing him to lay the lands off into lots and blocks and to sell same free from liens, and to apply the proceeds, first, to the payment of the purchase money, and, second, to the establishment of the college. The deeds were not to be recorded until the purchase money for the lands had been paid. J. J. Hudson platted the lands as Ouachita Subdivision to El Dorado, Arkansas, and sold some of the lots by like description contained in the deed of appellee and his predecessors in title. The plat which Hudson filed was locked up in the clerk's vault and never recorded until appellee had same recorded on the date aforesaid. The establishment of the college failed, so November 19, 1918, the lands were reconveyed to the grantors, M. G. Murphy and the other parties, by metes and bounds, just as they had conveyed them to the trustee. All the deeds were recorded on the date of the reconveyance. The lands which M. G. Murphy conveyed to the trustee and which the trustee, in succession, conveyed back to him, was described as follows: "Commencing 60 feet of the northwest corner of the southwest one-quarter of the northeast one-quarter of section 29, township 17 south, range 15 west, and run south 633 feet, and thence west 120 feet, thence south 340 feet to the El Dorado and Lisbon dirt road, thence west 31 degrees north 1180 feet, thence north 365 feet, thence east 1105 feet to place of beginning."

The surveyor and abstracter, who were witnesses in the case, testified that it was impossible to locate the lands from the face of the plat itself, which were embraced in or covered by the plat of Ouachita Subdivision to El Dorado, Arkansas, for the reason that the plat was not tied to any landmarks; that, although it showed that the lands embraced therein were on the north side of the El Dorado and Mount Holly Highway, it did not show what particular part of that highway they adjoined; that there were no other highways or public streets forming boundaries of the plat so as to definitely fix the location of the lands embraced therein.

Appellee alleged in his bill that block 17 of Ouachita Subdivision of El Dorado, Arkansas, owned by him, adjoined appellant's land, being separated therefrom by Murphy Avenue on the west and Reid Street on the north, as shown on the plat of Ouachita Subdivision to El Dorado, under which plat he had purchased, and that the Triangle Subdivision to the city of El Dorado, as well as the fence of appellant, embraced Murphy Avenue and Reid Street aforesaid, in which he had an easement by virtue of his purchase, in accordance with the plat of Ouachita Subdivision to El Dorado, Arkansas. In other words, the gist of his bill was that appellant had closed Murphy Avenue and Reid Street, which had been dedicated to the use of the public by the filing of the plat of Ouachita Subdivision to El Dorado, Arkansas, by J. J. Hudson, and which was afterwards recorded by appellee.

We cannot agree with appellee that the filing and subsequent recording of the plat of Ouachita Subdivision to El Dorado, Arkansas, constituted a dedication of the avenues and streets therein named to the use of the public or established an easement therein for the use of those who purchased lots according to the plat. The plat wholly failed to locate any of the lots, blocks, avenues, streets and alleys purporting to be embraced therein. The only landmark to which the plat is tied is the Mount Holly Highway, and the particular point on the highway where it is supposed to be tied is not designated. It is not bounded by other accepted streets and highways. It contains no government calls. It contains no scale for the measurement of the lots, blocks, avenues, streets and alleys. The sizes of the lots, blocks, avenues, streets and alleys are not marked upon the plat in any way. The plat is absolutely void for indefiniteness in description of the lands purporting to be embraced therein.

"A plat is a subdivision of land into lots, streets, alleys, marked upon the earth, and represented on paper in such a way that the streets, lots and blocks can be identified." 6 Words & Phrases, p. 5403, citing *McDaniel*

v. *Mace,* 47 Iowa 509, 510; *Burke* v. *McGowen,* 115 Cal. 481, 47 Pac. 367.

On account of the error indicated the decree is reversed, and the cause is remanded with directions to dismiss the bill of appellee for want of equity.

KNIGHT v. STATE.

Opinion delivered October 11, 1926.

1. ARREST—NECESSITY OF WARRANT.—Since the offense of possessing an unregistered still is a felony under Acts 1921, p. 372, an officer may, without a warrant, arrest one who, he has reasonable grounds to believe, is in possession of such a still.
2. CRIMINAL LAW—UNREASONABLE SEARCH.—Where there is a lawful arrest for possessing an unregistered still, the officer making the arrest may, without a search warrant, make a search for such a still in the dwelling of the person arrested.

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

D. S. Plummer, for appellant.

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

McCULLOCH, C. J. Appellant was tried and convicted under an indictment charging him with the offense of having in possession an unregistered still, and his contention for reversal is based on the ground that the evidence is insufficient to sustain the verdict, and that the court erred in admitting testimony based upon information obtained by the arresting officer while searching appellant's dwelling-house without a search warrant. Appellant is a negro tenant farmer residing in Lee County, about ten or twelve miles from Marianna.

The State relies upon the testimony of Smith, the sheriff, and Curtis, a deputy, who accompanied him to appellant's house. According to the testimony of these two witnesses, the sheriff received information that appellant was operating a still somewhere about his premises,

and the sheriff and Curtis, one of his deputies, went to appellant's house, and found in the loft of the house an apparatus which he described as a still, and testified that it was in fact a still and had recently been in operation. He testified that he found the apparatus in a sack, and brought it down into the lower room in the presence of appellant and Curtis. Curtis testified to the same effect.

When the two officers got to appellant's house, they did not find appellant or any other person there, and Curtis went out into an adjoining field, under Smith's instruction, to find appellant and bring him to the house, which Curtis did. While waiting for appellant to be brought in, Smith, according to his own testimony, strolled about the lower rooms of the house to ascertain what he could find, and, when Curtis returned with appellant, he went up into the loft and found the still. He described it as a large copper boiler, with an eighteen-inch pipe attached thereto, and testified that the whole apparatus smelled strongly of whiskey, and that it was complete as a crude still for making whiskey. Another witness, who had examined the still after it was brought into town, testified that, without any coil on it, it was sufficient to use in distilling spirituous liquors. The sheriff testified that he found the apparatus in a sack, and that there was also a coil in the sack, adapted to use in attaching it to the pipe which protruded from the boiler.

Curtis testified that, when the sheriff came down from the loft, he had the sack in one hand containing the apparatus, and the coil in the other hand. Appellant was arrested by the sheriff, and the apparatus was taken into custody and carried to town and held in the sheriff's office until the trial of the cause. The apparatus itself was not introduced in evidence, but the sheriff and his deputy testified concerning its condition and how it was obtained.

Appellant admitted that he had the boiler with the pipe in it, which he claimed he had found a few weeks

before beneath the waters of a lake, and that he had taken it out and put it in his loft for the purpose of selling the boiler as old copper. He denied that there was any coil with the apparatus, but stated that the coil then in possession of the sheriff had been found at another house, over which he had no control.

We are of the opinion that the apparatus, as described by the officers, was a crude still, assembled at appellant's house for the purpose of manufacturing ardent spirits, and that it was susceptible to that use. *Moore* v. *State,* 154 Ark. 13, 240 S. W. 1082.

Appellant made objection to all the testimony with reference to the finding of the still, on the ground that the evidence was unlawfully obtained by search without warrant. The court overruled the objection to the testimony, and it is earnestly insisted that this was error which calls for a reversal. In other words, we are asked to overrule former decisions of this court holding that such testimony is admissible even though based upon information wrongfully obtained by unlawful search. The same argument is made as was made in the recent case of *Van Hook* v. *Helena,* 170 Ark. 1083, 282 S. W. 673, that our previous decisions on this subject are in conflict with the rulings of the Supreme Court of the United States, and should be overruled.

We deem it unnecessary to enter upon a reconsideration of the precise questions decided in previous cases, for the reason that we conclude that the facts of the present case bring it within the exception announced by the Supreme Court of the United States to the rule against allowing testimony based upon information obtained by search without warrant. In the recent case of *Carroll* v. *United States,* 267 U. S. 132, Chief Justice Taft, speaking for the court, said:

"When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense, may be seized and held as evidence in the prosecution. * * * The right to search and

the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

In the still more recent case of *Agnello* v. *United States,* 269 U. S. 70, the court said:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. * * * Such searches and seizures naturally and usually appertain to and attend such arrests. But the right does not extend to other places."

Further on in the opinion the court said: "While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."

The offense of possessing an unregistered still is a felony under our statute. Acts 1921, p. 372. A peace officer may lawfully make an arrest without warrant "where he has reasonable grounds for believing that the person arrested has committed a felony." Crawford & Moses' Digest, § 2904. The sheriff testified that he had reasonable information that appellant was engaged in the manufacture of whiskey, and he went to appellant's house pursuant to that information, and had him brought in from the near-by field where he was at work, and that the search was made in appellant's presence. He testified also that appellant was immediately arrested on the charge of possessing an unregistered still. The testimony is not altogether clear as to the precise moment when the formal arrest was made, but the testimony, when considered together, shows that appellant was taken into custody out in the field and brought to the

house, pursuant to the sheriff's information that whiskey was being manufactured there. In other words, the testimony, reasonably considered, shows an arrest substantially contemporaneous with the search of the premises, and the case in this respect comes clearly within the decisions of the Supreme Court of the United States. It is not proper, we think, to draw fine distinctions as to the particular moment the arrest was made, for, according to the decisions of the Supreme Court of the United States, when there is a lawful arrest and the arrest and search are substantially contemporaneous, there is no violation of the constitutional guaranty against unlawful search, and the evidence found under those circumstances is not inadmissible. Our conclusion therefore, under the facts of this case, is that the testimony of the arresting officers was admissible, and this conclusion is reached without reconsidering our former rulings on that subject.

Judgment affirmed.

SMITH, J., (dissenting). It must be conceded that the admission of the testimony of the sheriff, which the majority holds was properly admitted, was not erroneous under the decision of this court in the case of *Benson* v. *State,* 149 Ark. 633, 233 S. W. 758, and some later cases following it. In that case there had been a wrongful search of the defendant's home without a search warrant, and intoxicating liquors had been found as a result of the search, and we held that the evidence thus secured was not rendered inadmissible because it had been illegally obtained. We recognized in that case that there was a division in the authorities, and, upon an investigation of the authorities, we concluded that the weight of authority supported the rule that this evidence was not to be excluded because it had been illegally obtained, and we adopted what we conceived to be the majority rule, and did so because it was the majority rule.

The question has since recurred with such frequency that we are caused to pause and doubt whether the real effect of that decision has not been to license officers of

the law to treat as meaningless very sacred provisions of our Constitution.

We have therefore further considered the question of the admissibility of testimony obtained as a result of a wrongful and illegal search of one's home, as we have the right to do, inasmuch as only a rule of evidence is involved, and the writer and Mr. Justice HART have concluded that, even though we were correct as to where the weight of authority was when the Benson case was decided, we should now follow the rule which is supported by the better reasoning, and hold that testimony obtained by an illegal and wrongful search of one's home should be excluded when proper objection is made to its admission.

When our Constitution was framed, there were certain rights which were considered so sacred and inviolable that they were specifically enumerated in article 2 of the Constitution, and this article was called the "Declaration of Rights."

In § 8 of this article it is provided, among other things, that no person shall be compelled, in any criminal case, to be a witness against himself; and § 15 of this article reads as follows: "The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

The source from which these guaranties to the citizens come is certain. The first is found in the Fifth Amendment to the Constitution of the United States, and the second is almost an exact copy of the Fourth Amendment to the Constitution of the United States, indeed is identical with the provisions of the Fourth Amendment to the Federal Constitution, except that, following the words, "The right of the people", our Constitution contains the clause, "of this State". This was an unnecessary phrase, perhaps, but manifests unmistak-

ably the intention to reserve to the citizens of this State specifically the right to immunity from unreasonable searches and seizures.

Under these two amendments to the Federal Constitution, testimony obtained as the result of a wrongful search has always been held to be incompetent by the Supreme Court of the United States, the leading case so holding being that of *Boyd* v. *United States,* 116 U. S. 616.

The Boyd case gives a history of the Fourth and Fifth Amendments to the Federal Constitution, and makes plain the purposes thereof and the evils they were intended to protect the citizens against, and the history of these amendments, as there shown, makes it very clear that the purpose of the amendments was to afford protection from a system of espionage which had become intolerable in England. The opinion in the Boyd case also recites the travail of the British people in securing immunity to themselves from illegal searches and seizures.

It was thought that, if one's person, house, papers or effects could be unreasonably seized or searched, and the evidence obtained as a result thereof be used against the person whose rights had been thus violated, he was, in effect, required to become a witness against himself. The provision of the Fifth Amendment, that no person shall be compelled, in any criminal case, to be a witness against himself, has been regarded by the Supreme Court of the United States as supplementing the Fourth Amendment.

The reason inducing the decisions of the Supreme Court of the United States and the decisions of the courts which have followed the Supreme Court of the United States, is that the Fourth Amendment and the rights guaranteed thereby cannot be given effect if testimony is admitted which was obtained by violating the amendment. Indeed, as is pointed out in many of these cases, a desire to obtain the testimony is ordinarily the inducing cause to violate the Constitution by the officers mak-

ing the search, and, if this unlawful invasion of the rights of the citizens is rewarded by permitting this purpose to be accomplished, the guaranty of the Constitution against such invasions becomes a mere phrase of meaningless words, affording the citizen no protection at all.

It was said in the Boyd case: "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

It was there also said: "Both amendments relate to the personal security of the citizen. They nearly run into and mutually throw light upon each other. When the thing forbidden in the Fifth Amendment—namely, compelling a man to be a witness against himself—is the object of a search and seizure of his private papers, it is an 'unreasonable search and seizure' within the Fourth Amendment."

In the case of *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, as the result of an illegal search and seizure, certain books and papers belonging to the company had been obtained, and copies and photographs thereof were made, and the company was ordered to produce the originals, and was fined for contempt for refusing to do so. That judgment was reversed, and Mr. Justice Holmes, speaking for the court, said: "The Government now, while in form repudiating and con-

demning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means, which otherwise it would not have had. The proposition could not be presented more nakedly. It is that, although of course its seizure was an outrage which the Government now regrets, it may now study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States,* 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. * * * It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others; but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

It will not do to say that an illegal search of one's home will not be regarded as unreasonable if made by an officer for the reason that an officer would not make a search unless he had probable cause to believe that a search would disclose some evidence of crime. The historical fact is that the inhibition was directed against officers. This is pointed out by the Supreme Court of Appeals of West Virginia in the case of *State of West Virginia* v. *Wills,* 91 W. Va. 659, 114 S. E. 261, where it was said: "But we are told that the constitutional privilege under § 5 is strictly limited to admissions of the party, *as a witness,* and that that provision does not apply to incriminating articles taken from the accused

illegally; that, if the accused is required *as a witness, under judicial process,* to produce the incriminating articles, it applies, and he can claim the privilege; but, if the State does not choose to act under the law and pursuant to the law, but wholly without the law, it may do so—it may forcibly and illegally seize them from the accused, either from his person or his home, and use them against him. Possibly that might be true, if it were not for § 6, which prohibits unreasonable searches. That prohibition was meant not for private persons, but for the State and all its officers. Searches and seizures made by private persons, or officials acting in their private capacity or for private purposes, were always against law, and needed no constitutional inhibition. We repeat that § 6 was meant for the State. It makes it unlawful for any one acting in an official capacity under governmental authority to make unreasonable searches and seizures. It does not prohibit all searches and seizures, but only those which are unreasonable. And what are unreasonable? Certainly all those searches and seizures that are unlawful. To search without a search warrant the person of one not charged with felony, or committing an offense within the presence of the officer which would authorize his arrest without a warrant, is an unlawful and therefore an unreasonable search; and to seize liquors so found upon him, after such unlawful search, is an unlawful and therefore an unreasonable seizure."

The § 6 there referred to is a section of the Constitution of the State of West Virginia substantially identical with the provision of our Constitution and that of the Fourth Amendment to the Constitution of the United States.

The majority opinion in the recent case of *Van Hook* v. *Helena,* 170 Ark. 1083, 282 S. W. 673, concedes that we have not given to our constitutional provisions the same interpretation as has been given by the Supreme Court of the United States to the provisions of the Federal Constitution, although ours were taken from that instrument. The provisions are substantially identical, yet

we are refusing to follow the court whose right and duty it is to interpret language that we borrowed and incorporated into our own Constitution. The net result of this difference, I submit, is that the Federal courts are preserving a sacred and constitutional right, while we are permitting the provisions of our Constitution to become, as was said by Mr. Justice Holmes, a mere form of words.

There is recently off the press a work on Search and Seizure by A. L. Cornelius, of the Detroit bar. This work contains a most exhaustive review of the Fourth and Fifth Amendments to the Federal Constitution and the provisions of the State Constitutions which have incorporated the substance of these amendments, and the cases, Federal and State, construing these provisions are reviewed at great length.

At § 7 of this work it is said: "Critics of the Federal rule usually assert that the doctrine admitting evidence illegally seized is sustained by the weight of authority." And this was what we said in the case of *Benton* v. *State, supra.* The author then proceeds to say: "This statement, although it may have been true some years ago, is of doubtful accuracy at the present time, since there has been a steady drift of authorities towards the exclusion doctrine in recent years. Seven years ago, not to exceed four States had announced adherence to the Federal rule. At the present time, fifteen States have announced unqualified adherence to the doctrine excluding evidence illegally seized."

The author then reviews the decisions of the various States on the subject.

After commenting upon Professor Wigmore's view that evidence was not to be excluded because it had been illegally obtained (page 2955 of volume 3 of Wigmore on Evidence), which we quoted from in our opinion in the case of *Benson* v. *State, supra,* the author proceeded to say: "The question is not merely, as Professor Wigmore seems to assume, one between the courts and a criminal, or, upon a larger view, between society and

a criminal, but the problem which confronts the courts in the adoption of a practical policy that will preserve to all of the people—the innocent as well as the guilty—the guaranty of the Constitution against the invasion of the right of privacy. Faced with a startling increase in illegal searches and seizures which affected not only the guilty but the innocent as well, many of the courts came to a realization that practical measures would have to be adopted or the constitutional provisions against unreasonable searches and seizures would become a dead letter."

In this connection, we quote from the recent decision in the case of *Youman* v. *Commonwealth,* 224 S. W. 860, wherein Chief Justice Carroll, speaking for the Court of Appeals of Kentucky, said: "It seems to us that a practice like this (that of admitting testimony obtained as the result of an illegal search) would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if, at any time, the protection of these rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified. It is trifling with the importance of the question to say, as some courts have said, that the injured party had his cause of action against the officer, and this should be sufficient satisfaction. Perhaps, so far as the rights of the individual are concerned, this might answer; but it does not meet the demands of the law-abiding

public, who are more interested in the preservation of fundamental principles than they are in the punishment of some petty offender."

A case in which the subject was thoroughly considered and the authorities reviewed both in the majority and in the dissenting opinions is that of *State of Missouri* v. *Owens,* 302 Mo. 348, 259 S. W. 100, and there is an extensive annotator's note to this case in 32 A. L. R. 383. In that case it was said by Mr. Justice White, speaking for the Supreme Court of Missouri, that "in nearly all the States where the Constitutions have provisions similar to the Fourth and Fifth Amendments to the Federal Constitution, the courts agree with the ruling in the United States Supreme Court in the interpretation of the principle."

The Supreme Court of Appeals of West Virginia had held, as this court has held, that the admissibility of evidence is not affected by the illegality of the means by which it is secured, and, in the case of *State* v. *Wills, supra,* this rule was invoked to justify the admission of testimony obtained by an illegal search, as a result of which "moonshine liquor" was found in the defendant's possession, and, in holding against that contention, the court said: "We subscribe to the general doctrine that the admissibility of evidence is not affected by the illegality of the means by which it is secured; but, where the evidence is secured by an illegal search or seizure in violation of the Constitution, the article so seized, as well as the information so illegally obtained, is inadmissible upon a trial of the accused. It therefore follows that the court erred in admitting such evidence, over objection of the defendant, which was seasonably made. Under the practice in this State the defendant might object to the introduction of the evidence when offered. He is not required, as he did in this case, to file his petition for the return of the seized articles and the rejection of the evidence, to prevent their introduction against him."

The majority held the testimony of the sheriff that he found a still in defendant's home competent, because, after finding the still, he arrested defendant. In other words, the sheriff wrongfully searched defendant's home, and there found a still, and then arrested him, and it is held that, because defendant was arrested, the evidence showing the result of the illegal search became competent. This result is reached in the application of the rule of evidence, which has always prevailed in the Federal courts and all other courts, that, "where a man is legally arrested for an offense, whatever is found on his person or in his control which it is unlawful for him to have, and which may be used to prove the offense, may be seized and held as evidence in the prosecution," and the majority cite also a statute of this State which gives a peace officer the right to make an arrest when he has reasonable grounds for believing the person arrested has committed a felony.

I submit that these undisputed propositions of law have nothing whatever to do with the admissibility of the testimony of the sheriff, and that we should either reaffirm our holding in the Benson case, *supra,* under which the testimony is competent, or that we should follow the rule announced by the Supreme Court of the United States holding the testimony is incompetent.

So far as the statute cited is concerned, it has no relation whatever to unlawful searches made in violation of our Constitution, and the cases of *Carroll* v. *United States,* 267 U. S. 132, and *Agnello* v. *United States,* 269 U. S. 20, cited in the majority opinion, do not in any manner change the rule of the Federal courts that evidence obtained as the result of an illegal search of one's house is inadmissible when proper objection to its admission is made.

The principal point in the Carroll case was whether the search of an automobile was legal, and the court held that it was legal, and, this being true, the evidences of guilt found as an incident to the search and arrest were, of course, admissible.

In the Agnello case the facts were that Frank Agnello and certain other defendants were indicted for a conspiracy to violate the Federal Drug Act. Certain of the conspirators were lawfully arrested, and in that connection Mr. Justice Butler, who delivered the opinion of the court, used the language which the majority quote. After quoting from the Carroll case, and pointing out that a necessary difference exists between the right to search a dwelling house or other structure, in respect to which a proper official warrant might readily be obtained, and the right to search a ship, motor-boat, wagon or automobile, for contraband goods, when it was not practicable to secure a warrant, because the vehicle could be quickly moved out of the locality or jurisdiction in which the warrant must be sought, the learned justice proceeded to say: "The protection of the Fourth Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant." It was there further said: "Belief, however well founded, that an article is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful, notwithstanding facts unquestionably showing probable cause. The search of Frank Agnello's house and seizure of the can of cocaine violated the Fourth Amendment." Continuing, it was further said: "It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment."

The court then quoted from the case of *Silverthorne Lumber Co.* v. *United States, supra,* as follows: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it

shall not be used at all." And then proceeded further to say: "The admission of evidence obtained by the search and seizure was error and prejudicial to the substantial rights of Frank Agnello. The judgment against him must be set aside and a new trial awarded."

The work on Search and Seizure from which we have already quoted is recent enough to contain a review of both the Carroll and the Agnello cases, and at § 20 of this work it is said: "A search that is unlawful when it begins is not lawful when it ends by the discovery and seizure of intoxicating liquor or other property being used unlawfully. It was against such prying on the chance of discovery that the constitutional amendment was intended to protect the people. Neither is the discretion of the officer, however good and well-intentioned, a substitute in law for a search warrant issued by a proper magistrate."

The argument that the evidence wrongfully obtained by the sheriff through the illegal search of appellant's home becomes admissible, because the search was not fruitless and appellant was arrested, is so completely answered by the Supreme Court of the State of Wisconsin in the case of *Allen* v. *State,* 183 Wis. 323, 197 N. W. 808, that we copy somewhat at length from that opinion: "In the instant case the police officers did not find the defendant violating any law of the State until after his illegal search and illegal arrest, when they discovered evidence leading them to believe he was violating a law of the State. This statute cannot be construed to give police officers the right to find a person guilty of the offense by illegal arrest or illegal search. Policemen are not to try the accused. If they see him in the act of committing an offense, they may arrest him without a warrant. But if the accused is searched, without warrant as a basis of arrest, or if arrested without warrant as a basis of search, in order to ascertain that the accused is committing an offense, the proceedings are void from the beginning. Had the officers made a legal arrest, they would have been justified in their search of the defend-

ant; or, had the officers made a legal search of the defendant, they would have been justified in making an arrest upon finding defendant violating the law. But the officers did neither. They had no warrant to arrest, they had no warrant to search. So, assuming that the arrest was made before the search, the arrest was illegal, and the search following was illegal; or, assuming the search was made before the arrest, the search was illegal, and the arrest based thereon without a warrant was illegal. * * * The defendant was peacefully going his way. He was officially restrained—illegally restrained. He was searched—illegally searched. The test is not that the officers found liquor upon the defendant. Suppose they had not found it. They would have been guilty under the law of illegal search—of violation of the defendant's sacred right, under the Constitution, to walk the street unmolested. That the officers found liquor could not change the original wrong into a right. That wrong was not blotted out by what they found. The test is the right of an innocent pedestrian against unlawful invasion of his person. And the innocent cannot be protected if officers are permitted to search the person of every one who has been accused by hearsay or rumor. If these officers might waylay a pedestrian without warrant and search his person, opportunity would be open wide for the night prowler and robber to hold up their victims under pretense of official authority, search their persons, and take their valuables without resistance. The answer is that it cannot be done. It is well recognized by the authorities that a person unlawfully restrained may resist, but we should not come to such a pass. A citizen should respect officers of the law, especially when clothed in the habiliments of authority. This respect for authority can only be secured and maintained by such officers themselves respecting the law they are sworn to uphold."

The question of the admissibility of testimony obtained as the result of an illegal search would not arise unless some evidence of crime were found, and there

would be no trial if no one was arrested. If, therefore, because evidence of crime was found, and an arrest was made, as the result of an illegal search, it is competent to prove what was found, then there is no distinction between a search made under the authority of a warrant and one made by the officer because his suspicions had been aroused. And if we are to permit officers who violate the Constitution by searching homes without warrants to be rewarded by being allowed to give testimony showing the result of their unlawful act—the purpose of the search being to obtain testimony—then, as was said by Justice Holmes in the Silverthorne case *supra,* the constitutional provisions have become a mere form of words.

The case of *Weeks* v. *United States,* 232 U. S. 383, is one of the more recent and leading cases holding that testimony obtained by an illegal search is inadmissible, and in that case Mr. Justice Day, speaking for the Supreme Court of the United States, said: "While the efforts of courts and their officials to bring the guilty to punishment are praiseworthy, they are not to be aided by sacrificing the great fundamental rights secured by the Constitution."

The home of the citizen should not be searched and his right of privacy invaded unless there is probable cause for doing so, and, if this cause exists, it is not difficult to obtain a warrant authorizing the officer to make a search; but, if he does not do so and ignores a constitutional right guaranteed the citizens, the courts should say, as a warning to other officers not to repeat the wrong, that the violation of the Constitution shall be fruitless by denying the right to prove the result of the search.

For these reasons the writer and Mr. Justice HART have concluded that the court was in error in the Benson case *supra,* and that that case should be overruled, and the judgment in the present case should be reversed on account of the admission of the sheriff's testimony showing what he had found in defendant's home after wrongfully searching it.

Justice HART concurs in this dissent.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* SEVIER COUNTY.

Opinion delivered June 28, 1926.

1. HIGHWAYS—ESTABLISHMENT—NOTICE.—Under Crawford & Moses' Dig., § 5230, providing that, previous to any petition being filed for the establishment of a county road, notice thereof shall be given in some newspaper published in the county, etc., *held* that a judgment of the county court opening a road over a railroad right-of-way is not invalid because the petition was presented before notice was given that the application would be made for the road, where the court did not act upon the petition until the notice has been properly authenticated and filed.
2. HIGHWAYS — ESTABLISHMENT — SUFFICIENCY OF BOND.—Under Crawford & Moses' Dig., § 5228, providing that an application for laying out a public road shall be signed by ten freeholders of the county, and one or more of the signers shall enter into bond with sufficient security, payable to the State for the use of the county, *held,* that one contesting the establishment of a road is in no position to complain because the bond was signed only by two of such signers, but not by a surety, as the bond was given to protect the county for cost and expenses incident to the view.
3. HIGHWAYS—ESTABLISHMENT—IRREGULARITIES.—That a bond to protect the county was filed and the viewers were appointed before the notice of the application to establish a public road was published for a full week was a mere irregularity in the exercise of the county court's jurisdiction.
4. EVIDENCE—MATTER OF COMMON KNOWLEDGE.—It is common knowledge that streets run through railroad yards where there are many switches and tracks, and that extraordinary hazards of the traveling public are guarded against by flagmen.
5. HIGHWAYS—ESTABLISHMENT—DISCRETION OF COUNTY COURT.—The county court *held,* under the evidence, not to have abused its discretion in opening up a public road over and across a railroad switchyard.

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

James B. McDonough, for appellant.

J. R. Campbell, Jr., and *Henry Collins,* for appellee.

HUMPHREYS, J. This suit was commenced in the county court of Sevier County, by certain landowners, to open a public highway over a railroad right-of-way of

appellant near DeQueen, under authority of §§ 5228, 5229 and 5230 of Crawford & Moses' Digest. Appellant interposed three defenses to the proceeding, as follows: First, that the petitioners did not publish the notice as required by § 5230 of Crawford & Moses' Digest; second, that the petitioners did not give the bond with security required by law; and third, that railroad yards cannot be condemned for a public highway.

The suit was first tried in the county court, then on appeal in the circuit court, where it was adjudged upon the testimony and law that the highway should be opened across appellant's right-of-way at a point where its land had been acquired exclusively for railroad yards.

An appeal has been duly prosecuted to this court from said judgment. The record reflects the following facts pertinent to the issues involved in the appeal.

The proposed highway will intersect the railroad right-of-way about a mile and one-half north of the depot in DeQueen, over land acquired by the railroad for yard purposes. The proposed crossing is 912 feet north of the most northerly switch and at a point where the railroad has only one track and where the right-of-way begins to narrow in width. It is the purpose of appellant to use its land at the proposed point of highway and railroad right-of-way intersection for terminal and switching purposes in the natural expansion and development of its business. The right-of-way purchased for yard purposes is about 800 feet wide, whereas the customary width of rights-of-way is 100 feet. Appellant also introduced testimony to the effect that, when the switching tracks should be laid on the north end of the yard, it would be dangerous to have a highway through it on account of cars moving back and forth. The proposed road will connect county road No. 2, mail route, west of the railroad track, with the Jefferson Highway running parallel with the railroad on the east side thereof, and being the main highway between DeQueen and Mena. The proposed road is about two miles long, and will furnish the people in its vicinity and the neighborhood west

of the road an outlet to the Jefferson Highway without being compelled to go around by DeQueen, two miles south, or about two miles north to a cross-road. The petition for the proposed road was filed in the office of the county clerk on the 30th day of January, 1922. Notice of the application was published March 31, 1922. Proof of the application of the notice was filed April 3, 1922. The bond required by the statute was approved April 4, 1922. The viewers for the proposed road were appointed April 6, 1922, and filed their report on July 3, 1922, the day the order was made establishing the highway.

Appellant's first contention for a reversal of the order or judgment establishing the road is because the petition was presented before notice was given that the application would be made for the road. Section 5230 of Crawford & Moses' Digest requires that notice must be given by publication of the intended application for the road previous to the presentation of the petition for same, and that the notice shall be duly authenticated and presented with the petition to the county court. We think the statute means that, before the petition shall be called to the attention of the court for action, a required notice shall have been published and duly authenticated. It did not mean that the notice should be necessarily published and authenticated before the petition could be filed in the clerk's office. The record reflects that the petition was filed several months before it was acted upon by the court, but the court did not act upon it until after the notice had been properly authenticated and filed. The petition was directed to the court and not the clerk. Of course, the court did not acquire jurisdiction until the notice had been given, authenticated, and filed, because it was a necessary prerequisite and the basis of any action on the part of the court, but it would be technical indeed to interpret the statute as meaning that the notice could not follow the filing of the petition when the statute provides, in so many words, that the notice shall be duly authenticated and presented with the petition to the county court.

Appellant's second contention for a reversal of the order or judgment is that the court approved a bond without security and appointed the viewers on April 2, 1922, before the notice had been published for a full week. The objection made to the bond is that it was not signed by a surety. It was signed by two of the petitioners, presumably solvent, and was approved by the court. We do not think appellant is in any position to complain of this, since the bond was given to protect the county for costs and expenses incident to the view in case the prayer of the petitioners should not be granted or in case the proceedings should not be finally confirmed and established. Section 5228 of Crawford & Moses' Digest. Objection was also made because the bond was filed and the viewers appointed before the notice had been published for a full week. These were mere irregularities in the exercise of jurisdiction, and not necessarily prerequisites to the exercise thereof by the court. *Polk* v. *Road Improvement District No. 2 of Lincoln County,* 123 Ark. 334.

Appellant's third and last contention for a reversal of the order or judgment is that highways cannot be opened across lands acquired by a railroad for yard purposes, although not being used for such purposes. The testimony was to the effect that, at some future time, the land at the point of intersection of the railroad and the proposed highway would likely be used for yard purposes. The argument is that highways opened across railroad yards entail great hazard and danger upon users of the roads and much inconvenience to the railroads themselves. The same might be said concerning the extension of streets through railroad rights-of-way in cities and towns, yet it is a common thing and acknowledged right to do so. *St. L. S. Ry. Co.* v. *Fayetteville,* 75 Ark. 535. It is common knowledge that streets run through railroad yards where there are many switches and tracks, and that the extraordinary hazard and danger to the traveling public is guarded against by flagmen. We can see no reason why railroad and public cannot

occupy the land for their respective purposes, as the uses may reasonably coexist. In this State county courts have exclusive jurisdiction in the matter relating to county roads. Article 7, § 28, Constitution of 1874. It is provided by § 5226 of Crawford & Moses' Digest that:

"All public roads and highways shall be laid out, opened and repaired agreeably to the provisions of this act, and the county court of each county shall have full power to make and enforce all orders necessary as well for establishing and opening new roads as for changing and vacating any public road or part thereof." When a railroad acquires or condemns property for railroad purposes, it takes it with full knowledge that its easement is subject to the establishment of intersecting highways or crossroads wherever necessary for the convenience of the public, and the existing necessity therefor is within the sound discretion of the county court so far as rural highways are concerned. It is suggested by appellant that this rule would allow county courts to lay off highways through depot buildings and other like expensive improvements of railroad companies. Not so, for this could be avoided by slight detours, and it would be an abuse of discretion not to make a detour under such circumstances. And likewise it would be an abuse of discretion to unnecessarily cross railroad yards with highways when it could be avoided by a slight deviation in the route of the road, or when it would be practical to construct an overhead or underground way. The whole matter is one of sound discretion by the county court, and subject to review.

We do not think that the testimony in this case shows that the county court abused its discretion.

No error appearing, the order or judgment is affirmed.

The CHIEF JUSTICE and Mr. Justice WOOD concur in the judgment.

CONCURRING OPINION.

WOOD, J. The Chief Justice and the writer concur in the judgment for the reason that the proposed high-

way does not invade any land of appellant that is now in actual use as yards. The county surveyor testified concerning this, in effect, that the appellants had indicated the yard limits by a sign painted on a post, which post was a considerable distance north of the proposed road; that the sign, "yard limits," had been at the same place north of the proposed highway for fifteen or twenty years; that the proposed road was nine hundred and twelve feet north of the last switch at the north end of the yards of appellant. The testimony of witnesses of the appellant, its superintendent, trainmaster, civil engineer of the DeQueen & Eastern and the Texas, Oklahoma & Eastern, was to the effect that the land condemned for the proposed highway was acquired several years ago by appellant for yard purposes; that "it is necessary that this land be held by the railway company for future expansion and use as yards;" that "it would be dangerous to permit, or to have a highway running through the yards," both to the traveling public and the railroad. The assistant engineer of appellant, in answer to a question, stated that he did not know of any proposed changes in the yards of appellant at this time. The appellant's superintendent, on cross-examination, referring to a map of the situation of appellant's road at DeQueen, testified that appellant had twenty-five hundred feet south of the proposed crossing upon which appellant could build tracks if it desired. Appellant had not thought about extending the yards for the past ten years; it had not been necessary. This witness exhibited a drawing showing the tracks that are now in actual use, and those that would be necessary when the tracks would have to be expanded and extended. He was asked how far in the future that would be, and answered, "That depends on the traffic of the country." He was further asked the following question: "I wish to get some idea from you about how long it will be before that will take place, and whether or not there is any immediate danger of that taking place," and answered, "There is no immediate danger." He further stated that, in his opinion, it is neces-

sary now for the better operation of the road and transportation of freight, but the superior officers of the railway company, while agreeing to the idea, were not quite ready for it. Witness had not received any instructions to extend the yards at DeQueen and did not know of any proposed changes in the yards of the Kansas City Southern in DeQueen at this time.

It occurs to us that the above testimony was legally sufficient to sustain the finding and judgment of the county court and of the circuit court "that the county of Sevier had the right to condemn a highway over the property of the defendants," because, according to the undisputed testimony, the appellants were not using the land condemned for the highway as yards, and the above testimony was suffcient to warrant a finding by the court that it was uncertain when, if ever, the land condemned would be actually used by appellants as railroad yards. While the lands were acquired many years previous for yard purposes, appellants had not used the land condemned for railroad yards, and whether they would so use them was, under the evidence, a possibility and probability which the future exigencies of railroad traffic would determine. Appellants could not purchase land and appropriate it for yard purposes by merely designating same as "yards." Bottomed upon such facts we concur in the judgment.

But these facts do not justify this court in announcing broadly that "the whole matter of condemning *railroad yards* is one of sound discretion by the county court, and subject to review." Such, we believe, is not the law. The exclusive jurisdiction vested in county courts "in the matter of public roads" by our Constitution, article 7, § 28, does not confer upon county courts the power to condemn railroad yards that are in actual use as such for the purposes of public highways. Section 5226 of C. & M. Digest provides as follows:

"All public roads and highways shall be laid out, opened and repaired agreeably to the provisions of this act, and the county court of each county shall have full

power and authority to make and enforce all orders necessary as well for establishing and opening new roads as for changing and vacating any public road or part thereof."

The general powers conferred by the above statute to lay out, open, and repair public roads do not vest county courts with authority to condemn for public highways railroad land that is set apart and being used for railroad yards. Under our Constitution, statutes, and decisions construing them, "a railroad corporation is by its charter clothed with the power of eminent domain to the extent of its necessities." Railroad corporations have the right to acquire land, to the extent of their necessities in the building and operation of their roads, either by condemnation, purchase, or voluntary grants and donations. See § 1, art. 17, Constitution; § 8450, C. & M. Digest, subdivs. 2, 3, 4, 5, 6 and 8; *St. L. I. M. & So. Ry. Co.* v. *Faisst,* 99 Ark. 61; *St. L. I. M. & So. Ry. Co.* v. *F. S. & V. B. Ry. Co.,* 104 Ark. 344. See also *McKennon* v. *St. L. I. M. & So. Ry. Co.,* 69 Ark. 104.

It is wholly immaterial by what method the lands are acquired by the railway company. If they are set apart, and are in use, for railroad yards, it is not within the power of the county court to lay off and establish a public road over such yards without special legislative authority so to do. Such authority is not included, as we have stated, under the general power vested in the county court to establish public roads. The question is one of very great importance, and, in various phases, depending upon the facts in the particular case, the question of the right to exercise the power of eminent domain over land that, under such power, has already been devoted to the use of the public, has been before many courts of last resort in this country. It is unnecessary to review them all. Suffice it to say that, under statutes conferring general power similar to that conferred by § 5226 *supra,* the power does not exist in the county court to condemn for a public highway land which has been purchased and which is being used by railroad com-

panies for yards. Such power can only be exercised by express legislative authority. The cases establishing this doctrine are cited and succinctly and correctly reviewed in the excellent brief of counsel for the appellants. In *New York, S. & W. R. Co., Prosecutor,* v. *Mayor, etc., of City of Patterson,* 39 Atlantic 680, the court states the doctrine as follows: "Under the authority given by the charter of the city of Patterson to lay out and open streets, and to take such lands as may be necessary therefor, upon making compensation, the city has no power to lay out a street through land used by a railroad company as a freight yard, when it will deprive the company of the beneficial use of such freight yard, and compel it to transfer its freight business to another locality. To authorize such an invasion of the rights of the company, there must be an express grant of power by the Legislature, or an implication equally conclusive. Such power will not be inferred from the general authority granted to lay out and open streets." *Winona & St. P. Ry. Co.* v. *City of Watertown,* 56 N. W. 1077. See also *C. R. I. & P. Ry. Co.* v. *Williams,* 148 Fed. 442; *Richmond F. & P. Ry. Co.* v. *Johnston,* 49 S. E. 496; *St. Louis & San Francisco Ry. Co.* v. *City of Tulsa,* 213 Fed. 87; *Pros. Park & C. I. R. Ry. Co.* v. *Williamson,* 91 N. Y. 552-561; *Milwaukee & St. P. Ry. Co.* v. *City of Faribault,* 23 Minn. 167. See also *St. Paul Union Dep. Co.* v. *City of St. Paul,* 15 N. W. 684; *Town of Alford* v. *Great Northern Ry. Co.,* 161 N. W. 467; *In re Saratoga Ave. in City of New York,* 123 N. E. 197; *B. & O. Ry. Co.* v. *North* (Ind), 3 N. E. 144; *City of Seymour* v. *J. M. and I. Ry. Co.,* 126 Ind. 466; *City of Fort Wayne* v. *Lake Shore Ry. Co.,* 132 Ind. 558, 18 L. R. A. 367, 32 Am. St. Rep. 277; *City of Terre Haute* v. *Evansville & T. H. Ry. Co.,* 149 Ind. 174.

The *rationale* of the doctrine is that lands once taken and devoted under the power of eminent domain for a public purpose cannot be taken under the same power for a public use inconsistent with the first taking. In such case the two uses cannot coexist. The last appropriation for the public use destroys the first. This cannot be done

without legislative sanction which, in express terms or by necessary implication, authorizes such appropriation. *Marsh Mining Co.* v. *Inland Empire Min. & Mill Co.,* 165 Pac. 1128; *Vermont Hydro-Elec. Corp.* v. *Dunn,* 112 Atl. 223; *Williamson County* v. *Franklin & Spring Hill T. Co.,* 228 S. W. 714; *Byfield* v. *City of Newton,* 141 N. E. (Mass.) 658; *Northern Cent. Ry. Co.* v. *Mayor and City Council of Baltimore,* 106 Atl. 159.

Our Constitution declares "all railroads shall be public highways." Art. 17, § 1. They are public highways in the sense that, when chartered, their owners serve the public as common carriers over their roads, having the right to acquire land by eminent domain and by purchase or donation. When the railroads have acquired lands by donation or purchase, if they devote the same to a public use, it is in legal effect precisely the same as when they condemn land for such use. *In re Saratoga Ave. in City of N. Y., supra; Cochran* v. *Wilson,* 229 S. W. 1050; *Town of Alvord* v. *Great Northern Ry. Co., supra; In re East 161st Street,* 102 N. Y. Supp. 500.

Article 17, § 9, of our Constitution declares: "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals." See also § 3929, C. & M. Digest.

This right of eminent domain is a supreme power. It belongs to the State as the sovereign, and can only be exercised by the Legislature, the supreme power of the State, or the agencies to which it has delegated that right. The power "is essentially political in its nature, and not judicial." 3 Dillon on Municipal Corporations, p. 1640, § 1036 (600), and authorities cited in note 1; also § 1742. The exercise of this right has been delegated to the State's subordinate governmental agencies—counties and municipalities—in the following particulars, to-wit: in counties, through its county court, to lay out, open and repair public roads and highways, § 5226, C. & M. Digest,

supra, and in municipalities "to lay off, open," etc. "streets, alleys, public grounds," etc. In *St. Louis & S. F. Ry. Co.* v. *Fayetteville,* 75 Ark. 534, we held that the statute "giving the city the authority to lay off and establish streets within the corporate limits impliedly gives it the right to cross the *tracks* of railroads when it is necessary to do so for the purpose of connecting the two ends of a street." "A right," says the court, "so lightly affecting the franchise of the corporation may be inferred from the general power to lay off, condemn and establish streets." Section 8483, C. & M. Digest, provides, in part, "where any public road, highway or street of any incorporated city or town hereafter established shall cross any railroad now established or hereafter to be established, such railroad company or corporation shall be required to so construct such railroad crossing," etc. In *St. L. S. W. Ry. Co.* v. *Royal,* 75 Ark. 530, we held "that, where any public road shall cross any railroad, the railroad company shall construct and keep it in repair" without compensation. And in *K. C. So. Ry. Co.* v. *City of Mena,* 123 Ark. 323, we held that "where a city opened a street across the right-of-way and tracks of a railroad company, the railroad is required to construct and maintain the crossing," without compensation. It may be said that the language of § 8483 is sufficient to give express authority to counties and cities and towns to condemn land for highways or streets across railroad *tracks.* Even if such power were not expressly conferred by the statute upon these governmental agencies, they would have such power under their general powers delegated to them to lay off, open, and establish highways or streets. But the right to condemn land for a public highway or street over the railroad *track or tracks* is one thing, while the right to condemn over railroad *yards* is an entirely different thing. All the authorities, as shown above, hold that the right to condemn for public highways or streets over land appropriated by railroads and used for station grounds and yards is not conferred, and cannot be implied, from the general powers above mentioned. There is a broad dis-

tinction between land used by railroad companies for depot grounds and yards and that used for tracks over which their trains run on schedule. All the authorities recognize the fact that the use of land for grounds and yards is entirely inconsistent with the use over same for highways or streets. The danger and inconvenience in the use of highways or streets over grounds and yards is so great, so imminent, both to the railroad and the public, that such use is prohibited unless there is express or implied authority therefor. Whereas such use over railroad tracks is not inconsistent with their use also for highways over same. In addition to the authorities already cited, see *Cincinnati W. & M. Ry. Co.* v. *City of Anderson,* 38 N. E. 167; *Penn. Ry. Co.* v. *Bogert,* 59 Atl. 100; *City of Fort Wayne* v. *Lake Shore & Mich. So. Ry. Co.,* 18 L. R. A. Ann. 367.

There is no statutory authority which, either expressly or by necessary implication, confers upon counties the right to condemn highways over railroad *yards.* Therefore it cannot be done.

The county court and the trial court, on the facts, were justified in holding that this was, in reality, but a proceeding to condemn land for a public highway over a single track of the appellant and not over its *yards* at all. That is the only theory upon which this case should be affirmed. For, if it be assumed that this is a proceeding to condemn land for a highway over appellant's yards, then there is no statutory authority for such condemnation. If the right to condemn over appellant's yards is involved, then the cases of *Fayetteville* v. *St. Louis & S. F. Ry. Co.,* and *So. Ry. Co.* v. *Royal,* and *K. C. So. Ry. Co.* v. *Mena supra,* have no application whatever, for the only issue in these cases, except as to compensation, was (in two of the cases) whether a city had power to condemn land for a street over a railroad *track, or tracks,* and in the other, whether the county had the power to condemn for a public highway over a railroad *track.* There was no issue as to railroad yards in any of these cases.

The line of demarcation seems very clear to us. The failure to observe it is fraught with grave consequences.

The majority of the court, by holding that the whole matter of condemning railroad yards for public highways is "one of sound discretion of the county court, and subject to review," has approved what we consider an unauthorized assumption of jurisdiction by the county court to exercise the right of eminent domain, one of the highest functions of the legislative department. The exercise of such power, unauthorized by the Legislature, even though the Supreme Court should determine, on review, that the county court had abused its discretion, would nevertheless subject the railway companies to the annoyance and expense of defending in order to protect their rights in property which had already been appropriated by them for a public use. This of itself would be a manifest injustice. The question of the right of a county to condemn lands for a public highway over railroad yards is one of first impression in our State, and, because of its far-reaching significance, we have concluded to express our views of the law. For the reasons stated it occurs to us that, while the judgment, on the facts, is correct, the opinion of the majority, as to the law, is erroneous. We therefore concur in the judgment but earnestly dissent from the opinion.

WILSON v. BILES.

Opinion delivered July 12, 1926.

1. DESCENT AND DISTRIBUTION—NEGROES—LEGITIMACY.—In the absence of evidence that unmarried negro parents were cohabiting in the State as husband and wife when the act of February 6, 1867 (Crawford & Moses' Dig., § 7040) was passed, legalizing such cohabitation and legitimizing their children, was passed, their right to inherit from their father was not established.
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of fact will not be set aside unless clearly against the weight of the evidence.

3. DESCENT AND DISTRIBUTION—FAILURE OF ISSUE—SURVIVING WIDOW.—Under Crawford & Moses' Dig., § 3536, the widow of one who left no children takes a fee simple in an undivided half of his newly acquired land.

4. DEEDS—FORGERY—EVIDENCE.—In an action to quiet title, evidence *held* to show that a deed to an intervener was a forgery.

5. ACKNOWLEDGMENT—PROOF OF FORGERY.—A certificate of acknowledgment of a deed alleged to be a forgery does not preclude proof of such forgery.

6. PRINCIPAL AND AGENT—ACCEPTANCE OF BENEFIT OF AGENT'S ACT.—A grantee is bound by the representation of his agent who negotiated a purchase of land that a deed would be made to the grantee as trustee to perfect the title, whereupon the grantor would convey title upon payment of an undetermined consideration.

7. VENDOR AND PURCHASER—MUTUALITY OF CONTRACT.—Where the consideration to be paid for land was never agreed upon, the minds of the parties never met.

8. EVIDENCE—CONSIDERATION OF DEED—PAROL EVIDENCE.—Parol evidence of the consideration of a deed which recites a nominal consideration is open to explanation by parol evidence.

9. VENDOR AND PURCHASER—INNOCENT PURCHASER.—The grantee in a deed reciting that the grantor has no title to the land, on which a *lis pendens* has been filed, is not an innocent purchaser.

10. VENDOR AND PURCHASER—FAILURE OF TITLE—REMEDY OF PURCHASER.—Where the grantee in an oil lease placed in escrow wrongfully took possession of it and placed it on record without the lessor's knowledge or consent, one who in good faith purchased the lease from such grantee is entitled to judgment against him for the amount paid for the lease.

11. MONEY RECEIVED—NATURE OF OBLIGATION.—An action for money had and received can be maintained whenever one man has received or obtained possession of the money of another which he ought, in equity and good conscience, to pay over.

12. ESCROW—PERFORMANCE OF CONDITION.—When a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed, even to an innocent purchaser without notice.

Appeal from Union Chancery Court, First Division; *J. Y. Stevens,* Chancellor; reversed in part.

J. W. Warren, J. B. Moore, Gaughan & Sifford, Betts & Betts, Powell, Smead & Knox, for appellant.

Davis & Costen, for appellees.

Carmichael & Hendricks, for appellee Lockhart.

WOOD, J. On March 5, 1923, Roxie Wilson Tatum, Rosie Wilson Winn, Major Wilson, and Lyna Wilson Murdock, instituted their action in the Union Chancery Court against Willie Wilson, A. C. Benson, C. J. Lockhart *et al.*, to cancel and set aside a deed from Lizzie Wilson to Willie Wilson and an oil and gas lease from Willie Wilson to A. C. Benson and by Benson assigned to C. J. Lockhart. The land described in these instruments is the southeast quarter of the southwest quarter of section 6, township 16 south, range 15 west, Union County, Arkansas. It was alleged that the plaintiffs were the children and the only heirs of Charlie Wilson, who died in 1911, leaving surviving him the plaintiffs and Lizzie Wilson, his widow, who was a second wife of Charlie Wilson and not the mother of plaintiffs. It was alleged that Willie Wilson claimed to be the owner of the land in controversy by deed from Lizzie Wilson, who died in 1922; that various and sundry persons were claiming to own the land through the above-named defendants. They prayed that these instruments be canceled as clouds on their title. This action was numbered 4272 in the chancery court.

On March 12, 1923, Walter G. Wilson instituted a separate action against the above-named plaintiffs and the defendants and others. He claimed that he was the owner of an undivided half interest in the above tract of land as the son of Robert Wilson, brother of Charlie Wilson, owner of the land, who died without issue in the year 1922; that his mother and father were both dead, and that all other collateral heirs of Charlie Wilson were dead, leaving him the only surviving heir. He prayed that his title to an undivided half interest be quieted as against all other claimants. This action was numbered 4284.

F. P. Vines filed an answer in the action numbered 4284 on May 15, 1923, in which he denied that Walter Wilson was a collateral heir of Charlie Wilson and that

he had any interest in the lands, and alleged that he was the owner of an undivided half interest by virtue of quit-claim deeds executed to him by the collateral heirs of Charlie Wilson, and prayed that his title be quieted.

On June 4, 1923, one W. S. Biles, trustee, filed his intervention in the action numbered 4284, in which he admitted that Charlie Wilson was the owner of the land, and alleged that he died without lineal descendants. Biles alleged that he was the owner of all the lands, one-half thereof through deeds from certain parties named by him, who, he alleged, were the collateral heirs of Charlie Wilson, and the other undivided half interest by virtue of a deed from Willie Wilson.

On June 7, 1923, the two causes were consolidated and ordered thereafter to proceed under No. 4284. November 28, 1923, C. H. Murphy filed an answer and cross-bill in which he claimed under a commissioner's deed executed to him in pursuance of a foreclosure of a mortgage on the land. He prayed that the title be quieted in him as against all other claimants.

On December 5, 1923, interventions were filed by Major Jackson and Cheney Lee, claiming to be the owners of an interest as the grandchildren and collateral heirs of Charlie Wilson. On January 9, 1924, Willie Wilson and his wife, Viola Wilson, filed their joint answer to the complaints and interventions, in which they denied all material allegations of the complaints and interventions affecting their interest, and alleged, by way of cross-complaint, title to the land in controversy by deed from Lizzie Wilson to Willie Wilson and by adverse possession as their homestead since May 16, 1922. In their complaint they charged that the purported deed from Willie Wilson to W. S. Biles, trustee, was a forgery, and, in the alternative, if the court did not so decide, that the claim Biles was asserting under it was a fraud on their rights. On March 1, 1924, Vines filed an amended answer and cross-complaint in which he denied the title of all claiming an interest in the land, and, by way of cross-complaint, stated that he was the owner of an

undivided half interest by virtue of conveyances from the only descendants of the collateral heirs of Charlie Wilson, who died without issue.

Benson filed an answer on June 2, 1924, in which he denied the claims of Walter Wilson and the other plaintiffs and the claims of all the interveners. He denied that he obtained the lease under which he claims, and through which he conveyed the title to Lockhart, wrongfully or unlawfully, but states the same was executed and delivered to him in good faith. He denied that he was indebted to Lockhart, and admitted he had not paid the full purchase price of the property conveyed by Willie Wilson to him and by him in turn to Lockhart, but alleged that he was able and willing at all times to pay the same, and offered in his answer to do so. On October 6, 1924, Lockhart filed an answer and cross-complaint in which he alleged that he was the owner of oil and gas rights by mesne conveyances from Charlie Wilson, the owner in fee of the land, and deraigned title from him to Lizzie Wilson, his wife; from her to Willie Wilson; from him to A. C. Benson, who conveyed the lease to him, Lockhart. He denied that the other plaintiffs and interveners had any interest in the land. For cross-complaint against his codefendant, Benson, he alleged that he purchased from A. C. Benson an oil and gas lease on the southeast quarter of southwest quarter of section 6, township 16 south, range 15 west, Union County, Arkansas, and paid therefor the sum of $20,000, and, in the event the title thereto fails, the said Benson will be indebted to the said Lockhart for the sum of $20,000 with interest, etc. He then alleges that Benson is a nonresident of the State, and is the owner of an interest in oil and gas leases of lands situated in Union County, Arkansas, which he describes, and alleges that he has given notice of the filing of *lis pendens* against this property. He prays for an equitable garnishment and that the property described be impounded until the final determination of these actions, and, in the event his title fails and judgment be rendered against him, he prays for judgment

against Benson. By an amendment to his answer to all the plaintiffs and interveners he set up that he paid Benson $20,000 for the assignment of the lease on the land in controversy, and, after acquiring such lease, he began to advertise units in said lease for sale and sold said units to others who had no notice of the claim of the plaintiffs or of the interveners. He stated that, after he had thoroughly advertised and sold a great many of the units, he expended the sum of $13,500 in drilling a well on the land. He alleged that the making of the lease and the assignment were matters of record in Union County, and that all knew that the land was being prospected and drilled. He alleged that Willie Wilson and all the plaintiffs and interveners knew that he was selling units to innocent purchasers, and that drilling was going ahead. Lockhart therefore set up that he and all claiming under him were innocent purchasers, and that Willie Wilson and all the plaintiffs and interveners were estopped, under the circumstances as above set forth, from maintaining their action as against him (Lockhart), and he prayed that all their complaints and interventions as against him be dismissed.

On October 10, 1924, one H. L. Armstrong filed an intervention in which he adopted the answer and cross-complaint of W. S. Biles, and alleged that on August 24, 1924, he acquired the property by warranty deed from Biles for a valuable consideration. He alleged that, if there was any secret agreement by which Biles was to hold the land in trust for Willie Wilson, he knew nothing of it, and demanded strict proof thereof. He specifically pleaded the statute of frauds against such an agreement, and set up that he was an innocent purchaser, and asked that his title be quieted.

The answer of Benson, to which we have already referred, denied that he was indebted to Lockhart in any sum, and prayed that the cross-complaint of Lockhart and all complaints and interventions be dismissed as to him. On December 1, 1924, Willie Wilson and Viola Wilson, his wife, filed their answer to the intervention

of Armstrong, in which they deny all material allegations set forth therein, and renew their prayer that all the complaints and interventions be dismissed for want of equity as against them, and that the conveyance from Biles to Armstrong be canceled as a cloud on their title, and for all proper and general relief.

On December 1, the court heard a demurrer by Willie and Viola Wilson to the intervention of Murphy, and sustained the same and dismissed the intervention. Murphy excepted and prayed an appeal, but has not perfected the same.

It is stipulated by all parties that Charlie Wilson died intestate about the year 1910, and that, at the time of his death, he was the owner of the lands in controversy. It is further stipulated that all instruments of writing of record affecting the lands since 1910 are evidence in the cause.

Taxes for the year 1910 were paid by Charlie Wilson, in 1911 by Young and Anderson, in 1912 by Henry Crayton, from 1913 to 1921 by Lizzie Wilson, and for 1922 and 1923 by Willie Wilson.

The trial court, after hearing all the testimony adduced on the above issues, rendered a decree canceling the lease of Willie Wilson and Viola Wilson to A. C. Benson and its assignment by Benson to Lockhart, and quieting title of Biles, trustee, and his assignee Armstrong to the land in controversy, upon their payment to Willie Wilson of the sum of $3,000. The court entered a decree against Benson in favor of Lockhart in the sum of $2,800, and also a decree dismissing for want of equity the original complaint of Roxie Wilson Tatum and co-plaintiffs, the complaint of Walter G. Wilson, and the complaints and interventions of all parties claiming as lineal descendants and collateral heirs of Charlie Wilson, and of all parties claiming as grantees under them.

Appeals and cross-appeals have been perfected here by parties whose interests were adversely affected by the decree. The multitude of parties and the multiplicity of issues presented by this record make it wholly imprac-

tical to set out in detail and discuss at length the testimony on the issues in which we agree with the findings and decree of the trial court. We have thoroughly examined all the testimony covering these issues, and the parties and their attorneys must be content with a brief statement of our conclusions concerning them.

1. As to Roxie Wilson Tatum *et al.,* the original plaintiffs who claimed to be the children and lineal descendants of Charlie Wilson, the testimony is not sufficient to prove that Charlie Wilson, their father, and Mollie Owens, their mother, were living and cohabiting together in Arkansas as husband and wife recognizing and holding each other out as such, on February 6, 1867, when the act was passed providing that "all negroes and mulattoes who are now cohabiting as husband and wife and recognizing each other as such shall be deemed lawfully married." There is some testimony to the effect that these four children were the children of Mollie Owens by Charlie Wilson, but the testimony falls far short of proving that they were born while Charlie Wilson and Mollie Owens were living and cohabiting together as husband and wife in Arkansas. Therefore these four plaintiffs do not prove that they are entitled to inherit as the children and heirs of Charles Wilson according to the act approved February 6, 1867, under which they claimed. *Meekins* v. *Meekins,* 169 Ark. 265.

2. As to Walter Wilson and all others who claim as and under collateral heirs of Charlie Wilson, the testimony is so vague, conflicting and uncertain, we are unable, after a careful reading and consideration of it, to say that the finding of the trial court that none of them were entitled to inherit as the collateral heirs of Charles Wilson is clearly against the preponderance of the evidence. The decree dismissing the complaints and interventions of all who claim as and under collateral heirs is correct.

3. This brings us to the issue between Willie Wilson and those claiming by or under him. It is undisputed that Charles Wilson died owning 80 acres of land in Union

County, Arkansas, of which the forty acres in controversy was a part, and that this land constituted his homestead; that he died leaving his widow, Lizzie Wilson, in possession of the land; that the forty on which they resided at the time of his death was mortgaged, and she abandoned her claim to this forty and moved on to the forty now in controversy, and improved the same and claimed it as her own, whereon she lived until she died. Willie Wilson, the illegitimate grandson of Charlie Wilson, and who had been reared by him and Lizzie Wilson, continued to live with Lizzie Wilson until her death. Before her death she conveyed to Willie Wilson by warranty deed the land in controversy. The land was a new acquisition, and, as we have seen, Charlie Wilson had no children. Therefore at his death, his wife, Lizzie Wilson, was entitled to one-half of his real estate in fee simple, and took one-half the forty acres of land in controversy. Section 3536, C. & M. Digest. The effect of the decree in this case is to declare that Lizzie Wilson had title to an undivided half of the land in controversy, and that she had conveyed the same by warranty deed to Willie Wilson. The chancery court had jurisdiction to so decree, and its decree in this respect is correct. See *Baxter* v. *Duvall,* 152 Ark. 175-179, 237 S. W. 701; *Maxwell* v. *Awtry,* 154 Ark. 85-89, 235 S. W. 384; *Beal-Burrow Dry Goods Co.* v. *Kessinger,* 132 Ark. 132-135, 200 S. W. 1002.

A. We will now dispose of the issue between Willie Wilson and W. S. Biles and his grantee, Armstrong. Biles contends that Willie Wilson and his wife, Viola, on March 13, 1923, conveyed to him by quitclaim deed the lands in controversy, and he produced in evidence a deed purporting to be signed by Willie and Viola Wilson and duly acknowledged by A. C. Neygaard, notary public, and witnessed by M. T. Thompson and Robert Wilson, conveying to him, as trustee, the lands in controversy, subject to an oil and gas lease previously given by Willie Wilson to A. C. Benson. Biles testified in substance that the land was purchased pursuant to an agreement entered into between him and three others, including Chavis, that

he and two associates would furnish Chavis and the other associate $2,500 with which Chavis was to procure for all of them deeds to property in the oil district of Union County, Arkansas, from certain parties named Wilson and others. This Chavis did. Title was taken in Biles' name as trustee for the benefit of himself and his associates. He exhibits an agreement signed by himself and associates as testified to by him, dated February 20, 1923.

Chavis testified that he was a lawyer, and lived at Pine Bluff; that he procured a deed from Willie Wilson and his wife, Viola Wilson, to Biles, after fully explaining to them its purpose. The understanding was that the $10 consideration was paid to Wilson, and that the deed was to be given to Biles as trustee. Biles was to perfect the title to the lands for the parties owning the same, and then Wilson and the parties conveying the lands were to sell the same to Biles when the title was cleared up and it was ascertained who the owners were. He paid Wilson, and other parties from whom he had obtained like deeds, checks each in the sum of $10. Other parties who signed like deeds were present, whom witness named. He stated that the deed to Biles was witnessed by Robert Wilson and M. T. Thompson. Thompson testified that he witnessed the deed, and his testimony was to the same effect as that of Chavis. Chavis was asked to produce the checks he had given in the sum of $10 each, and stated that he would, but did not do so. Demand was made also for the original deed, but it was not produced.

On the other hand, Willie Wilson alleged that this deed was a forgery, and he and his wife, Viola Wilson, testified that they did not sign and acknowledge such a deed; that they did not know A. C. Neygaard, the notary public who took the alleged acknowledgment. The other alleged witness to the deed, Robert Wilson, testified that he was not present and did not witness such a deed, and likewise the other parties who Chavis and Thompson stated were present, testified that they were not present and did not witness such a deed. The notary public, A. C. Neygaard, did not testify.

We are convinced that a preponderance of the evidence shows that the purported deed from Willie and Viola Wilson was a forgery. Since the charge is made that the deed is a forgery, the certificate of acknowledgment is not conclusive of the facts recited therein, and hence the makers of the deed were not precluded from showing that the deed was a forgery. *Myers* v. *Jerry,* 158 Ark. 314, 250 S. W. 34.

But, if we are mistaken in concluding that the deed was a forgery, it is certain, under the testimony of Biles' agent, Chavis, who procured the deed, and the testimony of Thompson, the only other witness for Biles who testified to the execution of the deed, that Willie Wilson and his wife Viola Wilson made the deed to Biles, as trustee, for the purpose of perfecting title, and under a promise that, when that was done, they would then convey the absolute title of the land to him. It must be borne in mind that the testimony of Chavis and Thompson was introduced on behalf of Biles. Biles certainly cannot be allowed to repudiate the testimony of his own agent as to the consideration for the deed, and the testimony of his agent, corroborated by the testimony of the only witness he introduced, shows that Willie Wilson and Viola Wilson executed the deed to Biles, not for the sum of $3,000, but for $10, and with the understanding that they would, when Biles cleared the title, convey to him absolute title to the land. It is very clear therefore that Biles himself has proved that the minds of the parties to the contract under which this deed of March 13, 1923, was executed never met, unless the deed was executed for the consideration and purposes as disclosed by the testimony adduced for Willie Wilson as well as that adduced by Biles through his own agent, Chavis. Biles is bound by the representation of his own agent who negotiated for him the purchase from Willie Wilson. The consideration for this deed was open to explanation. See *McGill Lbr. Co.* v. *Lane-White Lbr. Co.,* 90 Ark. 426, 429, 119 S. W. 822, and cases there cited. The only consideration named in the deed is $10, and the only testimony in the record showing

the real consideration for the deed was to the effect that the parties had not determined what Biles should pay for an absolute title. There is not a particle of testimony in the record to prove that Willie Wilson agreed with Biles that he would take $3,000 for the land in case the lease to Benson were canceled. Therefore the decree of the court vesting the fee title in Biles, trustee, and Armstrong upon their payment to Willie Wilson of the sum of $3,000 is wholly without any testimony to sustain it.

In August, 1924, Biles, trustee, executed a warranty deed to H. L. Armstrong, conveying to him all Biles' interests in the land in controversy, subject to the oil and gas leases given by Willie and Viola Wilson to A. C. Benson. The consideration named was $2,500, and it is recited in the instrument that Biles, as trustee and as individual, did, on the 12th of March, 1923, for a valuable consideration, transfer to Armstrong all his rights under a certain contract entered into on the 23rd of February, 1923. The contract here referred to was the contract between Biles and his associates whereby it was agreed to put up $2,500 for the purpose of acquiring title to 80 acres of land, including the lands in controversy, and perfecting the title to the same. At the time the deed or instrument of August, 1924, was executed by Biles to Armstrong, there was on record in Union County a *lis pendens* of the lands in controversy. At the time Biles entered into the agreement on February 20, 1923, with his associates, he had no title to the land in controversy, and the agreement so recites. He never thereafter perfected the title as trustee, according to the understanding between his agent Chavis and Willie Wilson, and never obtained any title to the land such as his own agent testified was contemplated, in consideration of the alleged quitclaim deed of March 1, 1923, executed by Willie and Viola Wilson. Armstrong testified that he paid $2,500 for the land, and that he did not know anything about the alleged trust agreement between Chavis and Willie and Viola Wilson. But he obtained no title under the instrument of February 23, 1923, under which he claims, and

the instrument itself was notice that he might never obtain title, therefore, even if the deed from Willie and Viola Wilson to Biles was not a forgery, the above facts do not constitute Armstrong an innocent purchaser.

B. This brings us to a consideration of the issue between Willie Wilson and Lockhart. On May 18, 1922, Willie Wilson executed a gas and oil lease on the land in controversy to one A. C. Benson, leasing to Benson in the usual form 7/8 of the oil and gas of the land in controversy. This lease was not delivered directly to Benson, but was delivered to one Patrick W. Murphy, to be held in escrow. Murphy testified concerning this substantially as follows: He identified the record of the purported lease for the lands in controversy, and stated that Willie Wilson was brought in to his office by Benson and a Mr. Reeves for the purpose of buying the lease and arranging to place the same in escrow during the examination of the abstract of title. The lease was to be executed by Willie Wilson and left with the witness in escrow, to be delivered to Benson upon his approval of the title and the payment to Wilson of the sum of $3,000. The escrow agreement and the lease were executed and delivered to witness with the abstract of title. Witness was informed by Mr. Abbott that Willie Wilson did not have a marketable title, and witness so informed Benson. Witness then placed the abstract and lease and escrow agreement on file. Witness was taken ill, and went to New Orleans, where he remained for ten months; on his return, he was informed by Abbott that Benson had come into his office, complained of their delay in not filing suit, and took the entire file from witness' office. Witness did not deliver the lease and escrow agreement to Benson; had no authority to do so, and did not authorize Benson to record the lease or to dispose of it. Witness warned Benson not to pay Wilson any large sum of money on the lease, because the title was in such shape that the property would be worthless as an oil-producing property, after a lengthy litigation of several years. While witness was in New Orleans. Benson telephoned witness from Shreveport

that, if witness had not completed the curative work, he would take the matter out of his hands. Witness replied that an arrangement of that kind would be satisfactory to witness. The testimony of the witness shows that no such an arrangement was made. The witness was asked what was the understanding as to the length of time that Benson would have to satisfy himself about the title, and answered that the owners agreed to bear the expense of the curative work, and there was a subsequent *oral* agreement between the parties as to the *time* limit. The testimony of Willie Wilson was to the same effect, and he stated that Benson paid him $200 and never offered to pay him the balance. He never made demand on witness with reference to getting the title straight. Witness did not authorize Mr. Pat Murphy to deliver the lease to Benson. When they undertook to drill a well on witness' land, witness objected. Witness is a colored man, and Benson is a white man. In the fall of 1922 they were preparing to drill a well on witness' land. Witness came in to consult with Mr. Walter Reeves. He told witness that they had no right to drill on witness' land. Witness did not know anything about the lease being in the possession of Benson. Witness told the driller that he did not want him to drill. Witness did not think they had the lease at that time—thought it was still in the hands of Mr. Murphy. The lease was put in escrow May, 1922, and they commenced cutting derrick timbers in November, 1922. They told witness, at the time the papers were placed in escrow, that they would investigate the title in three weeks and pay the witness. He told witness if he did not pay him he would get the lease back. Witness asked the parties, when they started to cut derrick timber, and also when they started to drill, to quit. Witness did not ask them any more because he saw they were paying no attention to him, and witness thought the next time they might be hitting him. They did not say anying about hitting him, but they were not talking any too good.

Lockhart testified that he bought Benson's interest in the land in controversy, for which he paid $20,000. He

did not know of any outside claims at the time he bought. Benson did not furnish him an abstract of the title until the land was paid for. Witness did not demand an abstract. A man by the name of Williams bought the property in witness' name. Witness was not accustomed to doing business that way—had never done so before nor since. Witness did not get any attorney's opinion as to the title before he purchased. He learned that, after the suit was brought, various attorneys had refused to approve the abstract of title. Williams and witness had adjoining offices, and they were working together to sell the property after witness had bought it. Witness stated that he was doing the paying for the property and the inside work, and Williams was doing the outside work. Witness did not demand an abstract because it would have been the same as interfering with another man's business. Williams was to get one-eighth when he sold the property, and after the property was sold Williams got one-eighth as his compensation.

In *Ford* v. *Moody*, 169 Ark. 649, 276 S. W. 595, we said: "The undisputed testimony shows that, at the time Ford had the instruments recorded, the escrow agreement was still in force and he had complied with its terms; therefore there was no delivery of the instruments to him, and, without a delivery of the instrument, no right or title in the property conveyed therein passed to Ford. His act in having the instruments recorded while the escrow agreement was in force was a plain violation of the terms of that agreement, because, although it gave him no real title to the lands in controversy, it operated to becloud the title of the Moodys." In the above case we quoted from *Bondurant* v. *Ennis*, 152 Ark. 372, 238 S. W. 48, as follows: "When a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed. The transaction is incomplete. It is not the grantor's deed until the second delivery. Even if the grantee obtains possession of it before the condi-

tion has been performed, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum.*" See also *Chandler* v. *Chandler,* 21 Ark. 95; *Ober* v. *Pendleton,* 30 Ark. 61, and other authorities cited in brief of counsel for Willie Wilson.*

In *Fisher* v. *Beckwith,* 30 Wis. 55, it is held (quoting syllabus): "A deed purloined from the grantor or obtained from him fraudulently or wrongfully, without his consent or acquiescence, does not pass the title even as against a subsequent purchaser for value without notice." See also 16 Cyc., p. 579-81; 10 R. C. L., p 636. Now, Benson has not testified, and no explanation is offered of his conduct in withdrawing the lease from the files of the escrow agent while the latter was sick and absent from his office, and without his knowledge or consent. For the uncontroverted proof is that Benson took the lease and escrow contract without any arrangement whatever with Murphy or Willie Wilson and without paying Willie Wilson the purchase money for the lease, and had the lease placed on record. Without explanation, this conduct of Benson justly opens him to impeachment for the exploitation of Willie Wilson's land, with no shadow of excuse or justification for his unlawful and wrongful conduct. He took $20,000 from Lockhart with nothing whatever in law to give in return. Therefore Lockhart is entitled to a decree against Benson for that amount of money, under the doctrine announced in *Brand* v. *Williams,* 29 Minn. 238, and approved by us in *Arkansas National Bank* v. *Martin,* 110 Ark. 578-585, as follows: "An action for money had and received can be maintained whenever one man has received or obtained possession of the money of another which he ought in equity and good conscience to pay over. This proposition is elementary." But, as to Lockhart and Willie Wilson and third parties, Lockhart cannot avail himself of the doctrine of innocent purchaser predicated on an instrument wrongfully and surreptitiously taken from escrow, as shown by the above authorities. More-

* See 3 Washb., Real Property, p. 270; 16 Cyc. p. 579.

over, so far as the rights of Willie Wilson and third parties are concerned, the conduct of Lockhart himself, in the eyes of the law, is far from innocent. He took the assignment of the lease from Benson before the same was recorded, and paid his $20,000, without an abstract of title and without inquiry as to title. He took the assignment of the lease, wholly indifferent to a title which had been condemned by every lawyer and abstracter who had examined the same; and, in conjunction with his outside agent, Williams, they proceeded to unload the lease upon a gullible public. It occurs to us, when the circumstances are considered under which this lease was withdrawn from escrow and the rights of Willie Wilson ignored, and the precipitate haste with which it was exploited to the detriment of Wilson and the public who purchased an interest therein from Lockhart and Williams, that Benson, Lockhart and Williams are all tarred with the same stick. We find nothing in the testimony to warrant us in saying that Willie Wilson is estopped by laches from invoking the aid of a court of chancery to protect his property rights against those who have thus illegally endeavored to destroy them. He did not know that the lease had been withdrawn from the hands of his trusted escrow agent; he had not received pay for his property; he protested as vigorously as he deemed it expedient, considering those with whom he was dealing, at their first incursion upon his homestead. He was required to do no more. The trial court therefore was correct in finding that the lease had not been delivered to Benson and in canceling the same and the assignment thereof to Lockhart.

The decree of the court quieting the title of the lease of the lands in controversy in Biles and Armstrong is reversed. A decree should be entered in favor of Lockhart against Benson in the sum of $20,000, with interest from the time the money was paid to Benson, and a decree should be entered canceling the lease of Willie Wilson to Benson and the assignment thereof to Lockhart, and quieting the title of Willie Wilson to an undivided one-

half (20 acres) of the land in controversy. For the errors indicated the decree is reversed, and the cause is remanded with directions to enter decrees herein indicated, and for such other and further proceedings as may be necessary according to law and not inconsistent with this opinion.

McCULLOCH, C. J. (dissenting). The chancery court did not pass on the question of the validity of the lease from appellant, Willie Wilson, to Benson. The decree was against Wilson, and the court canceled the Benson lease only as against the rights of appellees Biles and Armstrong, and this was done for the reason that the title was in appellees and that the lease was not of any validity as against them. The question of the validity of the lease as against Wilson was not fully developed in the trial below. This is evident from a consideration of the record and the appearance of the only testimony, that of witness Murphy, in regard to the lease having been prematurely taken out of escrow by Benson. Opportunity for the trial of that issue should be given on the remand of the cause, instead of directing a decree in favor of Wilson. In other words, the parties ought to have an opportunity to develop that question and to have it decided upon all the testimony which could be adduced on that subject. But, even if the question of the validity of the lease is to be decided in this court, it seems to me that the court has adopted a very rigid rule in holding that Lockhart, the assignee of the Benson lease, is not entitled to any protection at all. The rule of law on the subject is, as stated in the opinion of the majority, that a deed wrongfully and prematurely taken out of escrow without performance of the specified conditions of the deposit does not pass the title of the grantor, but this rule is subject to limitations which are consonant with conceptions of equity and natural justice. In other words, the rule is to be applied only to the extent of protecting the interest of the grantor and no further as against an innocent purchaser. The ends of justice will be fully attained by compelling the innocent purchaser to pay the purchase

price, which was sought to be avoided by the wrongful taking of the instrument out of escrow. A court of equity should go no further in applying such a rigid rule.

The proof is undisputed that Lockhart, the assignee of the lease, was an innocent purchaser. He testified that he paid Benson $20,000 for the lease, and that he had no information or notice of any kind that the lease had been in escrow or prematurely taken out of escrow. It being proved that Lockhart paid a valuable consideration for the lease, the burden of proof was upon those attacking the validity of the lease to show that Lockhart had notice of any infirmity in the title. There is no proof at all in the record charging Lockhart with notice.

My conclusion is therefore that the case ought to be sent back for a trial on this issue; but, if not, the decree ought to provide that Lockhart must pay the consideration named in the lease to Benson; otherwise that the lease be canceled, and only on such failure to pay.

GREGG v. ENGLAND LOAN COMPANY.

Opinion delivered October 4, 1926.

1. SPECIFIC PERFORMANCE—AGREEMENT TO BID.—An agreement to bid a certain amount at a foreclosure sale if the mortgagee would foreclose is not an agreement to purchase, and hence the mortgagee could not enforce specific performance.
2. CONTRACT—CONSIDERATION.—Where defendants agreed to bid a particular amount at a foreclosure sale if the mortgagee would authorize a certain attorney to institute the foreclosure proceedings, *held* that the employment of such attorney was not an essential part of the contract, or, if so, was sufficiently complied with by his employment, though he was subsequently discharged by the mortgagee.
3. CONTRACTS—WAIVER OF BREACH.—In an action for breach of a contract to bid a certain amount at a foreclosure sale, provided a certain attorney should be employed to institute the proceedings, defendants will be held to have waived such provision where another attorney was substituted, and defendants offered no objection thereto, but appeared at the sale and offered a bid for a less amount than agreed.

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

D. K. Hawthorne, for appellant.

McMillen & Scott, for appellee.

WOOD, J. This is an action in the chancery court by the appellee against the appellants. The facts are stated by counsel for appellants as follows:

The England Loan & Trust Company loaned Charles E. Taylor $3,000, and, as security therefor, took notes secured by a deed of trust on certain lots in Weil's Addition to the city of Little Rock. Default was made in payment of said notes and interest thereon, and the appellant, Gregg, entered into a contract with the appellee wherein he agreed that he would bid enough at the sale of the lots by foreclosure of the said deed of trust to pay the amount of the debt due thereunder, including improvement taxes, State and county taxes, interest, and costs, provided the appellee would authorize D. K. Hawthorne to foreclose the deed of trust, and he agreed to pay D. K. Hawthorne such fee as he might charge for the foreclosure proceedings. Appellant Harrington guaranteed the performance of this contract. Pursuant to this agreement, the appellee authorized D. K. Hawthorne to bring suit to foreclose the deed of trust on the property, and he brought the suit. The appellee became dissatisfied with the progress of the suit, and requested Harrington to authorize the substitution of Andrew H. Scott for D. K. Hawthorne. Harrington agreed to this, provided it was satisfactory to Gregg. The England Loan & Trust Company then authorized A. H. Scott to bring suit to foreclose the mortgage, and he brought the suit after suit had already been filed by D. K. Hawthorne.

Decree was rendered in the second suit, and the property was advertised for sale. Appellant Gregg saw the advertisement of the sale the day before the sale was to take place, and called his attorney's attention to it. After investigation it was discovered by Mr. Gregg that Scott & McMillen had brought a second suit to foreclose the deed of trust given by Taylor to the England Loan &

Trust Company, and that a decree had been rendered thereunder, and the sale advertised to take place the next day. At this sale the property was struck off to Frank B. Gregg, but, on account of some difference between him and W. E. Harrington, he declined to take the property. Inasmuch as Mrs. Frank B. Gregg had not been made a party to the original complaint, a supplemental complaint was filed, making her a party, and in due course of time a decree was taken authorizing the foreclosure of the mortgage, and, at the sale under this second decree, the England Loan & Trust Company, now the England Loan Company, bid the sum of $3,050, and there was then due the England Loan Company the sum of $3,890.08.

At a later time the England Loan Company sued W. E. Harrington and Frank B. Gregg, alleging a contract with Frank B. Gregg, guaranteed by W. E. Harrington, in which Gregg agreed to bid enough at the sale of the property to protect the England Loan Company from loss, and alleging that the loan company purchased the property at the sale and tendered a deed to the appellants, and asked that they be required to accept it and pay the sum of $5,813.92.

The appellants agreed to bid enough at the sale of the property under foreclosure proceedings to protect the appellee, provided D. K. Hawthorne was authorized to bring the foreclosure proceedings. After these foreclosure proceedings were brought by him, the appellee talked with Harrington and obtained his consent to substitution of attorneys, provided it was agreeable to Mr. Gregg. Mr. Gregg, however, was never consulted about the substitution, and knew nothing of it until the day before the sale of the property under the foreclosure proceedings brought by Scott & McMillen. Default had been made under the terms of the deed of trust executed by Charles E. Taylor to the England Loan & Trust Company at the time Gregg wrote the letter to it proposing to bid at the sale of the property, if foreclosure proceedings were brought by D. K. Hawthorne.

A stipulation in the record shows that the difference between the amount due the appellee by Charles E. Taylor and others on September 28, 1923, the date of the last sale of the property, and the amount bid by appellant Gregg at that sale, together with the attorney's fee of $150, amounted to the sum of $990.08. The trial court entered a decree for that sum, from which is this appeal.

1. The undisputed testimony shows that there was no agreement upon the part of the appellants to purchase the property. The agreement, as shown by the letter of Gregg, was that he would bid enough at the sale of the lots by foreclosure of the trust deed to pay the amount of the debt due the appellee thereunder by Taylor and others, including improvement, State and county taxes, interest, costs and attorney's fee, provided the appellee would authorize D. K. Hawthorne to foreclose the deed of trust. Under this agreement the appellants could not be required to purchase the property, and therefore the court correctly held that the appellee was not entitled to specific performance. The appellants, however, contend that they are not liable because the appellee violated the contract in substituting the attorney Andrew H. Scott for D. K. Hawthorne, and in authorizing the foreclosure proceedings, after such substitution, to be conducted by the firm of Scott & McMillen instead of D. K. Hawthorne, as the contract contemplated.

We are convinced that the appellee did not violate its contract in the substitution of attorney Scott for attorney Hawthorne. This substitution was made on the authority of Harrington, as shown by the testimony of the appellant, Gregg. While Gregg was not informed of this substitution until the day before the sale, nevertheless he knew that the substitution had been made, and he did not on that account refuse to bid on the property, but, on the contrary, did bid for himself and associates the sum of $3,000. This change of attorneys was not a material alteration of the contract. The consideration of the contract moving from the appellee to the appellant

Gregg was the institution of the suit for foreclosure. That was the real purpose and the real consideration for the agreement. That was carried out on the part of the appellee. The testimony of Gregg showed that it was the agreement between him and Harrington that they were to obtain the lots and divide them, but they didn't get together on the deal and didn't complete the purchase of the lots because of this failure to agree upon a division after the sale. Although the letter specified that the suit of foreclosure was to be instituted by D. K. Hawthorne and that the appellant Gregg was to pay his fee, this did not constitute Hawthorne the attorney of appellant Gregg. On the contrary, he was employed to institute the action for the appellee, and was the appellee's attorney, and appellee had the right to control the litigation and to discharge its attorney if he was not satisfactory to it, and to substitute another in his stead. The appellee complied with its contract in employing Hawthorne to institute the first action for foreclosure, and did not violate its contract in substituting another attorney to conduct the litigation when it deemed it advisable to do so. It is apparent that the naming of Hawthorne as the attorney to institute the action for foreclosure in appellant Gregg's letter was a mere incident and not the consideration, or, at least, not a material part of the consideration for the contract. It occurs to us that the appellee had the right to assume, upon obtaining Harrington's consent to the change, that there would be no objection upon the part of the appellants because there was a change and substitution of attorney Scott for attorney Hawthorne. We are persuaded that there was no breach of contract on the part of the appellee, because the real object which the parties had in mind, and the real consideration therefor, as we have stated, was the foreclosure, which was had.

2. But, if we are mistaken in this, unquestionably the conduct of Gregg, after he learned of the substitution, in not making any protest or objection to the appellee on that account, and in not giving the appellee an oppor-

tunity, as plaintiff in the foreclosure, to hold up the sale and to dismiss the action to foreclose, and in his appearance at the sale and bidding the amount he agreed to bid, and the express authority given by Harrington to substitute attorney Scott for attorney Hawthorne, all clearly constitute a waiver on the part of the appellants of any violation of the contract on the part of the appellee, if any, in the substitution of one attorney for another. See *Grayson-McLeod Lbr. Co.* v. *Scott,* 102 Ark. 79.

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

WRIGHT MOTOR COMPANY *v.* SHAW.

Opinion delivered October 4, 1926.

1. JUSTICES OF THE PEACE—DUTY OF APPELLANT.—One appealing a case from a magistrate's court should be present when the case is called for trial in the circuit court.
2. PLEADING—AMBIGUOUS COMPLAINT—MOTION TO MAKE DEFINITE.—Where a complaint was ambiguous as to whether the action was for conversion of an automobile or on purchase-money notes, the defendant should raise the question by a motion to make the complaint more definite and certain.
3. SALES—SUFFICIENCY OF EVIDENCE.—Evidence *held* to support judgment for the seller of an automobile on a conditional contract against the buyer's transferee, either on the theory of a conversion or of the assumption of payment of the purchase-money notes.
4. SALES—REMEDIES AGAINST THIRD PERSON—AMOUNT OF DAMAGES.—Where an automobile sold on a conditional contract was worth more than the amount due on the purchase-money notes and interest, *held* that the face of the notes with interest was the measure of the seller's damages for conversion of the automobile, in an action against the buyer's transferee.

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

Wills & Strangways, for appellant.

S. M. Bone, for appellee.

HUMPHREYS, J. Appellee instituted this suit against appellant and G. H. Briggs before R. B. Evans, a justice

of the peace in and for Ruddell Township, in Independence County, upon the following complaint, omitting the caption and signature:

"Comes the plaintiff, and for its cause of action against the defendant says:

"That plaintiff, on the 24th day of July, 1923, sold and delivered to the defendant, G. H. Briggs, one Star automobile; that said sale was made upon a conditional contract in writing in the form of promissory notes issued and signed by said defendants, for the purchase price of same remaining unpaid, consisting of four notes of $58 each, with interest from maturity at 10 per cent. per annum; that defendant paid two of said notes, but has failed and refused to pay the other two, which are now past due and unpaid.

"Copies of said notes are attached and filed herewith and made a part hereof, marked Exhibits A and B.

"That plaintiff retained title to said car, but that the defendant, G. H. Briggs, removed said car from this county without paying balance due on same, as above stated, and delivered same to the Wright Motor Company of North Little Rock, Arkansas, in Pulaski County; that said Wright Motor Company has wrongfully converted said car to its own use, and has thus become liable to plaintiffs for the balance due on same by the said G. H. Briggs.

"That there is now due plaintiff on said notes as balance on purchase price of said car the sum of $130.95.

"Wherefore plaintiff prays judgment against the defendants for said sum of $130.95, together with interest at 10 per cent., for all costs, and such further relief as may to the court seem proper."

Service was obtained and judgment rendered by default against appellant and Briggs for $131, from which an appeal was duly prosecuted by both defendants to the circuit court of said county.

On the second day after the circuit court convened, the cause was called up and tried upon the pleadings and testimony, in the absence of the appellant, resulting in a

finding by the court that appellant agreed and undertook with defendant, G. H. Briggs, that it would assume and pay the amount of the note sued upon, and a rendition of judgment against appellant and Briggs for $132.45, with interest from date at the rate of 10 per cent. per annum until paid, together with all costs in the case, from which appellant has duly prosecuted an appeal to this court. Two days after the rendition of the judgment aforesaid, and prior to this appeal, appellant filed a motion to set the judgment aside, and requested a new trial upon two grounds:

First, that the case was set down on the second day of the term without notice to appellant; and

Second, that it did not indorse or assume the payment of the notes upon which it alleged the suit was based.

The court overruled the motion, to which ruling appellant duly objected and excepted.

Appellant did not bring itself by allegation or proof within any of the statutory grounds to set the judgment aside and obtain a new trial. Appellant itself had appealed the case from the magistrate's court, and the duty rested upon it to be present when the case was called for trial in the circuit court.

The main contention of appellant, however, for a reversal of the judgment is that the allegations in the complaint, and the testimony adduced, are insufficient to support the verdict and judgment. It is contended that the suit is upon the debt, and not for a conversion of the automobile, and that there was no evidence whatever tending to show that it had assumed or agreed to pay the notes.

It is true that, if the suit was upon notes that this appellant did not assume or agree to pay, and not for a conversion of the automobile, then there could have been no recovery against appellant. By referring to the complaint it will be seen that an ambiguity exists as to whether the suit was upon the notes or for a conversion of the automobile. In view of the ambiguity it was the

appellant's duty to raise the question by a plea, which it failed to do. Had it been present and filed a motion to make the complaint more definite and certain, this ambiguity would have been eliminated.

G. H. Briggs testified that he sold the automobile in question to appellant for $350 in exchange for a new car, and that it removed the car out of the county; that he had never seen it after he had made the trade; that he informed it of the existence of the two unpaid purchase notes and of the vendor's lien upon the automobile to secure same when he made the trade, and that he traded upon condition that it would stand between him and the payment of the notes, taking the automobile subject to the notes.

We think this testimony sufficient to support a judgment, either upon the theory that appellant assumed the payment of the notes in trade, or that it converted the automobile to its own use.

Appellant argues that the evidence is insufficient to support the judgment upon the theory of a conversion of the automobile, because proof was not introduced showing the amount of damage sustained by reason of the conversion of the automobile.

It appears that the automobile was worth $350 for trading purposes, which largely exceeded the amount due appellee upon the purchase money notes, so appellee would have been entitled to recover the full amount of the notes and interest out of the value of the automobile had it not been converted. By the conversion of the automobile it was prevented from doing it, so that the face of the notes and the interest thereon was the measure of its damage. As stated above, however, the evidence was sufficient to sustain the judgment upon the theory that appellant assumed the payment of the notes. This seems to have been the theory upon which the court rendered judgment.

No error appearing, the judgment is affirmed.

TURLEY v. ST. FRANCIS COUNTY ROAD IMPROVEMENT DISTRICT NO. 4.

Opinion delivered October 11, 1926.

1. TAXATION—SALES—EXTINGUISHMENT OF ROAD TAX LIEN.—Special road tax lien secured by Crawford & Moses' Dig., § 5433, *held* not extinguished by a sale under the State's lien for general taxes.
2. TAXATION—ENFORCEMENT OF ROAD TAX LIEN.—Sale to the State of lands for nonpayment of general taxes suspends the enforcement of the special road tax lien so long as the title remains in the State; but such lien, under Crawford & Moses' Dig., § 5433, may be enforced when the land goes back to private ownership.

Appeal from St. Francis Chancery Court; *John E. Martineau,* Chancellor on exchange of circuits; affirmed.

C. W. Norton, for appellant.

M. B. Norfleet, Jr., for appellee.

McCULLOCH, C. J. St. Francis County Road Improvement District No. 4 was organized under general statutes of the State (Crawford & Moses' Digest, § 5399 *et seq.*) authorizing the creation of improvement districts by order of the county court on petition of owners of property. The statute authorizes the collection of special taxes upon assessed benefits, payable in installments, and the foreclosure of the tax lien by action in the chancery court. A section of the statute (Crawford & Moses' Digest, § 5433) provides, in part, as follows:

"The tax so levied shall be a lien upon all the real property in the district from the time same is levied by the county court, and shall be entitled to preference over all demands, executions, incumbrances or liens whatsoever created, and shall continue until such assessments, with penalty and costs that may accrue thereon, have been paid."

The present action was instituted in the chancery court of St. Francis County by the commissioners of the district to foreclose liens for delinquent taxes for the years 1923, 1924 and 1925 on certain lands in the district, including two tracts to which title is claimed by appellants. These two tracts of land were sold by the

county tax collector in the year 1922 for the general taxes assessed against the same for the year 1921, and, there being no bidders, the lands were knocked off to the State, and, not being redeemed within two years, were certified to the State as forfeited lands. Appellants purchased the State's title, and received a deed from the Commissioner of State Lands. Appellants appeared in this action and defended against the asserted lien of the road district on the ground that the sale for general taxes extinguished the lien of the road district for the special taxes and vested an absolute title in appellants as purchasers, against all such liens. They asked that their title be quieted as against all of the special taxes levied by the district, both delinquent and immature. The cause was heard by the chancery court upon an agreed statement of facts, which presents the sole question whether, as contended by appellants, the sale by the State for general taxes extinguished the lien for improvement district taxes and vested the title in the purchaser at the tax sale, free of all such antecedent liens. The chancery court decided the question in favor of appellee, holding that the special tax liens were not extinguished by the sale under the State's lien for general taxes, and that the sale under foreclosure of either one of the liens did not operate as an extinguishment of the other lien, but that the title obtained by the purchaser under such sale was subject to the other lien and subject to the right to redeem therefrom. The court in its decree dismissed the complaint of appellants for want of equity and declared a lien in favor of the road district for the unpaid delinquent taxes for the years 1923, 1924 and 1925, and ordered a sale of the lands if the amount decreed be not paid within the time specified in the decree. Appellants were given the right to redeem within a specified time. Our conclusion is that the decision of the chancery court was correct.

Counsel for appellants rests his case entirely upon the theory—an obviously sound one—that the State's sovereign power of taxation is paramount and that all

other liens are subordinate to it. It is declared in the Constitution of the State that "the State's ancient right of eminent domain and of taxation is herein fully and expressly conceded" * * * (art. 2, § 23, Constitution of 1874), but it does not follow that it is beyond the power of the lawmakers of the State to provide, in the enforcement of the State's lien for taxes, for due recognition of other charges against the taxed lands. Such provision does not operate as an exemption from taxation, and therefore does not offend against the Constitution. *Gould* v. *St. Paul*, 110 Minn. 324. Such a provision falls within the general power of the lawmakers to control without hindrance, except such restrictions as are expressly imposed in the Constitution, all the revenues of the State and its subordinate branches. *Sanderson* v. *Texarkana*, 103 Ark. 529, 146 S. W. 105; *Cone* v. *Hope-Fulton-Emmett Rd. Imp. District*, 169 Ark. 1032, 277 S. W. 544.

In § 2, act of March 27, 1925 (Acts 1925, p. 781), the lawmakers, in the exercise of their authority, have provided for coordinate enforcement of liens of the State for general taxes and improvement districts in recognition of the continuation of both liens. That section reads as follows:

"Section 2. In any sales for delinquent State and county taxes, or sales for improvement district taxes made by improvement districts described in § 1 of this act, or any other improvement districts, the purchaser shall acquire title, subject to the liens of any unpaid State and county taxes and unpaid taxes in improvement districts. Where, at sales for State and county taxes, the lands are struck off to the State, the cost of redemption therefrom shall include all past due and unpaid installments of improvement district taxes, together with their respective penalties and costs, and in all sales to the State of lands forfeited for taxes the price of sale shall not be less than sufficient to pay all State and county taxes, penalties and costs, and all past due improvement district taxes, together with their respective penalties and

costs, and all such sales shall transfer title, subject to the lien of improvement district taxes not due."

This statute is well within the legislative power, as we have already seen, for it does not amount to an exemption from taxation or to a relinquishment of the State's lien, but merely operates as a continuation of the coordinate lien of one of the State's agencies and establishes a method of preserving each one of the liens without extinguishing the other. That statute, of course, has no application to the present litigation, for it was enacted after the liens were acquired and after appellants had purchased the land in controversy from the State. But we think that the other statute quoted above (Crawford & Moses' Digest, § 5433) is equally potential in continuing the lien of the improvement district and in preventing its extinguishment by a sale for general taxes. The words, "all demands, executions, incumbrances or liens whatsoever created," have no reference to the State's paramount lien for taxes. But the words which follow unmistakably carry the meaning that the special taxes of the improvement district shall continue until fully paid, and are not extinguished. Of course, the forfeiture to the State of lands for general taxes necessarily suspends the enforcement of the special tax lien as long as the title remains in the State, but as the lien, under the terms of the statute, is not extinguished and continues until the special taxes are paid, the same can be enforced when the land goes back into private ownership. This construction of the statute gives full recognition to the State's paramount right of taxation and in nowise detracts from the dignity and power of the State as against subordinate governmental agencies.

In the statute *supra,* in force at the time of the forfeiture of these lands to the State, there was not prescribed any method of redemption in recognition of the continued existence of other liens, as in the recent statute referred to above, but the court in this instance preserved the rights of the parties under the old statute by directing the enforcement of the special tax lien and at the same

time protecting the purchasers from the State by permitting redemption.

The language of this court in *Faulkner Lake Drainage District* v. *Williams,* 169 Ark. 592, 276 S. W. 704, referred to by counsel, is not in conflict with the views now expressed. We merely referred, in that case, to the tax forfeitures as a shrinkage in available revenues of the district, in testing the sufficiency of the revenues for retirement of outstanding bonds as they matured, and we did not say that the liens for the improvement taxes were extinguished by the forfeiture for general taxes.

The decree was correct, and the same is affirmed.

McCLINTOCK v. WHITE RIVER BRIDGE COMPANY.

Opinion delivered October 11, 1926.

1. JUDGMENT—RES JUDICATA.—Judgments in previous actions sustaining the condemnation of land for a public road and defendants' right to build a toll bridge, as against plaintiff's ferry privilege, *held res judicatae,* in a subsequent action between the same parties, on the issue whether plaintiff's land was taken and his ferry rights invaded, in violation of the Fourteenth Amendment.
2. BRIDGES—EXCLUSIVE PRIVILEGE OF TOLL BRIDGE.—Crawford & Moses' Dig., §§ 10255-10260, conferring on the county courts the power to grant exclusive privileges to build toll bridges, was not repealed by Crawford & Moses' Dig., §§ 4693-4721, authorizing the grant of exclusive ferry licenses, as the two acts are not in conflict.

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

Gregory & Holtzendorff and *Emmet Vaughan,* for appellant.

Cooper and *John D. Thweatt, G. DeMatt Henderson* and *Chas. B. Thweatt,* for appellee.

WOOD, J. This action was instituted by J. M. McClintock against the White River Bridge Company and Harry E. Bovay. For his first cause of action the

plaintiff, in substance, alleged that the defendants were liable to him in damages which accrued by reason of the opening of a public road on his land two hundred feet wide, without notice to him, and the destruction of his ferry business and equipment by the building and operation of a toll bridge on his land. The plaintiff alleged that he owned the east half of section 17, through which White River runs from north to south; that he had a franchise to operate a ferry near the half section line; that the county court granted a franchise to the defendant Bovay to build a bridge over White River, and contracted with Bovay not to grant to any one else a bridge or ferry franchise for a distance of ten miles of the bridge; that Bovay transferred his franchise to the White River Bridge Company. The bridge franchise was secured on December 19, 1921, and covered a period of forty-nine years. The plaintiff alleged that the destruction of his ferry franchise and the taking of his land for a public road without compensation deprived him of his property without due process of law and denied him the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States; that the defendants had rested the abutments of their bridge on the roadway and taken the dirt from this roadway to build dumps for approaches to their bridge; that the dirt so taken was of the value of $6,948, and that the land taken for roadway and the ferry equipment were of the value of $251,000, and that he was entitled to $75,000 for destruction of his ferry business, for which sum he prayed judgment. He further alleged, for a second cause of action, that the bridge company began operation on the first day of January, 1925; that this action of the bridge company was an infringement of plaintiff's exclusive statutory right to operate his ferry, and that the operation of the bridge subjected the defendants to penalties imposed by § 4694 of C. & M. Digest. He therefore prayed judgment against the defendants in the sum of $100 per day from January 1, 1925, to the date of judgment.

The defendants answered the first cause of action, denying that the road was opened on plaintiff's land by the county court without notice to plaintiff, and alleged that plaintiff appeared and contested the proceedings; that he lost the contest in the county court and also in the circuit and Supreme courts, to which he appealed from the judgments against him. The defendants denied that the plaintiff had an exclusive ferry franchise, and denied all the other allegations of the complaint. They alleged that the plaintiff's ferry rights had ceased to exist by reason of the bridge franchise, under the statute making such franchise exclusive. They pleaded the proceedings in the county, circuit and Supreme courts in the case of *McClintock* v. *Bovay,* reported at 163 Ark. 388, 260 S. W. 395, as *res judicata* of the present action against them, for compensation for damages for the taking of the plaintiff's land.

The defendants demurred to the second cause of action, on the ground that the complaint shows on its face that the plaintiff has no ferry rights; that his former ferry rights have ceased to exist by reason of a valid franchise and the operation of a toll-bridge thereunder, and that he is not entitled to recover any damages or penalties for the infringement of ferry rights.

The case was heard upon the pleadings and an agreed statement of facts, in which the orders of the county court opening the road and granting the toll-bridge franchise, the proceedings in the case of *McClintock* v. *Prairie County,* and the order accepting the public road, were made evidence in this cause, and it was admitted that the plaintiff had no notice of the order of the county court opening the road, rendered October 25, and that he afterwards filed his petition in the county court to vacate the order, which was protested by Bovay and certain citizens of Prairie County, and the case was heard, and the county court rendered the order opening the public road and authorizing Bovay and his successors and assigns to improve the same in such manner as would make the same suitable for passing to and

from said bridge and for connecting the bridge with the improved highway. Plaintiff took an appeal from the adverse judgment of the county court to the circuit court, and from the adverse judgment of the circuit court to the Supreme Court, and the cause was decided by the Supreme Court, and is reported in 163 Arkansas at page 388, 260 S. W. 395.

It was agreed that the defendants did not take charge of or appropriate any lands of plaintiff whatever except under the authority of the order of the county court opening the road. It was agreed that they had constructed the bridge under the authority of the act of Congress and the bridge franchise granted by the county court; that they built the abutments to the bridge entirely upon the right-of-way of the road so opened up by the orders of the county court, and that these abutments are so built as to connect the new road with the bridge over White River. The dirt used in constructing the embankments was taken from the right-of-way of the road opened by the orders of the county court; that the alleged usurpation of ferry privileges of the plaintiff and the destruction of his land and equipment for ferry purposes by the building and operation of the toll-bridge by the bridge company was done entirely under the bridge franchise granted to Bovay and transferred to the bridge company; that the plaintiff had operated his ferry at a point five hundred feet above the bridge on White River for ten years past under an annual license from the county court of Prairie County, until January 1, 1925, when he applied for an annual license for the year 1925, and same was refused, because the county court had granted a bridge franchise, and the operation of the toll-bridge thereunder began on January 1, 1925.

It was agreed that the cases of *McClintock* v. *Bovay*, 163 Ark. 388, 260 S. W. 395, and *McClintock* v. *Bovay*, 164 Ark. 482, 262 S. W. 669, were between the same parties and related to the same bridge and ferry as the present suit, and the case of *White River Bridge Company* v. *Hurd*, 159 Ark. 652, 252 S. W. 917, also related to the

same bridge. The court rendered a judgment sustaining the demurrer to the plaintiff's second cause of action, and, the plaintiff refusing to plead further, dismissed his complaint. On the first cause of action the court found that the defendants were not liable to the plaintiff, and dismissed this cause of action also. From the judgment is this appeal.

1. It is disclosed by the pleadings and the agreed statement of facts that the land in controversy had been condemned and set apart by the county court of Prairie County as a public highway on the petition of Bovay and certain other citizens and taxpayers of Prairie County, in which proceedings the appellant was allowed to intervene and contest the right of Prairie County and Bovay and others to have the land condemned and taken as a public road. That cause was finally adjudicated in the Supreme Court in *McClintock* v. *Bovay,* 163 Ark. 388, 260 S. W. 395, and the judgment of the county court condemning the land in controversy as a public road was sustained.

In the case of *McClintock* v. *Bovay,* 164 Ark. 482, 262 S. W. 669, McClintock instituted an action against Bovay and his successors, alleging that they were building a bridge over White River contrary to his right to exercise ferry privileges under his license and as the owner of the land on both sides of the river. The defendants in that action set up that they were building the bridge under a franchise granted them by the county court of Prairie County. In that case we held as follows: "That the rights conferred under a franchise to build a toll-bridge were superior to ferry privileges, and that the county court could not grant a ferry privilege which would interfere with the exclusive privilege to build and operate a toll-bridge. * * * The fact that appellant has obtained his license from year to year does not deprive the county court of the power, under the statute, to grant an exclusive privilege in that territory to construct and operate a toll-bridge. * * * The question of appellant's compensation for his property taken as a bridge-site and his rights in that regard are not affected by the decree

in this case, as this is not a suit to condemn the bridge-site."

In the case of *White River Bridge Co.* v. *Hurd,* 159 Ark. 652, 252 S. W. 917, we held that county courts have exclusive jurisdiction of the matter of building bridges over watercourses. We concluded the opinion in that case as follows: "The county court is the agency of the State in the matter, and has the power to grant an exclusive franchise for the construction of a toll-bridge, and this itself would prevent the granting of a franchise to another bridge company or to another ferry company."

In the agreed statement of facts in the case at bar it is agreed that "*McClintock* v. *Bovay,* 163 Ark. 388, 260 S. W. 395, and *McClintock* v. *Bovay,* 164 Ark. 482, 262 S. W. 669, were between the same parties and related to the same bridge and ferry as the present suit; that the case of *White River Bridge Company* v. *Hurd,* 159 Ark. 652, 252 S. W. 917, relates to the same bridge as is involved in the present suit."

The above cases (*McClintock* v. *Bovay*) are *res judicata* on the issue between the appellant and the appellees in this action, that appellant's lands were taken and his ferry rights invaded and destroyed by appellees contrary to law, and for which they were liable to him in damages. These decisions are likewise *res judicata* on the issue as to whether or not appellee had damaged the appellant by taking dirt from his land for the building of the dumps connecting the bridge with the roadway. The dirt for these dumps, it appears from the agreed statement, was taken from the 200-foot strip of land which had been condemned as a public road by the county court, and it appears also that the abutments of the bridge rested upon this roadway. Therefore appellees, under the former decisions of this court, are not liable to the appellant in this action in damages as compensation for the value of the dirt taken from his land to build a roadway for the bridge, nor for the destruction of his ferry business and the value of his ferry equipment. In building these dumps for bridge purposes and

to connect the bridge with the highway, and in placing the abutments thereon all within the 200-foot strip of public roadway condemned by the county court, the appellees were exercising rights which had been legally conferred upon them by the county court, as held in the above decisions. Under our statutes, and decisions construing them, the appellant, as the owner of land on both sides of White River, had the exclusive right to ferriage privileges, provided a license was conferred upon him by the county court to exercise such privileges. To obtain such license, the applicant therefor must satisfy the court that public convenience will be subserved; and the license to exercise the privilege continues only one year from the date of such license. See §§ 4694, 4696, 4699, 4704, C. & M. Digest. In this connection see *Murray* v. *Menifee,* 20 Ark. 265; *Bell* v. *Clegg,* 25 Ark. 28; *Little Rock* v. *McGehee,* 41 Ark. 209; *Finley* v. *Shemwell,* 94 Ark. 193, 126 S. W. 719; *Shemwell* v. *Finley,* 95 Ark. 344, 129 S. W. 792; *Shults* v. *Munn,* 124 Ark. 418, 187 S. W. 316; *Munn* v. *Shults,* 130 Ark. 300, 197 S. W. 570. It follows, under the above decisions of the court, that the trial court did not err in dismissing the appellant's complaint on his first cause of action.

2. It follows likewise, under the decisions in *White River Bridge Company* v. *Hurd, supra,* and *McClintock* v. *Bovay,* 164 Ark., *supra,* that the court did not err in sustaining the appellee's demurrer to appellant's complaint setting forth his second cause of action and in dismissing that cause of action. Learned counsel for appellant argue that these decisions were made upon the authority of § 10258, C. & M. Digest, which is as follows: "No county court, after conferring the privileges of this act upon any persons, shall again have power to confer the same or like privileges upon any person, to the injury of him upon whom such privileges were first conferred." This is § 4 of act of March 6, 1875, which confers upon the county courts of this State the power to grant privileges to any person or persons to build toll-bridges over watercourses, etc., whenever the interests of the county

or of the traveling public shall, in the discretion of the county court, demand such improvements. See § 10255, C. & M. Digest. Counsel contend that the above provision of the act of March 6, 1875, making bridge franchises exclusive, was repealed by act 50 of the Acts of 1913, p. 163, approved Feb. 13, 1913, as follows:

"Section 1. That § 3556 of Kirby's Digest of the Laws of Arkansas be amended so as to read as follows:

" 'Section 3556. Every person owning the land fronting on any public navigable stream shall be entitled to the privilege of keeping a public ferry over or across such navigable stream; if he owns the lands on both sides or banks, or if he shall have possession of both sides or banks, by preemption or settlement right, he shall be entitled to the sole and exclusive right of ferriage at such place; and if he owns the land on one side only, or has possession thereof, by preemption or settlement right, he shall have the privilege of a public ferry from his own shore and making the landing and road up said opposite bank, and keeping the same at all times in good repair and condition for ascending and descending, and an exclusive right to all ferry privileges in any such case shall follow any leasehold interest during the life of said lease and the faithful performance of all municipal, county and State obligations, and the right shall not be impaired by any packet trade or company, or otherwise, under penalty of one hundred dollars' fine of any such owner or manager of said packet enterprise or the party in any way violating the spirit or letter hereof, to be recovered by appropriate action in any court having jurisdiction, at the instance of the injured party, and each day's interference shall constitute a separate offense.

" 'Section 2. That all laws and parts of laws in conflict herewith are hereby repealed. This act being necessary for the immediate preservation of the public peace, health and safety, the same shall take effect and be in force from and after its passage'."

This act of February 13, 1913, was a reenactment of § 3556 of Kirby's Digest, which was a part of the Revised Statutes. The amendment, after reenacting this provision of the Revised Statutes as to ferry privileges, merely extends the privileges therein granted so as to include those holding a leasehold interest as well as those owning the fee; and the right or privilege, when granted by license from the county court to the owner or the owner holding a leasehold interest under the act, could not be impaired by any packet, trade, or company or otherwise, as prescribed in the amendment, under a penalty of $100. It was not the design of the lawmakers in any way to change the provisions of the laws pertaining to ferries and digested in chapter 66, §§ 3555 to 3562, Kirby's Digest, and later digested in ch. 65 of C. & M. Digest. All the provisions, such as authorizing the county court to issue a license only upon a showing that the ferry is needed for public convenience, and limiting the privileges under the license for a period of only one year, etc., are left intact. The amendatory act confers the exclusive right of ferriage, but it has no reference whatever to the act of 1875, conferring upon county courts the power to grant certain toll-bridge privileges, as contained in ch. 172, C. & M. Digest, §§ 10255 to 10260, inclusive.

There is no conflict, certainly no invincible repugnancy, between the provisions of § 10258, C. & M. Digest, pertaining to exclusive toll-bridge privileges, and the provisions of § 4694, C. & M. Digest, pertaining to exclusive ferry privileges. Repeals by implication are not favored. The cases of *White River Bridge Company* v. *Hurd, supra,* and *McClintock* v. *Bovay, supra,* were decided since the enactment of the act of February 13, 1913. In the case of *Bridge Company* v. *Hurd,* one of the contentions was that the toll-bridge privilege was exclusive, and, when conferred by the county court, that court could not thereafter grant a ferry license to any one to operate a ferry within a mile of the bridge. We upheld this contention, and cited § 10258, C. & M. Digest,

concerning the exclusive toll-bridge privileges. And in the case of *McClintock* v. *Bovay, supra,* we cited the case of *White River Bridge Co.* v. *Hurd, supra,* and stated: "The effect of that decision was to hold that a franchise to build a toll-bridge is superior to a ferry franchise, for the reason that a bridge is more to the convenience and benefit of the public, and for that reason the statute in express terms had made the bridge franchise exclusive. The fact that appellant has obtained his license from year to year (to operate a ferry) does not deprive the county court of the power, under the statute, to grant an exclusive privilege in that territory to construct and operate a toll-bridge." These decisions, thus holding, would both be erroneous and should be overruled if act 50 of the Acts of 1913, *supra,* pertaining to ferry privileges, repealed the provisions of § 10258 of C. & M. Digest, making toll-bridge franchises exclusive, as contended by counsel for the appellant. But, as we have stated, their contention is not well taken, and the court did not err in dismissing the complaint as to the second cause of action.

There is no error in the record. The judgment is correct, and it is therefore affirmed.

MUTUAL RELIEF ASSOCIATION *v.* PARKER AND JUSTICE.

Opinion delivered October 18, 1926.

1. INSURANCE—REGULATION BY STATE.—The State has power to regulate insurance companies and the method of conducting their business.
2. INSURANCE—REGULATION—PROSPECTIVE EFFECT OF STATUTE.—Acts 1925, p. 405, requiring payment of the amount specified in a membership certificate issued by a benefit association, has no application to such certificates issued before passage of the act.
3. STATUTES—PROSPECTIVE OPERATION.—All statutes must be construed to be prospective in operation unless otherwise declared or a clear intent to the contrary is shown.

4. INSURANCE—CONSTRUCTION OF BY-LAWS.—By-laws of a mutual benefit association doing business under the assessment plan, adopted in conformity with Acts 1925, p. 465, requiring payment of the maximum amount specified in the certificate, do not affect rights vested under certificates already in existence.

Appeal from Pope Circuit Court; *J. T. Bullock,* Judge; modified.

John P. Roberts, for appellant.

Robert Bailey and *Joe D. Shepherd,* for appellee.

McCULLOCH, C. J. Appellant is a mutual insurance association, doing business on the assessment plan, the members or policy-holders being grouped into circles and the members of each group being assessed to pay the benefits maturing upon the death of a member of that circle. The policy, or certificate, issued to members pursuant to the by-laws, provides a maximum amount of $500, with $60 payable if death occurs during the first or second month of the life of the certificate and $20 per month for each month thereafter for 22 months, and provides further that "the liability of the Mutual Relief Association hereunder shall, in no event, exceed the amount produced by one assessment on the members of the circle in which said member may be placed, less the cost of collecting said assessment."

J. C. Parker became a member of the association on November 30, 1920, and a policy or certificate of insurance was issued to him in accordance with the above form and substance, payable, in case of death, to J. L. Parker, one of the appellees herein. J. C. Parker died on January 15, 1926, and the amount produced at that time by one assessment on the circle in which said member had been placed, less the cost of collecting the assessment, is shown to have been in the sum of $150.71.

On October 20, 1921, Mary M. Amos became a member of said association, and a policy or certificate of insurance was issued to her, payable to her son, W. H. Justice, one of the appellees herein. Mary M. Amos died in January, 1926, and the amount produced at that

time by one assessment on the circle in which she had been placed is shown to have been the sum of $108.20.

Appellees instituted separate actions against appellant on said certificates to recover $500, the maximum amount specified in each policy, and the two cases were consolidated and tried together, resulting in a judgment in favor of each appellee for the sum of $500, together with twelve per cent. penalty, and attorneys' fees. The cases are presented here as consolidated actions, and the only question presented relates to the amount of recovery—whether the appellees are each entitled to the maximum specified in the policy, or the respective amounts which were produced by one assessment on the members of the circle as shown by the evidence.

Counsel for appellees rely, in support of the judgment, upon the terms and effect of a recent statute enacted since the parties named became members of the association (Acts 1925, p. 405), which, they contend, applies to these certificates, and requires payment of the maximum amount specified therein. Counsel for appellant contends, in the first place, that this statute is unconstitutional as impairing the obligation of contracts, and that it does not unconditionally require the payment of the maximum amount specified in certificates, but that, if the statute is so interpreted, it is not retroactive in effect so as to be applicable to policies or certificates of membership issued prior to its enactment. The purposes of the statute, as stated in the caption, are "to define assessment life, health and accident associations or companies, industrial insurance companies, to provide how same may be organized and transact business in this State, for proper regulation of same, and for other purposes." There are numerous sections not involved in the present controversy, but § 3-B, upon the construction of which it is claimed the result of this litigation depends, reads as follows:

"Such association shall specify in their policy or membership certificate forms the sum of money they promise to pay and the number of days after satisfac-

tory proof is filed when such payment will be made. Upon the occurrence of such contingency, unless the contract shall have been voided by fraud or by breach of its conditions, the corporation shall be obligated to the beneficiary for such payment at the time and in the amount specified in the policy or certificate. If such corporation shall refuse or fail to make such payment, after final judgment has been obtained upon such claim, the Insurance Commissioner shall notify the corporation not to issue any new policies or certificates until such indebtedness is fully paid; and no officer or agent of the corporation shall make, sign or issue any policy or certificate of insurance while such notice is in force."

Conceding, without deciding, that the language of this section means what counsel for appellees contend, we do not think that the decision of the case turns upon its interpretation, but the controlling question is whether or not it applies to policies or certificates issued by the association prior to the enactment of the statue. It must be conceded that it was within the power of the lawmakers to regulate insurance companies and the method of conducting that kind of business. In *Lewelling* v. *Manufacturing Wood Workers' Underwriters,* 140 Ark. 124, 215 S. W. 258, we said:

"The State, in the exercise of its police power, may fully and completely regulate the business of insurance; and it may prescribe the conditions under which persons or corporations outside the State may exchange insurance with persons or corporations within the State."

Many authorities could be cited sustaining this power. The statute is valid in so far as it undertakes to regulate the business of such companies as are specified therein. Penalties are prescribed in the statute for doing business without compliance with the statute, and a period of six months after approval of the statute is allowed for reorganization of companies and changes in the method of doing business so as to conform to the statute. We are of the opinion that this statute, when

its terms and provisions are considered as a whole, was intended to act prospectively and has no application to policies or certificates theretofore issued so as to increase the amounts payable different from the specifications of amounts therein when issued. It is a settled rule of law that all statutes must be construed to be only prospective in operation, unless otherwise expressly declared or a clear intent otherwise shown. Many authorities recognizing this principle are cited in the case of *Mosaic Templars of America* v. *Bean,* 147 Ark. 24, 226 S. W. 525. In that case the question presented for decision was whether or not a statute which, if applicable, would have invalidated a policy in a mutual assessment association, should be declared to be retroactive, and in the opinion it was said:

"The statute under consideration pertains to the regulation and incorporation of fraternal beneficiary associations, and is very lengthy, containing 32 sections. There is nothing in any of them that tends to show that the Legislature intended the statute to have a retroactive effect. On the other hand, considering the language used in the light of the well-known rule of construction above stated, it is apparent that the Legislature did not intend to give a retrospective effect to the statute. At the time of the passage of the act there were doubtless many members of fraternal societies who were acting under the rules and constitutions of the societies as they then existed. There is nothing to indicate that the Legislature intended the statute to affect the rights of such members. Given a prospective operation, as we think it should be given, the statute has reference to the regulation of the rights and privileges between the societies and such members as should thereafter join them, and did not attempt to cut off or destroy the rights or privileges of those members who had already joined and secured benefit certificates under the constitution and by-laws of the associations as they then existed."

The statute now under consideration, and all such statutes, are reciprocal in their burdens and benefits and apply alike to the association and to its members. This association has no reserve fund, and its only method of paying benefits is by assessment upon the members. The statute, if given a retroactive effect, would necessarily increase the burden of the persistent members by requiring them to pay additional or higher assessments than those specified in their contract. The rule stated above forbids that that interpretation be given to the new statute. Moreover, the language of the statute itself shows affirmatively, we think, that a retroactive effect was not intended. The section above manifestly applies only to certificates issued after the enactment of the statute.

It is further contended by appellees that the association, after the enactment of the statute, adopted by-laws in conformity with the statute, so as to be able to do business in accordance with its provisions. These by-laws, however, must be confined in their operation to a prospective effect so as not to disturb rights vested under the certificates already in existence. *Mosaic Templars of America* v. *Crook,* 170 Ark. 474, 280 S. W. 3. It follows therefore that the judgments were each for an excessive amount. We have decided that a similar provision in by-laws or policies of such an association limiting the amount of the benefit to the sum raised by a single assessment on the members in a circle is valid and enforceable, and controls the amount to be recovered under the policy. *Home Mutual Benefit Ass'n.* v. *Rowland,* 155 Ark. 450, 244 S. W. 719, 2 A. L. R. 86; *Home Mutual Benefit Ass'n.* v. *Rownd,* 157 Ark. 597, 249 S. W. 3.

The judgment in each case is reversed, and judgment will be entered here as of the date of the judgment below in favor of appellee Parker for the sum of $150.71, and in favor of appellee Justice for the sum of $108.20. No recovery is allowed for penalty or attorneys' fees, for the reason that the sum recovered in each instance is less than the amount demanded. It is so ordered.

MILLER v. YATES.

Opinion delivered October 18, 1926.

1. PARTNERSHIP—PAYMENT BY PARTNER OF INDIVIDUAL DEBTS.—Where a partner sells merchandise, and charges the purchase price against his personal obligation to the purchaser, without his copartner's consent, the latter, after purchasing the business, including accounts, may recover therefor against such purchaser.
2. PARTNERSHIP—AUTHORITY OF PARTNER TO PAY INDIVIDUAL DEBTS.—Where a partner without objection permits his copartner to sell partnership merchandise, and credit the price on his personal obligation, he cannot, after purchasing the partnership and outstanding accounts, recover from the buyer.
3. PARTNERSHIP—JURY QUESTION.—Evidence *held* to make it a jury question whether a partner assented to his copartner crediting the price of goods sold to defendant upon his copartner's obligation to defendant.

Appeal from Columbia Circuit Court; *L. S. Britt,* Judge; affirmed.

Kitchens & Upton, for appellant.

McKay & Smith, for appellee.

WOOD, J. O. E. Yates instituted this action against N. B. Miller. Yates alleged that he and J. H. Roden were engaged as partners in the grocery business in the city of Magnolia, Arkansas, between the first of April and the sixth of August, 1924; that the plaintiff purchased Roden's interest in the business, including all the outstanding accounts; that, while the plaintiff and Roden were in business as partners, Roden sold to N. B. Miller goods, wares and merchandise belonging to the partnership of the value of $392.26, and, without the knowledge or consent of the plaintiff, charged the amount of such sale to himself in order to pay a personal indebtedness due by Roden to Miller. The plaintiff prayed judgment against Miller in the sum of $392.26.

Miller answered, and admitted all the allegations of the complaint, except that Roden charged to himself, without the knowledge or consent of plaintiff, the purchase price of the goods, wares and merchandise which

the defendant purchased of Roden. Miller denied that he was indebted to the plaintiff in any sum.

The plaintiff, Yates, testified that he and Roden were in business as partners under the name of Roden & Yates. Witness did not know of, or authorize Roden to charge, the account which is the foundation of this action to himself and obtain credit with Miller on the individual indebtedness which Roden was due Miller. Witness was originally in partnership with Miller, and the business was known as Miller & Yates. Witness purchased Miller's interest, and took Roden in, who was to own one-half of the business. Witness did not know that Roden had been letting Miller have merchandise and charging same to Roden to settle Roden's individual indebtedness with Miller, until about the time or right after witness came into possession of the business. Witness did not know that Roden owed Miller until a while before witness bought Roden's interest. Witness ascertained that Roden had charged Miller's account to Roden when witness started to examine the books. Witness was fixing to buy Roden out when he discovered this. The bookkeeper was Wiley Langston. There was still $150 on the books charged to Miller at the time witness bought the interest of Roden.

Witness Coney testified that he was collecting for Yates about the time Roden retired from the business, and he presented an account against Miller in the sum of $150, which Miller refused to pay, saying that it had been credited to Roden's note.

Roden testified that he was in partnership with Yates and Miller in the original firm of Roden, Miller & Yates. Yates and witness bought out Miller's interest. Witness gave Miller a check for $2,300 and credited him on the books of Roden & Yates in the sum of $100. Yates, Miller and witness were present at the time of this transaction. The $100 credited on Miller's account was the amount that he owed the firm of Miller & Roden & Yates at that time. Witness had borrowed $650 from Miller to cover part of witness' stock in the firm of Roden,

Miller & Yates, and witness asked Miller if he wanted what witness owed him at that time, and Miller replied, "No." Witness said to Miller, "I would be glad for you to trade here, and I will charge that to myself and credit you for it," and Miller replied, "Well, I have to trade somewhere, and that will suit me as well as anything." Yates was there in the house, but witness does not know whether he heard this conversation or not. Witness thought Yates was close up. The three of them were talking together when witness made that statement. The conversation occurred just after the witness and Yates had bought Miller out. The matter of crediting Miller's account on witness' individual account came up between Yates and witness about a week or ten days after the above conversation and transaction, when Miller brought a new note for $500 for witness to sign and for witness to charge to himself the sum of $150 principal of the note and interest to date, which would make it $189. Witness explained that to Yates, and asked him to sign the new note to Miller with witness. Yates refused to do so. Witness said, in the conversation with Yates, that he would charge the $189 to witness' personal account, and credit Miller's account. Witness was asked if Yates made any objection to this, and answered, "He didn't say yes or no." The arrangement witness had with Miller was as follows: "I gave Miller credit on the books of Roden & Yates for $189, and charged myself with it, and Mr. Miller credited me on the note with it, and then on the first of each month we made similar entries for whatever the amount his account was." The next time that the matter came to Yates' knowledge must have been about the first of August, about the time witness and Yates were dissolved. Along about the first of July Mrs. Miller came in and bought a bill of dry-goods and groceries amounting to about $40 or $45, and witness told Yates about it. Witness concludes his testimony in chief as follows: "I balanced Miller's account and debited my account with the amount of his on the company books two or three times, I don't remember

exactly. As a showing for this, Miller was given a credit slip from to time. Miller held my note and was to credit the amounts of these credits that went to Miller's account on the note. That was the agreement between us. I do not know whether or not Yates knew of these arrangements from either the time Miller withdrew or this other time that I spoke of, when the $500 note was presented, or at the time we settled with him (Miller), no more than I have already told you. I know that I talked with him about it, just what I have told you." On cross-examination witness stated that he and Yates dissolved partnership in August or the first part of September—witness did not remember the exact date. He thought it was about the first of September, 1924.

The defendant, Miller, testified in his own behalf, and, according to his testimony, he sold out his interest to Roden and Yates about May 1, and the trade was finally consummated on May 9. At that time Roden owed witness the sum of $650, money which witness had loaned Roden to put in the business of Roden, Miller & Yates. Roden asked if witness wanted the money he owed witness, and witness replied that he could do without it, as money at that time was hard. Roden then asked if it would suit witness to trade at the store, and let Roden pay him that way, that is, to credit witness and charge the amount to Roden. Witness agreed to that. Roden told witness he would charge it to witness until the end of the month, and then Roden would charge it off to his individual account and give witness credit for it. This was in Yates' presence and was a part of the conversation that took place at the time of the settlement. Witness first received a bill for this account when it was presented to him last fall, just a few days before circuit court—the November term of court. That was the first time witness knew that Yates was denying the arrangement witness had for collecting that account. Witness further testified that he did not remember whether there was anything said between witness and Roden in regard to witness' individual indebtedness until witness sold out

to them or not. Yates knew Roden owed witness money, because witness asked Yates to sign the note, and he said he would rather not do it. Witness did not remember just when Yates was asked to sign the note. Yates was present and heard Roden ask witness if witness wanted the money Roden owed witness at the time they paid for witness' interest. Roden, Yates and witness were there at the office in the store at the time. The office is small—about six by eight.

Vesper Holly testified that he was employed by Roden & Yates from the first of May to some time in August, when Roden sold out to Yates. He heard Roden and Yates talk about Roden balancing Miller's account and charging it to Roden. He could not remember just the time he heard this. He heard them talk about it a few days after they bought Miller out. They were talking about this money Miller had loaned Roden, and Roden asked Miller if he wanted this money, and Miller told him he would trade it out, as he needed the stuff. Later the witness heard Yates and Roden talking about the accounts. The collections were a little slow, and they were talking about what Miller had bought making the payment of these bills a little hard. Roden was talking to Yates about it. Witness heard them talking about a bill of goods Mrs. Miller had bought there. Roden was talking about them buying that much and getting no money for it. This was some time before Roden and Yates dissolved partnership. Roden and witness were running the business. Yates would help them in the store on Saturdays.

On redirect examination, Yates testified that nothing was said between Roden and Miller in witness' presence or hearing when witness settled with Miller as to how they should handle the account of Miller. Nothing was said to witness when Roden presented that note and asked witness to sign it about the way they were going to handle Miller's account, and that was the first witness knew anything about the note. Witness did not know a thing about Roden having given Miller credit on the books

for $189 until the bookkeeper found it. Witness did not work in there during the time witness and Roden were partners, except on Saturdays, and witness did not know anything about the way Roden was handling the business. Sometimes witness would drive in through the week and spend an hour or so, and would sell something if witness was needed. Witness had access to the books. Witness trusted them, and did not suspect them. He had farmed all of his life, and was farming at the time, and did not come in except on Saturdays.

At the request of the plaintiff the court instructed the jury as follows: "You are instructed that, if you believe from a preponderance of the testimony that J. H. Roden sold goods, wares and merchandise to the defendant, and that said Roden charged said goods to the said defendant, and at the first of each month canceled the debt in order to discharge a personal obligation due by the said Roden to the said defendant, without the assent of the plaintiff, then you will find for the plaintiff."

At the request of the defendant the court instructed the jury as follows: "You are instructed that partnership property may be disposed of to pay the individual debts of a copartner with the consent, either express or implied, of the other copartner, and, if you find from the evidence in this case that the plaintiff, O. E. Yates, knew of the transactions complained of at the time, or assented thereto, or that he later acquired knowledge thereof and failed to clearly and promptly repudiate them within a reasonable time after they came to his knowledge, he will be deemed to have ratified them, and will be bound thereby as though he had expressly authorized them in the first instance."

The jury returned a verdict in favor of the plaintiff in the sum of $392.26. Judgment was entered for the plaintiff in that sum, from which is this appeal.

The law applicable to the facts, which the testimony for the respective parties tended to prove, was correctly declared by the trial court in its instructions to the jury. *Boyd* v. *Arnold,* 103 Ark. 105, 146 S. W. 118; *Smith* v.

Spinnenweber, 114 Ark. 384, 170 S. W. 84. Counsel for appellant contend that this court should declare as a matter of law that appellee knew of the arrangement between Roden and appellant Miller whereby Miller was to trade at the store of Roden & Yates and receive credit on his account at the end of each month for the amount thereof, which amounts were to be charged to Roden's individual account on the books of the firm of Roden & Yates and credited on Roden's note held by Miller. We cannot agree with counsel in this contention. It occurs to us that the above issue, under the evidence, was purely one of fact. The material testimony bearing on the issue is set forth above, and it speaks for itself. No useful purpose could be subserved by discussing it. The appellee testified in substance that he did not know of the arrangement between Roden and Miller until about the time, or right about the time, he came into possession of the business himself, and he did not know that Roden owed Miller anything until a while before appellee bought Roden out. Appellee was asked this question: "How came you to find out that Mr. Roden had done this—had charged this account up to himself?" His answer was, "When I started to go into the books, Mr. Willie Harrington was attending to the books. I was just fixing to buy Mr. Roden out, and that was the time Mr. Harrington found this." This testimony of the appellee was of itself sufficient to make an issue of fact for the jury as to whether appellee had knowledge of the arrangement between Roden and Miller, as above stated by counsel for the appellant. To be sure, there was a sharp conflict on this issue of fact, but the jury were the sole judges of the credibility of the witnesses and the weight to be given their testimony, and it cannot be said as a matter of law that there was no testimony of a substantial character to sustain their verdict. The judgment must therefore be affirmed.

UNITED ORDER OF GOOD SAMARITANS *v.* ROBINSON.

Opinion delivered October 18, 1926.

1. INSURANCE—CONSIDERATION FOR COMPROMISE.—An instruction to disregard a compromise agreement of the beneficiary to release one-half of a benefit certificate unless the jury find some consideration therefor is erroneous where the evidence was uncontradicted that the release was signed with knowledge of defendant's contention that it was entitled to refuse past-due premiums and cancel the policy.
2. INSURANCE—VALIDITY OF COMPROMISE.—Where a beneficiary, with knowledge of the contention by the insurer that insured was over the insurable age, signed an agreement to take a reduced sum under the policy, she will be bound thereby.

Appeal from St. Francis Circuit Court; *E. D. Robertson,* Judge; reversed.

Norfleet & Norfleet, for appellant.

Mann & Mann, for appellee.

WOOD, J. This action was instituted by the appellee against the appellant to recover on a benefit certificate issued by the appellant on the life of the mother of the appellee for the benefit of the appellee. The appellant agreed, on the conditions named in the certificate, to pay to the appellee, on the death of the assured, the sum of $300, and also to pay $50 as a burial benefit. The appellee set up the certificate, alleged that the assured had complied with its terms, and was in good standing at the time of her death; that the appellant had refused to comply with the terms of the contract, and she prayed for judgment in the sum of $350. The appellant, in its answer, admitted that the assured was in good standing at the time of her death on November 25, 1923. It defended on the ground that, at the time the certificate was issued to the assured, she was over 61 years of age, and that, under the terms of the policy and the by-laws of the appellant, in such event it undertook to pay $25 for each full three months membership in the order if the assured member died of dropsy, and not to exceed the full value of the policy. The appellant alleged that the assured died of dropsy, and that, under the terms of the

policy, the appellee was only entitled to recover the sum of $150, which sum the appellant had tendered and was willing to pay. The appellant further alleged that the appellee was estopped from claiming more than the sum of $150 because of a written agreement signed by her to accept that sum in full satisfaction of the policy; that the appellant and the appellee, before the death of the assured, were in a dispute as to whether the certificate was a binding contract. The appellant agreed to accept the premium and to continue the policy in force, notwithstanding the assured was over the age at which the appellant could issue its certificate, provided the appellee would agree to accept the sum of $150 on the death of the assured; that the appellee had entered into a written agreement to accept said sum, and the appellant thereupon continued the policy.

There was testimony on behalf of the appellant to the effect that, under the by-laws of the order, at the time the certificate was issued the appellant was forbidden to accept as members persons over sixty years of age. Under the by-laws of the order the appellant was authorized to refund the premiums that had been paid on the certificate and to cancel the certificate and past due premiums. It was under these circumstances that the following written agreement was executed by the appellee on October 16, 1923: "This is to certify that I, Mary Robinson, beneficiary in policy of Fanny Coleman, hereby agree, in case of death of said Fanny Coleman, to accept one-half of the amount stated in the policy now under consideration, and under no consideration will it be more than $150."

A witness for the appellant who negotiated the transaction for the appellant testified that the appellee signed the agreement voluntarily, and the witness then accepted the past due premium from the appellee. Other witnesses for the appellant testified that they were present and witnessed the agreement, and that the agent of appellant refused to accept the past due premium unless plaintiff would sign the agreement. There was further testimony

on behalf of the appellant tending to prove that the assured, at the time the certificate was issued, was more than sixty years of age. There was testimony to the effect that she died of dropsy.

The appellee testified that she signed the written agreement above set forth, and she does not deny that it was signed under the circumstances as detailed by the witnesses for the appellant.

At the request of the appellee, and over the objection of the appellant, the court, among other instructions, gave to the jury the following: "Unless you find that there was some consideration for the signing of the release of one-half of the policy, you will disregard such release." The jury returned a verdict in favor of the appellee in the sum of $350, and from a judgment in appellee's favor for that sum is this appeal.

The court erred in giving the instruction above set forth, at the instance of the appellee. By this instruction the issue was submitted to the jury as to whether or not there was a consideration for the execution of the agreement. The facts are undisputed, and they show that there was a consideration moving to the appellee from the appellant for the execution of the agreement. Under the appellant's by-laws, which were a part of the contract of insurance, the appellant had the right to refuse to accept past due premiums and to cancel the policy if the assured was more than sixty years of age. The undisputed testimony shows that the appellant was contending that the appellee, at the time the agreement was entered into, was over sixty years of age, that the certificate was subject to cancellation, and that it had refused to accept the past due premium and would have canceled the certificate if the appellee had not signed the agreement to accept not exceeding the sum of $150 as full payment for the amount due under the policy. The undisputed testimony was to the effect that the appellee voluntarily signed the above agreement, after she had been fully advised of the contention made by the appellant. The facts were undisputed, and they prove that the agree-

ment was a valid one. It was within the power of the appellant, under its constitution and by-laws, to enter into such an agreement, which was a consideration moving from the appellant to the appellee as an inducement for her to execute the agreement. Under the undisputed evidence, the appellee is therefore estopped from repudiating the binding force of her agreement.

If the appellee will enter a *remittitur* so as to reduce the judgment in her favor to the sum of $150, the error may be cured here. For the error indicated the judgment is reversed, and the cause will be remanded for a new trial, unless the appellee, within fifteen days, will agree to the entry of a judgment in this court in her favor against the appellant in the sum of $150 with interest from the date of the rendition of such judgment.

BREECE-WHITE MANUFACTURING COMPANY *v.* GREEN.

Opinion delivered October 18, 1926.

1. MASTER AND SERVANT—SAFE APPLIANCES—JURY QUESTION.—Whether a master was negligent in not placing bumpers on a saw carriage to prevent breaking of a piston *held* for the jury.
2. MASTER AND SERVANT—ASSUMED RISK.—The breaking of a piston of a sawmill carriage *held* under the evidence to be an extraordinary risk and not one assumed by a servant.
3. COMPROMISE AND SETTLEMENT—OPERATION AND EFFECT.—Where a master and servant agreed that the master should pay the medical bills of an injured servant and full-time pay during incapacitation, and the servant agreed to accept such payment as settlement, such agreement bars the latter's action for damages.
4. EVIDENCE—PRIVILEGED COMMUNICATION.—A physician may not, over the patient's objection, testify as to information obtained by him while treating the patient.
5. APPEAL AND ERROR—HARMLESS ERROR.—The exclusion of testimony tending to increase the amount of damages is harmless where no objection is raised to the amount of recovery.

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

E. E. Hopson, for appellant.

Sam M. Levine and *Norman Moore,* for appellee.

WOOD, J. This action was instituted by Jim Green against the Breece-White Manufacturing Company. The plaintiff alleged that, while in the employ of the defendant company, on the 26th of March, 1923, he was injured through the negligence of the defendant in failing to exercise ordinary care to provide plaintiff a safe place to work; that the defendant was operating a saw-carriage propelled by steam, which forced a piston attached to the saw-carriage to operate along a horizontal plane; that the operation of the steam carriage and shotgun feed was in the exclusive charge of the company's sawyer; that the steam lines, the valves and other parts of the machinery had become defective and dangerous; that such defective and dangerous condition was unknown to the plaintiff, but the defendant knew, or should have known, of such condition; that, as the result of the negligence of the defendant company, the piston was forced from the gun of the carriage and propelled against the plaintiff, breaking and fracturing the bones of both limbs as well as inflicting serious wounds about his head; that the defendant was negligent in failing to furnish bumpers for the piston to keep it within bounds, and in the careless handling of the carriage lever. The plaintiff alleged that he had been damaged in the sum of $12,500, for which he prayed judgment.

The defendant, in its answer, denied specifically the allegations of the complaint as to negligence, and alleged that the injury to the plaintiff was the result of an accident, and that the injury was the result of ordinary risks and dangers incident to the work in which the plaintiff was engaged. The defendant also alleged that, prior to the institution of the action, the plaintiff and defendant had entered into an agreement by which the defendant was to pay all doctors' and medical bills and agreed to pay the plaintiff his wages for the full time that he was incapacitated. This agreement the defendant pleaded as a complete defense to the plaintiff's cause of action.

The defendant admitted that the plaintiff was in its employ at the time of the accident and injury, but denied that the injuries were as severe as alleged by plaintiff, and denied that it was liable in damages for such injuries.

The testimony adduced by the plaintiff tended to prove that, at the time of his injury, he was running a cut-off saw situated at the front end of the mill, about 70 or 80 feet from the carriage machinery. The accident occurred on March 26, 1923. The plaintiff was standing with his back toward the carriage. The thing went off, and that is all plaintiff knew. The plaintiff then described the nature of his injuries, which it is unnecessary to set forth, inasmuch as there is no controversy as to the amount of the verdict, if the defendant is liable for the injury.

One of the witnesses for the plaintiff described the occurrence as follows: "I was working on the cut-off saw at the time Jim Green was injured. The piston blew out. Three men were injured—two completely knocked out, and one dead; don't know how it got loose. I was the closest man to the injury. The piston came from out of the gun—came very rapidly—a wink of the eye, and it was all over. The rings were on the end of it. The piston seemed to be broken off. The part broken off seemed to be that part ordinarily exposed while the carriage is working. I have been working around sawmills all my life. There was no bumper or anything like that between Jim Green and the carriage. I have seen carriages at other mills and have seen bumpers and other obstructions to check the carriage if it got loose. I saw them at the Chicago mill, and at Bogalusa. The Bogalusa mill is the largest one I know anything about." On cross-examination the witness stated that he knew nothing about the building of a sawmill, but had seen lots of them. He had seen two sawmills that had obstructions, which witness thought were put there for something—he just saw that there was a bumper that looked as if it would stop a piston if it happened to come out. Witness

saw a piston come out of the gun at Bogalusa. It killed three men.

J. Z. Tucker testified that he was in the employ of the defendant as superintendent of manufacture. He had charge of the employees and of the operation of the mill, running of the machinery, and the manufacture of the stuff that goes out. He knew something about millwright work. He had been fifteen or eighteen years engaged in mill work in connection with repairs, construction and assembling of parts. Witness was talking to Jim Green at the time he was injured. Witness was injured at the same time. Witness' duties were to watch after the carriage and things and see if he could detect anything wrong. The safety of witness as well as the safety of the other men depended on witness' vigilance. Witness did not know that there was any unsafe condition or that anything was liable to happen to the machinery at the time of the accident. The piston broke and the follow-head was separated from the gun, causing the accident. If there had been any defect there, witness would have discovered it, but, so far as human knowledge and skill was concerned, the mill was, up to the time of the accident, in good condition. After the accident happened, witness saw the broken parts, and nothing has developed in examining these parts to show that witness could have foreseen the accident. There were no bumpers installed in the mill at the end of the piston. It was not necessary for the safety of the men working around the plant. Witness had known cases of bumpers doing more damage than good. The witness was charged with the duty of installing bumpers if it became necessary. A bumper has been installed since the accident, but witness did not do it. The carriage was under witness' charge. The accident happened by the piston coming out of the back end of the cylinder. They were operating at the time, and the brake was on center, and the valve was open to go ahead, and, when that thing broke in two, it left the head, and the remaining part of

the steam rushed in there with the full steam power behind it. The whole cylinder blew off.

The defendant's master mechanic testified, and qualified as a machinist and master mechanic. He stated that the saw-carriage runs backward and forward on the track. That that was what it was doing when the piston broke. Witness never had his attention called to any defective condition of the piston. The piston broke by reason of crystallization of the metal. The piston was purchased from Fohr & Stowell, a reliable machinery concern. The machinery in the plant was first-class. A piece of crystallized metal cannot be detected by looking at it. The defendant could not have known that the piston was defective before it broke. The reason witness knew that the piston was crystallized is that it was glassy and glittery when it was first broken. Witness looked at it about five minutes after it happened, and it was like glass china in spots all over it. If it had not been crystallized, it would not have broken off smooth.

C. L. White testified that he was the general manager of the defendant company. He was at the mill on the day when Jim Green was injured. He had just left the mill at the time of the accident. No notice or complaint of any kind had been served on witness as to the condition of any machinery, and especially of the piston. Witness had no information that the piston was defective. As soon as the accident occurred, witness called Drs. Barlow, Francis and MacCammon, and told them to look after Jim Green until he was discharged. Witness told Green that he was going to pay him for his time and doctors' bills and his medicine bill until he was able to go to work. This the defendant company did. Green came back to work about a year from the time of the accident. When defendant paid Green for his time and paid his doctors' bills, Green accepted it, and indicated to witness that he was satisfied when witness told him defendant would pay until he came back to work. The defendant company took one dollar a month from the pay of each man, provided they wanted to pay it that

way. Some of them did not want to pay it. It was optional on their part. If they pay it, it gives them free doctors' services whenever they need it. The company is not the beneficiary of the one dollar in any way, and, if a man objects to paying it, it is not taken out. It is not a fact that Green was paid without coming to an agreement with him. The defendant never stopped paying. It paid Green's time and doctors' bill and medicine bill until he came back to work. When he returned to work, he afterwards left on his own hook.

A witness who was operating the saw at the time of the injury testified that he was operating the steam feed as he had always done, and that there was no warning that there was anything wrong. The secretary and treasurer of the defendant company testified that the company paid the plaintiff from March 26, 1923, the date of the accident, to March 16, 1924, the sum of $593.60. After plaintiff came back to work the company paid him $13.50. The company paid for medicine and doctors' bills the sum of $553.10.

The defendant offered to prove by Dr. MacCammon that he was in the employ of the defendant company to treat those of the defendant's employees who wished to be on the doctors' list. He gave his attention to the employees, their families and dependents. He saw Jim Green immediately after the injury. He had concussion of the brain, which rendered him unconscious from the time of the accident until the next morning. During that time he suffered no pain. Plaintiff did not complain any more than the average patient. He saw the wounds exhibited to the jury, and would say that the bones are in good shape. The witness would consider the plaintiff a well man. The plaintiff objected to the introduction of the above testimony, and the court sustained the objection.

The plaintiff testified in rebuttal that he did not have a settlement with the defendant after the injury. He did receive money from the company for his time.

Over the objection of the appellant, the court gave the following instruction: "No. 2. If the plaintiff, Jim Green, was in the performance of his duty, in the employ of the defendant corporation, Breece-White Manufacturing Company, engaged at work in a place and under circumstances in no way connected with the instrumentality that caused the injury of which he complains, he having been struck by a portion of the flying machinery which was hurled against him through the pressure of steam, as the result of want of ordinary care on the part of the defendant corporation, its agents or servants, or through the failure of the defendant, its agents or servants, to discard or repair the said machinery or appliances, after a defective condition therein, if such existed, was known to the defendant company, its agents or servants, or should have been known to the defendant company, had ordinary care been exercised to detect such defective condition, or in the failure of the defendant company, its agents or servants, to use due care to provide the plaintiff with a reasonably safe place in which to work, then it is your duty to find for the plaintiff." To the ruling of the court the defendant duly excepted.

The defendant asked the court to instruct the jury that, under the law and the evidence, the plaintiff is not entitled to recover. The defendant also presented the following prayers for instruction:

"No. 15. You are instructed that the plaintiff, in accepting employment by the defendant company, assumed all of the risks and hazards incident to the operation of a sawmill.

"No 16. If you find from the evidence that the defendant company entered into an agreement with the plaintiff by the terms of which the defendant company should pay the doctors' bills and medicine bills and plaintiff's time from the time of the injury until he should be able to return to work, and if you find that the defendant, in good faith, carried out the conditions of the contract entered into, and that plaintiff accepted the medical treatment and payments and did return to work

for defendant company on the 16th day of March, 1924, then you will find for the defendant."

The jury returned a verdict in favor of the appellee in the sum of $1,000. Judgment was entered in accordance with the verdict, from which judgment the defendant duly prosecutes this appeal.

1. The appellant contends that there was no evidence to sustain the verdict; that the undisputed evidence proved that the injury to appellee was the result of an accident; that the accident was caused by the breaking of the piston, and the breaking of the piston was caused from the crystallization of the metal thereof, which could not have been anticipated by the appellant company, and could not have been discovered and prevented by the exercise of ordinary care upon the part of the appellant. The appellant therefore urges that the court erred in giving appellee's prayer for instruction No. 2, submitting to the jury the issue of negligence, and also erred in refusing appellant's prayer No. 1 for a peremptory instruction.

We do not concur with learned counsel for appellant in this view of the testimony. It was an issue for the jury under the evidence as to whether the appellant was negligent in failing to exercise ordinary care to provide the appellee a safe place in which to work. It was for the jury to say whether the exercise of ordinary care upon the part of the appellant required the construction of bumpers or some other means of obstruction which might have protected the appellee from injury resulting from the breaking of the piston while in the performance of his duty. There was testimony for the appellee tending to prove that other large mills had built bumpers which gave their employees such protection, and appellant's own superintendent of manufacture, without any objection on the part of the appellant, testified that, after the injury, appellant also installed such a bumper, and that originally such a bumper was installed there. The jury had before it for inspection the part of the piston that broke.

We believe the testimony was sufficient to make it an issue for the jury as to whether or not the appellant was negligent in failing to exercise ordinary care to provide the appellee a safe place to work. The jury might have concluded that, by the exercise of ordinary care on the part of the appellant to examine the machinery and appliances and the place where appellee was performing his duties, the appellant should have discovered that the installment of bumpers was necessary for the protection of the appellee, or that a proper inspection of machinery would have discovered some defect therein. The issue of negligence was correctly submitted to the jury by the court's instructions, and there was testimony sufficient to sustain the verdict on that issue.

2. Counsel for appellant next contends that the undisputed testimony shows that the risks of the work in which appellee was engaged were obvious, and that the appellee assumed these risks. But not so; even the testimony of appellant's own witnesses proves conclusively that the risk of injury from the breaking of a piston, under the circumstances, was not an ordinary risk to appellee's work, nor was it an obvious risk. On the contrary, it was one of those extraordinary hazards which only the exercise of ordinary care upon the part of the master might have anticipated and prevented. It was not so open and obvious that the appellee, in the exercise of ordinary care for his own protection in the performance of his duties, could or should have known, and appreciated the danger incident to the operation of the carriage machinery. No duty of inspection devolved upon appellee to discover the alleged defects in machinery and appliances which caused the injury. The servant does not assume such risks. See *Greenville Stone & Gravel Co.* v. *Chaney,* 129 Ark. 96, 195 S. W. 13; see also *Chess & Wynne Co.* v. *Wallis,* 134 Ark. 136, 203 S. W. 274; *Vaughan* v. *Hinkle,* 146 Ark. 149, 225 S. W. 226; *C. R. I. & P. Ry. Co.* v. *Daniel,* 169 Ark. 23, 273 S. W. 15.

The court correctly instructed the jury that the plaintiff, while in the employ of the defendant, agreed

to assume all the ordinary risks and dangers incident to the work in which he was engaged, but the court also correctly ruled in refusing appellant's prayer for instruction No. 5. That instruction was too broad, and did not properly declare the law of assumed risk applicable to the facts of this record.

3. The court did not err in refusing to give appellant's prayer for instruction No. 16. Such prayer was not an accurate statement of the law applicable to the facts on that branch of the case. The court correctly declared the law on this branch of the case in instruction No. 17, which is as follows:

"You are instructed that, if you find from the fair preponderance of the evidence that the plaintiff and defendant entered into an agreement, after the injury complained of, by the terms of which agreement the defendant agreed to pay plaintiff's doctors' and medicine bills and agreed to pay plaintiff full time during such time as he should be incapacitated and unable to work, and that the plaintiff accepted said terms of settlement in full settlement of any claims he might have, and returned to work for the defendant company, the payments made will be a bar to his recovery of any damages, and you will find for the defendant."

4. There was no error in the ruling of the court in excluding the testimony of Dr. MacCammon. This testimony was not competent because it was information obtained by the physician while treating his patient, and was therefore in the nature of a confidential communication. Furthermore, even if the testimony had been competent, it was not prejudicial error to exclude it, because it related only to the measure of appellee's damages. The appellant, in its motion for a new trial, did not assign as error that the verdict was excessive. Therefore the exclusion of Dr. MacCammon's testimony, in any view of the case, was not prejudicial to appellant.

We find no error in the rulings of the trial court, and its judgment is therefore affirmed.

BRENARD MANUFACTURING COMPANY v. MCREE'S MODEL PHARMACY, INC.

Opinion delivered October 18, 1926.

1. BILLS AND NOTES—PURCHASE OF PATENTED ARTICLE—FORM OF NOTE.—Under Crawford & Moses' Dig., § 7956, requiring negotiable notes for patented articles to be executed on a printed form and to show on its face the consideration for which it was given, and § 7959, excepting merchants and dealers who sell in due course of business, *held* that, where plaintiff contracted to give defendant the exclusive agency to sell a patented phonograph and took his note therefor without complying with § 7956, he was not a dealer within § 7959.
2. BILLS AND NOTES—SALE OF PATENTED ARTICLES—OBJECT OF STATUTE.—The object of Crawford & Moses' Dig., § 7956, requiring negotiable notes given for patented articles to show their consideration on their face, was to save to the vendee any defenses he might have in an action on his note, and hence the failure to comply with the statute did not affect the validity of the sale, though no recovery could be had on the note.
3. APPEARANCE—EFFECT OF FILING ANSWER.—Where an amended complaint set up a different cause of action from that relied upon in the original complaint, defendant, by filing an answer to the amended complaint, will be held to have entered its appearance.
4. BILLS AND NOTES—INVALIDITY OF NOTE—SEPARABLE CONTRACT.—Where a note for a patented article and a written contract to which the note is attached are separable, detachment of the note from the contract will not invalidate the contract, though the note is invalid for noncompliance with Crawford & Moses' Dig., § 7956.
5. APPEAL AND ERROR—PREJUDICE.—It is reversible error to instruct the jury upon an issue which had been abandoned by the plaintiff.

Appeal from Phillips Circuit Court; *E. D. Robertson*, Judge; reversed.

STATEMENT BY THE COURT.

The Brenard Manufacturing Company brought this suit in the circuit court against McRee's Model Pharmacy, Inc., to recover the sum of $195, alleged to be due upon a promissory note. Among other defenses interposed by the defendant, it pleaded that the note was void because it was given for a patented article without showing upon its face that it was executed in

consideration thereof. Subsequently the plaintiff filed an amendment to its complaint in which it sought to recover upon a written contract, which is exhibited with the complaint. The defendant filed an answer to the amended complaint, and thereby entered its appearance to the action.

On the trial of the case, the written contract was introduced in evidence, and bore the date of January 11, 1923, and was signed both by the plaintiff and the defendant. The contract recites that, in addition to a check for $75, the defendant agreed to execute a note to the plaintiff for $195 for a Claxtonola phonograph equipment. The contract further provides that the plaintiff grants to the defendant the exclusive agency for Claxtonola phonographs in Helena, Arkansas, for a period of three years. The agreement also provides that defendant agrees to order a new Claxtonola phonograph as fast as it sold the one on hand.

The note was also introduced in evidence. It was in common form, dated January 11, 1923, and payable to the order of the plaintiff. The note was payable in installments of $32.50 each. The first installment was due thirty days after date, and each succeeding installment was due thirty days after the preceding one.

Theodore O. Loveland was a member of the Brenard Manufacturing Company, which is a partnership. According to his testimony, the Brenard Manufacturing Company is a dealer in phonographs and radio equipments. The firm sells patented articles in the usual course of business. The defendant entered into the contract with the plaintiff for the purchase of the phonograph in question and the exclusive agency to sell phonographs of that make in the city of Helena. The note originally sued on was executed pursuant to the terms of the written contract. It does not show on its face that it was given for the sale of a patented article.

The defendant is a corporation, and John I. McRee was its president when the contract and note in question were executed. According to his testimony, the

contract and the note were all on one piece of paper when he signed them. The note was detached from the contract when it was sued on.

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

A. D. Whitehead, for appellant.

Moore, Walker & Moore, for appellee.

HART., J., (after stating the facts). It is first contended by counsel for the plaintiff that the court erred in not directing a verdict in favor of the plaintiff.

In the first place, it is contended that the provisions of § 7956 of Crawford & Moses' Digest, which provide that a negotiable instrument given for a patent shall be absolutely void unless it is executed on a printed form and shows on its face that it is executed in consideration of a patent, does not apply in the present case, because the plaintiff was a dealer, and falls within the exceptions to the act provided for in § 7959. We do not agree with counsel in this contention.

It is true that one of the partners testified that the plaintiff, which is a partnership, is a dealer which sells patented articles in the usual course of business, but the contract itself shows that the present transaction does not fall within that class. Under the terms of the contract, the defendant secured from the plaintiff the exclusive agency to sell Claxtonola phonographs within the city of Helena for the three years, and, as part of the contract, the defendant was to receive one phonograph to be placed on sale. As fast as each phonograph was sold by the defendant, it was to be replaced by another, purchased from the plaintiff at the same price. Under these circumstances the plaintiff was not a merchant or dealer who sells patented things in the usual course of business, in contemplation of the statute. If the plaintiff had merely sold the defendant patented articles for resale, this would have constituted the plaintiff a dealer or merchant within the exceptions provided for in the statute, but the fact that the defendant was given the

exclusive agency to sell the patented articles within a given territory takes the case without the provisions of the statute and makes it fall within the rule laid down in *Williams* v. *Layes,* 168 Ark. 675. Hence the court did not err in refusing to instruct a verdict for the plaintiff.

The next assignment of error is that the court erred in giving, at the request of the defendant, the following instruction: "The jury is instructed that, if they find from the evidence that the note offered in evidence was given for a patented article, and does not so show on its face, then such note is void, and the plaintiff cannot recover on the note."

In this contention we think that the counsel for the plaintiff is correct. It is true that the suit was originally brought on the note, but subsequently the plaintiff filed an amended complaint, in which a recovery was sought alone upon the contract.

This court has said that the object of the statute in question was to save a vendee of any patented article all the defenses that he might have to an action on his note for the purchase money, and to prevent the loss thereby by transfer of the note to an innocent holder before maturity. Hence it was held that the failure to comply with the statute does not affect the validity of the sale, and that, though the note may be void, the seller may recover whatever may be due him on the contract of sale from the purchaser. *Roth* v. *Merchants' & Planters' Bank,* 70 Ark. 200, 66 S. W. 918, 91 Am. St. 80; and *Warmack* v. *Askew,* 97 Ark. 19, 132 S. W. 1013. While a suit upon the note and upon the contract of sale are entirely separate and distinct causes of action, the effect of the defendant's answering the complaint and defending the action entered its appearance.

According to evidence for the defendant, the contract and the note were attached to each other when they were first executed, and the note was detached for the purpose of bringing suit on it by the plaintiff. This, however, does not help the defendant any. If it should

be said that, on account of the note having been detached by the plaintiff, the case should stand as if the contract and note were still fastened together and constituted one instrument, the provisions of the statute would not, in anywise, be violated. In other words, if the contract and note are to be considered but one instrument, the note would show on its face that it was given for a patented article and thus show a compliance with the statute. In that event plaintiff would be entitled to recover.

The case of the *Toledo Scale Co.* v. *Gogo,* 186 Mich. 442, 152 N. W. 1046, Ann. Cas. 1917E, 601, relied upon by counsel for the defendant, is not in point. In that case there was a conditional sale of a pair of scales as expressed in the written contract, and a note for the purchase price was a part of the same instrument. The plaintiff in that case, by detaching the promissory note, created a negotiable instrument, absolute in form, which he could sue on; and the court held this to have been a material alteration of the instrument, and to result in avoiding it.

In the case at bar the contract of sale was an absolute and not a conditional one. The detaching of the note did not in anywise change the terms of the sale. The case falls exclusively within the rule announced by the decisions of this court cited above, to the effect that, while no recovery can be had upon the note where the statute is not complied with in its execution, still a recovery may be had upon the contract.

To sum up, it may be said that the detachment of the note from the contract in no wise affected the contract. The contract, on its face, is an absolute one, and the plaintiff has elected to disregard the note and sue on the contract. If the note was still attached to and a part of the same paper as the contract of sale, the plaintiff could disregard it and sue on the contract. According to the evidence for the defendant, it had complied with the terms of the contract, and, in accordance with its terms, had offered to return the phonograph because it had been unable to sell it.

The result of our views is that the court did not err in refusing to direct a verdict for the plaintiff, but did err in giving the instruction above quoted. By amending the original complaint and suing on the contract, the plaintiff abandoned its original cause of action and sued upon an independent and distinct one. In short, the plaintiff sought no recovery on the note, and the instruction in question tended to confuse and mislead the jury by directing its attention to a matter that had ceased to be an issue in the case. It was therefore necessarily prejudicial to the rights of the plaintiff, and calls for a reversal of the judgment.

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

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. ALLISON.

Opinion delivered October 18, 1926.

1. MASTER AND SERVANT—ASSUMED RISKS.—A servant assumes the risks ordinarily incident to his employment.
2. MASTER AND SERVANT—ASSUMED RISKS.—Negligence on the part of a master or fellow-servant is not an incident of a servant's employment, and the servant does not assume the risks therefrom unless they are obvious and patent.
3. MASTER AND SERVANT—ASSUMED RISKS.—At common law, a servant assumes the extraordinary risks incident to his employment or risks caused by the master's negligence, provided they are obvious or fully known and appreciated by him.
4. MASTER AND SERVANT—ASSUMED RISKS.—While in the case of ordinary risks a servant is conclusively presumed to know them, he is not charged with constructive knowledge of the negligence of the master or of a fellow-servant.
5. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—A carpenter working on the roof of a caboose, who was injured when he stepped on a loose piece of tin left by a fellow-servant whose duty it was to remove such loose pieces, *held* not negligent as matter of law.

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

Thos. S. Buzbee, George B. Pugh and *H. T. Harrison,* for appellant.

Harry H. Myers and *Reed & Beard,* for appellee.

HART, J. Appellant prosecutes this appeal to reverse a judgment against it in favor of appellee for damages for injuries sustained by him, which, he alleges, was caused by the negligence of a fellow-workman while they were engaged in repairing the roof of a caboose for appellant. This is the second appeal in the case. The judgment upon the first appeal was reversed on account of error of the trial court in instructing the jury. *Allison* v. *C. R. I. & P. Ry. Co.,* 164 Ark. 333, 261 S. W. 629.

The sole ground relied upon for a reversal of the present judgment is that the evidence is not legally sufficient to support it. Counsel for appellant insists that, when the evidence is viewed in the light most favorable to the appellee, he should be held, as a matter of law, to be precluded from recovery under the doctrine of assumed risk. The doctrine of assumed risk is predicated upon the knowledge of the employee of the risks to be encountered and his consent to be subject thereto. Hence the general rule is that the servant assumes the risks ordinarily incident to his employment. Negligence, on the part of the master or of a fellow-servant, is not an incident of the employment; and the servant does not assume the risks therefrom, unless they are obvious and patent. *C. R. I. & P. Ry. Co.* v. *Daniel,* 169 Ark. 23, 273, S. W. 15.

At common law, the rule is well settled that a servant assumes the extraordinary risks incident to his employment, or risks caused by the master's negligence, which are obvious or fully known and appreciated by him. *Boldt* v. *Pennsylvania Railroad Co.,* 245 U. S. 441.

The result of these views is that, in the case of ordinary risks, the servant is conclusively presumed to know them, while, in the case of risks caused by the master's negligence or the negligence of a fellow-servant,

he is not charged with constructive knowledge, unless they are so obvious that an ordinarily prudent person would have observed and appreciated the risks.

In the case before us, according to the evidence for appellee, at the time the accident in question happened he had been working for several years as a carpenter, and had worked for another railroad company in the same capacity for several years prior to his employment by appellant.

On the day he was injured, he and H. C. Voss, another carpenter, were on the top of the caboose, tearing the siding off of the cupola. Their object in tearing the siding off was in order that S. W. Dale, a metal worker, could pry the tin off and replace it with new tin. The old tin or flashing had become rusty, and this caused the roof to leak. In placing the tin on the roof, it was caught and flashed up against the cupola. The strips of wood were then nailed on the cupola. Thus, it was necessary to remove the siding before the tin flashing could be taken off. The strips of flashing are about 7½ inches wide and about 4 feet long.

Dale and appellee were working on the north side of the cupola, and Voss was working on the south side of it. The cupola is about 30 inches high and the caboose is about 9 feet wide. There was room enough to walk on the top of the caboose on each side of the cupola. Appellee started to work at the northeast end of the cupola, and Dale was working behind him, cutting the tin.

It was the duty of appellee, when he pried off the siding, to carry it along in front of him until he could reach a place where he could dump it off of the car. It was also the duty of Dale to take up the tin as fast as he cut or pried it off. In other words, each workman was supposed to clean up his work as he went along.

After appellee had pulled all the siding off of one side, he was notified to go over on the other side so as to be out of the way of Dale. Appellee stood up next to the cupola, about the middle of the car. Voss asked

him about the flashing on the south end of the caboose where he was working. Voss said that the flashing on the south end of the caboose was rusted and warped. Appellee crawled or walked on towards the end of the car, and then started to walk around the side of the cupola next to the edge of the car. In doing so, he stepped upon a piece of tin or flashing which had been pried up. This caused him to slip, and to fall off the car, carrying the piece of flashing or tin with him. He had looked down, as he stepped around the edge of the cupola, and observed the piece of tin or flashing. He did not observe that it had been pried loose from the roof of the car, when he stepped on it. In other words, he did not know that the flashing had been pried up and that it was loose when he stepped on it.

Under these circumstances, we do not think it can be said, as a matter of law, that an ordinarily prudent man or one with the experience of appellee ought to have noticed that the piece of flashing was loose. He was not required to make an inspection to see whether Dale had left any of the flashing where he would walk on it.

It was the duty of each servant to clean up his work as he went along. Appellee was working in front of Dale. When he tore off strips from the caboose, it was his duty to carry the strips along in front of him until he reached a place near the edge of the roof of the car where he could throw them on the ground. It was likewise the duty of Dale to remove the tin as he pried it up. He might anticipate that Voss or appellee would have occasion to walk on the place where he had pried up the tin, in order to perform their work. It is fully inferable from the testimony that it was the duty of Dale to throw the tin or flashing off of the roof of the car when it was found to be so defective that it could not be used again, or any part of it used for repair work.

The testimony shows that sometimes new tin would be carried on the roof by Dale to be used in repair work, and sometimes he could use a part of the old tin for that purpose. In any event, he knew that his fellow-workman

might have occasion to walk around the cupola in doing their work. Hence it is fairly inferable that, when he pried up the strips of tin or flashing, he should have either thrown them off of the roof or have carried them to one side, so that his fellow-workman would not slip on them in walking around the cupola. Thus it will be seen that the condition which caused the injury was created by the negligence of a fellow-servant of appellee.

Appellee was not required to make an inspection to see whether or not a strip of tin had been pried up before he stepped on it. He had a right to assume that Dale had discharged his duty in the premises. Appellee said that he looked down on the roof before he stepped around the corner of the cupola, and did not notice that the strip of tin or flashing had been pried up. The jury might have found his testimony on this point to be true. It might have believed that Dale left the tin laying flat down on the roof in the same position that it was before he pried it off, and that appellee, relying upon the fact that Dale would move the tin out of his way when he pried it up, did not notice that he had not done so when he looked at it.

The result of our views is that the court did not err in refusing to declare as a matter of law that appellee had assumed the risk. The judgment will therefore be affirmed.

NICHOLS v. STATE.

Opinion delivered October 18, 1926.

1. INTOXICATING LIQUORS—SALE IN BUILDING—INJUNCTION.—Under Crawford & Moses' Dig., § 6196, declaring engaging in the sale of intoxicating liquors in a building to be a nuisance, and § 6201, providing that such nuisance may be enjoined, *held* that the circuit court has jurisdiction to restrain the sale of intoxicating liquor in defendant's home and to punish disobedience of such order.
2. INTOXICATING LIQUORS—SUFFICIENCY OF INFORMATION.—Where an information for contempt, under Crawford & Moses' Dig., § 6202,

is filed by the prosecuting attorney, his official oath is a sufficient verification.

3. INTOXICATING LIQUORS—CONTEMPT CITATION.—An order of the circuit court for the issuance of a citation for contempt as authorized by Crawford & Moses' Dig., § 6202, at the instance of the prosecuting attorney, reciting acts in violation of an injunction against engaging in the sale of liquors in defendant's home, *held* a substantial equivalent of filing an information.

4. CRIMINAL LAW—IRREGULARITY IN PROCESS—WAIVER BY APPEARANCE.—Any irregularities in the issuance of process are waived by defendant's appearance in response to a citation for contempt in violating an injunction against the sale of intoxicating liquors issued under Crawford & Moses' Digest, § 6202.

5. CRIMINAL LAW—TIME TO MAKE DEFENSE—WAIVER.—Where defendant, accused of violating an order restraining her from selling liquors at her home, voluntarily entered her appearance and denied the facts alleged in the citation for contempt, without asking for further time to prepare her defense, she will be held to have waived her right to further time.

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

Berry H. Randolph, for appellant.

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

HART, J. Lillie Nichols filed a petition for a writ of certiorari in this court to quash a judgment of contempt against her in the circuit court.

The record shows that, on the 14th day of April, 1926, the circuit court, on the relation of the prosecuting attorney, found that a building occupied by Lillie Nichols was a public nuisance. The record recites that the State was represented by the prosecuting attorney, and that the defendant appeared in person and by attorney, and that the court found, upon the oral evidence introduced, that the place occupied by the defendant was a public nuisance and that said nuisance should be abated. It was adjudged that the defendant be restrained from further using said premises for the purpose of selling liquor or for storing liquor therein.

On the 8th day of July, 1926, the circuit court entered of record an order directing the circuit clerk to issue a

citation to the defendant to appear in court on July 12, 1926, to show cause why she should not be punished for contempt. The record recites that the prosecuting attorney asked for the citation for contempt against the defendant because she had refused to comply with the order of the court enjoining her from further engaging in the sale of liquor or for storing liquor in a certain building occupied by her as a dwelling-house and store on the Mount Ida-Hot Springs Highway, in Garland County, Arkansas.

An order of the circuit court of July 17, 1926, recites that the State of Arkansas appeared by the prosecuting attorney, and the defendant in her own proper person, and the court proceeded to hear the testimony of witnesses on the citation for contempt. The order further recites that the case is continued for further testimony.

On the 13th day of August, 1926, the prosecuting attorney caused to be filed by the circuit clerk, in the case of State of Arkansas v. Lillie Nichols, in the Garland Circuit Court, the following:

"Notice of Citation for Contempt. You are hereby notified that the undersigned, as prosecuting attorney of the 18th Judicial District, will on this day present evidence to the Garland Circuit Court showing a violation of the permanent injunction heretofore granted against the place now occupied by you, and against yourself, showing that you have violated the liquor law of this State, and therefore are in contempt of said court. You are notified to be present and show cause, if any, why you should not be punished in accordance with the laws for such contempt. Wm. G. Bouic, Pros. Atty."

The return of the sheriff shows that the citation was served on the 13th day of August, 1926, by bringing Lillie Nichols before the circuit court of Garland County. On the same day the circuit court, in the case of the State of Arkansas v. Lillie Nichols, entered of record the following order or judgment: "On this day is presented to the court the citation of the prosecuting attorney of the 18th Judicial District, charging the defendant with

being guilty of contempt of court for having violated an injunction issued against the defendant heretofore on the 14th day of April, 1926, wherein the defendant was enjoined from the further engaging in the sales of intoxicating liquors on the premises where she resides, in Garland County, Arkansas; and comes the defendant in proper person and enters her denial to the facts alleged in said citation; thereupon the court proceeds to hear the testimony of witnesses on behalf of the State and defendant, and, after the conclusion thereof and due consideration of same, the court finds as follows: That heretofore, on the 14th day of April, 1926, the premises now occupied by the defendant was declared to be a nuisance, and the defendant was then perpetually enjoined from further engaging in the sales of intoxicating liquors, and that, since said order was issued, the defendant has violated said judgment of the court, and has been engaging in the sales of intoxicating liquors on said premises; and it is thereupon by the court considered, ordered and adjudged that the defendant is in contempt of court; and it is further by the court considered, ordered and adjudged that the punishment of the defendant be fixed at confinement for a period of six months in the county jail of Garland County, to which she is committed."

At the outset, in the discussion of the principles of law involved, it may be stated that the circuit court had jurisdiction to grant the restraining order of April 14, 1926, referred to above, and to adjudge the defendant guilty of contempt for disobedience of the order.

Under § 6196 of Crawford & Moses' Digest, the carrying on or engaging in the illegal sale of intoxicating liquors in any building is declared to be a public nuisance, which may be abated.

Section 6197 confers jurisdiction upon the circuit court, upon the relation of the Attorney General or prosecuting attorney, to abate such nuisance.

Section 6201 provides that if, upon the trial of a case under the act, the existence of the nuisance be estab-

lished, the judgment of the court shall perpetually enjoin the defendant from conducting, continuing or maintaining such nuisance.

Section 6202 provides that, if any person shall violate any permanent injunction under the provisions of the act, he shall be subject to punishment for contempt, and upon conviction shall be imprisoned in the county jail for not less than thirty days nor more than six months, and may also be fined in any sum not exceeding $50.

In *Hickey* v. *State,* 123 Ark. 180, 184 S. W. 459, it was held that a defendant may be restrained from maintaining a public nuisance in violation of the provisions of the act. In *Adams* v. *State,* 153 Ark. 202, 240 S. W. 5, it was held that the circuit court had jurisdiction, under the act, to restrain a person from selling intoxicating liquors in his home, and that disobedience to the order subjected the guilty party to proceedings for contempt and punishment thereunder. It follows that the circuit court had jurisdiction of the subject-matter and the authority to make the particular order or judgment now complained of, upon obtaining jurisdiction of the person of the defendant.

It will be noted that, under the provisions of the statute above cited, proceedings for contempt, in cases of this sort, are criminal in their nature, and the prosecuting attorney is one of the officers who may conduct proceedings for the State under the act. The contempt complained of was not committed in the presence of the court, and, under the ancient rule of reason and natural justice, the offending party should be proceeded against upon the affidavit of some one with knowledge of the facts, or upon information of the prosecuting attorney who instituted the proceedings for the State in the first place. Where information is filed by the prosecuting attorney, his official oath is sufficient, and no further verification is necessary. *Poindexter* v. *State,* 109 Ark. 179, 159 S. W. 197.

Other cases holding that a formal presentation by a sworn prosecuting officer is a sufficient verification to

justify judicial action are the following: *Hurley* v. *Commonwealth*, 188 Mass. 443, 74 N. E. 677, 3 Am. Cas. 757; *Welch* v. *Barber*, 52 Conn. 147; *Ex parte Wright*, 65 Ind. 504; and *State* v. *Ackerson*, 25 N. J. L. 209.

But it is contended that no written information was filed by the prosecuting attorney upon which to base a citation for contempt. On July 8, 1926, an order was spread upon the records of the circuit court, in a case styled State of Arkansas *v.* Lillie Nichols, in which the circuit clerk was directed to issue a citation to the defendant commanding her to appear on July 12, 1926, to show cause why she should not be punished for contempt of court in failing and refusing to comply with the previous orders of the court.

This record recites that the citation is asked by the State of Arkansas upon the relation of the prosecuting attorney, and is directed to Mrs. Lillie Nichols, to show cause why she should not be punished for refusing to comply with the former order of the court restraining her from further engaging in sales of liquor or using her premises for the purpose of selling liquor or storing it.

The building occupied by the defendant is described as a dwelling-house and a store building, located on the Mount Ida-Hot Springs Highway, in Garland County, Arkansas.

Thus we see that the acts done, which are charged to constitute the contempt, are that Lillie Nichols violated a permanent order of the court restraining her from using her house in the illegal sale of intoxicating liquors. The acts constituting the contempt complained of were spread upon the record of the circuit court at the instance of and in the name of the prosecuting attorney, acting in his official capacity. The defendant was brought before the court and given an opportunity to defend herself. The spreading upon the record of the circuit court the acts charged to have constituted a violation of the order of injunction at the instance of and in the name of the prosecuting attorney, amounted substantially to the filing of an information by him. The appearance of the defend-

ant waived any irregularities in the issuance of the process. *Ex parte Ah Men,* 77 Cal. 198, 19 Pac. 380; *State* v. *Walker,* 78 Kan. 680, 97 Pac. 862; *Silvers* v. *Traverse,* (Iowa), 47 N. W. 888; *Jordan* v. *Wapello Co.,* 69 Iowa 177, 28 N. W. 548; and *Sona* v. *Aluminum Castings Co.,* 214 Fed. 936, and cases cited.

Testimony was heard, and the case was continued for further testimony. No definite date was set for the resumption of the hearing, and, if it be considered that the court lost jurisdiction of that particular proceeding upon that account, still jurisdiction was again obtained by what is called a notice of citation for contempt, filed on August 13, 1926, with the circuit clerk. This paper was signed by the prosecuting attorney, and is set out in our statement of facts.

In specific terms it notified the defendant that she had violated the provisions of the permanent injunction by offending against the liquor laws of the State. The defendant was actually taken before the circuit court and given an opportunity to defend herself.

Under these circumstances, if the facts are as represented, they show an irregularity merely in the obtaining of jurisdiction, and do not show such a want of jurisdiction as to warrant the discharge of the defendant. She was entitled to a reasonable time within which to prepare her defense, but the record does not show that she asked for further time. On the contrary, it affirmatively shows that she voluntarily entered her appearance and entered her denial of the facts alleged in the citation. This constituted a waiver of her right to further time within which to make her defense. *Poindexter* v. *State,* 109 Ark. 179, 159 S. W. 197.

As we have already seen, the court had jurisdiction to enjoin her from selling intoxicating liquors in her home in the first instance, and obedience to the injunction order was imperative upon her so long as it remained in force. Upon the complaint of the prosecuting attorney of a violation of the order of injunction by the defendant, she was brought into court, and entered her denial

of the facts alleged against her. The record affirmatively shows these facts, and that the court found her guilty, upon evidence introduced, of a violation of the injunction.

Under this state of the record, the defendant must be deemed to have consented to the trial and to have waived her right to further time in which to have prepared her defense. *People* v. *Court of Sessions,* 147 N. Y., 41 N. E. 700; *Ex parte Canavan,* 17 N. M. 290, 130 Pac. 248; *McCulloch* v. *State,* 174 Ind. 525, 92 N. E. 543; *In re McHugh,* 152 Mich. 505, 116 N. W. 459; *In re Odum,* 133 N. C. 250, 45 S. E. 569; and 13 C. J., p. 65, § 89.

It follows that the judgment of the circuit court was correct. Therefore the writ of certiorari will be quashed, and the judgment of the circuit court will be affirmed.

FIRST NATIONAL BANK OF MINNEAPOLIS v. MALVERN.

Opinion delivered October 18, 1926.

1. SALES—BREACH OF WARRANTY.—In an action on notes given for a tractor, in which there was evidence tending to establish the defense of a breach of warranty, it was not error to refuse to instruct the jury to find for plaintiff for the full amount of the notes, instead of allowing credit for any damages caused by such breach of warranty.
2. EVIDENCE—ADMISSIBILITY OF PAROL EVIDENCE.—In an action on notes given for a tractor, in which plaintiff contended that the letter of acceptance showed either that it conformed to the warranty or that the warranty was waived, representations of the seller's agent that the tractor would do the work after it limbered up was admissible to show the circumstances under which the letter was written and that the warranty was not waived.
3. SALES—REMEDIES OF BUYER.—The buyer of a tractor which did not conform to the warranty could retain it, and, when sued for the balance of the purchase money, recoup the damages resulting from the breach of warranty.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict will not be disturbed on appeal because it allows excessive interest if the evidence supports the verdict, and a finding on conflicting

evidence as to the amount of damages is conclusive if the sum found does not exceed the highest award supported by testimony.

5. APPEAL AND ERROR—EXCESSIVE JUDGMENT—REDUCTION OF AMOUNT. —In an action on notes given for a tractor, where recoupment allowed for breach of warranty was for an excessive amount, damages will be reduced and judgment rendered accordingly.

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

Coleman & Riddick and *Frank E. Chowning,* for appellant.

John L. McClellan, for appellee.

SMITH, J. Appellant brought suit against the city of Malvern upon three notes executed by the city in favor of Kinnard & Sons Manufacturing Company, hereinafter referred to as the company. The notes represented a part of the purchase price of a tractor purchased by the city from the company. At the trial a verdict and judgment were rendered in favor of the city, from which the plaintiff bank has appealed.

The tractor was purchased by the city under what was called a "demonstration order," under which the tractor was to be tested and tried to ascertain if it met the warranty under which it had been sold. This warranty was in writing, and was to the effect that the company warranted that the tractor was made of good material, and, when in good order and properly operated, would do the work for which it was reasonably intended, the work being "to operate successfully a Russell Standard grader and scarifier on the streets of the city of Malvern." The company also agreed to replace, free of charge f. o. b. factory, any parts which might be broken in regular and practical use by reason of defective material or workmanship, within a period of one year from date of purchase.

The scarifier was used to loosen and tear up the surface of the streets, preparatory to regrading and repairing them, and the Russell scarifier had nine prongs or teeth for this purpose.

The tractor was delivered, and a demonstration test was made by one Reeder, agent of the company, in the presence of a committee of the city council and the city's street commissioner. The tractor would not pull the scarifier until six of its nine teeth had been removed, but the agent stated that it would pull the scarifier with all of the teeth in place when the tractor was limbered up.

Thereupon the city paid the sum of $500 cash to the company and executed the three notes sued on, two of them being for $425 each and the third for $400. The street committee of the city council and the street commissioner also executed a certificate to the effect that the tractor had been tried, found satisfactory, and accepted by the city. This certificate was dated March 18, 1920, the day the test was made.

The undisputed testimony shows that the tractor would not at any time pull the scarifier unless most of the teeth were removed, and the removal of the teeth destroyed largely the efficiency of the scarifier. The testimony also showed that, when the scarifier was operated with only three teeth, there was constant trouble with the tractor, and frequent repairs were required.

The city defended upon the ground that the warranty under which the tractor had been sold was breached, and it sought to recoup damages for this breach, which, it alleged, were greater than the balance of the unpaid purchase money.

The first assignment of error is that the court erred in refusing to give instruction numbered 1, requested by the plaintiff, which, if given, would have directed the jury to find for the plaintiff the full value of the notes sued on.

No error was committed in refusing to give this instruction. Under the issues joined, the plaintiff would have been entitled to an instruction telling the jury to find for the plaintiff for the amount of the notes, less the credit, if any, allowed as damages; but the instruction requested did not do this, and, as no correct instruction was asked on the right of the plaintiff to recover the

amount of the notes, less the damages, appellant is in no position to complain of the refusal of the court to give its instruction numbered 1.

It is insisted that error was committed in permitting the city to prove the representations made by the company's agent that the tractor would do the work after it had been limbered up, inasmuch as there was an express written warranty which could not be enlarged by parol testimony.

Under the issues joined we think this testimony was not incompetent. The plaintiff contended that the written letter of acceptance of the tractor, after it had been tested, showed either that the tractor conformed to the warranty or that the warranty was expressly waived. The testimony was competent therefore to show the circumstances under which and the purpose for which the letter of acceptance was written. This testimony does not engraft an additional warranty upon the contract of sale. It merely shows that the warranty was not waived.

The case was tried upon the theory that, while the city might have repudiated the purchase of the tractor upon ascertaining that it did not conform to the warranty under which it was sold, it had the right to retain the tractor and, when sued for the balance of purchase money, to recoup against this demand the damages resulting from the breach of warranty. This is the law, and we think the instructions given so declared the law, although one or more of the instructions were not as clear as they might have been, but no specific objections were made. *Parrett Tractor Co.* v. *Brownfiel,* 149 Ark. 566, 233 S. W. 706.

We are of the opinion that the question of damages was fairly and properly submitted to the jury, and that no error was committed in the admission of testimony, and we would therefore affirm the judgment, were we not also convinced that the verdict of the jury allowed damages in an excessive amount.

It will appear from what we have said that the suit was, in effect, one for damages for breach of warranty,

as the liability of the city is undisputed, and it sought to discharge that liability by recouping damages. The verdict of the jury was for the city, thus indicating that the damages were assessed in a sum equal to the unpaid purchase money.

The testimony shows that three persons used the tractor, these being A. I. Posey, Keith Rutherford, and F. B. Medford, the latter being the street commissioner at the time the tractor was purchased, and the person who had made the largest use of it. The undisputed testimony shows that the tractor would not pull the scarifier as warranted, and that, even when the scarifier was used with less than the full number of teeth, it was still unsatisfactory, and that considerable expense was entailed in attempting to use the tractor in dragging the scarifier at all, but no complaint appears to have been made to the company of this fact, although it was shown that complaint was made on two occasions to Reeder, the salesman who demonstrated the tractor, the last being after Reeder had severed his connection with the company.

But, while the testimony shows an unsatisfactory use of the tractor in connection with the scarifier, and that it did not otherwise comply with the warranty, it is also shown by the testimony that the city made large use of the tractor in connection with the grader, and that it had substantial value.

The deposition of Medford, who had ceased to be street commissioner and had removed from the city, was taken and offered in evidence by the city. In this deposition Medford found many faults with the tractor, especially when used in connection with the scarifier, but he admitted writing a letter to the company on December 8, 1921, which was more than a year and a half after the tractor had been delivered, in which he ordered certain new parts, and, in identifying the tractor so that the order might be properly filled, he stated: "We have one of your Flour City tractors of the smaller type, with which we have been able to do a wonderful lot of street work,"

and he admitted in his deposition that this statement was true when the tractor was used for light work.

Posey admitted that the tractor would handle the scarifier reasonably well with three teeth, but, even then, they had trouble with it when used for that purpose, and that he was able to make as much use of the tractor as he did only because he was himself a good mechanic and was constantly adjusting and repairing it, and that, had he not been a mechanic, it would have been necessary to have carried a mechanic along to use the tractor at all.

The witness Rutherford was asked what the tractor was worth compared with what it would have been worth if it had done the work that the contract of sale guaranteed that it would do, and he answered, not over a third. If, however, we take the answer of this witness as the basis on which the jury computed the damages, the fact remains that excessive damages were allowed. The purchase price of the tractor was $1,750, and the city had paid only $500, so that, if the city were allowed to recoup as damages two-thirds of the purchase price, the company would still have been entitled to a judgment of one-third of the purchase price, which it $83.33 more than the sum which the city had paid.

A verdict will not be disturbed on appeal upon the ground that excessive damages were allowed if there was evidence to support the verdict (*St. L. I. M. & S. R. Co.* v. *Spann,* 57 Ark. 127, 20 S. W. 914), and a finding upon contradictory evidence as to the amount of damages is conclusive on appeal, provided the sum found as damages does not exceed the highest award supported by any of the testimony. *Glasscock* v. *National Box Co.,* 104 Ark. 154, 148 S. W. 248; *St. L. Sw. Ry. Co.* v. *Overton,* 114 Ark. 98, 169 S. W. 364.

We think, when the testimony is viewed in the light most favorable to appellee, there was no testimony supporting a larger award of damages than does the testimony of Rutherford, and therefore damages could not be allowed in a sum exceeding the amount shown by his testimony.

This appears to be the only error in the record, and it may be cured by reducing the damages to a sum not greater than that sustained by Rutherford's testimony, and this error will be cured by such reduction, and the company will therefore be awarded judgment here for $83.33. *Collier Commission Co.* v. *Wright,* 165 Ark. 338, 264 S. W. 942; *Kansas City Southern Ry. Co.* v. *Leinen,* 144 Ark. 454, 223 S. W. 1.

CARDEN v. MONTGOMERY.

Opinion delivered October 18, 1926.

1. ADVERSE POSSESSION—SUFFICIENCY OF EVIDENCE.—Undisputed testimony that plaintiff suing in ejectment had been in continuous possession of land for more than seven years before suit warranted a directed verdict in his favor, if the description of the land in the complaint was sufficient to identify it.
2. EJECTMENT—DESCRIPTION OF LAND IN JUDGMENT.—A description of the land in ejectment which would be good in a deed is sufficient also in a judgment in ejectment.
3. EJECTMENT—SUFFICIENCY OF DESCRIPTION OF LAND.—The test of the sufficiency of description of land in a complaint and judgment in ejectment is whether, by aid of the description given, the land can be located.
4. EJECTMENT—DESCRIPTION OF LAND—EVIDENCE.—Where a judgment in ejectment located the land recovered by the plaintiff by means of a fence and road, proof of their location at the time the judgment was rendered is admissible if they have been subsequently removed or changed.
5. APPEAL AND ERROR—CONSOLIDATION OF CAUSES.—In absence of objection, separate causes of action in a complaint in ejectment and for damages to adjoining land resulting from deprivation of property are treated as consolidated and tried by consent in a single suit.
6. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.—A motion for new trial for newly-discovered evidence was properly denied where the evidence was merely cumulative and no explanation is given as to why the evidence was not produced at the trial.

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

Norwood & Alley, for appellant.

Pipkin & Frederick, for appellee.

SMITH, J. Appellee brought suit in ejectment against appellant to recover possession of a certain tract of land, about an acre in area, which was described in the complaint as follows: "All that part of the southeast quarter southeast quarter of section 30, in township 1 south, range 29 west, lying south of the public road known as the Waldron and Cherry Hill road and west of the first fence east of the west line of the said southeast quarter southeast quarter, running in a southerly direction from said road, and containing about one acre."

It was alleged in the complaint that appellee went into the possession of the land in 1912, and occupied the dwelling-house thereon and the ground inclosed therewith under fence, and that he thereafter remained continuously in possession of the house and inclosed land until about December 15, 1924, a period of more than seven years, when appellant ordered appellee's tenant, who was in possession, to vacate the house, and wrongfully took possession thereof. The complaint also alleged that appellee owned adjoining land, on which there was no house for the use of a tenant, and appellee was unable, through the loss of the use of the house, to rent this adjoining land, and he prayed judgment for the recovery of the house and land and damages for the use thereof, and also for damages for loss of rent on the adjoining land resulting from the loss of the use of the house, which was necessary to renting this adjoining land.

The answer filed by appellant did not question the sufficiency of the description of the land contained in the complaint, but denied that appellee was entitled to recover the land, and alleged title in himself.

There was a verdict in appellee's favor for the recovery of the land, and damages were assessed at $50, and judgment was rendered accordingly.

The trial occurred on the 23d of April, 1925, and a motion for a new trial was filed and overruled on the 22d of May, 1925.

In the motion for a new trial filed by appellant he assigned as error the action of the court in directing the jury to find for the plaintiff for the possession of the land and in giving an instruction which authorized the jury to consider the damages to the adjoining land.

Another error assigned in the motion for a new trial was that, after the rendition of the verdict and judgment, appellant had learned that one S. C. Harrison is a material witness, who could and would be produced if a new trial were granted. Attached to this motion was the affidavit of Harrison, which was to the effect that appellee knew the house did not belong to him, and that appellee did not claim to own it. This affidavit was made July 10, 1925, which was some time after the rendition of the judgment.

The testimony appears to be undisputed that appellee had, for a period of more than seven years before the institution of the suit, been continuously in possession of the land in controversy, and there was therefore no error in the court directing the jury to return a verdict in his favor for the possession of the land, provided there was a description of the land sufficiently definite to make certain the land which had been occupied and sued for.

The chief insistence for the reversal of the judgment is that the description employed in the complaint and in the judgment is too indefinite to identify it.

A description which would be good in a deed would also be sufficient if employed in a judgment, and in the case of *Tolle* v. *Curley,* 159 Ark. 175, 251 S. W. 357, it was said that the rule is that a deed is not void for uncertainty of description if the land can be located from the description in the deed.

In the case of *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456, which was a suit in ejectment to recover a small triangular tract of land, it was insisted that the verdict and the judgment pronounced thereon were void because the land recovered was not properly described.

The sufficiency of the description depended on the definiteness and certainty of a line run by a surveyor

named Hale, the survey being evidenced by certain rocks, stakes and marks which noted and identified the location of the line as surveyed. It was there said that "the description is sufficient where it is reasonably certain, or where it can be made certain, so that the land can be identified. This certainty may be established by reference to monuments upon the ground, or to some recorded map, or by some well-known and understood manner of location."

The question of the sufficiency of the description was again considered in that case on a petition for rehearing, and it was insisted, in support of that motion, that the evidence of the survey might at any time be destroyed and the description thereby rendered uncertain. The court said that the markings made by the surveyor on the ground might be removed, but, if so, the line as surveyed might be reestablished. It was said that if, upon issuing a writ of possession in favor of the prevailing party, it was insisted that more or different land from that described in the judgment was taken, the court could hear testimony as to the true location of the line that was established by the surveyor, and that, if the officer executing the writ had taken possession of more land than was specifically recovered, the court would order its restitution.

The defect complained of in the description employed in the instant case is that it is not shown where the fence, which forms a part of the boundary after leaving the Waldron and Cherry Hill road, ran, it being recited only that this line (the fence) runs in a southerly direction from said road. It would have been a more accurate description to have fixed the terminus of the fence after leaving the road, but the test is not whether the best or most satisfactory description was employed. It is sufficient if, with the aid of the description employed, the land can be located. The length of the fence and its terminus after leaving the road are not shown, but, in connection with the other descriptions which are employed, the fence incloses the land. The land is a part of the

southeast quarter southeast quarter of section 30, township 1 south, range 29 west, and is all that part of that forty-acre tract of land west of the first fence east of the west line of that forty and south of the Waldron and Cherry Hill public road. The lines of the forty-acre tract are certain, or can be made so, and the road and fence are both on the forty acres. If this fence has been or may be removed or destroyed, or the location of the road changed, then proof could be heard, if necessary, as was said in the case of *Russell* v. *Webb, supra,* to establish their location as they were when the judgment was rendered.

The land recovered was the land inclosed by the fence, and, when the location of the fence is made certain, the identity of the land is also made certain. In other words, it is not the character of the monuments which mark the boundaries of a tract of land which determines the sufficiency of the description, but is rather whether or not, by the aid of the description given, the land may be definitely located.

In this connection it may be said that present counsel representing appellant did not appear for him in the trial below, and it does not appear that it was thought, at the trial, that the description was so indefinite as to be void, inasmuch as no motion was made to make it more specific.

It is also insisted that the court was in error in admitting testimony to show that the rental value of land adjoining the acre sued for was affected by the deprivation of appellee of the house which had been used by appellee's tenants in cultivating this adjoining land, it being insisted that such damages could not be recovered in an ejectment suit brought to recover a specific tract of land.

It may be again said that no such question was raised until the motion for a new trial was filed. Had a separate suit for the damages to the adjoining land been brought, it might, by consent, have been consolidated and tried with the ejectment suit, and, in the absence of any objection to the form of action brought, we must treat

the two causes of action, if such they are, as having been consolidated and tried by consent as a single suit.

It is finally insisted that the court erred in refusing to grant a new trial on account of the newly discovered evidence of Harrison. In answer to this insistence, it may be said that the affidavit was not filed until after the rendition of the judgment. The affidavit filed was made by Harrison, and not by appellant, and it recites merely what Harrison's testimony would have been, had he testified. Appellant himself did not make an affidavit explaining his failure to have the affiant present at the trial. Moreover, the testimony was cumulative of other testimony offered at the trial to the effect that appellee had not acquired title by adverse possession of the land in controversy.

No error appearing, the judgment is affirmed.

MYERS v. CENTERS.

Opinion delivered October 18, 1926.

FRAUD—MISREPRESENTATION.—Where plaintiff voluntarily paid an assessment on his sister's bank stock, which she was in law bound to pay in any event, his payment was an indirect loan to her, and the fact that plaintiff was induced to make such loan by defendant's false representations as to the value of the stock did not render defendant liable to plaintiff.

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

Woods & Greenhaw and *E. G. Mitchell*, for appellant.

Shouse & Rowland, for appellee.

HUMPHREYS, J. This suit was brought in a magistrate's court in Boone County for appellee against appellant to recover $90, which he had paid for his sister, Miss Centers, upon a 30 per cent. assessment which had been made by the Bank Commissioner of the State against $300 worth of stock owned by her in the Farmers' Bank at Harrison, Arkansas, which was subsequently closed

for the purpose of liquidation. The gist of the complaint was that he had paid the assessment for his sister, upon the representation of appellant, who was president of the bank, that the 30 per cent. assessment against the stockholders would put said bank on a sound financial basis and make it as good as any bank in Harrison, and that he would guarantee that said stock would be worth, in a short time, 125 per cent. on the dollar.

Appellant orally denied the material allegations in the complaint, and, upon a trial of the cause, appellee recovered a judgment against him for $90, from which judgment he duly prosecuted an appeal to the circuit court.

On the trial *de novo* in the circuit court, appellee again recovered judgment in the sum of $90 against appellant, from which is this appeal.

The testimony introduced by appellee tended to establish that misrepresentations had been made to appellee by appellant as to the solvency of said bank and the value of said stock, which induced appellee to pay the 30 per cent. assessment, amounting to $90, against his sister's stock for her, and that, a short time thereafter, the bank was liquidated at the instance of the Bank Commissioner, which liquidation resulted in appellee's sister losing her stock and in appellee losing the amount of the assessment he paid for her.

The testimony introduced by appellant tended to show that he made no such misrepresentations to appellee.

The cause was sent to the jury on the sole issue of whether such misrepresentations had been made by appellant to appellee, over the objection and exception of appellant, and the finding of the jury upon that issue is conclusive. The weight of the evidence was a question solely for the jury; appellant contends, however, that the court erred in allowing the case to turn upon this issue, in view of the undisputed fact that appellee paid a stock assessment for his sister which the law required her to pay. Appellee testified that his

sister refused to pay the assessment, whereupon he paid it for her, being induced to do so through the misrepresentations of appellant as to the condition of the bank and the value of the stock. He also testified that, when the bank went into liquidation, his sister lost her stock, and he lost the amount of the assessment he had paid for her.

As we understand the testimony, he did not purchase his sister's stock, but, on the contrary, advanced the money to pay an assessment which the law required her to pay. It was an indirect loan to her for the purpose of paying her assessment, and voluntary so far as she was concerned.

Appellee insists that the instant case is ruled by the case of *Myers* v. *Martin,* 168 Ark. 1028, 272 S. W. 856. So far as the issue of misrepresentations is concerned, the two cases are alike, but they are dissimilar upon the issue of liability. Martin was induced to purchase stock and pay the assessment thereon, as a single transaction, through misrepresentations. In the instant case, appellee was induced to pay the assessment for his sister, which she was bound to pay under the law, through misrepresentations. In other words, appellee was not induced to buy anything on account of misrepresentations made to him by appellant. By voluntarily making the payment for her, he took her place. It was her duty to pay the assessment, with or without misrepresentations, and she could not have based a cause of action against appellant for paying the assessment upon his misrepresentations.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

BUNCH v. STATE.

Opinion delivered October 25, 1926.

INTOXICATING LIQUORS—UNLAWFUL SALES—EVIDENCE.—In a prosecution for selling intoxicating liquor, evidence was admissible that defendant permitted dancing parties at his house, where the participants became intoxicated.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; affirmed.

Isgrig & Dillon, for appellant.

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

McCULLOCH, C. J. Appellant was indicted by the grand jury of Pulaski County on April 28, 1926, for the crime of selling intoxicating liquor, and, on the trial of the case in June, he was convicted and sentenced to the penitentiary. The State introduced several witnesses who testified that they purchased whiskey from appellant. Three witnesses—Dwyer, McGuire and Mays—each testified to the purchase of liquor, and another witness testified about appellant furnishing liquor to the witness and her companions on several occasions at his home. The direct evidence of sales said to have been made by appellant was, of course, sufficient to sustain the verdict of conviction. The State also introduced the testimony of witness Adkins, the sheriff of the county, and Evans, one of his deputies, to the effect that they had made investigations at appellant's home on different occasions and observed drunken people about the premises, and that they had found, in and about the premises, bottles and other containers indicating that whiskey had been handled there.

It appears from the testimony that appellant had been permitting dancing parties to assemble at his house, and that on such occasions the participants became intoxicated, and sometimes engaged in fights. The officers testified that, on one occasion, they found three fruit jars with a small amount of liquor in them, and went to the barn and found a bottle with whiskey in it.

Another witness, introduced by the State, testified that he had, on a number of occasions, seen men and women in an intoxicated condition at appellant's house. It is contended that this constituted merely evidence of the commission of other crimes, which was not admissible, and also that some of the occasions were too remote in point of time to have any bearing upon the question of appellant's guilt or innocence of the particular charge in the indictment which the direct testimony of the State's witnesses tended to establish.

We have held that evidence of other similar offenses is admissible, if not too remote in point of time. *Duval and Rice* v. *State, ante,* p. 68, 283 S. W. 23, and cases therein cited. Counsel for appellant contend that some of the evidence admitted was too remote, and they rely upon the case just cited as supporting their contention for a reversal. In that case several years intervened between the commission of the crime under investigation and similar offenses disclosed in the evidence, and we decided that they were too remote to have any bearing upon the case on trial. In the present case, however, the evidence, though it goes back for a period of time more than one year preceding the commission of this particular offense, is connected up by proof of a continuous state of affairs with reference to dispensing intoxicating liquors at appellant's house down to the time of the sale shown by the direct testimony. We are of the opinion that the evidence was competent, as it tended to show that appellant had been engaged in dispensing liquor at his house for a long period of time, and this was proper for the consideration of the jury in settling the conflict in the testimony of the State's witnesses and those who testified as to direct purchases of liquor from appellant, and witnesses who were introduced by appellant whose testimony tended to show that there was no liquor sold at that place. The fact that the State relied upon direct testimony of sales of whiskey does not render the other testimony incompetent, for there was a conflict in the testimony, and the State had a right to complete its case, not only by intro-

ducing the direct testimony, but also by introducing other testimony tending to show that liquor was being sold by appellant at that place.

Judgment affirmed.

DUTTON & BARNES v. McILROY.

Opinion delivered October 25, 1926.

1. CONTRACTS—FAILURE OF CONSIDERATION.—Where a well driller guaranteed lasting water in a well, and it went dry during the dry season, defendant in a suit on a note given for such drilling could plead a failure of consideration.
2. CONTRACTS—FAILURE OF CONSIDERATION—WAIVER.—Where a well driller guaranteed lasting water in a well, and defendant accepted the work and gave his note and used the well until it went dry, he did not waive the defense that the consideration failed, since he could accept the well and rely upon the guaranty.

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

R. C. Waldron, for appellant.

Pope & Bowers, for appellee.

McCULLOCH, C. J. Appellants instituted this action to recover the amount of a promissory note executed by appellees McIlroy and his co-appellees, Jackson and Decker, who were sureties on the note, which was executed to appellants for the contract price of drilling a well on McIlroy's land. Appellees defended on the ground of failure of consideration, in that the well did not come up to contract. The case was tried before a jury, and there was a verdict in favor of appellees. The principal contention of appellants is that the evidence is not sufficient to support the verdict.

McIlroy engaged appellants to drill a well on his land, and agreed to pay the price of one dollar and fifty cents per foot. The contention of appellants is that there was no contract to guarantee the quantity of water to be produced in the well, but that they were merely to

drill, at the price named, to a depth that satisfied McIlroy that "he had plenty of water."

The testimony adduced by appellees was to the effect that appellants were to "guarantee lasting water"—that is to say, a good supply of water during all the seasons of the year. The well was drilled during the latter part of April, 1924, to a depth of about eighty feet, and, according to the testimony, there was a fair supply of water in the well at the time it was finished.

Appellees executed the note in suit on May 3, 1924, due and payable October ....., 1924. The well went dry in July or August, 1924, and McIlroy applied to appellants to drill the well deeper so that an adequate supply of water could be obtained. Appellants employed another driller by the name of Smith to deepen the well, and agreed to pay the cost, twenty-five dollars. McIlroy paid Smith twenty-five dollars for his work, and appellants credited this amount on the note. Smith's effort in drilling the well did not bring any better results, according to the testimony; in fact, Smith did not get the well any deeper. He testified that the hole was crooked and that there were several feet of casing above the surface, and that, in order to go deeper, it was necessary to drill partly through rock and also through mud and a soft, spongy sort of boulders.

The evidence was sufficient to establish the contention of appellees that the well did not furnish "lasting water," or water during all the seasons of the year, but that, on the contrary, the water failed as soon as the dry season came around, and that the effort to drill deeper was unavailing. If this was the true state of affairs, and if appellees are correct in their contention as to the substance of the contract, then the consideration for the note failed, and appellees had a right to plead that failure in defense. *Dutton* v. *Million,* 114 Ark. 330, 165 S. W. 1183. There was a sharp conflict in the testimony on the issue, but the verdict is supported by legally sufficient evidence.

It is earnestly contended by counsel for appellants that McIlroy waived the defect in the well by accepting the work and using the well for a considerable length of time, and that, for that reason, he should not be permitted to assert that the consideration failed. According to the testimony of McIlroy, there was an express warranty as to the capacity and durability of the well; hence the acceptance of the well did not constitute a waiver, for McIlroy had the right to accept the well and rely upon his warranty, and prove either a total or partial failure of consideration in defense against recovery on the note. And, besides that, the testimony disclosed that McIlroy accepted the well and executed the note on assurance from appellants that the flow of water in the well would last. When McIlroy applied to appellants to drill the well deeper, they agreed to do so, and it was not until after the effort to secure more water proved unavailing that McIlroy refused to pay the note. In fact, the note did not become due until it was demonstrated that the well did not afford a lasting supply of water, and then McIlroy refused to pay. Our conclusion is that the evidence supports the verdict, and that the court correctly submitted the issues to the jury.

Judgment affirmed.

BURNS v. FISHER.

Opinion delivered October 25, 1926.

1. DRAINS—NOTICE OF PROCEEDINGS TO ESTABLISH DISTRICT.—Under Crawford & Moses' Dig., §§ 3607-3666, providing for "an alternative system of drainage districts," notice of proceedings to establish a drainage district in Prairie County *held* sufficiently definite as to place of hearing to give the county court jurisdiction, notwithstanding the notice referred to the "county court of the Southern District of Prairie County," there being but one county court in the county, which was held in the Northern District.
2. DRAINS—SUFFICIENCY OF NOTICE OF PROCEEDINGS.—Under Crawford & Moses' Dig., §§ 3607-3666, notice of proceedings to

establish a drainage district which, after describing the lands within the proposed district, recited that such lands embraced the following public roads, tramroads and railroads, *held* to describe sufficiently the rights-of-way of two railroads within the proposed district.

Appeal from Prairie Chancery Court, Southern District; *John E. Martineau,* Chancellor; affirmed.

W. A. Leach, for appellant.

Rose, Hemingway, Cantrell & Loughborough, and *Joseph Morrison,* for appellee.

WOOD, J. This is a proceeding under chapter 51, §§ 3607-3666, of Crawford & Moses' Digest, providing for "an alternative system of drainage districts," to organize a drainage district in Prairie County, Arkansas. By act No. 133 of the Acts of 1885, page 217, Prairie County was divided into two judicial districts, designated as the Northern District and the Southern District. All that portion of the county lying north of certain lines described in the act constituted the Northern District and all that portion lying south of those lines constituted the Southern District. Des Arc was the county seat of Prairie County, and, prior to the passage of the act *supra,* all the courts were held there. By the above act the circuit, chancery and probate courts and the court of common pleas in and for the Northern District were to continue to be held at Des Arc, the county seat, and these courts, for the Southern District, were to be held in the town of DeValls Bluff. The place for the holding of the sessions of the county court for both districts was not affected by the act, but the place for the holding of the sessions of that court remained, as it had always been, at Des Arc, the county seat.

On the 17th of July, 1925, a petition was filed under the drainage act *supra,* in the office of the county clerk of Prairie County at Des Arc, for the creation of the district. All the lands described in the petition were situated within the territory constituting the Southern District of Prairie County, as divided by the act of 1885 *supra.* The county court entered an order directing that

notice be given of the petition for the creation of the drainage district, in which notice all the lands to be embraced in the proposed district are specifically described, all situated within the Southern District of Prairie County, as designated under the act of 1885. The rights-of-way of the Chicago, Rock Island & Pacific Railroad Company and of the St. Louis Southwestern Railway Company extended over and across the lands embraced in the district, and likewise a number of public roads and highways. The lands embraced in the district are specifically described in the notice. The notice recites that there had been a preliminary survey of the proposed district of the lands in the Southern District of Prairie County, as set forth in the petition, naming the petitioners. Then it recites that the district is to embrace all of the lands which will be benefited by a ditch to run as follows: (Here is set forth the general description of the lands through which the ditch runs, showing its direction, and this is followed by a recital, "and embracing the following lands, public roads, tramroads and railroads)." Then a specific description of the lands to be embraced in the proposed district is set forth. The notice concludes with a recital, to wit: "All persons owning property within said proposed drainage district are hereby notified that the county court of the Southern District of Prairie County, Arkansas, has set the 18th day of September, 1925, for the hearing of the matter of establishing said proposed district, and that they may appear before said court on said date, and show cause in favor of or against the establishment of said proposed drainage district."

On the 18th day of September, 1925, the county court of Prairie County, pursuant to the above notice, entered its final order creating Drainage District No. 2 of Prairie County. After setting forth the general description of the lands contained in the petition and the notice, this order recites that the court found that all the preliminary requirements of the law essential to the creation of the district had been complied with, and then

recites as follows: "It is therefore ordered by the court that a drainage district for the purpose of constructing a system of drains and ditches, together with necessary lateral ditches as described in said report of M. L. Buerkle, as such engineer, and embracing the following lands in said county." The order then described specifically the lands as set forth in the petition, report of the engineer, and the notice. After this specific description, the order recites as follows: " * * * together with all railroads and public roads and highways in said territory, be and the same is hereby created and established as a drainage district; that the same shall be hereafter known and designated as Drainage District No. 2 of Prairie County, Arkansas, and that said district be and it is hereby authorized and empowered to do and perform all such things in the draining of the territory embraced therein as may be necessary and as the law permits. It is further ordered by the court that John F. Fisher, William Schafer and Henry Wilkes, three owners of real property within said district, be and they are hereby appointed as the board of commissioners of said district."

The plaintiffs instituted this action in the Prairie Chancery Court, Southern District, against the defendants, the commissioners of Drainage District No. 2 of Prairie County, Arkansas, attacking the validity of the district, and alleging that all of the proceedings creating the Drainage District No. 2 of Prairie County were illegal and void, and praying that the defendants be enjoined from performing any of their duties as commissioners of such district. The answer denied that the district was invalid.

The above are substantially the facts upon which the cause was heard, and the trial court entered its decree dismissing the complaint for want of equity, from which is this appeal.

1. Learned counsel for the appellants contends that the order of the county court creating the district was void on the ground that the notice was not sufficient to

give the county court jurisdiction. He argues, first, that the notice was insufficient because it fails to set forth with certainty the time when, and the place where, the hearing should be had. It will be observed that the notice contains the following recital: "All persons owning property within said proposed drainage district are hereby notified that the county court of the Southern District of Prairie County, Arkansas, has set the 18th day of September, 1925, for the hearing of the matter of establishing said proposed district, and that they may appear before said court on said date and show cause in favor of or against the establishment of said drainage district." The agreed statement of facts, among other things, shows the following: "That there is but one county court in Prairie County. It convenes at Des Arc, in said county, and has convened there and nowhere else for fifty years previous to the publication of the said notice; that the residents of Prairie County, and particularly that portion which is situated in the drainage district, know that no county court is held in DeValls Bluff in said county, or anywhere but in Des Arc."

The notice designated September 18, 1925, as the day set for the hearing of the petition for the creation of the district. It was therefore definite as to the time fixed for the hearing. The notice was sufficiently definite as to the place set for the hearing, because, under the law, the sessions of the county court of Prairie County could only be held at Des Arc, the county seat. As we have seen, the act of 1885 *supra* did not make any change in regard to the holding of sessions of the county court. Therefore, even in the absence of a stipulation in the record showing that the county court had convened at Des Arc, the county seat, for fifty years, and that the residents of that portion of Prairie County situated in the drainage district knew that fact, they nevertheless would have to take notice of the law, and were bound to know that the county court would hear the petition for the establishment of the proposed drainage district at Des Arc—that the hearing could not be had elsewhere. The notice there-

fore was sufficient to give all property owners in the proposed district notice that the place for the hearing was at Des Arc.

2. Counsel for appellant next contends that the notice is insufficient because it does not contain a description of the rights-of-way of the two railroads located within the proposed district. The notice set forth in the complaint contained a general description of the lands, showing the route of the proposed drainage ditch, and contained a specific description of the lands embraced in the district, and recited that these lands "embraced the public roads, tramroads, and railroads contained in the district." This was a sufficient description of the public highways, tramroads and railroads that were located on the lands within the district. In the description in the notice embracing the "lands, public roads, tramroads and railroads," we find also the following: "commencing where the said right-of-way of the St. Louis Southwestern Railway intersects the south line of the northwest quarter of the southwest quarter of section 8, township 1 south, range 5 west, running thence through section 17 and the north half of section 20, thence along the west line of the east half of sections 20 and 29; commencing where the Chicago, Rock Island & Pacific Railway intersects the north line of section 16, thence through said sections 16 and 21, respectively, to the south line of the north half of section 28, all in township 1 south, range 5 west." This is the description of the rights-of-way as contained in the notice, which is made Exhibit B to plaintiff's complaint and which, the parties agreed, was a copy of the notice, as required by law, of the hearing of the petition for the creation of the district. It is difficult to conceive how any more accurate description of the rights-of-way of the railroads embraced in the district could have been given.

It is sufficient to meet the requirements of the statute, so far as the public roads embraced in the district are concerned, that the notice recites that the district embraced "the following lands, *public roads,* tramroads

and railroads," following the same with a specific description according to Government surveys of the lands embraced in the district. This description of the lands would necessarily include the public highways running through the lands embraced in the district. The order of the county court establishing the district describes the lands embraced therein according to the description of the Government survey, and, after so describing them, recites that these, "together with all railroads and public roads and highways in said territory be, and same is, hereby created and established as a drainage district." The recitals of the notice were sufficient to meet the requirements of the statute, and the recitals of the court's order show that it was made pursuant to the notice given.

In this view of the record it is wholly immaterial whether the attack by the appellants on the validity of the district be direct or collateral. The notice meets the requirements of the law in either case. The order of the county court creating the district is valid, and the chancery court ruled correctly in so holding and in dismissing the appellants' complaint for want of equity. The decree is therefore affirmed.

COWAN v. STATE.

Opinion delivered October 25, 1926.

1. LARCENY—THEFT OF AUTOMOBILE LICENSE PLATES.—Automobile license plates costing $16, issued under the Harrelson law (Laws Sp. Sess. 1923, p. 11) §§ 36, 40, 41, 49, *held* grand larceny, the cost of the plates, rather than the cost of replacing them, being the measure of their value.
2. LARCENY—EVIDENCE.—In a prosecution for grand larceny in stealing automobile license plates, evidence of their replacement cost *held* inadmissible.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

O. D. Thompson, for appellant.

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

WOOD, J. Bert Cowan was indicted in the Crawford Circuit Court for the crime of grand larceny. The indictment, in apt language, charged him with the crime of grand larceny in the stealing of two automobile license plates, of the total value of $16, the personal property of Paul W. Sheridan.

One of the witnesses introduced by the State testified that he worked for the Paul Sheridan Motor Company, in Van Buren, Crawford County, Arkansas, and that he saw Cowan, on or about the 31st day of May, 1926, in Crawford County, Arkansas, trying to get a license tag off of a Ford car which belonged to Paul Sheridan. Witness went for the sheriff.

The sheriff testified that he saw the defendant take a license tag off of a Ford touring car and stick it under the bib of his overalls, and witness arrested him. The law fixes as the regular price of license for a Ford touring car the sum of $16 from the 1st of January to the 21st of June.

The defendant offered to prove by the sheriff and other witnesses that the replacement cost of the license tags is $1. The court refused to allow the witness to so testify, to which ruling the defendant duly excepted.

The defendant was convicted and sentenced by judgment of the court to imprisonment in the State Penitentiary for a period of one year, from which judgment he duly prosecutes this appeal.

The law requires every person who owns and desires to operate an automobile in this State to pay a fee for the registration and licensing of such automobile, a minimum of $15 per annum. See § 36, subdiv. (f), act No. 5, approved October 10, 1923, commonly known as the Harrelson law. It is made the duty of the Commissioner of State Lands, Highways and Improvements, when the automobile has been duly registered and the license fee duly paid, to issue to the applicant a registration card and a set of registration plates bearing the number that has been assigned to such motor vehicle. Sections 40 and 41, act No. 5, *supra*. The possession of these registration

cards and license plates is evidence of the fact that the owner and operator of the car has complied with the law requiring registration and payment of the license fee. It is unlawful for the owner of any automobile to display any registration plate or plates that are not furnished by the State Highway Commissioner, and the owner of any motor vehicle subject to the payment of a license fee, who fails to pay the same when due, in addition to the license fee, is subject to a penalty for the operation of the car without paying a license. See §§ 41 and 49 of the act *supra.*

Under the above and other provisions of act No. 5, *supra,* and the testimony in this case, it is obvious that the stealing of automobile license plates evidencing the right to own and operate an automobile from Jan. 1 to June 21 constituted grand larceny. The only method by which the appellant could lawfully obtain a license plate to operate his car in this State was by complying with the provisions of act No. 5, *supra,* and, in order to obtain such license plates, it would be necessary for him to pay not less than the sum of $15. Registration cards and license plates, under the law, are not the subject of barter and sale. They evidence the right of the owner of the particular car that has been registered, and for which license plates have been issued, to operate that car. These original license plates cannot be obtained by any one lawfully without the payment of the license fee. Intrinsically, to be sure, the metal license plates were worth but little or nothing, merely the cost of the metal and the manufacture thereof into plates, but, as an evidence of the right to own and operate a car, they were worth the sum of $16. The effect of the provisions of the Harrelson law is to fix the value of license plates at not less than $15. The value of the license plates stolen by appellant was $16, as shown by the undisputed evidence in this case. It is not a question of what the owner of the automobile would have to pay in order to replace them; the question is, what was the value of the plates to the owner when he obtained them?—that is, what he had to

pay for same in order to obtain them as an evidence of the right to operate his car in this State. The value of these particular plates should be measured by what these particular plates cost, and not by what replacement plates would cost, for appellant was not charged and was not convicted of stealing license plates which had been replaced. He was charged and convicted of stealing automobile license plates of the value of $16. To obtain these license plates the owner had to pay $16, and if appellant, as before stated, had lawfully obtained the same, he would have had to pay the sum of $16 therefor. When motor vehicle license plates are stolen, the thief intends not only to deprive the owner of the car of the evidence of his right to operate such car on the highways of this State, but he also intends to deprive the State of the license fee which he would have to pay as an evidence of his right to operate a motor vehicle. He therefore intends to steal the property of another and to convert the same permanently to his own use, of more than the value of $10. In such case the *lucri causa* is complete, and, under the law, the offender is guilty of grand larceny. See §§ 2484 and 2489, C. & M. Digest.

The trial court ruled correctly in holding that the offered testimony was inadmissible, and its judgment is therefore affirmed.

McCULLOCH, C. J., (dissenting). The offense of larceny consists of stealing, taking and carrying away the property of another, and the degree of the offense is fixed according to the value of the property stolen. Crawford & Moses' Digest, §§ 2483, 2486. The extent of the value is unimportant further than it fixes the degree of the offense, but the property stolen must be of some value. It is not contended in the present case that the two automobile license tags which were stolen were entirely without value, however trifling it may have been, but the contention is that it is limited to the intrinsic value of the tags themselves, and not the value of the privilege, of which the tags constitute mere evidence. I think that

counsel for appellant is right in this contention, and that the offense made out is only that of petty larceny.

At common law, things without intrinsic value, such as choses in action, were not subjects of larceny (Rapalje's Larceny and Kindred Offenses, § 41; 2 Wharton's Criminal Law, § 1111), but our statutes place such property on the same basis as the money value which choses in action represent, and provide in express terms that such character of property may be the subject of larceny. Crawford & Moses' Digest, § 2485. The stealing of a license tag does not, however, come within the provision of that section, for it is not a "banknote, bond, bill, note, receipt, or any instrument of writing whatever."

It is contended that the case comes within the terms of the following section of the statute:

"Section 2484. Larceny shall embrace every theft which unlawfully deprives another of his money or other personal property, or those means and muniments by which the right and title to property, real or personal, may be ascertained." Crawford & Moses' Digest.

I do not think this is true, for the theft of the tags does not deprive the owner of personal property of the value of the license evidenced by the tags, nor of "those means and muniments by which the right and title to property, real or personal, may be ascertained." The license to use the car on the public highway is a personal privilege, and its use is limited to the particular car named in the license. This privilege does not constitute property within the meaning of the statute, therefore the license tags do not constitute "means and muniments by which the right and title to property, real or personal, may be ascertained." But, even if so regarded, the value amounts to the sum of one dollar, which would be required to replace the tags, as that is the extent of the owner's loss. In other words, the value could not in any event exceed the replacement cost.

My conclusion is that the judgment should be reversed, with directions to the court to sentence appellant for petty larceny.

HENRY v. UNION SAWMILL COMPANY.

Opinion delivered October 25, 1926.

1. SIGNATURES—USE OF MARK.—The mark of one who cannot write is not a *prima facie* signature, unless the person who writes the name writes his own name as a witness to it, but it may be proved as genuine by other testimony, though there be no attesting witness to it.
2. MORTGAGES—EVIDENCE AS TO CONSIDERATION.—As between the parties, parol evidence is admissible to show the true character and consideration of the mortgage.
3. MORTGAGES—PAROL EVIDENCE AS TO CONSIDERATION.—As between the parties to a mortgage, although it is for a definite sum and secures the payment of notes for definite amounts, it may be shown that it is simply one for future advances.
4. MORTGAGES—FORECLOSURE UNDER POWER OF SALE—NOTICE.—In a foreclosure sale under a power in a deed of trust, where notice of the sale was given by publication, it was unnecessary to serve a statement of the account on the grantors.
5. BILLS AND NOTES—BONA FIDE HOLDER.—One taking negotiable paper before maturity as security for a debt without notice of any defect therein or defense thereto is a *bona fide* holder in due course of business for value within the statute.
6. MORTGAGES—FRAUD IN FORECLOSURE.—In a suit to cancel a trustee's deed for fraud, testimony of the grantors that the secured indebtedness had been discharged *held* insufficient to show fraud where plaintiffs attorned to the purchaser at foreclosure sale for three or four years before suing.

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

STATEMENT BY THE COURT.

Tom Henry and Kansas Henry, his wife, brought suit in equity against J. S. Alphin to cancel a deed of trust from them to J. R. Plair to eighty acres of land in Union County, Arkansas, and a trustee's deed to the same land from the trustee to J. S. Alphin at a foreclosure sale under the power contained in the deed of trust. Subsequently, the Union Sawmill Company instituted an action of ejectment against Tom Henry, in the circuit court, to recover said land. On motion of Tom Henry, the action

in the circuit court was transferred to equity and consolidated with the suit in the chancery court.

The record shows that, on October 3, 1914, Tom Henry and Kansas Henry, his wife, executed a deed of trust to J. R. Plair to eighty acres of land in Union County, Arkansas, to secure an indebtedness of $500, evidenced by the note of Tom Henry and Kansas Henry, payable to the order of J. R. Plair on October 1, 1916, with interest at ten per cent. per annum from date until paid.

J. D. Nelson was named as trustee in the deed of trust, and it contained the usual power of sale. It provided that, if Tom Henry and Kansas Henry should pay the note when due and all other indebtedness due Plair, the deed of trust should be void. In the event of their failure to pay the note or any other indebtedness due Plair, it was provided that the trustee should sell said land for the purpose of paying the indebtedness in the manner and under the terms prescribed in the deed of trust.

Kansas Henry joined with her husband in the execution of the deed of trust. The deed of trust and the $500 note were transferred by J. R. Plair to J. S. Alphin on October 4, 1914. The deed of trust and the note purport to have been signed by Tom Henry and Kansas Henry by their marks. The deed of trust was acknowledged by them before J. C. Wallace on the date of its execution, and has been duly filed of record.

On the 10th day of January, 1907, Tom Henry and Kansas Henry, his wife, conveyed the timber on said land to the Union Sawmill Company, and it was given ten years within which to cut and remove the timber.

On the 1st day of March, 1921, J. S. Alphin conveyed the land to the Union Sawmill Company, reserving a one-eighth interest in the oil, gas and other minerals in said land for a period of fifteen years.

Tom Henry and Kansas Henry made default in the payment of the indebtedness secured by the deed of trust as above set forth, and, on account of the illness of J. D. Nelson, J. K. Mahony was appointed substitute trustee

for the purpose of foreclosing the deed of trust under the power of sale. The sale was made in the manner and under the terms prescribed in the deed of trust, and J. S. Alphin became the purchaser thereof for the sum of $635. The deed of trust recites that this was the highest bid for the land, and was more than two-thirds of its appraised value. It also recites that notice of the time, terms and place of sale had been made in a newspaper of *bona fide* circulation in Union County, Arkansas.

The above facts are undisputed. Other facts bearing on the issues involved in the appeal will be stated under appropriate headings in the opinion.

The chancellor found the issues in favor of J. S. Alphin and the Union Sawmill Company, and a decree was entered of record in accordance with his findings.

To reverse that decree, Tom Henry and Kansas Henry have duly prosecuted an appeal to this court.

John Bruce Cox, Stewart & Oliver, E. W. McGough, and *J. R. Wilson,* for appellant.

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

HART, J., (after stating the facts). The evidence introduced by appellee tends to show that J. D. Nelson, the trustee named in the trust deed, became sick, and J. S. Alphin, to whom the deed of trust had been transferred by J. R. Plair, named J. K. Mahony as a substitute trustee. Mahony gave notice of the time, terms and place of sale, and caused said notice to be duly published in a weekly newspaper of *bona fide* circulation in Union County, Arkansas. Mahony also caused the land to be appraised, and sold it for more than two-thirds of its appraised value, as required by statute. J. S. Alphin bid the sum of $635, and, this being the highest bid, the land was struck off to him, and Mahony, as trustee, executed a deed to him in accordance with the provisions of the deed of trust. Alphin then took possession of the land, and subsequently sold it to the Union Sawmill Company.

Counsel for appellants now contend that the deed of trust executed by Tom Henry and Kansas Henry, his wife, to J. R. Plair, is invalid because it appears that their signatures were made by mark, and that there is no attesting witness thereto. J. C. Wallace was a witness for appellees. According to his testimony, he was the officer before whom the deed of trust was acknowledged by Tom Henry and Kansas Henry on October 3, 1914. He read over the deed of trust to them and explained its provisions. He also read the note for $500 to them, and they executed their signatures to it by mark. He did not write his name as an attesting witness thereto, because he forgot to do so. Wallace certified that the grantors, Tom Henry and Kansas Henry, his wife, had signed the deed of trust in his presence, and regarded this as sufficient. The certificate of acknowledgment to the deed of trust shows that Tom Henry and Kansas Henry, his wife, signed the deed of trust and acknowledged its execution before J. C. Wallace.

In the absence of an affirmative showing that the note and deed of trust were not executed as they purport to have been, they were just as effective as if signed by appellants' written signatures. A signature to a paper by mark, made by a person for the purpose of identifying himself as a party thereto, was good at common law without any attestation thereof by a subscribing witness. The mark of one who cannot write is not a *prima facie* signature, unless the person who writes the name writes his own name as a witness to it; but it may be proved as genuine by other testimony, though there be no attesting witness to it. *Ex parte Miller*, 49 Ark. 18, 3 S. W. 883; *Ward* v. *Stark*, 91 Ark. 268, 121 S. W. 382; and *Nail* v. *Kirby*, 162 Ark. 140, 257 S. W. 735.

It is next contended by counsel for appellants that the deed of trust is void for usury. On this point the testimony of appellants is to the effect that Tom Henry only owed Plair $143, and that a note was executed for $500, for the purpose of enabling Henry to secure future advances, if needed, to make a crop, and that no such

future advances were made. If this testimony be true, it does not help the case of appellants any. As between the parties, parol evidence is admissible to show the true character of a mortgage and for what consideration it was given. Although it is for a definite sum and secures the payment of notes for definite amounts, it may be shown that it is simply one for future advances. Jones on Mortgages, 7th ed., § 384; *Curtis & Lane* v. *Flinn,* 46 Ark. 70; and *Blackburn* v. *Thompson,* 127 Ark. 438, 193 S. W. 74. Hence, under appellants' own testimony, there is no taint of usury.

It is next insisted that no statement of the account was served upon appellants by Alphin at the time of foreclosure. Notice of sale was given by publication, and it was not necessary to serve a statement of the account. *Wilkinson* v. *Hudspeth,* 134 Ark. 132, 203 S. W. 263; and *Straughan* v. *Bennett,* 153 Ark. 254, 266 S. W. 76.

It is also contended that appellants had paid off the deed of trust and that the foreclosure and sale under it were fraudulent. In the first place, the record shows that the mortgage was given by Tom Henry and Kansas Henry, his wife, to Plair for $500, evidenced by note for that amount. The note and mortgage were transferred by Plair to J. S. Alphin before they became due. J. S. Alphin was a *bona fide* purchaser for value. Plair was indebted at the time to Alphin, and transferred the note and deed of trust in question to Alphin in part payment of the indebtedness. Alphin had no notice of any defect or defense to the note. One who takes negotiable paper before maturity, as security for a debt, without notice of any defect therein or defense thereto, is a *bona fide* holder in due course of business for value, within the statute. *Newell Contracting Co.* v. *McConnell,* 156 Ark. 558, 246 S. W. 854; and *State National Bank of Texarkana* v. *Birmingham,* 166 Ark. 446.

Moreover, we do not think that appellants have sustained their contention that there was fraud in the foreclosure of the deed of trust. They testified that they only owed $143 to Plair and that they had paid him

this amount. They claim that the reason for the execution of a note for $500 was for future advances. They testified that the future advances were not made. Their testimony upon this branch of the case is not consistent with the attendant circumstances. They afterwards paid rent to Alphin, and thereby recognized him as the purchaser of the land at the foreclosure sale. Plair had been dead for three or four years before the instigation of the present suit, and appellants knew this. It is hardly probable that they would have waited so long to assert their claim if it had been a *bona fide* one. The natural thing for them to have done, when Alphin claimed to be owner of the land as purchaser at the foreclosure sale, would have been to have gone to Plair and reminded him that the indebtedness secured by the deed of trust had been paid in full. Instead of doing this, they waited until after Plair's death before asserting their claim to the land, and, in the meantime, they had been recognizing Alphin as the owner of the land.

It is also contended that the description of the land in the deed of trust is void on account of being indefinite. The description as contained in the deed of trust is as follows: "SW¼ SE¼ and SE¼ SW¼ section 21, township 17 south, range 12 west, 80 acres, the same now being in possession of parties of the first part, and all cotton and corn which the said party of the first part shall make or cause to be made this year, in the county of Union and State of Arkansas, aforesaid."

This description under the Government surveys shows that the land is situated in Union County, Arkansas. Besides, it recites that the land is in possession of the grantors in the deed of trust and that they have mortgaged all the cotton and corn which they shall make in Union County, Arkansas, in that year. This shows inferentially that the land is situated in Union County, Arkansas. *Tyson* v. *Mayweather,* 170 Ark. 660, 281 S. W. 1.

The result of our views is that the decree of the chancery court is correct, and it will therefore be affirmed.

WHITTAKER v. KIRCHMAN.

Opinion delivered October 25, 1926.

1. NEGLIGENCE—FAILURE TO PUT ALCOHOL IN RADIATOR OF CAR.—The failure of a garage keeper to put alcohol in the radiator of an automobile after having agreed to do so constitutes negligence, rendering him liable for the resulting damages.
2. TRIAL—SUBMISSION OF APPELLANT'S THEORY.—It was not error to refuse to submit appellant's theory of the case in a certain instruction where such theory was embodied in other instructions.
3. EVIDENCE—ITEMIZED ACCOUNT OF REPAIRS TO CAR.—In an action against a garage keeper for damages to an automobile, it was not prejudicial error to admit in evidence an itemized account of the repairs where a mechanic testified that he examined the car minutely and saw what parts were needed, and was satisfied, after looking at the account, that the repairs mentioned therein were necessary to restore the car to its former condition.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

STATEMENT BY THE COURT.

William Kirchman sued L. A. Whittaker to recover $136.30, which he claims to be due him on account of the negligence of the defendant in failing to put alcohol in the radiator of his new Dodge touring car, as he had agreed to do.

According to the testimony adduced in favor of the plaintiff, he lives in Van Buren, Crawford County, Arkansas, and, on the 11th day of December, 1924, he drove his new Dodge touring car, with wood wheels, to the garage of L. A. Whittaker, and asked him to put alcohol in its radiator for the purpose of preventing it from freezing. The defendant had been accustomed to perform this service for the plaintiff. The plaintiff relied upon the performance of the service by the defendant, and drove his car home, thinking it had been supplied with alcohol to prevent freezing, as requested. On the 19th day of December, 1924, the plaintiff attempted to drive his car, and found that it had frozen, which caused a break in the radiator. The repairs necessary to

restore the car to its former condition cost the plaintiff $136.30, which was the usual price for such repairs.

On cross-examination, the plaintiff admitted owning a Dodge car of an older model, which had disc wheels, but denied that this was the car which defendant agreed to put alcohol in, in order to prevent the radiator from freezing.

According to the testimony of G. H. Wright, a witness for the plaintiff, he was foreman of the mechanical department of the Martin-Ross Motor Company, and was called in December, 1924, to get the Dodge touring car in Van Buren, Arkansas, for the purpose of examining it and making the necessary repairs on it. Upon examination of the car, he found that the whole top and back radiator was frozen up and that the block was frozen solid. The witness was familiar with the effect of alcohol as an anti-freeze mixture, and had worked on Dodge cars for four years. He could tell by examination that no alcohol had been put in the radiator of the car. The water was frozen solid, and he could tell that no alcohol had been placed in it. He was overseer of the repair work on the car. After examining the car, he wrote an order stating the work to be done, and turned it over to the mechanics who did the work. The witness supervised the repair work on the car, and placed his initial "W" on the work to be done.

According to the evidence for the defendant, he did not agree to put alcohol in the new Dodge touring car of the plaintiff to keep the radiator from freezing, but did agree to put alcohol in an old Dodge car with disc wheels, belonging to the plaintiff, to keep the radiator in it from freezing, and performed this service for the plaintiff, according to agreement.

The jury returned a verdict for the plaintiff in the sum of $136.30, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Roy Gean, for appellant.

George Stockard, for appellee.

HART, J., (after stating the facts). It is earnestly insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict. We cannot agree with counsel in this contention. In *Bussy* v. *Hatch*, 95 N. J. L. 56, 111 Atl. 546, it was held that a garage keeper, to whom an automobile was delivered for storage under a simple contract of bailment, is liable for damages resulting from the freezing of water in the car while it was in storage, especially where an express agreement to maintain sufficient heat in the garage to prevent freezing was made. The failure of the garage keeper, in the respect mentioned, was considered negligence on his part.

The same rule holds here. According to the evidence for the plaintiff, he carried his car to the garage of the defendant and asked him to put alcohol in its radiator to prevent it from freezing. The defendant had been accustomed to perform this service for the plaintiff. About one week after this time the radiator of the plaintiff's car froze, and it cost him $136.30 to repair the same.

This made out a *prima facie* case of liability against the defendant. It is true that the defendant denied that he had agreed to fill the radiator of the car of the plaintiff with alcohol, but this disputed question of fact was submitted to the jury under proper instructions, and, under our settled rules of practice, this court must uphold the verdict of the jury.

It is next insisted by counsel for the defendant that the court erred in refusing to submit his theory of the case in instruction No. 2, given to the jury over his objection, at the request of the plaintiff.

According to the evidence for the defendant, the alcohol would boil away if the car was used a great deal, and it would be necessary to replace the alcohol at intervals, in order to prevent freezing. In the instruction complained of the court told the jury that, even if it should find that the defendant did put alcohol in the radiator of the car, if the quantity was insufficient to prevent freezing, the plaintiff would be entitled to recover, unless precluded by other instructions given to the jury. No spe-

cific objection was made to this instruction. It is a matter of common knowledge that the court cannot at all times submit the theories of both parties on the facts of the case in one instruction.

In the case at bar, when the instructions are read and considered as a whole, it will be seen that this theory of the defendant was submitted to the jury in other instructions given by the court. The verdict of the jury was in favor of the plaintiff for the full amount sued for, and it is evident that the jury rejected the theory of the defendant that he had attempted in any wise to comply with the request of the plaintiff to fill the radiator of the new Dodge touring car in order to prevent freezing.

It was next insisted that the court erred in the admission of evidence before the jury. G. H. Wright was a witness for the plaintiff. According to his testimony, he was foreman of the garage company which repaired the Dodge car in question after its radiator had frozen. According to his testimony, he examined the car minutely and saw what parts were needed to repair it. He gave the order to the mechanics in the shop for the necessary repairs, and placed his initial "W" on the written order. He oversaw the labor of repairing it. The itemized account of the repairs and the cost of making them was introduced in evidence. Under the circumstances of the case, there was no error in this. The witness was satisfied from his own personal knowledge, after looking at the account, that the repairs mentioned were necessary to restore the car to its former condition. It is not claimed that the price charged was exorbitant.

It will be noted that the witness placed his initial "W" on the repairs necessary to be made. It was not necessary that the writing should have been made by the witness himself, and, while the better practice would be to have permitted the witness merely to use the writing for the purpose of refreshing his memory, as held in *Bowden* v. *Spellman*, 59 Ark. 251, 27 S. W. 602, still no prejudice, in this case, could have resulted to the defendant from the introduction of the account itself. As we have

already seen, the witness had written down the repairs which were necessary to be made, and had placed his initial "W" on the writing. No claim whatever is made that the price of the repairs is unreasonable.

It follows that the judgment must be affirmed.

UNITED ORDER OF GOOD SAMARITANS *v.* ANDERSON.

Opinion delivered October 25, 1926.

1. INSURANCE—BENEFIT INSURANCE—SUSPENSION OF DELINQUENT.—Where the constitution and by-laws of a fraternal benefit society provide that a member neglecting to pay dues for two months shall be notified thereof by the secretary, and suspended in open meeting, and record thereof made on the minutes, mere delinquency in payment of dues did not automatically suspend the delinquent member.
2. INSURANCE—FORFEITURE.—Where mere nonpayments of assessment dues does not of itself forfeit insurance, a clear intention to declare a forfeiture must be shown, and, if notice is required, it must be given.
3. INSURANCE—REINSTATEMENT—EVIDENCE OF GOOD HEALTH.—Evidence *held* to sustain a finding that a member of a fraternal benefit association was in good health when she applied for reinstatement.
4. APPEAL AND ERROR—QUESTION NOT RAISED.—A question not raised in appellant's motion for new trial will not be considered on appeal.

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

Booker & Booker, for appellant.

Isgrig & Dillon, for appellee.

SMITH, J. Appellees are the beneficiaries named in an insurance policy issued by appellant, a fraternal benefit society, to one Fannie Johnson, and, upon the death of the insured, appellees brought this suit to recover the amount of the insurance. There was a trial before a jury, and from a verdict and judgment in appellees' favor is this appeal.

Liability was denied upon the ground that, by failing to pay the monthly assessment levied against all members, the policy of Fannie Johnson had lapsed. It is also insisted that, while an attempt was made to reinstate the insured, the attempt was unsuccessful, for the reason, chiefly, that the insured was in bad health at the time of the reinstatement; a by-law of the order providing that reinstatement would be granted only to members who were in good health at the time of their application to be reinstated.

The instructions submitted two questions to the jury, the first whether the policy had lapsed, the second whether, if the policy had lapsed, the insured was in good health at the time she was reinstated.

We think the testimony warranted the submission of both these questions, and that the jury might have found for appellees on either or both of these issues.

A section of the constitution and by-laws of the society reads as follows: "Any brother (sister) neglecting to pay all arrears to the funds of the colony for two months shall be notified by the secretary, and shall be suspended by the colonial chancellor in open meeting, a record of such suspension shall be entered on the minutes of the colony, and, during such suspension, he (she) shall forfeit all claims to the privileges of the colony, and should he (she) desire to return, he (she) shall pay up all indebtedness and contributions that may have been assessed on each member in the interval between his (her) suspension and time of return, and shall stand over one month before he (she) shall be entitled to any benefits."

It thus appears that mere delinquency in payment of dues does not automatically suspend a delinquent member, but, before the member is suspended, there must be notice of delinquency and suspension in open meeting, of which action a record is to be made on the minutes of the colony, which we understand to be the local lodge of which the delinquent was a member.

The testimony fully supports the contention of appellees that no notice was given or action taken, and the

verdict of the jury might therefore be affirmed on this account.

Appellant insists that this case should be reversed and dismissed upon the authority of the case of *Sovereign Camp Woodmen of the World* v. *Anderson,* 133 Ark. 411, 202 S. W. 698. In that case it was held that, where a certificate of insurance in a fraternal order made the constitution and by-laws of the order a part thereof, and the constitution and by-laws provided that, when the certificate lapsed for failure to pay dues, it could be reinstated only upon a statement by the insured that he was in good health, the insured is held to have knowledge of these regulations, and could not be reinstated by the mere payment of dues when the insured was in bad health at the time of his application for reinstatement.

It appears, however, from the opinion in that case that the constitution and by-laws provided that the insured should stand suspended upon the nonpayment of dues, and no notice of delinquency or order of suspension was necessary to make the suspension effective. Here, however, as we have said, the constitution and by-laws require notice and an order of suspension.

"Where the mere nonpayment of an assessment does not of itself forfeit the insurance, a clear intention on the part of the insurer to declare a forfeiture must be shown, or it will be held not to have taken place (*Columbus Mut. Life Assn.* v. *Hanrahan,* 98 Ill. App. 22). If the insurer is, by contract or law, required to give insured notice of a forfeiture or suspension for nonpayment of assessments or dues, notice must be given." 3 Cooley's Briefs on the Law of Insurance, page 2382.

It is an undisputed fact that Fannie Johnson became delinquent in the payment of her dues, and it is also undisputed that one of the beneficiaries paid the delinquent assessments. These delinquent dues were forwarded to the head office of the society by the local officer of the colony to whom the payment was made. It was the duty of the proper officer at the home office to make a record showing the reinstatement of any delin-

quent member who had complied with the by-laws of the society. This notation on the records of the society was not made in the case of Fannie Johnson, for the reason that she had not furnished a certificate showing that she was in good health, and it is insisted that the undisputed testimony shows that the insured was not in good health.

In one of the instructions given, the jury were told to find for the defendant (appellant) if they found the insured was not in good health at the time of her application to be reinstated, so that the jury must have found the fact to be that she was in good health, and we are unable to say this finding is contrary to the undisputed evidence or is unsupported by substantial evidence. One of the appellees, a daughter of the insured, testified that her mother was employed as a nurse for a child, and was so engaged until a few days before her death, when she suffered a "stroke," from which she died.

The verdict returned was for the sum of $300, and it is insisted that, because of the age of the insured, she was entitled, under the by-laws of the society, to recover only one-half that amount. In answer to this insistence it suffices to say that no such question was raised in the motion for a new trial.

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

DUNFORD v. DARDANELLE & RUSSELLVILLE RAILROAD COMPANY.

Opinion delivered October 25, 1926.

1. VENDOR AND PURCHASER—POSSESSION AS NOTICE OF RIGHTS.—Possession by a railroad of a portion of its right-of-way was notice of its claim thereto, and, though the contract upon which such claim was based was not recorded, the purchaser was put upon inquiry as to the extent of such right-of-way.
2. RAILROADS—AGREEMENT FOR RIGHT-OF-WAY—DEFINITENESS.—Though an agreement conveying a right-of-way did not describe the lots and blocks through which the railway was to run, this

did not render the instrument void for indefiniteness, where it expressed the purpose to enable the railroad to reach a certain river, and the construction of the road made its location definite and certain.

3. RAILROADS—NONUSER OF PART OF RIGHT-OF-WAY.—Though a railroad did not use all of its 100 feet of right-of-way, this did not constitute an abandonment, so as to permit another to erect a building on the unused portion.

4. EVIDENCE—MAP OF RIGHT-OF-WAY.—In determining the location of a railroad's right-of-way, it was not error to permit the recorder to offer in evidence a certain map showing the location of the right-of-way and its width on the ground, though it was not marked filed, if it was in fact filed with the recorder.

5. TRIAL—DIRECTION OF VERDICT.—Where both parties request a directed verdict, and neither asks any other instruction nor offers to introduce further testimony, they thereby submit the case to the decision of the court, and the court's finding will have the same effect as the verdict of a jury.

Appeal from Pope Circuit Court; *J. T. Bullock,* Judge; affirmed.

Robert Bailey, for appellant.

Hays, Priddy & Rorex, for appellee.

SMITH, J. The Dardanelle & Russellville Railroad Company, hereinafter referred to as the railroad, brought suit against appellant, in which, after alleging its corporate capacity, it further alleged that it owned a right-of-way for railroad purposes across lots 11 and 12, block 56, in J. L. Shinn's addition to the city of Russellville, and that appellant claimed to own a portion of this right-of-way, and was erecting a building thereon, and there was a prayer for judgment for possession of the disputed right-of-way. There was an alternative prayer that, if it be found that the right-of-way of the railroad did not include a strip of land across said lots extending a distance of fifty feet from the center of the track, a right-of-way of that width be condemned.

The answer in the case denied that the railroad company owned a right-of-way of greater width than that occupied by its roadbed, and alleged that defendant was the owner of the remainder of said lots, under a deed from the heir-at-law of J. L. Shinn, deceased.

The complaint in the case alleged that the right-of-way had been acquired by a contract between the railroad and J. L. Shinn, so that Shinn is the common source of title.

The railroad offered in evidence a certain contract between itself and Shinn, which contemplated the operation of a ferry-boat across the Arkansas River near Dardanelle, and, among other considerations for this agreement, was the right granted to the railroad to run the line of the railroad across "all such lands as the party of the first part (Shinn) now owns in the said county of Pope, provided that no more than fifty feet of the right-of-way so granted is to be used until such time as it may become absolutely necessary for the keeping up and maintaining of said road, the necessity of which is to be determined by the board of directors (of the railroad), except in places where the one hundred feet are necessary."

Objection was made to the introduction of this instrument, upon the ground that it had never been placed of record, and that defendant had bought without knowledge of its existence, and also upon the ground that it was void for indefiniteness, in that it contained no description of the right-of-way granted except that it was over any lands owned by Shinn in Pope County, the county in which the lots were situated.

The railroad then offered in evidence a map showing a survey of the right-of-way over the lands in question, and, according to this survey, the right-of-way was 100 feet wide.

The map showing this survey was produced by the clerk and recorder, and objection was made to its introduction upon the ground that it had never been recorded, and had not even been marked filed for record. The clerk testified, however, that the plat of the survey had been in the custody of himself and his predecessors in office for many years, and had been kept in the place where similar maps and plats were kept.

As we have said, both parties claim under Shinn, and the testimony did not show that the railroad had ever made use of the portions of the lots conveyed to defendant by the heir at law of Shinn, which is included in the railroad right-of-way. In other words, the railroad had not used all its right-of-way through the lots.

The railroad was in the actual possession of a portion of the right-of-way and used it constantly in connection with the operation of its trains. This possession was notice that the railroad had or claimed a right-of-way, and the fact that the agreement or contract upon which this claim was based was not of record did not relieve defendant of the duty, before purchasing, of inquiring what was the extent of the right-of-way which the company owned. This point was settled in the case of *Campbell* v. *Southwestern Telegraph & Telephone Co.*, 108 Ark. 569, 158 S. W. 1085, where the same question was raised. It was there said: "The right-of-way deed was not placed of record until after J. M. Jones conveyed the quarter section of land to the plaintiff; but the railroad had been constructed, and the company's occupancy of the roadbed was sufficient to put all persons on inquiry as to the extent of its right-of-way. Plaintiff, when she purchased the land, was chargeable with notice of the extent of the railroad company's rights."

We think the agreement, which was, in effect, a conveyance of the right-of-way, was not void for indefiniteness. It did not describe the lots and blocks through which the railroad was to run, but a reading of the agreement shows its purpose to have been to enable the railroad to reach the river, so that freight might be transferred to and from the river and be ferried across the river, and, pursuant to this agreement, the raiload was constructed across the lots in question. The construction of the railroad made its location definite and certain, and necessarily the railroad's claim of the right-of-way granted would have been confined to the road constructed, and was not to exceed 100 feet. Shinn owned the lots across which he had granted the right-of-way, and the

railroad had been in operation for many years when defendant purchased from the heir-at-law of Shinn. No question is made that the directors of the company had not determined that a right-of-way of a hundred feet was required for railroad purposes.

It is true the railroad had not actually occupied the portions of the lots upon which defendant was erecting a building, but a portion of the ground upon which he proposed to do so was embraced within the right-of-way granted to the railroad by Shinn, and this right-of-way was not lost or abandoned because the whole of it was not used. This point is controlled by the opinion in the case of *Ritter* v. *Thompson,* 102 Ark. 442, 144 S. W. 910, where it was said: "The deed (to the right-of-way), in our opinion, conveyed to the railroad company the entire strip of land mentioned therein; and, so long as any part of the same was being used for railroad purposes, appellant (the grantor) could not enter and take possession of any part that might not be used for the easement or right-of-way."

We think no error was committed in permitting the clerk and recorder to produce and offer in evidence the map showing the location of the right-of-way and its width. This map had evidently been filed, and with the proper officer, although the fact of filing had not been indorsed upon the map, as should have been done. In the case of *Hogue* v. *Hogue,* 137 Ark. 485, 208 S. W. 579, we said: "While the certificate of the clerk entered upon the demurrer at the time of its receipt is the best evidence of such filing, it is not conclusive evidence to that effect, and it was competent to show by parol evidence what was intended. The reason is that, while it is proper for the clerk, when he receives papers, to indorse thereon the date of the filing, such indorsement is not the filing, but is simply an evidence of such filing. A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file. *Bettison* v. *Budd,* 21 Ark. 578; *Eureka Stone Co.* v. *Knight,* 82 Ark. 164 [100 S. W. 878]. See also *Peterson* v. *Taylor,* 15 Ga. 483; *Powers* v. *State,* 87 Ind. 144; and *Grubbs* v. *Corres,* 57 Mo. 83."

Moreover, the testimony set out above, without this map, shows the location of the railroad and the width of the right-of-way.

It is finally insisted that the court erred in refusing to hear and consider testimony which defendant would have offered. The judgment, however, recites that the company, "having introduced its evidence, the jury, under the direction of the court, retired, and the defendant, Tom Dunford, by his attorney, moves the court for a peremptory instruction for the defendant." The plaintiff also moved for a peremptory instruction for plaintiff. "Whereupon the court instructed the jury to return a verdict for the plaintiff railroad company, which was accordingly done."

We understand this recital to mean that, upon the conclusion of the introduction of the testimony for the plaintiff railway company, each party asked a peremptory instruction in its own favor, and neither asked any other instruction, nor did the defendant ask permission to introduce further testimony.

It is the settled practice in this State, where both parties ask a directed verdict, and neither asks any other instruction nor offers to introduce further testimony, to treat the case as having been withdrawn from the jury and submitted to the court for decision, and, upon a review of the decision, we give the same effect to it as would be given to the verdict of a jury, and affirm the decision if the testimony tending to support it is legally sufficient for that purpose. *St. L. Sw. Ry. Co.* v. *Mulkey,* 100 Ark. 71, 139 S. W. 643; *Webber* v. *Rodgers,* 128 Ark. 28, 193 S. W. 87.

The testimony is legally sufficient to support a finding that the railroad company is the owner of the land in controversy as right-of-way, upon which the defendant had entered, and the judgment of the court awarding the possession to the railroad company is therefore affirmed.

DONAGHEY v. LINCOLN.

Opinion delivered October 25, 1926.

1. EMINENT DOMAIN—DEDUCTION OF BENEFITS.—In estimating the benefits from a public improvement, the advantages and disadvantages to a particular tract should be balanced against each other, so as to ascertain the net result of the construction of the improvement, in its effect upon the assessed property.
2. EMINENT DOMAIN—DEDUCTION OF BENEFITS.—Where no question is raised as to the correctness of the assessment of benefits from the construction of a bridge under Sp. Acts 1919, p. 78, since it was the duty of the assessors to offset the damages against the benefits, it is too late, in a property owner's suit to review the action of the assessors, to raise the question that the actual benefits exceeded the benefits assessed.
3. EMINENT DOMAIN—INJURIES TO PROPERTY NOT TAKEN.—In determining the damages to a building by reason of changes in the width and grade of bridge approaches, the difference in value of the building before the improvement was made and after the improvement should be considered, and in estimating this difference the cost of restoration should be considered.
4. EMINENT DOMAIN—INJURIES FROM CONSTRUCTION OF BRIDGE.—A bridge district, created by Sp. Acts 1919, p. 78, is not responsible in damages for temporary interference with the use of abutting property by reason of construction of the bridge and changes in the grade and width of approaches, whether such changes were authorized by the municipality or not, since the bridge was a public highway and the changes were acquiesced in by the city.
5. EMINENT DOMAIN—NATURE OF INJURY.—In determining the damages to abutting store owners from a change of width and grade of a bridge approach, under Sp. Acts 1919, p. 78, allowance of damages to a strip of ground leased from the county and used to broaden the approach to the bridge, was properly refused where there was no showing of substantial injury or lessening of rental value of the stores.
6. EMINENT DOMAIN—INJURY TO PROPERTY NOT TAKEN.—In awarding damages to the owners of abutting stores for changes in the grade of bridge approaches, under Sp. Acts 1919, p. 78, allowance of damages for reduced ceiling height of the stores was properly refused, in the absence of any evidence as to the extent of the injury.
7. APPEAL AND ERROR—PRESUMPTION AS TO MASTER'S FINDING.—Where the testimony as to the cost of restoring a building neces-

sitated by a change of grade of bridge approaches was conflicting, and the master did not specifically refuse to allow architect's fees in awarding damages, it will be presumed on appeal that such item was considered in estimating the damages as part of the cost of restoration.

8. EMINENT DOMAIN—APPROPRIATION OF PROPERTY—INTEREST.—Filing of the assessment list for construction of a bridge, under Sp. Acts 1919, p. 78, was not a condemnation of the property, and consequently interest should not be allowed except from the time of injury to or taking of the property, which was the maturity date of the notice that work of cutting the wall of the building would be commenced on a certain date.

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

Moore, Smith, Moore & Trieber, for appellant.

Ashley Cockrill, John W. Newman and *H. M. Armistead,* for appellee.

McCULLOCH, C. J. The Broadway-Main Street Bridge District of Pulaski County is a local improvement district created by a statute of the General Assembly of 1919 (Special Acts 1919, p. 74), authorizing the construction of two bridges across the Arkansas River connecting the two cities of Little Rock and North Little Rock, one of the bridges being known as the Broadway bridge and the other as the Main Street bridge, the latter forming a connection with Main Street, on the Little Rock side, and with Maple Street, on the North Little Rock side of the river. The width of the Main Street approach to the north side covers the full width of Maple Street up to the curb line, and the sidewalk continues from the intersecting street corner across the bridge. The approach begins at the intersection of Maple Street with Washington Avenue, which runs east and west at right angles with Maple Street.

The appellees, Charles K. Lincoln and his sister, Mrs. Shipton, are the owners of improved real estate situated in North Little Rock, on the east side of the Main Street bridge approach, and this litigation involves the question of the extent of the damage done to this property in the construction of the improvement.

The statute creating the district provides for the appointment of assessors to "assess the benefits which will accrue to all lands, railroads, tramroads, and telegraph, telephone and pipe lines within the district, from the making of the proposed improvement, and all damages which will result therefrom." It provides that the assessors shall make a return showing "the description of the property benefited, the name of the supposed owner, and the amount of the benefits and damages, together with an estimate of what the work will probably cost such property owner, and the amount which the property owner will be called upon to pay the first year." After the return of the assessors is made and filed with the county clerk, notice is given so that owners of property may have an opportunity to appear and make complaint, and there is a provision that any dissatisfied property owner "may bring suit in the chancery court of Pulaski County within thirty days to review the action of the board of assessors." All these provisions with reference to the assessments are contained in § 3 of the statute, *supra*.

The assessment list was filed with the county clerk in May, 1920, and within thirty days thereafter appellees filed separate actions in the chancery court of Pulaski County attacking the correctness of the appraisals of damages to their property made by the assessors. The causes were consolidated and tried together, but separate findings were made with reference to each piece of property owned by each of the appellees. There was a reference to a master, and there were exceptions filed to his reports by both sides, but, on hearing the exceptions, the court overruled them all and rendered a final decree on December 24, 1924, in accordance with the findings of the master. An appeal has been prosecuted by the district, and appellees have also prosecuted cross-appeals from portions of the decree adverse to their claims on certain issues.

The new Main Street bridge had been completed before the trial of the cases below, and the testimony

shows that it is a modern type structure, erected in replacement of the old bridge, which was constructed by the county many years ago, and which had gotten considerably out of repair.

The property in controversy owned by appellee Lincoln consists of a hotel building fronting west towards the bridge, but not actually abutting thereon, and a store building adjoining the hotel building on the north, and running through to Washington Avenue, and also three other store buildings fronting on Washington Avenue, designated as Nos. 124, 126 and 128. The hotel building is 60 feet square and has three stories and a basement. The first story consists of four store rooms, each 15 feet wide, fronting west towards the bridge, and the second and third stories are used for hotel purposes. The building was constructed of brick. The drugstore building is 20 feet wide and is a one-story structure. The other three stores owned by Lincoln are one-story brick buildings, 20 feet wide, fronting on Washington Avenue. The property of Mrs. Shipton consists of four store buildings adjoining the Lincoln property on the east and fronting on Washington Avenue. The second floor of the hotel building and the ground floor of the drugstore building were on a level with the approach to the old bridge, and between the two buildings and the bridge there is a triangular-shaped strip of ground owned by the county. The base of the triangle at the southwest corner of the hotel building is 19.8 feet wide, and it runs to a point at the northwest corner of the drugstore building at the intersection of Maple Street and Washington Avenue. This piece of ground was a deep hollow, far below the surface of the street and bridge approach, and, after the construction of the buildings owned by Lincoln, the latter leased the ground from Pulaski County, under a written contract, for a period of fifty years. The purpose of the county in granting this lease was, as declared in the contract, to widen the approach to the bridge, and the contract imposed upon the lessee an obligation to fill in the ground and construct a sidewalk over and above it from

his building or property line to the embankment and sidewalk of the bridge. The sidewalk was to be on a level and connecting with the sidewalk of the bridge so that the whole of the paved area could be used by the public as a part of the bridge approach. The contract was complied with by Lincoln, and the structure, as it then existed, provided a sidewalk covering the space between the bridge approach and the front of the buildings and continuing clear across the bridge. This made a sidewalk about 24 feet wide, and afforded plenty of space for the occupants of the store buildings in the hotel to display their goods for sale.

In constructing the new bridge on the site of the old one which was torn down, Maple Street was widened to the extent that a few feet were taken from the northwest corner of the drugstore building and a narrow strip was taken off the edge of the leased property next to the bridge. A triangular cut was made from the front of the drugstore building about six feet wide, thus narrowing the front. The court below made an allowance of $4,000 for this injury to the drugstore building, and neither side questions the correctness of that award. The effect of widening the approach on Maple Street was to narrow the sidewalk between the walls of the building and the curb line from 24 feet, as it existed prior thereto, to 18 feet when the new structure was completed. There was also a change in the grade of the approach on Maple Street, so as to raise it from the intersection of Maple Street and Washington Avenue to the bridge proper. The raise in front of the four stores in the hotel building was 15 inches in front of the first room on the south, and 22 inches in front of the store on the north. This change in the grade made it necessary to raise the floors of each of the four store rooms in the hotel building so as to place them on a level with the sidewalk, and in doing so the height from floor to ceiling in each of the stores was reduced from about 13 feet to a little more than 11½ feet. It also became necessary, on account of the raise in grade on Maple Street, to raise the grade on Washington Ave-

nue so as to conform to that grade. The raise at the intersection of those two streets was 3.9 feet higher than the old grade, and extended east 170 feet on Washington Avenue at a downward grade of 3.44 per cent. It was necessary to raise the floors of the brick store buildings so as to put them on a level with the raised sidewalk, and the ceiling height was reduced from 13 feet 9½ inches to about 10 feet 3½ inches. The change in the grade made it necessary to raise the floors in the other three buildings owned by Lincoln on Washington Avenue and two of the buildings owned by Mrs. Shipton, and this, of course, resulted in a slight reduction of the ceiling height.

The report of the master sets forth the findings of fact with respect to the various changes in the property and the extent of restoration and injury, and he made specific findings as to damages as follows:

Statement as to Separate Property.

Land leased from Pulaski County.

This claim disallowed.

Hotel Property.

Raising floors and sidewalks	$3,015.18
Damage to basement	300.00
Water mains and plumbing	334.19
Loss of rents during reconstruction	160.00
Total	$3,809.37
If loss of rents during construction of bridge is allowed, there should be added to the above amount	$2,335.00

Land at corner of Washington and Maple.

Value of land taken	$4,000.00

Lincoln Property, Nos. 130, 128, 126 and 124, West Washington Avenue.

Cost of restoration	$ 9,967.36
Damage by increase of grade	1,350.00
Loss in rentals during reconstruction	570.00
Total	$11,887.36

If rents during construction are allowed, to this total amount there should be added $1,935.00

Shipton property, Nos. 122, 120 West Washington Avenue.

Cost of restoration	$4,983.68
Damage by increase of grade	600.00
Loss of rentals during reconstruction	240.00
Total	$5,823.68

If rentals are allowed during construction of the bridge, there should be added to the above amount $720.00

The court, in approving the master's findings, allowed the claim for loss of rents during the construction of the bridge, and included those items in the decree in favor of each of the appellees. The master refused to make any allowance for damage to the first two buildings on the east owned by Mrs. Shipton, and also refused to allow any damage to the leasehold estate held by Lincoln under his contract with the county.

The present litigation challenges only the correctness of the appraisal of damages, and nothing else. Neither party has made an attack on the correctness of the assessment of benefits made by the assessors of the district, but appellees commenced these actions in apt time to enlarge the award of damages. So the assessment of benefits for the purpose of taxation must stand as returned by the assessors. The attack on the award of damages is a direct one, and calls for an independent investigation by the court as to the amounts to be allowed.

In the trial below, appellants offered evidence tending to show that the actual benefits accruing to the property of appellees were largely in excess of the amount of benefits assessed by the assessors of the district, and contended that this excess ought to have been considered in reduction of the damages. In other words, that the benefits proved in addition to those allowed by the assessors for taxation purposes should be balanced off against the

award of damages, thus reducing the amount of damages correspondingly. The court refused to consider that testimony, and the question of its admissibility is presented here as the principal one involved in this appeal.

Counsel rely upon two recent decisions of this court (*Gregg* v. *Sanders,* 149 Ark. 15, 231 S. W. 190, 17 A. L. R. 59; *Sain* v. *Cypress Creek Drainage District,* 161 Ark. 529, 257 S. W. 49, 258 S. W. 637) as supporting their contention. In *Gregg* v. *Sanders, supra,* the only feature of the case reviewed on the appeal involved the question whether or not, in ascertaining the damages on account of the taking of a portion of a tract of land by an improvement district, the benefits accruing to the remainder of the tract should be considered in reduction of the amount of damages to be awarded. We decided that, in view of the fact that the benefits accruing to the remainder of the tract were taxed the same as the benefits to other lands in the district, they could not be offset against the damages accruing on account of the loss of the tract actually taken. And, in announcing our conclusion on that question, we stated the converse of this rule as follows: "Damages to the property not taken may, however, be balanced off against the benefits which accrue, for damages must necessarily be taken into account in the estimate of benefits." This was but another way of saying that, in estimating benefits, the advantages and disadvantages should be balanced off against each other so as to ascertain the net result of the construction of the improvement in its effect upon the taxed property. We have no hesitancy now in reaffirming that statement of the law, for we are of the opinion that it is correct. Undoubtedly the orderly method of appraising benefits and damages is to consider the advantages and disadvantages to accrue, the extent of the injuries and the value of the enhancement, so that they may be balanced off against each other and a net result obtained; the lesser amount, either benefit or damage, being merged into the greater. The statute now under consideration provides, however, for separate appraisals of the benefits and damages, so that the one may be taxed

and the other paid. That was the method adopted by the assessors, and neither party has challenged the correctness of that method. Now, under that method of assessment, the taxable benefits must be estimated in uniformity with the assessments on other property in the district similarly situated, the advantages and disadvantages to accrue from the improvement as a whole being considered and balanced off against each other in determining the amount of net benefits; and then the estimate of damages must be based upon the direct physical effect of the construction of the improvement upon the particular piece of property being appraised, the direct advantages and disadvantages being likewise considered in reaching the result. In other words, in following out that method of separate assessments, the benefits are assessed on the same basis as all other property in the district, whereas the damages are estimated in accordance with the direct effect of the improvement upon the value of the property, considering all the advantages and disadvantages which may result. As we have already seen, there has been no question raised as to the correctness of the assessment of taxable benefits, therefore it was too late in the trial of this cause to question the assessment or to offset additional benefits against the damages.

As we understand the findings of the master, he did not fail to consider the difference in value between the building before the improvement was made and in its restored condition after the improvement was completed, and, in estimating the difference in value, the cost of restoration was considered. Our conclusion is that there was no error committed in this respect.

The only complaint made by appellants against the specific allowances made by the master in his award relates to the items allowed for loss of rents during construction of the bridge. We are of the opinion that this complaint is well founded. The master should not have included those rents in his award of damages. The authorities on this subject all hold that a municipality or

other public agency, in the construction or improvement of streets, is not responsible in damages for temporary interference with the use of abutting property. The doctrine is stated in 13 R. C. L., p. 223, as follows:

"A municipality has a right to close or obstruct a street temporarily for the purpose of repairing it, or making a public improvement therein, and may delegate its authority in this respect to one who has contracted with it to make the improvement or repairs. The use of the street for such purposes becomes paramount to its use for travel under such circumstances, and the obstruction or closing of it does not constitute a nuisance, so long as reasonable care and diligence are exercised in prosecuting the work; nor is it a damaging of abutting property for which the Constitution requires compensation to be made, although access thereto is temporarily interfered with." See also 1 Lewis on Eminent Domain, § 230; *Peck* v. *Chicago Ry. Co.*, 270 Ill. 34, 110 N. E. 414; *Slatterly* v. *St. Louis*, 120 Mo. 183, 25 S. W. 521.

This court gave approval to the doctrine in *Kansas City Southern Ry. Co.* v. *Anderson*, 88 Ark. 129, 113 S. W. 1030, where we said:

"Many consequential losses to the landowner, such as injury to business, inconvenience, expense and losses from interruption of business, are not recoverable as damages in condemnation suits."

The change of grade which caused the interruption in the use of the buildings of appellees for business purposes does not appear from the evidence to have been directly authorized by the municipality, but the bridge constitutes a public highway, and, if the city of North Little Rock did not reestablish the grade, the change was acquiesced in by the city authorities, and, as it was done for the public benefit, individuals cannot complain of the temporary interference with business.

This brings us to the consideration of the cross-appeal, upon which appellees insist upon the insufficiency of the award of damages with respect to certain items. In the first place, it is contended that something should have

been allowed for damages to the strip of leased ground covered by the pavement between the walls of the building and the bridge. The purposes in leasing the ground to appellees was, as before stated, to broaden the approach to the bridge so as to furnish a continuous passageway along the sidewalk in front of the stores and across the old bridge. The ground was unfit for any other use, and the construction of the pavement between the walls of the building and the bridge precluded any other substantial use of the ground. It is true that there was proof of construction of a small garage on the strip underneath the pavement, but it is not shown that any very substantial injury resulted from the raising of the grade or the broadening of the approach. It is also urged that the narrowing of the sidewalk in front of the stores materially affected the usable value of the store fronts because the space for displaying goods was diminished. It is not shown that there was any actual lessening of the rental value of the stores on account of the narrowing of the display space in front. We think the master was correct in refusing to allow anything on this item.

It is further contended that the master erred in failing to allow any damage for the reduced ceiling height of the stores in the hotel building. According to the testimony in the case, the reduction of the height left sufficient space for all purposes. There was expert testimony to the effect that ceiling height is an element for consideration in determining the rental value of a storeroom, but there is nothing in the testimony to base a finding upon as to the extent of such an injury in dollars and cents.

It is next contended that the master erred in refusing to allow architect's fees for restoration of the building by raising the floors. The readiest answer to this contention is that there was a conflict in the testimony as to the cost of restoration, and, as there was no specific finding by the master refusing to allow architect's fees, we must

assume that that item was considered in estimating the damages by way of cost of restoration.

Complaint is made as to the amount of cost of restoration in the way of raising the floors and reconstructing the sidewalks so as to conform to the new grade. Counsel argue very earnestly that the master and the chancellor failed to give proper force to the testimony of the experts who furnished information concerning the extent of the damage and cost of restoration, but, after comparing the finding of the master with the proof in the case, we are unable to say that the finding was incorrect.

Finally, it is insisted that the court erred in refusing to allow interest from May 11, 1920, the day of the filing of the assessment list. This contention is based upon the theory that the filing of the assessment list was tantamount to the commencement of condemnation proceedings, and that, in a condemnation proceeding, interest should be allowed on the award of damages from the date of the commencement of the proceeding. The authorities on this question are collated in the case-note to *Campau* v. *Detroit,* 225 Mich. 519, 32 A. L. R. (Mich.) 91, and it will be seen that the theory upon which most of the authorities proceed in determining this question is that the continued possession of the owner after commencement of condemnation proceedings is precarious and liable to be disturbed at any time, so that the situation amounts to a constructive taking of possession, and that interest should be allowed. These authorities, as well as the decisions of this court cited by counsel for appellees (*School District* v. *Smith,* 113 Ark. 526, 168 S. W. 1089), relate to cases in which there was a taking of the property, and none of them, so far as we have observed, apply to consequential damages arising where property is not actually taken. All of the injury in the present case was consequential, except the taking of a small part of the corner of the brick store building, and as to that, as well as to the consequential damages, the answer to the contention of appellees is that there has been no judgment of condemnation nor any formal proceedings for that

purpose. The filing of the assessment list did not in any sense constitute a condemnation of the property. On the contrary, § 18 of the statute creating the district provides for a method of condemnation similar to proceedings of that kind by railroad, telegraph and telephone companies. There having been no condemnation, there is no basis for allowing interest except from the time the injury was done to the property. The record shows that, on October 28, 1923, the commissioners of the district served notice on appellees that the work involving the cutting of the wall of the building would be commenced fifteen days thereafter, and we are of the opinion that the maturity of this notice constituted a taking of the property and established a period from which interest on the award of damages should be computed at the legal rate.

The decree in each case will be modified by excluding the award of rents during the construction of the bridge. In accordance with this modification, judgment will be entered here in favor of appellee Lincoln for the sum of $19,696.73, and in favor of Mrs. Shipton for $5,823.68, with interest on each amount at six per cent. per annum from November 12, 1923. It is so ordered.

HART, J., (dissenting). Under our Constitution, that property shall not be damaged for public use without compensation, it is no longer necessary that there should be a physical invasion of one's land in order to give a right of recovery. *Hot Springs R. Co.* v. *Williamson,* 45 Ark. 429.

Under the original plans, it was contemplated that all the buildings of appellees would be damaged by actually cutting away a part of the walls of them. On October 28, 1923, the commissioners notified appellees that they expected to begin work on the Main Street bridge at the location of their property, and the notice contained the following: "This work will involve the cutting into a part of the west wall of one or more buildings on your property, and we will be glad if you will make quick disposition as will enable us to begin the work within fifteen days."

On account of this notice, appellees were compelled to make new contracts with their tenants in conformity with the provisions of the notice, and they resulted in a depreciation in the rental value of their property. Subsequently, the commissioners changed their plans, and only one wall of any of the buildings of appellees involved in this suit was cut.

The majority opinion recognizes that the damage within the meaning of our Constitution commenced when appellees received the written notice above referred to, and it fairly and reasonably follows that the damage continued until appellees were notified that it would not be necessary to cut but one of the walls of the buildings.

It also reasonably follows that the measure of damages in such a case is the depreciation in the rental value of the buildings from the date appellees were notified that the walls of their buildings would be cut until this plan was abandoned and appellees were notified of the change in plans. I think this view of the matter was recognized and applied by this court in *Pine Bluff & Western Ry. Co.* v. *Kelley,* 78 Ark. 83, S. W. 562.

In this case the court held: "Where a railroad company instituted proceedings to condemn a right-of-way, and used the land for a short time, and then abandoned it, the measure of damages in such case is the rental value of the land in the condition in which it was when taken for the time it was occupied, and the depreciation in value thereof by reason of timber cut and other acts done thereon by the railroad company, and the damage resulting to the remainder of the owner's land from the building of the road across it and from overflow caused by the construction thereof; but, for all other damages occasioned by torts committed or wrongs done by the railway company, the owners have remedies in actions to recover the same."

DONAGHEY v. FONES BROTHERS HARDWARE COMPANY.

Opinion delivered October 25, 1926.

1. EMINENT DOMAIN—CHANGE IN BRIDGE APPROACH—DAMAGES.—Evidence *held* to sustain a finding that a change in the approach of a bridge damaged property used in a wholesale business to the extent of $27,500.
2. EMINENT DOMAIN—CHANGE IN BRIDGE APPROACH—DAMAGES.—The owners of a building are entitled to recover the depreciation in value of the building caused by a change in the approaches thereto, regardless of what use the building might be put to by consolidating it with adjoining buildings.

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

Moore, Smith, Moore & Trieber, for appellant.

Robinson, House & Moses, for appellee.

McCULLOCH, C. J. The lot and building involved in this controversy are located in the city of Little Rock, at the foot of Main Street, at the intersection of Main and Water streets, and abut on the west side of the new Main Street bridge constructed by the Broadway-Main Street Bridge District of Pulaski County. There was an assessment of benefits and damages, and the list was filed in May, 1920. The owner of the building claims damages considerably in excess of the amount awarded by the assessors, and this action was instituted in apt time by appellees against the district for a review of the assessment of damages and for recovery of the amount claimed.

The property consists of a lot having a frontage of 150 feet on Main Street and a depth of 124.5 feet, on which there is a three-story and basement brick building, occupied, up to the time of the construction of the bridge, as a wholesale hardware store. The facts of the case, with respect to the location and condition of the building at the time the new bridge was constructed in replacement of the old bridge and the changes brought about by constructing the new bridge and its approach, are set forth with accuracy by counsel for appellant in their

brief, and we adopt the same as substantially correct for the purpose of disposing of the case on this appeal. The statement is as follows:

"Prior to the construction of the new bridge, the old county free bridge and its approach stood at the foot of Main Street in front of and east of the Fones property. The approach to the old bridge began somewhat south of the intersection of the Fones and Lincoln buildings, and its grade ascended toward the north to where the old bridge actually began, a distance of about 54 feet north of the south line of the Lincoln property. At the south end of the Fones building, only a few feet north of the north wall of the Lincoln building, there were double doors opening onto Main Street, the south of which was used for shipping purposes. In front of these doors was a sidewalk 12 feet wide, in front, to the east of which lay Main Street, there being, on account of the approach to the bridge, a slope from the middle of the street west toward the curb of the sidewalk. For a space of about 25 feet north and south, in front of the doors, the grade was sufficiently level to make it possible to back trucks up to the curb for shipping purposes.

"The west side of the old steel bridge was about 30 feet from the east property line of the Fones building. Between the old bridge and the curb of the sidewalk in front of the Fones building there was originally a roadway 17½ feet wide, leading north along and parallel to the sidewalk to the north end of the building. There was attached to the north wall, at the northeast corner of the Fones building, a wooden platform, inclosed with tin sides and roof. This shed abutted upon the railroad tracks, and was used for the receiving and shipment of carload freight, there being doors cut into the wall of the basement of the building so that the shed communicated with the basement floor as well as with the elevator at the north wall. * * * It will be seen that the shed had a double door cut into its east side, through which shipments were also loaded into trucks and wagons. The old bridge was built of steel girders,

and the lower part of Main Street under it and east of the north part of the Fones building was open, it being possible to drive trucks and wagons from the Fones building clean under the bridge to the east side of Main Street, east of the bridge, to what was known as the Wait building, a brick warehouse located on north Main Street north of Elm and east of the bridge.

"The 17½-foot roadway between the curb of the Fones property and the west side of the old bridge was used for the passage of trucks down to the north end of the Fones building, to be loaded at the east doors in the shed. Trucks would be driven down this roadway, swung or turned east under the bridge, and then backed up to the shed entrance for loading. It was testified that there was room along the 17½-foot roadway for two trucks to pass, one going north and the other south up the hill. As stated, immediately in front of the south doors of the Fones building the street running north and south, although on grade, was sufficiently level for a space of about 25 feet to back trucks into the curb, to be loaded from these doors. A few feet north of the south doors, however, the 17½-foot roadway began a steep slope toward the north. On reaching the north end of the building the grade decreased, there being a fairly level space in front of the shed for a space of ten or fifteen feet north and south; but the average grade of the roadway between the south doors of the building and the north or shed entrance was 13½ per cent. The roadway itself was macadam. * * *

"The method adopted by the Fones Bros. Hardware Company of operating their business in the old location was as follows, according to the testimony of appellee: about 50 per cent. of the incoming freight or hardware was received and unloaded at the north shed entrance of the building, along the railroad tracks. The other fifty per cent. consisted of local shipments from factories, all of which was trucked from various freight depots in the city to the building, and unloaded through the south front doors on Main Street on to the first or main floor,

whence it was taken by an elevator at the south wall to the other floors for storage until shipped. The building contains two elevators, one at the south end, against the south wall, and about 50 feet west of the east wall of the building, and the other at the north end of the building, against the north wall, about 40 feet west of the east wall, the north elevator having an opening or door direct from the shaft into the shed. According to appellee's testimony, about ninety per cent. of outgoing shipments were handled by truck or wagon, owing to the fact that the company buys in large quantities and sells and ships out in small, shipments to customers being necessarily smaller than quantities bought by the company.

"According to their testimony, appellees used both entrances, the shed entrance at the north and the Main Street entrance at the south, for loading on to trucks or wagons their outgoing shipments, the *modus operandi* being described as follows: A truck would proceed down the steep 17½-foot roadway between the building and the old bridge to a point near the north end of the roadway, where it would be turned to the east under the bridge, and from that point backed up opposite to the east entrance to the shed, the freight being loaded from the shed onto the vehicle. The truck would then be driven back up the roadway to a point opposite the south or front door entrance, where it would again be wheeled to the east and then backed up to the curb for further loading, a good deal of the heavy merchandise being loaded at the north end. In loading trucks at the north end of the property, there was a two- or three-foot lift from the sidewalk to the bed of the truck, but at the south entrance, owing to the fact that there was an eighteen-inch depression of the street at the curb, the bed of the truck slanted toward the sidewalk, there being not so much to lift. It was testified that, under the old arrangement, it was possible to load two trucks at the north end and three trucks at the south end of the building at the same time. The goods loaded into trucks at the north end were usually such as were stored and kept

in the basement, while the goods loaded at the south end were such as were kept on the main and higher floors, the elevator at the north end being used chiefly for elevating incoming goods to higher floors. The goods for loading out at the north end were usually assembled in the shed, the goods shipped from the south or main floor entrance being assembled at the south end of the main floor inside of the two south doors. The entire sidewalk east of the building, from the south doors to the shed entrance on the north, was also used for the assembling of goods during dry weather, as is shown by the photographs above referred to; and great quantities of goods were also stored in the middle of Main Street under the old bridge * * * * * *.

"The surroundings have been changed as follows: The old steel and iron structure has been replaced by a modern and permanently constructed concrete bridge, with an easier grade or approach from Markham Street north to the point where the bridge connects with Main Street. This has necessitated the raising of the grade of Main Street north of Markham to the bridge and the widening of the bridge itself. * * * * The bridge sidewalk actually begins at the south wall of the C. K. Lincoln building and extends flush with the Lincoln and Fones buildings to a point 29 feet north of the south wall of the Fones building. At that point a flight of eight concrete steps leads from the bridge sidewalk in front of the Fones property down to the original or old sidewalk leading north along and east of the Fones building to the railroad tracks. The raised sidewalk along the south 29 feet of the Fones building is sufficiently higher than the grade of the original sidewalk at that point to make the new sidewalk 5 feet 7 inches above the main floor at the south doors. The height of the ceiling above the main floor is 14 feet.

"As stated, the sidewalk opposite this 29 feet of the building is the bridge and Main Street sidewalk, and, to accomplish this result, the west wall of the bridge * * * * was curved to the east and brought into

the sidewalk 29 feet north of the south wall of the building. This resulted in cutting off and eliminating the old 17½-foot driveway formerly existing between the old bridge and the building, it being no longer possible to drive vehicles between the Fones building and the bridge, down to the north or shed entrance, for loading. To take care of this situation, the roadway on the east side of the bridge, between it and the Wait building, was very materially altered and improved. * * * * A narrow sidewalk borders the Wait building on the west, the Wait building being at the northeast corner of north Main and Elm Streets, this sidewalk running north for a distance of 51 feet. Between the curb of the sidewalk and the east wall of the bridge the roadway is 20.3 feet wide. After passing the point where the sidewalk ends, an additional space of 4.5 feet is added to the width of the roadway, making it 24.8 feet wide. This roadway has been paved with concrete, and its grade has been reduced from the original fifteen per cent. to a six per cent. grade. At a point down this east roadway, about 90 feet north of the north side of Elm Street, a large opening or arch has been made in and under the new bridge, for the purpose of enabling trucks and vehicles to pass from Main Street down east of the bridge, between it and the Wait building, and to drive under the bridge to the Fones building and its loading facilities on the west side of the bridge * * *.

"The roadway under the arch and clean over to the sidewalk along the east of the Fones building is paved with concrete, and, after passing out from under the arch to the west, in front of the Fones building, there is now a paved open space from the west wall of the bridge to the east property line of the Fones building, of 21 feet, this space being the space between the west wall of the bridge south of the archway and the Fones building, leading up to the staircase in the sidewalk. * * *

"The result is that, while the operations of the bridge district have shut off the access down the west

side of Main Street to the loading shed at the north end of the Fones building, yet the district has substituted therefor a new and improved roadway down east of the new bridge and under the arch, so as to enable trucks and vehicles to come down east of the bridge, turn west under the archway, and thus have what appellants claim to be easy and practicable access to the north end of the building.

"It is to be noted that, while the new sidewalk along the south 29 feet of the front of the Fones building has been elevated to a point 5 feet 7 inches above the main floor level, it leaves the building at the point 29 feet north of the south wall, turning on to the bridge. At this point the flight of concrete steps above referred to takes one from the new sidewalk down to the level of the old sidewalk, which is far below the level of the main floor, the old sidewalk from that point north to the railroad tracks sloping north along what is the basement of the building, and reaching a level with the basement floor at about the north end of the building.

"The west wall of the new bridge is about 12 feet nearer the property line than the west side of the old bridge. There is very little difference in the height of the two bridges. At a point opposite the two doors at the south end of the Fones building the grade of the new bridge is 2½ feet higher than that of the old. From that point the difference between the grade of the two bridges grows less and less, until, at a point opposite the north end of the building, the grade of the new bridge is only one foot higher than that of the old."

There was reference to a master, before whom proof was adduced by both parties, and the master made his report, fixing the damages at $27,500, to which report appellants filed exceptions. The court overruled the exceptions, and rendered judgment in favor of appellees for the recovery of the amount of the award.

It is the contention of appellees that the changes in the surroundings of the building have caused a com-

plete deprivation of the use of the building as a wholesale store, and that now the best restoration that can be effected will be to confine its use to mere storage purposes, and that the amount of damages awarded by the chancery court does not more than compensate for the loss in value of the building. On the other hand, it is contended by appellants that, under the plan of restoration suggested by architects introduced by the commissioners, the building can still be used, with the proper facilities, as a wholesale business house, and that the damages awarded below are grossly excessive. Both sides introduced numerous witnesses as to value and as to the effect of the change in the usefulness and value of the building caused by the construction of the new bridge. There is no conflict in the testimony as to the changes that were made, but there is a wide difference of opinion as to the usefulness of the building now and the depreciation in its value.

The evidence adduced by appellees was to the effect that a wholesale business could not be successfully operated in the building under the restricted shipping facilities after the construction of the new bridge. According to the testimony, the north, or shed, entrance from the railroad track could be used only for shipping heavy goods kept in the basement, and that the shipping of all other goods on the main floor and the upper floors could only be conveniently handled out of the entrances on Main Street. The testimony adduced by appellants tended to establish the fact that, even though the driveway between the front of the building and the west side of the old bridge had been shut off from travel, there had been a substantial restoration of access to the building by widening and paving the twenty-foot street on the east side of the bridge and providing a paved archway which afforded access to the building. In addition to that, the evidence thus adduced tended to establish the fact that there could be substantial restoration of the shipping facilities by cutting double doors at a new place in the front on Main Street. It is unnecessary to state

in detail the various plans for restoration suggested by witnesses introduced by appellants.

There was a sharp conflict in the testimony of witnesses who gave testimony as to real estate values and the extent of depreciation. The testimony as to the original value of the building ranged all the way from $60,000 to $100,000, and the depreciation runs all the way from twenty to fifty per cent. of the original value. The owner of the building held it at a value of $77,500—carried the value at that sum on the books—and after the construction of the bridge, but before any steps were taken towards restoration, the building was sold on the market for $50,000. A fair consideration of the testimony, weighed in the light of the conflicting opinions of the various witnesses, warrants the conclusion that the building in its original condition was worth $77,500, and that its value was reduced by the construction of the new bridge to the sum of $50,000. The master, in his analysis of the testimony, seems to have given considerable weight to the fact that the building was sold in the market for $27,500 less than the original value, and he adopted that as the amount of the award.

Our conclusion is that the findings of the master are in accordance with the preponderance of the evidence. It seems clear to us that, from the standpoint of good business, the property, even with the best of restoration, is not available for ordinary business purposes otherwise than for storage purposes. Access to the building by customers is restricted to the eight-foot stairway running down from the sidewalk near the corner of the building. The front of the building is necessarily unattractive by reason of lack of access to it, and, while there is an approach to the building from the east side of the bridge and under the archway, it is a roundabout way to get to the building, and the testimony shows that it does not afford sufficient access to give proper shipping facilities. Conceding that each of the restoration plans suggested by witnesses introduced by appellant are feasi-

ble, the fact still remains that the building is isolated and its usefulness very much restricted, almost entirely so, as a business building, and to some extent even as a place of storage. Of course, it may be of value to the owners of adjoining property if the building be consolidated with other buildings, but the owners at the time the damage accrued are entitled to recover the depreciation in the value of their property, regardless of what it may be used for if consolidated with other buildings. Of course, the possibility of a sale to adjoining property owners would not be without probative force. But, when everything is considered, we are of the opinion that the master and the chancellor reached the correct conclusion in fixing the amount of the award. The evidence fully sustains the original value at $77,500, and it appears from the testimony that the owner, after the damage accrued, and after putting the property on the market for sale, and after reasonable effort, made a sale at the price of $50,000. Besides that, there is plenty of evidence in the record to show that $50,000 is a fair value for it in its damaged condition. The result of our views is that the decree is correct.

Other questions involved in the appeal have been disposed of in the decisions rendered today involving damage to property of other owners.

Affirmed.

FIRE ASSOCIATION OF PHILADELPHIA v. BONDS.

Opinion delivered October 25, 1926.

1. INSURANCE—CONCURRENT FIRE INSURANCE—WAIVER.—A condition in a fire insurance policy against concurrent insurance *held* not waived by insurer's agent.
2. INSURANCE—RETENTION OF POLICY—PRESUMPTION OF ACCEPTANCE.—Though retention of a policy by insured raises a presumption of acceptance, which, in absence of explanation, makes insured liable for the premium, such presumption is rebuttable.
3. INSURANCE—APPLICATION AND ACCEPTANCE OF POLICY.—An insurance agent cannot, by sending a policy to one who does not want it and has not authorized its issuance, impose an obligation to pay the premium, and such a policy would not be effective as a contract of insurance if there were no obligation to pay the premium.
4. INSURANCE—ACCEPTANCE OF POLICY.—In an action on a policy of fire insurance, where the defense was that insured carried other insurance in violation of a provision against carrying concurrent insurance, evidence *held* to show that insured never accepted the policy, but elected to reject it by refusing to pay the premiums thereon.
5. INSURANCE—TIME TO SUE ON POLICY.—A suit on a policy of fire insurance before the expiration of the 60 days allowed to the company to determine whether to pay the policy was not premature where the company had definitely refused to pay more than half of the face of the policy.
6. INSURANCE—PENALTY AND ATTORNEY'S FEE.—An insurance company which refused to pay the face of its policy when liable thereon is liable for the statutory penalty and reasonable attorney's fees.

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

Roscoe R. Lynn, for appellant.

John L. Bledsoe, for appellee.

SMITH, J. Appellee owns a house and lot in the city of Pocahontas, upon which he had executed a mortgage to the Randolph County Bank to secure a loan of $300 made to him by the bank. The mortgage is not copied into the transcript, but it is admitted that it contained a clause requiring the mortgagor to insure the property in a sum sufficient to protect the loan made by the bank.

Appellee applied to and obtained from the appellant insurance company a policy covering the house in the sum of $800, with additional insurance of $250 on the household goods. This policy was issued January 13, 1924, by Judge Meeks, the local agent of the appellant company, who had authority to countersign, issue and deliver policies, and expired one year from that date. After receiving this policy, appellee delivered it to the bank, and it remained in the bank's possession thereafter.

Appellee had for several years been carrying his insurance with Judge Meeks, and had directed him to renew the policy, but, about the time of the expiration of the policy held by the bank, appellee received from the bank a policy written by the bank as agent of the Atlas Fire Insurance Company, covering the house and household furniture. Appellee then went to Judge Meeks and told him that he wished him to write the insurance, but that he owed the bank, and he was apprehensive, if he did not allow the bank to write the insurance, the loan would be foreclosed upon its maturity. Judge Meeks told appellee he thought this could be arranged by getting another bank in the city to carry the loan if the Randolph County Bank attempted to foreclose. Judge Meeks saw the other bank, made the necessary arrangements, and advised appellee that he had done so, whereupon appellee told Judge Meeks to continue the insurance. Judge Meeks had, before the expiration of the first policy, written the policy here sued on, and had placed it on his desk, and this last policy was delivered to appellee and the premium paid after the arrangement had been made for another bank to carry the loan if this became necessary.

The assistant cashier of the Randolph County Bank, who had charge of the insurance department of that bank, testified that the bank was the local agent of the Atlas Insurance Company, and that, when the policy expired which appellee had placed in its possession, he wrote a policy for appellee on the same property, which became effective on the day the old policy expired. The bank had never before written any insurance for appel-

lee. It was not directed to write insurance for appellee. The matter of writing the policy was not mentioned to appellee, but the policy was written to protect the bank's security and the policy was mailed to appellee, who never returned it. Monthly statements covering the premium were sent to appellee, but no response of any kind was received. Witness called at appellee's home on two occasions to see him about the insurance, but appellee was not at home either time, and nothing was ever said to appellee about the insurance, until after the fire, except to send statements covering the premium, which appellee ignored.

Appellee testified that, when he conferred with Judge Meeks, he told the judge that he would have to cancel one or the other of the policies, as he was not able to pay for both, and when Judge Meeks removed the fear of foreclosure if he did not take and pay for the policy written by the bank, appellee told Judge Meeks that he would keep his policy, and he paid him the premium. Appellee also testified that he did not return the Atlas policy to the bank because he had never told it to write the insurance, and did not feel that he ought to run after it to take the policy back, as he felt it was trying to impose upon him because it had a mortgage on his property. That he never considered the Atlas policy in force; that he never paid the premium on that policy or promised to do so, and that he never had any intention of doing so.

The property insured was destroyed by fire on April 19, 1924, and negotiations were entered into with the adjuster of the appellant company, and, when the adjuster was advised of the issuance of the Atlas policy, he declined to pay more then one-half the amount of the insurance. This position of the adjuster was based upon a provision found in both the policies, that the insurer should not be liable for a greater proportion of the loss than the limit of the policy bore to the whole amount of insurance on the property destroyed.

When the adjuster announced this position, this suit was brought against appellant company. Appellant filed

an answer, setting up the fact that another policy was outstanding, and prayed that the Atlas Company be made a party defendant. This was done, and the cause was transferred to the chancery court, on the motion of appellant, and, upon a trial there, it was decreed that appellant alone was liable, and judgment was rendered against it for the face of the policy, with the statutory penalty of 12 per cent., and an allowance of $100 as attorney's fee was made, and this appeal is prosecuted to reverse that decree.

For the reversal of the decree, appellant insists that it is not liable in any sum, for the reason that the policy sued on contained a provision that the policy should be void "if insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Appellant also insists that in no event is it liable for more than one-half of the amount of loss sustained by appellee, and it is also insisted that the suit was prematurely brought, in that the policy provided that no suit should be brought within sixty days of the date of loss, and, for these reasons, appellant insists that it could not be liable for the statutory penalty and an attorney's fee.

For the affirmance of the judgment appellee insists (a), that the provisions of the policy against concurrent insurance was waived by Judge Meeks, acting for appellant; and (b), that the provision was never violated, in that only one policy—the one sued on—was in force as a contract of insurance.

We do not agree with appellee in his contention that Judge Meeks waived the provision of the policy which invalidated it in the event there was other insurance. This court has many times held that such provisions are valid, and will be enforced unless waived; but we have also frequently held that the provision may be waived, and is waived if, with knowledge that the condition has been violated, the agent issuing the policy consents to a continuance of the contract of insurance. This prin-

ciple was applied in the late cases of *Fidelity Phenix Fire Ins. Co.* v. *Roth,* 164 Ark. 608, 262 S. W. 643, and *National Union Fire Ins. Co.* v. *Kent,* 163 Ark. 7, 259 S. W. 370, and in other cases there cited.

The principle applied in those cases was that the provision was for the benefit of the insurer, and being for its benefit, might be waived, but, to constitute a waiver, there must be knowledge of the violation of the provision and consent, either expressly given or necessarily implied from the fact that, with knowledge of its violation, the policy was not canceled as a contract of insurance, as it might have been.

We think, if it does not appear from the undisputed evidence, it is certainly shown by a clear preponderance, that Judge Meeks did nothing which could be construed as consenting that two policies should be outstanding on the property burned. The proposition addressed to Judge Meeks was which of two policies should be effective, and his efforts were directed to arranging for appellee to carry the insurance in his company. He testified that he did not think there ought to be two policies covering the same property, and, when asked, "What would have been your duty to your company if you had known that the other policy was to be kept?" he answered, "I think I would have canceled mine. I should have canceled it if I had known that there were two policies." He testified that he understood appellee intended to return the Atlas policy, and that he presumed this would be done. He was also asked, "If you had not understood that he (appellee) was going to take it (the Atlas policy) back, would you have canceled your policy?" and he answered, "I think so; I feel sure that I would." Appellee did not remember that he had promised Judge Meeks to return the Atlas policy, but he does not deny that he had done so.

Under these circumstances we do not think it can be said that Judge Meeks, acting for the appellant company, waived the provision against concurrent insurance. It is true he did not cancel his policy after knowing that the

bank had written one for the Atlas company, but we think it very clear this was not done for the reason that he believed appellee had elected to keep his policy and would not keep the other.

We do think, however, that appellee is correct in his second position, that is, that there was never in fact but one policy in effect.

In the case of *Gray* v. *Blackwood,* 112 Ark. 332, 165 S. W. 958, suit was brought to collect a premium on a life insurance policy which had been issued to and held by the defendant, the insured, and we there held that it was error to charge the jury that the burden was on the plaintiff to prove that the defendant had accepted the policy. In that case we quoted from the case of *Mutual Life Ins. Co.* v. *Parrish,* 66 Ark. 612, 52 S. W. 458, the following declaration of law: "The mere manual possession of the policy by either party makes a *prima facie* case for that party, subject to be rebutted by proof *aliunde* that the contract of insurance was complete and valid, or that delivery was essential to completion or not without delivery." And we there further said: "If the beneficiary had brought suit on the policy and produced the same at the trial, and the company had admitted the death of the insured, this would have made a *prima facie* case in favor of the beneficiary, and the burden of proof would have been on the insurance company to show that the policy of insurance had not been accepted. So here the defendant, to whom the policy was issued, remained in possession of it from that time until the institution and trial of this case in the court below. This made a *prima facie* case in favor of the plaintiff, and, in the absence of evidence to the contrary, Mrs. Blackwood (the insured) would be deemed to have accepted the policies at the time they were left in her possession, and the burden of proof was on her to show that she had not accepted them."

The judgment in that case was reversed, and a second appeal was prosecuted under the same style, and is found reported in 117 Ark. at page 100. In that case the judgment in favor of the insured, who was sued for the

premium, was affirmed, and in affirming it we said: "It is well settled that one who retains a policy of insurance in his possession will be deemed to have accepted it, and cannot avoid liability for the premium, but that principle does not apply when the proof shows there was express refusal to accept the policy in any form. Appellee was not bound to do anything more than her own testimony showed that she did in expressing her nonacceptance, and her testimony was sufficient to overcome any *prima facie* presumption of acceptance arising from the fact that the policies were found in her house or possession."

It thus appears that, while the retention of a policy of insurance does raise a presumption of acceptance, which, in the absence of proper explanation, makes the person insured liable for the premium, this presumption is not conclusive, but may be rebutted. So here we think that, while the testimony does show that the Atlas policy was sent to appellee, and never returned by him, the testimony also shows that he never authorized its issuance and never accepted it as a contract of insurance.

An agent cannot, by mailing or sending a policy to one who does not want it, and who has not authorized its issuance, impose an obligation to pay the premium required by the policy; and the policy would not be effective as a contract of insurance if there were no obligation to pay the premium. The retention of the policy might raise a presumption of acceptance, but this presumption may be overcome by showing there was in fact no acceptance; and we think that showing was made here, and the Atlas Company policy was never effectual as a contract of insurance, and the court below was correct in so holding.

It is an undisputed fact that appellee did not authorize the bank to write the Atlas policy, and it is also undisputed that he never at any time agreed to pay the premium, and that he ignored several statements sent him by the bank covering this premium. He testified that he felt the bank was attempting to impose upon him because it had a mortgage on his property, and his conduct in

connection with the issuance of the policy sued on shows, we think, very clearly his election to take the policy issued by Judge Meeks and to reject the other. Had he sued the Atlas company, the right to recover would have been denied appellee if the testimony before us had been offered in that case.

It is true that the bank had the right to protect its security. The mortgage required the mortgagor to insure the property, and this provision would have given the mortgagee the right to take out insurance to protect its security had this been necessary. But this was a secondary right. The primary duty to insure was upon the mortgagor. It was his duty to take out the insurance and pay the premium. He had done this, and had delivered a satisfactory policy to the mortgagee. There was no refusal on his part to keep insurance in force; indeed, he was making a very earnest effort to do so, and if he had in fact discharged this obligation, then the bank had no right to require him to pay for additional insurance. The amount of the insurance was largely in excess of the debt due the bank, and it had no right to carry insurance in a larger amount than was necessary to protect its security. Sufficient insurance was being carried for this purpose, and the action of the bank in issuing the policy in the Atlas company was therefore unauthorized.

The bank was anxious, no doubt, to write this policy to earn the premium which would have inured to it, so also was Judge Meeks, but appellee was unwilling to carry insurance in so large an amount. He probably knew nothing at the time about the provision invalidating his policy if concurrent insurance was carried, and he did not put his objection on that ground, but, whatever reason might have prompted his action, he had the right to decline to take any more insurance than was necessary to protect the security of the bank. We think he did this, and that the court below was correct in holding that there was in fact no liability against the Atlas Insurance Com-

pany, and in refusing to prorate the loss between appellant and that company.

Upon the proposition that the suit was prematurely brought, it may be said that, before the expiration of the sixty days allowed the company in which to determine whether it would pay the policy or not, the conclusion was announced that it would pay only one-half the policy, and this position appellant has since consistently maintained. The suit was therefore not brought prematurely. The refusal of the appellant to pay the face of the policy was in effect a denial of liability, and, when that position was announced, the right to sue accrued, even though the sixty days had not then expired. *Old American Ins. Co.* v. *Wexman,* 160 Ark. 571, 255 S. W. 6; *German Ins. Co.* v. *Gibson,* 53 Ark. 494, 14 S. W. 672.

If the appellant company was, in fact, liable for the face of its policy—and we think the court below was correct in so holding—then it is also liable for the statutory penalty and for a reasonable attorney's fee, and no objection is made as to the fee allowed.

The decree of the court below is correct, and is therefore affirmed.

CRUCE v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered October 25, 1926.

1. WITNESSES—PRIVILEGED COMMUNICATION.—In an action for personal injuries testimony of a government medical examiner disclosing information obtained in examining plaintiff on his application for disability compensation *held* inadmissible against plaintiff, being privileged under the Veterans' Compensation Act, § 30.
2. COMPROMISE AND SETTLEMENT—EVIDENCE OF PRIOR SETTLEMENTS.—Evidence relative to injuries previously settled for and having no connection with the injury which is the basis of this suit was erroneously admitted in an employee's suit against a railroad for personal injuries.
3. DAMAGES—EVIDENCE OF PREVIOUS INJURIES.—In a suit by an employee against a railroad for personal injuries, testimony of persons in charge of the files of the United States Veterans' Bureau, relative to a claim filed by such employee for previous

temporary injuries while in the government's service, *held* improperly admitted.

4. MASTER AND SERVANT—INSTRUCTION ON ASSUMED RISK.—An instruction on assumed risk *held* not to impose on employee knowledge of danger by reason of the situation he occupied.

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

Brundidge & Neelly, for appellant.

Thos. B. Pryor, Vincent M. Miles and *H. L. Ponder,* for appellee.

HUMPHREYS, J. Appellant brought this suit against appellee in the circuit court of Jackson County, on September 13, 1923, to recover damages for an injury received on the 12th day of June, 1922, through the alleged negligence of appellant in allowing a tool-box full of tools to fall out of the rack of the engine in which he was working, and striking him with such force that it caused an abrasion of the skin at the base of his neck and the small of his back, which paralyzed his right leg, and permanently crippled him.

Appellee filed an answer, denying the material allegations of the complaint, and, by way of additional defense, pleaded an assumption of the risk and contributory negligence by appellant.

Upon the first trial of the cause, the court instructed a verdict for appellee, and dismissed appellant's complaint, from which an appeal was duly prosecuted to this court. The judgment was reversed, and the cause was remanded for new trial. That case is reported under the style of *Cruce* v. *Missouri Pacific Railroad Company,* 167 Ark. page 88, 266 S. W. 981. In rendering the opinion, a full and complete statement of the facts was made relative to the issues of negligence, contributory negligence, and assumption of the risk.

In obedience to the mandate of this court, the cause was submitted to the jury upon the pleadings, and testimony introduced by the parties, which resulted in a verdict and judgment in favor of appellee, from which is this appeal.

The question involved on this appeal renders it unnecessary to again set out the testimony in the case. Suffice it to say that appellant served as a private in France during the World War. He was honorably discharged from the service on July 3, 1919, and soon thereafter was employed by appellee as a fireman on locomotives, in which capacity he served until he was injured on the 12th day of June, 1922. During this term of service he was able, physically, to perform his duties as fireman. At the time of his injury he was earning about $200 per month, was twenty-six years old, and in line for promotion with an increase in pay.

Appellant's first contention for a reversal of the judgment is that the court erred in permitting Dr. W. H. DeClerk to disclose information obtained in making an examination of appellant in August, 1921, and in testifying to communications which he received during the examination, from appellant, relative to injuries he sustained during army service in France.

The testimony of Dr. DeClerk was objected to upon the ground that the communication and information were privileged, because obtained by a physician in the examination of a patient. Dr. DeClerk was the medical examiner for the Government under the Veterans' Compensation Act, at the time he examined appellant in August, 1921. Appellant had presented a claim to the Government for disability compensation. Under that act, veterans of the World War are entitled to medical and hospital services free of charge. Dr. DeClerk testified that he made the examination of appellant with the view of sending him to a hospital, and that, after making the examination, he sent him to the Army and Navy Hospital at Hot Springs. Section 30 of that act makes the record confidential, and provides that no disclosure shall be made unless within one of the exceptions provided for.

We think it must be said that, in view of the fact that the Government furnishes its veterans free medical and hospital services, and the further fact that Dr. DeClerk examined appellant with a view to sending him to

a hospital, and did send him to the Army and Navy Hospital at Hot Springs, the confidential relationship between physician and patient attached when appellant presented himself to the doctor for examination.

Dr. DeClerk's testimony relative to the physical condition of appellant when he examined him, and touching communications he received from appellant in the course of the examination, was incompetent.

Appellant's next contention for a reversal of the judgment is that the court erred in permitting appellee to introduce testimony relative to five separate and distinct injuries, covering a period of about two years, in settlement of which it had paid sums ranging from fifty to one hundred dollars. As we read the record, these injuries had no connection with the injury which is the basis of this suit. Appellee had settled with appellant for each one and had retained appellant in its employment for a period of twelve months after the last one of the injuries occurred. We think proof of these injuries was incompetent, and that the trial court committed reversible error in admitting the evidence.

Appellant's next contention for a reversal of the judgment is that the court erred in not excluding the testimony of Cleveland Cabler. Cleveland Cabler had charge of the files of the United States Veterans' Bureau, which contained a claim of appellant which he filed with it for disability under the Veterans' Act. The trial of the cause had been postponed for one day for this witness to be present, to prove that he had a claim, signed by appellant, to the effect that he had received an injury to his back while in France, which had permanently injured him. When he appeared as a witness, no objection was made to the introduction of his testimony because it was thought that the claim would contain such a statement. As soon as it was discovered that it did not contain such a statement, the appellant moved to exclude the testimony and objected and excepted to the court's refusal to do so. Temporary injuries, from which appellant had recovered, and which had no connection with the injury made the

basis of this suit, were incompetent and prejudicial. The testimony of Cleveland Cabler was of this character, and should have been excluded, and the court committed reversible error in not doing so.

Appellant's last contention for a reversal of the judgment relates to the refusal of the court to give certain written instructions requested by him, and in giving, on its own motion, instruction No. 9.

We have examined all of the instructions given by the court, and think every phase of the case was fully covered, and that no prejudice resulted to appellant on account of refusing additional instructions requested by him.

Instruction No. 9, given by the court, to which our especial attention is called, is as follows:

"You are instructed that, although you may believe that the prong or prongs of the rack of the tool-box were bent out, and that it was neglect on the part of defendant to have said prong or prongs in such condition, yet if the plaintiff was so situated that he knew of such condition, and appreciated the dangers therefrom, he assumed the risk of the injury occasioned by the condition of said prong or prongs."

The objection made to this instruction is that it imposed upon appellant knowledge of the position of the tool-rack and also the dangers therefrom, by reason of the situation he occupied.

Of course it would be error to place such an imposition upon appellant. We do not think the court intended to do so by giving this instruction. Perhaps it is ambiguous and misleading. If the ambiguity had been pointed out to the trial court by specific objection, he would likely have changed the language so as to eliminate the cloud in this, as well as the other two instructions mentioned in appellant's brief.

On account of the errors indicated the judgment is reversed, and the cause is remanded for a new trial.

SMITH, J., dissents.

BENNETT v. WEIL BROTHERS' PLANTATION COMPANY.

Opinion delivered October 25, 1926.

1. EMINENT DOMAIN—AUTHORITY TO DIG DITCH.—Under Sp. Acts 1911, p. 352, authorizing a landowner within a certain drainage district to institute proceedings to condemn a right-of-way across the land of an intervening landowner who refuses permission to cross his land, *held* that it was not necessary to dig a new ditch where an existing ditch could be enlarged to carry the water.
2. APPEAL AND ERROR—MOOT CASE.—Where plaintiff procured a permanent injunction against defendant's bringing a condemnation proceeding to enlarge a ditch across his property, and the district commissioners enlarged the ditch during the pendency of the appeal, question on the appeal did not become moot, since the issue of damages for wrongful procurement of the injunction remained.

Appeal from Jefferson Chancery Court; *H. R. Lucas*, Chancellor; reversed.

Coleman & Gantt, for appellant.

Sam M. Levine and *Danaher & Danaher*, for appellee.

HUMPHREYS, J. This action was instituted in the chancery court of Jefferson County by appellee against appellants to enjoin them from prosecuting a suit in the circuit court of said county, which they had brought against it to condemn a right-of-way for a drainage ditch across its lands, under act No. 144 of the Acts of 1911, amending act No. 283 of 1907, creating Cousart Bayou Drainage District.

Appellants and appellee owned large tracts of adjoining lands within said drainage district, upon which they paid drainage taxes. The lands of appellants lay to the north of those of appellee, and were in sections 14, 23 and 24, while those of appellee were in sections 25 and 26, all being in township 6 south, range 8 west. Lateral ditch No. 3 was a component part of the drainage system in said district, its purpose being to drain Glen Lake, mainly in section 23, and surrounding lands. The original purpose was to dig it with a dredgeboat for its entire length of 9,600 feet. It emptied into the main canal near the north line of section 25, and traversed the

lands of both appellee and appellants, running in a northerly direction to a point east of Glen Lake. At the time the lateral was being dug, growing crops were upon the lands now belonging to appellee and appellants. They were then owned by other parties, who objected to holding the water in the ditch which was necessary to float the boat, so they consented that the drainage of the lake might be deferred. When one-half of the lateral had been dug with the dredgeboat, the remainder of the ditch was dug with scrapers after the dredgeboat had been removed. The upper half thereof was not of size and depth sufficient to care for the drainage it was planned to receive.

The upper part of the ditch passed through the lands of both appellee and appellants, and ran on the east side of Glen Lake.

Glen Lake was mostly upon the land belonging to appellants, and the purpose of the condemnation suit brought by them in the circuit court was to obtain the right to widen and deepen lateral No. 3 over and across appellee's land to the point reached by the dredgeboat before its removal. The plan of appellants was to dig a ditch from the lake to the lateral across their own land and to widen and deepen the lateral from the point of intersection across their own land, as well as the land of appellee, so as to conform to the original design and purpose of the lateral.

It was alleged in the injunction suit that the statute relied upon by appellants in the condemnation suit did not confer power upon a private property owner in the district to condemn land for the purpose of widening and deepening a lateral ditch. This allegation was controverted by appellants, and the cause proceeded to a trial, which resulted in the rendition of a decree permanently enjoining appellants from prosecuting their condemnation suit.

At the time the injunction suit was instituted a bond was filed by appellee to pay appellants for all damages they might sustain if it was finally determined that the

writ was wrongfully issued. With the filing of the bond, further construction work upon the ditch by the contractors employed by appellants ceased.

During the pendency of this appeal the commissioners of the district completed the lateral in accordance with the original plans.

This appeal involved the sole question of whether appellants were entitled to maintain a condemnation suit under act No. 144 of the Acts of 1911, for the purpose of enlarging lateral No. 3, over and upon appellee's land. That act provides:

"Any landowner within the Cousart Bayou Drainage District, as created by act No. 283 of the Acts of the General Assembly of this State for the year 1907 and the acts amendatory thereof, whose lands are assessed for drainage taxes by said district, may construct ditches to drain such lands into the public ditches of said drainage district, and if any intervening landowner should refuse permission to cross his lands with such ditch, the landowner seeking to construct such ditch may, by proceedings in the circuit court, to be conducted in the same manner as condemnation proceedings instituted by railroads, telegraph and telephone companies, condemn a right-of-way for such ditches. In such proceedings the jury shall deduct from the damages the benefit that will accrue to such landowner by the construction of such ditch, and said intervening landowner shall have the right to use such ditch for the drainage of his own land."

Manifestly the purpose of the act was to afford drainage of lands in the district assessed for drainage taxes and to allow the landowner to condemn a right-of-way, if necessary, across intervening lands, to construct ditches to convey the water into the public ditches of the district.

The lower half of lateral No. 3 was regulation size, but the upper half was insufficient in width and depth to receive and carry the water from Glen Lake and the land surrounding it.

In order to drain the lake and surrounding land, it was necessary to dig an additional ditch from the lake along the general course of the lateral across appellant's lands and the intervening lands of appellee, to the north end of the lower lateral which had been dug by the dredgeboat, or to intersect the upper lateral with a ditch from the lake, then widen and deepen the upper lateral from the point of intersection, through the lands of appellants and through the intervening lands of appellee.

The statute in question must be strictly construed, as the only authority to condemn a right-of-way across intervening lands is conferred by it; but a strict construction does not mean that a new ditch must be dug over the right-of-way, when an existing ditch thereon may be enlarged, at much less expense, to carry the water. The statute does not say the ditch must be a new one, and there is no necessity for making such an interpolation in order to ascertain the true purpose and intent of the act.

The language of the act is to construct a ditch. We think it would be extremely technical to say the enlargement of an old ditch did not amount to the construction of a ditch. It is true that the act provides that the landowner may construct a ditch over intervening lands to drain his lands into the public ditches, but the enlargement of one of the public ditches to drain his land would not change the course of the water, and thereby force the construction that the act contemplated the construction of new ditches only.

Our conclusion is, under the rule of strict interpretation, that the widening and deepening of lateral No. 3 was, in effect, constructing a ditch within the meaning of act No. 144 of the Acts of 1911.

It is suggested that the appeal should be dismissed because the question at issue has become moot on account of the completion of the upper part of lateral No. 3 by the district since the trial.

The completion of the ditch did not dispose of the only question involved, except liability for costs. The

issue of damages occasioned by the wrongful procurement of the injunction remains, and necessitates that the appeal be heard and determined.

On account of the error indicated the decree is reversed, with instructions to dissolve the injunction and dismiss the bill, and for further proceedings.

BRADLEY v. STATE.

Opinion delivered November 1, 1926.

INTOXICATING LIQUORS—POSSESSION OF STILL.—The offense of possessing an unregistered still is sustained by proof that accused was in possession and control of all the parts of a still and that he has been manufacturing whiskey.

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

J. W. Meeks, for appellant.

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

McCULLOCH, C. J. Appellant was convicted under an indictment charging him with the offense of having and keeping in his possession an unregistered still, and the only contention on this appeal is that the evidence is not sufficient to sustain the verdict of conviction.

The officers testified that they found, at appellant's home, a copper boiler. It was out in the yard, by the side of the house. They also found there a barrel which had recently contained mash. Witness McMurtry testified that, while he was confined in jail with appellant, the latter made a statement to him that he had concealed a copper stillworm in the waters of a small lake near his home, and that the place was marked by a certain cypress tree. The witness testified that, after he got out of jail, he told the officers about it, and accompanied them to the place, and that they waded out into the lake and found the stillworm concealed in the water at the place designated by appellant. The officers also testified that they found a stillworm in the water at the place indicated.

They testified that they first went to the house and found the boiler, as hereinbefore stated, and then went back, after they received information about the stillworm, and found it. According to the testimony of the officers, there was no lid on the boiler which they found in appellant's yard. We are of the opinion that the evidence was sufficient to sustain the verdict.

The different parts of the still were not connected up, but each of the essential parts was in possession and control of appellant. The boiler was in his yard, the barrel, which had recently contained mash, was in the barn, and the stillworm was found in the water a short distance from the house. This indicated clearly that appellant had had all of the parts in his possession, and completed the offense. *McGarity* v. *State,* 151 Ark. 423. We do not mean to say that the mere ownership of the parts of a still, though widely scattered, would make an offense of possessing a still. What we do hold is that, where all of the parts are in possession and immediate control of a person, ready to be connected up and used, this is sufficient to constitute possessing a still within the meaning of the law. Besides that, even if this did not constitute possession at the time, the fact that all of the necessary parts are in control of a person, and there is evidence that he has been manufacturing whiskey, is sufficient to warrant the inference that he has had possession of the complete still at some time. This may be said also with regard to the absence of the lid to the boiler. Counsel for appellant rely upon the fact that there was no lid to the boiler as a failure to establish the offense. The fact that appellant had been using the apparatus at that place, which the evidence tended to establish, is sufficient to warrant the jury in finding that there had been a lid on the boiler, for the reason that the boiled liquid would not vaporize unless the boiler had been closed with a lid.

The issues were submitted to the jury under correct instructions, and the evidence, we think, was sufficient to sustain the verdict.

Affirmed.

OTTINGER *v.* FERRELL.

Opinion delivered November 1, 1926.

1. PLEADING—MOTION TO MAKE CERTAIN.—The remedy for vague and indefinite allegations in a complaint is not by demurrer, but by motion to make more certain.
2. LIBEL AND SLANDER—COMPLAINT—DEFAMATORY MATTER.—Allegations in a complaint by a school-teacher that school officers uttered and published of him that he is "incompetent as a teacher, immoral, and not a good citizen," and that he "is unfit to teach school; he curses in his school; talks socialism in his school and to his patrons; and is disloyal to our Government," *held* sufficient to point out the particular language used and the circumstances under which it was used.
3. LIBEL AND SLANDER—WORDS TENDING TO INJURE IN PROFESSION.—False charges against a school-teacher of incompetency or immorality are actionable as libel or slander.
4. LIBEL AND SLANDER—JOINT CAUSE OF ACTION.—A joint cause of action is alleged in a complaint for libel which charged that defendants joined in a conspiracy to defame plaintiff's character, and that, pursuant to that joint design, libelous words were published.
5. LIBEL AND SLANDER—PARTIES.—While a joint action cannot be maintained for a slander, such an action may be maintained for a libel.
6. PLEADING—DEMURRER—MISJOINDER OF CAUSES.—A general demurrer does not reach the objection of a misjoinder of causes of action.
7. LIBEL AND SLANDER—PRIVILEGED COMMUNICATION.—A communication by school officers concerning the character and qualification of a school-teacher is not absolutely privileged, and the privilege must be pleaded by answer to the complaint alleging a libel, and cannot be raised by demurrer.

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

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

Fred M. Pickens, for appellee.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Jackson County against appellees, J. R. Ferrell, T. V. Flemming, C. P. Trice, Garland E. Land and J. O. Goff, alleging in his complaint that he is a school-teacher by profession, and is duly licensed as

such; that appellee Land is superintendent of schools in Jackson County, and that the other appellees are directors of School District No. 25 in Jackson County; that appellant was employed as teacher in said district, but was wrongfully discharged, and that, after the discharge, all of the appellees entered into a conspiracy to prevent him from securing school work in the State, and that, pursuant to that conspiracy, they uttered slanderous and defamatory words concerning his moral character and his fitness as a teacher, and that they also published libelous words to the same effect.

The language charged to have been uttered and published by appellees concerning appellant is that he is "incompetent as a teacher, immoral, * * * and is not a good citizen." In another paragraph the language charged to have been used is that appellant "is unfit to teach school; he curses in his school, talks socialism in his school and to his patrons, and is disloyal to our Government," etc.

There are numerous paragraphs in the complaint alleging slanderous and libelous words uttered and published on different occasions and to different persons, but the above are substantially the words alleged to have been used in each instance. It is unnecessary to discuss each paragraph in detail, for the court sustained a demurrer to the complaint as a whole, and it is only necessary to determine whether or not a cause of action was stated in either of the paragraphs.

Appellees first defended the judgment of the court in sustaining the demurrer on the ground that the cause of action was barred by the statute of limitations, but counsel has now abandoned that contention, and nothing more need be said about it.

It is next contended that the allegations are too vague and indefinite to be understood. If that were true, the remedy would not be by demurrer but by motion to make the complaint more definite and certain. *Dillahunty* v. *Railway Co.*, 59 Ark. 629. We think, however, that the allegations in the complaint are sufficient to point

out the particular language used and the circumstances under which it was used. It may be said, in this connection, that the law is well settled that a false charge against a school-teacher of incompetency or immorality is actionable as libel or slander. Newell on Libel and Slander, § 148. In this connection it is also urged that the complaint was not sufficient to charge a joint cause of action against all of the appellees. We find, however, that it is charged specifically in the complaint that all of the appellees joined together in a conspiracy to defame the character of appellant by slander and libel so as to prevent him from obtaining school work, and that the slanderous words were uttered and the libel published pursuant to that joint design. Now, the rule is that a joint action cannot be maintained against two or more persons for slander, but a different rule prevails concerning a libel, and such publication may be the joint act of two or more persons, who may be sued jointly or separately at the election of the plaintiff. Newell on Slander and Libel, § 371. The demurrer was general, and therefore did not reach the objection of misjoinder of causes of action.

The principal ground urged in support of the judgment of the court is that the alleged slanderous and libelous statements concerning appellant constituted, under the circumstances, privileged communication, and that, this appearing upon the face of the complaint, the objection to the sufficiency of the allegations could be raised by demurrer. We do not agree with counsel in this contention. It appears from the language of the complaint that all of the appellees are school officers, appellee Land being county superintendent, and the others school directors, and it also appears that the words spoken and written related to appellant's character and qualifications as a school-teacher, but the privilege could not, in any view, be absolute, and might, or might not, according to the circumstances, be privileged. That being true, it necessarily follows that the privilege must be pleaded by answer, and the question cannot be raised

by demurrer. 17 R. C. L., p. 401; Odgers on Libel and Slander, p. 636. Our conclusion is that the court erred in sustaining the demurrer to the complaint.

Reversed, and remanded for further proceedings.

SLOAN v. VILLAGE CREEK DRAINAGE DISTRICT.

Opinion delivered November 1, 1926.

1. DRAINS—REVIEW OF ASSESSMENTS ON APPEAL.—On appeal from judgments of the circuit court assessing the benefits from a drainage improvement, review of the testimony on appeal to the Supreme Court is limited to the question of the legal sufficiency of the evidence, and not to the weight thereof.
2. DRAINS—ASSESSMENT—SUFFICIENCY OF EVIDENCE.—Assessment of the benefits of improvements resulting from a lowering of the bed of a creek to prevent overflow *held* sustained by evidence.
3. DRAINS—ASSESSMENT OF BENEFITS.—The assessment of benefits for drainage improvements is a matter of estimate and forecast, and not one of absolute certainty.

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

Eugene Sloan, Cunningham & Cunningham, H. L. Ponder, for appellant; *O. C. Blackford* and *Eli Thornburgh, pro se.*

W. M. Ponder, W. A. Jackson, W. P. Smith and *G. M. Gibson,* for appellee.

McCULLOCH, C. J. The improvement district involved in this controversy was created by special statute enacted by the General Assembly at the extraordinary session of 1920, which authorized the construction of a drainage system in the area described in Lawrence County, and the imposition of taxes upon benefits in order to raise funds to pay for the improvement. The district embraces nearly 70,000 acres of land, and the authorized plan for the improvement contemplates the construction of a main ditch, or canal, from twenty to seventy-five feet in width, through the channel of Village Creek, for a distance of about twenty-two miles. The

plan also contemplates the construction of six lateral ditches, from twelve to twenty feet in width, through certain creeks or bayous which empty into Village Creek. One of the laterals is called Little Village, another Coon Creek, another Turkey Creek, another Lake Pond, another Lindsay Creek, and the other the White Oak lateral. The statute provides for an assessment of benefits to be made by the commissioners of the district, and, when the list is filed, notice is given and an opportunity for a hearing in the county court. The statute gives aggrieved owners of property in the district the right of appeal to the circuit court from the decision of the county court.

The commissioners completed their assessment of benefits and filed the list with the county court, and notice was given and a hearing was had in that court. There are about eight thousand calls, or items, in the assessment list, and there were numerous protests. The maximum assessment on lands found to derive the greatest benefit was twenty-four dollars per acre, and the minimum, one dollar and fifty cents per acre. The lands bearing the lowest assessment were those which did not overflow from the creek, but, according to the testimony adduced in the case, received general benefit on account of the locality being drained.

The county court approved the assessments made by the commissioners, with a few exceptions, but forty-eight owners of land appealed to the circuit court, and there was a trial anew in that court. In the trial in the circuit court, the assessments of benefits were again approved, with one or two exceptions. Twenty-four of the protesting landowners appealed to this court.

It is contended by counsel for appellee that some of the appeals should be dismissed—two of them for the reason that the transcripts were not lodged in time, and numerous others for the reason that the rules of the court have not been complied with in filing abstracts. We deem it unnecessary to pass upon the question raised on the motion to dismiss the appeal, for the reason that

we have reached the conclusion that, even if all the appeals had been perfected and duly prosecuted, the judgment in each instance must be affirmed. . . .

Each of the protests challenges the correctness of individual assessments; most of the protestants, however, being the owners of more than one tract, some of them numerous tracts. The questions as to the correctness of the assessment on separate tracts were heard consecutively, but each assessment was considered separately for the purpose of determining whether or not the assessment was correct. It was conceded in the trial below that all of the lands, with possibly two or three exceptions, were benefited to some extent and should be taxed, but the assault on the correctness of the assessments relates to the amount of the assessments. The decision of the case in this court turns upon the character of the review which we give, and that question has been settled by prior decisions of this court. It will be remembered that the statute creating the district authorizes an appeal to the circuit court, and the case is heard there *de novo*. We have often decided that the rule that limits our review of the testimony in trials at law to the question of the legal sufficiency of the evidence and not to the weight of the evidence applies to cases of this kind, involving the correctness of assessments of benefits in improvement districts. *St. L. & S. F. R. Co.* v. *Fort Smith & Van Buren Bridge District,* 113 Ark. 492, 168 S. W. 1066; *Oates* v. *Cypress Creek Drainage District,* 135 Ark. 149, 205 S. W. 293; *Rysinger* v. *Road Imp. Dist.* 143 Ark. 341, 220 S. W. 455; *Gibson* v. *Lawrence County,* 155 Ark. 319, 244 S. W. 341; *Tucker Lake Reclamation District* v. *Winfrey,* 160 Ark. 205, 254 S. W. 460.

It would serve no useful purpose and would unduly extend this opinion to discuss in detail the testimony in regard to each of the separate tracts of land involved in these protests. In each instance there was testimony of considerable weight introduced by the appellants in regard to their several tracts of land, tending to show that the lands would be benefited, some of them not at

all, and others to a considerably less extent than indicated in the assessment lists filed by the commissioners. If we were at liberty to review the testimony for the purpose of determining its weight, there are some instances in which the preponderance would appear to be against the finding of the trial court. But we are of the opinion that in each instance there is legally sufficient evidence to support the finding. Appellees introduced, as witnesses, some of the commissioners who made the assessments, and the engineer of the district, and also owners of large amounts of property in the district, and their testimony tended to show that there was more or less benefit to all of the lands in the district. It appears from the testimony that Village Creek is a wide, sluggish stream, which overflows its low banks, and, during the dry time in the summer, does not flow a stream of water, but is reduced to pools. The plan is to lower the bed of the channel of this creek so as to lower the water level, and not only carry off the water from the lands which overflow, but to afford what the witnesses termed underground drainage, and that in this way lands which do not overflow will receive great benefit. It appears that in many instances tracts of land of different owners are partly subject to overflow, but are mostly above overflow. The land lies in ridges, and is interspersed with low swales, and for this reason some of the owners claim that they get very slight benefit, whilst the testimony adduced by the commissioners tends to show that all of the lands, even the ridges not subject to overflow, will be benefited from underground drainage.

As we have often said, the matter of assessment of benefits is largely one of opinion, about which men differ. It is a matter of estimate and of forecast, and not one of absolute certainty. We are therefore unable to say that there is an entire absence of testimony to support the finding of the trial court upon either of the tracts of land involved in the controversy.

The judgment of the circuit court is therefore affirmed.

MELLON v. STEIN.

Opinion delivered November 1, 1926.

1. CARRIERS—NEGLIGENCE IN TRANSPORTING GOODS—JURY QUESTION.—In an action for goods lost in transportation, evidence *held to* make it a jury question whether the carrier was negligent in causing the goods to be transported to destination marked on package, instead of to destination marked on the bill of lading, and whether the shipper was damaged, and hence it was error to direct a verdict for the shipper.
2. CARRIERS—NEGLIGENCE IN MAKING SHIPMENT—JURY QUESTION.—In an action for loss of goods shipped, testimony by the plaintiff's shipping clerk that he was not sure that he had not misdirected the package, *held* to make it a jury question whether he had not misdirected the package.

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

Thos. B. Pryor, W. L. Curtis and *Vincent M. Miles*, for appellant.

I. J. Friedman, for appellee.

WOOD, J. Benno Stein, an individual, engaged in the wholesale dry goods business in the city of Fort Smith, Arkansas, under the trade name of the Stein Wholesale Dry Goods Company, will hereafter, for convenience, be called the appellee. Andrew W. Mellon, the successor of James C. Davis, agent of the Director General of Railroads under the Transportation Act of 1920, will hereafter, for convenience, be called the appellant. In January, 1920, the appellant was operating the Missouri Pacific Railroad. On the 24th of January, 1920, the appellee delivered to the appellant, at its freight depot in the city of Fort Smith, a box of dry goods of the value at that date of $620.48, marked "B. E. Loving, Loving, Oklahoma." The appellee intended to ship the goods to B. E. Loving at Allen, Oklahoma, and he obtained a bill of lading for said shipment showing the consignee to be B. E. Loving and the destination Allen, Oklahoma. The appellee sent the invoice of the merchandise to B. E. Loving at Allen, Oklahoma. Loving, Oklahoma, is an inland town, and the nearest shipping point is Bates,

Arkansas, a station on the Kansas City Southern Railway. Instead of being shipped to Allen, Oklahoma, as called for by the bill of lading, the merchandise was shipped to Bates, Arkansas. Within a reasonable time after receiving the invoice, Loving advised the appellee that the goods had not arrived at Allen, Oklahoma, and requested that it be delivered as soon as possible. The appellee notified the freight agent of the Director General that the shipment had not arrived at Allen, and asked that a tracer be sent. The goods were not delivered to the appellee sixty days after shipment. The Missouri Pacific Railway was returned to its owners by the Director General on March 1, 1920. The appellee did not know, in fact, that the Missouri Pacific Railway was being operated by a Director General of Railroads at the time of the shipment, and did not, in fact, know that the railroad had been returned to its owners by the Director General on March 1, 1920. On March 24, 1920, appellee filed his claim with the claim agent of the Missouri Pacific Railway for the loss of the goods. Some time in April, 1920, an agent of the Kansas City Southern Railway Company notified the appellee that he had found a box of goods at Bates, Arkansas, addressed to B. E. Loving, Loving, Oklahoma. Appellee was advised that the box was opened, and the marks and brands on the goods indicated that the appellee was the shipper. An inspector of the Kansas City Southern Railway Company notified the appellee that a box of merchandise was at Bates, Arkansas, marked B. E. Loving, Loving, Oklahoma, and asked the appellee what he intended to do with the box. Appellee replied that he had no further interest in the box of dry goods; that he had filed his claim against the Missouri Pacific Railway Company for the loss of the shipment, and would have nothing more to do with it. The Missouri Pacific Railway Company was notified on April 7, 1920, that the box of merchandise was at Bates, Arkansas. The box remained there until the latter part of October, 1920, when it was returned to the appellee by the Kansas City

Southern Railway with an expense and storage charge of $200. The appellee refused to receive the box, and it was later sold by the Kansas City Southern Railway Company for expenses and storage charges.

An action was instituted by the appellee, first against the Missouri Pacific Railway Company on May 19, 1921, to recover damages for the loss of the goods. On motion of the defendant, the Director General of Railroads under the Transportation Act of 1920 was made a party defendant. The Missouri Pacific Railway Company denied liability. The Director General admitted receiving the box of goods for shipment, but denied that it was lost through any negligence on his part. A trial was had upon the above issues and facts, which resulted in a verdict and judgment against the Missouri Pacific Railway Company. That company appealed to this court, and we held that the Missouri Pacific Railway Company was not liable, and the cause was remanded for a new trial. See *Missouri Pacific Rd. Co.* v. *Stein,* 161 Ark. 405, 265 S. W. 373. In the trial of the present cause against the appellant, substantially the same facts as above set forth were developed. In addition, there was introduced in evidence a portion of a circular issued by the Interstate Commerce Commission, as follows:

"The responsibility of the railroad for the safe transportation of property begins when the goods are accepted for shipment. The evidence of the acceptance is the signed bill of lading, shipping receipt or acknowledgment to a connecting carrier. These receipts, in whatever form they are given, should be for the actual amount and condition of the shipment; therefore a careful check of all freight is expected, whether carloads or less than carloads, so that the property, the receipts, the way-bill and the loading may be alike."

"Rule 6. Sec. 1. Freight, when delivered to carriers to be transported at less than carload or any quantity ratings, must be marked in accordance with the following requirements and specifications, except as provided in § 2 (b) of this rule, or otherwise provided

in specific items in this classification or in the Interstate Commerce Commission's regulations for the transportation of dangerous articles other than explosives by freight (see page 444). If these requirements and specifications are not complied with, freight will not be accepted for transportation.

"Section 2. (a) Each package, bundle or loose piece of freight must be plainly, legibly and durably marked by brush, stencil, marking crayon (not chalk), rubber type, metal type, pasted label (see note 1), tag (see note 2), or other method which provides marks equally plain, legible and durable, showing the name of only one consignee, and of only one station, town, or city and State to which destined.

"(c) The marks on bundles, packages or pieces must be compared with the shipping order or bill of lading, and corrections, if necessary, made by the shipper or his representative before receipt is signed."

The above rules were in force from January 1, 1920, to January 31, 1920, inclusive.

A shipping clerk of the appellee testified, among other things, that he marked the box of merchandise in controversy and made out the bill of lading from the same ticket, and that the box was marked just like the bill of lading and was checked again from the bill of lading before it left the appellee's house; that he addressed the box, not by stencil, but with free-hand print. He could not say positively that he did not make the destination marked on the box and on the bill of lading the same.

Appellee, among other things, testified that he refused to receive the box when it was tendered to him in October or November, 1920, because the goods were out of season and the market had dropped fully fifty or sixty per cent. The market value of the goods, as shown by the invoice, at the time the same were shipped to Loving, was $620.48. On cross-examination, the witness testified the market was strong in April and May, 1920. He would not be a bit surprised but what it was higher in March and April, 1920. The effect of his

testimony on cross-examination was that there was no falling-off of the market until about the first of August, 1920.

There was testimony on behalf of the appellee to the effect that it was the duty of the station agent and clerk of the Director General of Railroads to check the mark on the box with the bill of lading, and, if there was a different mark, he was supposed to make the correction before signing the bill of lading. It was in evidence by the defendant that the only marking on the box was "B. E. Loving, Loving, Oklahoma."

Upon the above facts the court directed the jury to return a verdict in favor of the appellee. The jury returned a verdict in favor of the appellee in the sum of $620.48, with interest at six per cent. per annum from January 24, 1920. The appellant duly excepted to the ruling of the court in directing the verdict, and requested the court to instruct the jury to return a verdict in its favor, and also presented other prayers for instructions submitting to the jury the issue as to whether or not the appellant was liable. We deem it unnecessary to set out these requested prayers for instructions by the appellant. Judgment was entered in accordance with the verdict, from which is this appeal.

The court erred in directing a verdict in favor of the appellee. It was an issue of fact for the jury, under the evidence, to determine whether or not the appellant was liable. This issue should have been submitted to the jury under correct instructions. There were two issues of fact for the jury, under the evidence: First, whether or not the appellant was negligent in causing the box of goods in controversy to be shipped to Bates, Arkansas, instead of Allen, Oklahoma; and, second, if appellant was negligent in this respect, it was still a question for the jury, under the evidence, as to whether the appellee was damaged, and, if so, the amount of such damage. The testimony of appellee's own shipping clerk who made out the bill of lading and marked the box for shipment was to the effect that he made the

bill of lading from the same ticket, and that the box was marked just like the bill of lading, and was checked again from the bill of lading before it left the house of the appellee. But he concludes his testimony with the statement that he could not say positively that he didn't make the destination on the box the same as the name of the consignee. This made it an issue for the jury as to whether appellee's agent who handled the shipment for appellee made a mistake in marking the destination on the box "Loving," Oklahoma, when it should have been Allen, Oklahoma.

For the error of the court in taking these issues of fact away from the jury and directing the jury to return a verdict in favor of the appellee the judgment is reversed, and the cause is remanded for a new trial.

FELDMAN v. FELDMAN.

Opinion delivered November 1, 1926.

1. PLEADING—TITLE OF PLEADING.—A statement of facts constituting a cause of action is sufficient to give the court jurisdiction, whether entitled a complaint or an affidavit.
2. REPLEVIN—SUFFICIENCY OF COMPLAINT.—A complaint containing a sufficient description and value of the goods, alleging that plaintiff is entitled to possession and that defendant is in unlawful possession, is sufficient to give the court jurisdiction over the subject-matter, under Crawford & Moses' Dig., § 8640.
3. REPLEVIN—DIRECTION OF VERDICT.—Where the undisputed testimony established that a highway unloading equipment, built as part of a barn and attached thereto by bolts, was a fixture which passed by deed to plaintiff, it having been removed by defendant, it was not error to direct the jury to ascertain the value of the equipment and return a verdict for plaintiff for possession of the property or its value.
4. JUSTICES OF THE PEACE—JURISDICTION.—A fixture detached from a barn by defendant became personal property in his possession, and a suit to recover same was within the jurisdiction of a justice of the peace.

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

Ward & Ward, for appellant.

Holifield & Irvin, for appellee.

WOOD, J. This action was instituted by the plaintiff, Bessie Feldman, against the defendant, David Feldman, in the justice court, as follows: "The plaintiff, Bessie Feldman, states that she is entitled to the possession of the following property, to-wit:

48 feet of hay-track used in barn of the value of 25 cts. per foot	$12.00
Twenty-five hangers support track	3.00
Hay harpoon of the value of	5.00
Two pulleys of the value of $1.25 each	2.50
150 feet of rope, one-inch	8.00
Hay carriage	10.00
One stop	2.25
One hay trip	.75

"of which the defendant unlawfully has possession without right, and which he unlawfully detains from the plaintiff. Wherefore, the plaintiff prays judgment for the recovery of said property, and for ten dollars damages for the detention thereof, and for other relief."

The defendant moved in the justice court, and also in the circuit court to which the cause was appealed, to quash the order of delivery and to dismiss the cause on the ground that the affidavit, or complaint, and the order of delivery did not sufficiently describe the property. The trial court sustained the motion, and quashed the order of delivery, but overruled the motion to dismiss the cause. To this ruling the defendant duly excepted.

The facts are substantially as follows: The defendant, by warranty deed, conveyed to the plaintiff a tract of land on which a barn was located. In this barn was an apparatus for unloading hay. It consisted of 48 feet of track, 25 hangers, a hay harpoon, two pulleys, a hay carriage, one stop, and 150 feet of rope. This equipment was necessary to unload hay into the barn, and was fastened to the barn by bolts, the hangers being

bolted to the rafters, the hooks connected with the hangers, and the track was also connected with the hangers. On the track the carriage was placed, and all these tools constituted a hay-unloading outfit which had to be used all together in order to effectuate the unloading of the hay. The barn was constructed with the view of installing this equipment for unloading the hay. When the defendant carried the equipment away, he had to unscrew parts of it from the barn. The defendant was asked, among others, the following question: "You and she never had any agreement that you were to have this stuff? A. It was stuff that I was to have. I was to have everything outside of the house but what was mentioned. What she was to have outside of the house was mentioned. She was to have the land—that real estate the barn was on and the house. Q. There was no special agreement that you were to have the track and stuff in the barn? A. Agreed that I was to have everything but what was mentioned; that stock and cattle and horses. I was to have everything else. We talked about this, and I told her I wanted to trade this to her for the use of the barn." The defendant further testified that a written contract was made between him and the plaintiff on October 3, 1923. He stated that there was a verbal contract made at the same time. They talked about it. Defendant stated to the plaintiff, "I will give you the whole hay outfit if you will let me use half of the barn." Plaintiff replied, "No, I won't—the rope is worn out anyway. I don't want you to have anything more to do with it." The rest of the contract was reduced to writing. Everything outside of the house that was mentioned she was to have, and everything not mentioned in the contract was to be defendant's. This alleged written contract is not in evidence. The only written contract in the record is the deed above referred to, executed November 20, 1923. This deed, as above stated, conveys the land on which the barn is situated, and contains the following recital: "This deed is made as a division of real estate in settle-

ment of property rights between David and Bessie Feldman, in a suit in the chancery court for the Eastern District of Clay County, Arkansas." The lands are described, and the *habendum* clause recites, "To have and to hold the same unto the said Bessie Feldman and her heirs and assigns forever, with all appurtenances thereunto belonging."

The trial court instructed the jury, in effect, that the property in controversy was a fixture and therefore a part of the real estate, and directed the jury to find the value of the property and to return their verdict in favor of the plaintiff for such value. The defendant duly excepted to the ruling of the court in giving this instruction. The jury returned a verdict in favor of the plaintiff for the possession of the property, except the rope, and fixed the value thereof at the sum of $25. Judgment was entered in favor of the plaintiff, from which is this appeal.

1. The court did not err in refusing to quash the affidavit or complaint, and did not err in refusing to dismiss the cause of action. Where there is a statement of the facts constituting the cause of action, whether the complaint be designated as an affidavit or complaint, it is sufficient to give the court jurisdiction. *Climer* v. *Aylor,* 123 Ark. 510. The affidavit or complaint filed before the justice court has been duly brought into this record by certiorari, and is set forth above. The instrument set out above designated affidavit or complaint contains a sufficient description of the goods in controversy and their value, and alleged that the plaintiff was entitled to possession thereof, and that the defendant was in unlawful possession and unlawfully detained the same, and the plaintiff prayed judgment for the recovery thereof. This complaint was sufficient to give the court jurisdiction of the subject-matter to determine rights of property between the parties, under § 8640, C. & M. Digest. See *Schattler* v. *Heisman,* 85 Ark. 73, and cases there cited.

2. There was no error in the ruling of the court in directing the jury to ascertain the value of the property from the testimony and to return a verdict in favor of the appellee for the possession of the property, or its value. The court was justified in finding from the undisputed testimony that the property in controversy was a fixture. The undisputed testimony shows that the barn was built with a view of having the hay-unloading equipment made a part thereof; that this equipment was attached to the barn by bolts, and was a part of the permanent structure. The court therefore ruled correctly in holding that it was a fixture and passed to the appellee by the deed to the land.

3. When the appellant detached and removed the property in controversy, it was thereafter personal property in his possession, and appellee's suit to recover the same was within the jurisdiction of the justice court.

The record presents no error in the rulings of the trial court, and its judgment is therefore affirmed.

WALLACE v. DAVIS.

Opinion delivered November 1, 1926.

1. MINES AND MINERALS—JOINT PURCHASERS—ACCOUNTING.—Where two persons buy an oil and gas lease for resale, and the total purchase price is advanced by one, the latter, on a resale, was properly decreed the portion of the purchase price advanced by him, less the other's share of the profits.
2. BANKS AND BANKING—LIABILITY FOR NEGLIGENCE IN COLLECTION.—Before recovery can be had from a bank for negligence in delivery of an oil and gas lease without requiring payment of a draft attached thereto, there must have been an actual loss, and no liability is established where the drawee owed the drawer nothing.

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

STATEMENT BY THE COURT.

J. H. Wallace instituted this action in the circuit court against W. E. Davis, F. L. Davis and the National

Bank of Commerce to recover the sum of $900 damages alleged to have been occasioned by the negligence of the defendant bank in the performance of its duty as agent for the plaintiff in the collection of a draft on the defendant Davis. The defendants filed separate answers. The bank denied negligence or liability on its part, and W. E. Davis and F. L. Davis denied liability on the draft. By the agreement of all parties, the case was transferred to the chancery court.

The chancellor found that, on the 30th day of March, 1921, J. H. Wallace and F. L. Davis, by his agent, W. E. Davis, purchased from George Zeigan a certain oil and gas lease to certain land in Union County, Arkansas, and took a deed therefor in the name of J. H. Wallace and F. L. Davis; that the purchase price of said lease of $3,250 was advanced and paid by F. L. Davis through her agent, W. E. Davis, under an agreement that J. H. Wallace would pay to F. L. Davis, on the following Monday, one-half of said $3,250; that no part of that amount has been paid by J. H. Wallace to F. L. Davis; that the lease was purchased by J. H. Wallace and F. L. Davis for the purpose of resale, under an agreement that each was to pay one-half of the purchase price and to divide equally any profit or loss which might be incurred in the transaction.

The chancellor further found that, on the 15th day of September, 1921, J. H. Wallace, through the Savings Bank & Trust Company of Monroe, Louisiana, forwarded to the National Bank of Commerce of El Dorado, Arkansas, a draft drawn by the plaintiff on the defendant Davis in the sum of $900, to which draft was attached an oil and gas lease executed by Wallace to his interest in the oil and gas lease above referred to; that said conveyance was incomplete until signed by F. L. Davis; that said bank delivered said lease to W. E. Davis without the knowledge or consent of Wallace; and that W. E. Davis, after having caused said lease to be signed and acknowledged by F. L. Davis, as her agent, filed it for record in Union County, Arkansas; that no legal delivery

of said lease, which was attached to said draft, was ever made by said defendant bank to said Davis, and that the deed so obtained by Davis is null and void, and passes no title, for the reason that no legal delivery was made of it by the bank to said W. E. Davis.

The chancellor further found that J. H. Wallace has failed to sustain his contention that W. E. Davis or F. L. Davis is indebted to him in the sum of $900; and that the complaint of J. H. Wallace against the defendant bank is not sustained by the evidence. It was therefore decreed that the complaint against these defendants be dismissed for want of equity.

The chancellor further found that J. H. Wallace was indebted to the defendant, F. L. Davis, in the sum of $1,625, with interest thereon from the 30th day of March, 1921, at six per cent. per annum; that F. L. Davis has collected the sum of $300 in the handling of the lease in question, and that the $1,625 due by Wallace to F. L. Davis should be credited with one-half of the $300 as of the date of March 30, 1921; that the defendant, F. L. Davis, is entitled to judgment therefor; that, under the pleadings as amended to conform to the evidence adduced at the trial, a lien should be declared on the one-half undivided interest of J. H. Wallace in said lease, and that, in default of the payment of the amount found due, the undivided interest of Wallace in said lease should be sold under the orders of the court and the proceeds applied, first, to the payment of the indebtedness found due by J. H. Wallace to F. L. Davis, and the balance, if any, should be paid to said Wallace.

The above finding of facts in a more detailed form is embodied in the decree entered of record in the case; and, inasmuch as counsel for the plaintiff expressly concedes that no question of fact is raised by the appeal, but that, accepting the chancellor's finding as correct, the decree is erroneous as a matter of law, we adopt the above as our statement of facts presenting the issues raised by the appeal of the plaintiff.

Coulter & Coulter, for appellant.

Powell, Smead & Knox, for appellee.

HART, J., (after stating the facts). It appears from the record that J. H. Wallace and F. L. Davis purchased an oil and gas lease to land in Union County, Arkansas, and took a deed therefor in their names, upon the agreement that the purchase price of said lease, which was $3,250, should be advanced and paid by F. L. Davis. It was agreed at the time that Wallace would pay to said Davis his one-half of the purchase price of said lease on the following Monday. This he failed to do, and never at any time paid any part of the purchase price of said lease. The lease was purchased by Wallace and Davis for the purpose of resale, and they were to share equally the profits or losses.

On the 15th day of September, 1921, through a bank at Monroe, Louisiana, Wallace forwarded to the National Bank of Commerce a draft drawn by the plaintiff on the defendant Davis in the sum of $900. Attached to this draft was an oil and gas lease to said land duly executed by Wallace. This lease appears to have been executed by Wallace on the theory of a sale of the gas and oil lease by him and Davis for a profit of $1,800, of which his share would be $900.

According to the finding of facts made by the chancellor, no such sale of the oil and gas lease owned by Wallace and Davis was made, and Davis only received $300 in the handling of the oil and gas lease. The chancellor properly held that Davis should account to Wallace for one-half of this amount. The chancellor also found that no part of the original consideration for the purchase price of the lease had been paid by Wallace to Davis according to the agreement. Under this state of facts, which is conceded to be supported by the evidence in the record, the chancellor properly entered of record a decree in favor of Davis against Wallace for the part of the purchase money advanced by Davis to Wallace, after accounting to Wallace for his share of the profits made under the lease.

The decree dismissing the complaint of the plaintiff against the defendant bank was also correct. As we

have just seen, the defendant Davis did not owe the plaintiff anything. On the other hand, the plaintiff owed Davis. In this view of the matter, it did not make any difference that the bank wrongfully delivered the oil and gas lease attached to the draft to Davis without collecting the amount of the draft.

In cases of this kind, even where the negligence of the agent is established, it is a question of damages only; and the agent may show that, notwithstanding his fault, his principal suffered no damages. The agent may show that, if he had used the greatest diligence, the draft would not have been accepted or paid, because the person on whom the draft was drawn did not owe his principal anything. This court has expressly held that, in cases of this sort, the collecting bank is liable only for the actual loss which results from its improper conduct or unauthorized acts. There must be an actual loss before any recovery can be had in such a case, and no recovery can be had for more than the actual loss sustained. *Second National Bank of Baltimore, Maryland,* v. *Bank of Alma,* 99 Ark. 386, 138 S. W. 432.

It follows that the decree must be affirmed.

OZARK-BADGER COMPANY v. ROBERTS.

Opinion delivered November 1, 1926.

1. CUSTOMS AND USAGES—VARYING TERMS OF CONTRACT.—In a suit on a promissory note, in which the maker counterclaimed for excessive credits taken by the payee while manager of defendant lumber company's mill, admission of testimony that it was customary for lumber companies to allow managers their expenses in attending conventions of lumbermen and for entertainment of prospective customers *held* error where a written contract between the parties defined the duties of the manager and fixed his salary, without allowing him an expense account for entertaining customers.
2. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—A principal can be bound only by the authorized acts of an agent.

3. CUSTOMS AND USAGES—VARYING TERMS OF CONTRACT.—Where an agency is created by contract, the nature and extent of the agent's authority must be ascertained from the contract itself, and, unless the language of the contract is technical or ambiguous, it cannot be extended by parol proof as to a custom.

4. MASTER AND SERVANT—EXPENSES OF BUSINESS TRIPS.—The manager of a lumber company was authorized to charge the expenses of a business trip to the company.

5. CORPORATIONS—ESTOPPEL TO DENY AGENT'S AUTHORITY.—Officers of a lumber company not being under duty to examine its books to ascertain whether its manager had been guilty of wrongdoing, the company was not precluded from recovering the amount of improper traveling expenses because they were set out in such books.

Appeal from Drew Circuit Court; *Turner Butler*, Judge; reversed.

STATEMENT BY THE COURT.

W. T. Roberts sued the Ozark-Badger Company to recover the sum of $668 alleged to be due him on a promissory note executed to him by the defendant.

The Ozark-Badger Company filed an answer, in which it admitted the execution of the note and the balance due and unpaid on it in the amount sued for. By way of counterclaim, it alleged that Roberts was manager of the sawmill business of the Ozark-Badger Company, a corporation, at Wilmar, Arkansas, during the years 1922-23, and until his resignation on the 13th day of March, 1924. It alleged that the manager was in charge of all the books of the defendant during this period of time, and that he wrongfully and illegally took credit for the sum of $1,175.52 on his expense account. The statements are set out specifically in the counterclaim, and the defendant asked judgment over and against the plaintiff in the sum of $475.52. On the trial of the case the note was introduced in evidence, showing a balance due on it in the amount sued for.

The record shows that W. T. Roberts was employed as general manager of the Ozark-Badger Company at Wilmar, Arkansas, on January 4, 1922, and continued as such manager until the 13th day of March, 1924. A

written contract was entered into between the parties on January 4, 1922, which defined Roberts' duties and salary as such general manager. His original salary was $300 per month, which was increased to $333.33 per month about the first of February, 1923.

The president and the secretary of the Ozark-Badger Company resided at Stoughton, Wisconsin, and, at stated intervals, came to Wilmar, but never made any examination of the books of the company. They did not know what the statements in the expense account were for. On one occasion, the president of the company met Roberts in the city of Chicago, attending a meeting of the rules committee of the National Hardwood Lumber Association, and Roberts stated that the association was paying the expense of the trip. The company made no objection to Roberts attending these meetings, but his attendance was not a part of his duties as manager of the company, and was not of any particular benefit to it. Roberts sent in a report showing the total general expenses of the operation of the sawmill, but the company did not know that the items involved in the suit had been charged against the company until the president came to Wilmar to make a final settlement with Roberts after his resignation.

Frank Seymour, assistant manager of the Gates Lumber Company at Wilmar, Arkansas, was a witness for the plaintiff, Roberts. Over the objections of the defendant company, he was permitted to testify that he charged up personal expenses to the Gates Lumber Company, which were paid by it, and that it was the custom of these lumber companies to allow their managers to spend a reasonable amount of money in entertaining prospective customers while away from home, and that they were allowed a lump sum for whatever they spent in railroad fare, hotel bills and suppers for prospective customers while in attendance at lumber association meetings and the like.

W. T. Roberts was a witness for himself. According to his testimony, he never kept an itemized statement of

his expense account involved in this lawsuit, because it was not the custom for general managers to keep such itemized statements. In a general way the expenses involved in the suit were for railroad fare, hotel bills and suppers and entertainment for persons with whom they did business and with whom they contemplated doing business. A part of the expenses was for railroad fare and hotel bills in going to Little Rock and Conway for the purpose of selling lumber and transacting other business for the company.

The jury returned a verdict in favor of W. T. Roberts in the sum of $617.48, and, to reverse the judgment rendered upon the verdict, the defendant, Ozark-Badger Company, has duly prosecuted an appeal to this court.

Williamson & Williamson, for appellant.

Henry & Harris, for appellee.

HART, J., (after stating the facts). The first assignment of error is that the court erred in allowing testimony to be introduced to the effect that it was customary for lumber companies like the Ozark-Badger Company to allow their general managers to spend reasonable amounts of money in attending the conventions of lumber associations and for the entertainment of prospective customers while there. We think the court erred in admitting this testimony. There was a written contract between the parties, which defined the duties of the general manager and fixed his salary at a definite sum, to be paid monthly. Nothing whatever was said about allowing him an expense account for the purpose of entertaining prospective customers.

It is a fundamental proposition of law that a person can only be bound by the authorized acts of his agent. Where an agency is created by contract, the nature and extent of the authority of the agent must be ascertained from the contract itself, except where it is ambiguous, and cannot be extended by parol evidence of the usage of agents of other companies. In other words, where there is no ambiguity in the language of the contract,

evidence of usage is not admissible in respect to what the contract expressly declares. Evidence of custom or usage is admissible "to show the intention of the parties in all those particulars which are not expressed in the contract, or which are expressed in unusual or technical terms." 17 C. J. 516; *Kimball* v. *Brawner,* 47 Mo. 398; *Porter* v. *Patterson,* 15 Penn. St. 229; *Patridge* v. *The Insurance Company,* 15 Wall. (U. S.) 573; and Greenleaf on Evidence, 15th ed., §§ 292, 294.

This court has recognized the general rule that, where the language of a contract is neither technical nor ambiguous, proof of usage in respect to the contract is not needed as an aid in its construction, and its admissibility would amount to establishing the principle that a custom may add to or vary a contract. *Runyan* v. *Runyan,* 101 Ark. 353, 142 S. W. 519; *In re Paepcke-Leicht Lumber Co.,* 106 Ark. 400, 153 S. W. 833; and *Batton* v. *Jones,* 167 Ark. 478, 268 S. W. 857.

We have not copied the contract here, and do not deem it necessary to do so. It is sufficient to say that it employed Roberts as general manager of the Ozark-Badger Company at a stated salary, payable monthly, and defined his duties. There is nothing whatever in its terms from which it might be inferred that the company intended that Roberts should attend meetings of lumber associations, and charge his expenses in going there and entertaining prospective customers to the company. There being no ambiguity in the language of the contract, evidence of the usage of other lumber companies situated in the same locality, as to the allowance of like expenses to their agents, was not admissible.

In this connection it may be stated that Roberts, as general manager of the company, would have the authority to send an employee of the company to Little Rock and to other nearby places for the purpose of selling lumber and transacting other business for the company, and allowing them the expenses of the trip, such as railroad fare and hotel bills. If Roberts had the authority to delegate this duty to another employee and to charge

the expenses of the trip to the company, he could perform the same services himself and charge his expenses to the company.

The court told the jury that, in the management and control of the plant of the company, Roberts had the right to spend money to further the interests of the company, and that he might include in his expense account railroad fare, hotel bills, and the cost of entertaining customers while attending the meetings of lumber associations in Chicago. Under the principles above announced, such instructions were erroneous and necessarily prejudicial to the rights of the company, and therefore call for a reversal of the judgment.

Finally, it is insisted by counsel for Roberts that the company is precluded from recovering these amounts, although they are illegal. This contention is predicated upon the fact that Roberts charged them in his expense account on the books of the company and that the president and the secretary of the company had access to the books of the company when they visited the mill plant, and might have discovered these charges if they had examined the books. In answer to this, it is sufficient to say that the president and the secretary were not required to examine the books for the purpose of ascertaining whether or not Roberts had been guilty of wrongdoing in his operation of the mill and had charged up illegal expenses to the company. In this connection, it will be remembered that both the president and the secretary of the company testified that they did not know anything about Roberts having charged the contested statements as proper expenses upon the books of the company until the president went to Wilmar, after Roberts had resigned, for the purpose of settling with him.

For the errors in the admission of testimony and in instructing the jury, as indicated in the opinion, the judgment must be reversed, and the cause remanded for a new trial.

ADKINS v. KALTER.

Opinion delivered November 1, 1926.

1. AUCTIONS AND AUCTIONEERS—SALE OF STATE PROPERTY AT AUCTION —TAX.—Where the Governor, through the appointment of an honorary commission, accepted military property granted by the United States, and such acceptance was impliedly ratified by the Legislature in Acts 1923, pp. 229, 656, and Acts 1925, pp. 958, 1072, the property was a valid gift to the State, and the proceeds of sale thereof, which were to be used by the National Guard, were exempt under Const., art. 16, § 5, from the auction tax claimed under Crawford & Moses' Dig., §§ 630, 634.
2. STATES—POWER TO ACQUIRE PROPERTY.—A State may acquire real or personal property by conveyance, gift or otherwise, and sell or dispose of it as it sees fit.
3. STATE—ACCEPTANCE OF GIFT.—While affirmative legislative action would be binding as expressing the intention of the State in accepting or rejecting a gift of property to the State, such action is not essential where the gift was accepted by the Governor, whose duty it was to execute and perform the trust imposed under the terms of the gift, especially where such acceptance was subsequently recognized and impliedly ratified by the Legislature.
4. OFFICERS—LIABILITY FOR PUBLIC FUNDS.—Money collected on the State's behalf by a State officer, under color of office but without authority of law, belongs to the State, and must be accounted for.

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

STATEMENT OF FACTS.

Appellant brought this suit in the Pulaski Chancery Court against appellees to recover an amount alleged to be due as a tax upon sale of personal property at auction, in said county. The suit was defended on the ground that the property sold belonged to the State, and that, on this account, the tax was not due. The material facts are practically undisputed, and may be briefly stated as follows:

A certain tract of land in Pulaski County, Arkansas, was purchased by the United States Government from the owners, at some time prior to the year 1922, to use as a United States army cantonment. Numerous buildings were erected on the land, and it was used as a

military encampment and mobilization point of the United States Army after the entrance of the United States in the World war. On the 15th day of May, 1922, the War Department of the United States granted to the State of Arkansas what was called a revocable license to use said buildings. The War Department retained the right to occupy any of the buildings which it might require in connection with the salvaging and disposition of Government property.

The Hon. Thomas C. McRae, then Governor of the State of Arkansas, appointed an honorary commission to take charge of said buildings, and also to accept, for the State of Arkansas, certain personal property from the United States. On the 19th day of May, 1922, the War Department of the United States entered into a written contract with A. D. Cohn, as trustee for said honorary commission, for certain surplus property then at Camp Pike, Pulaski County, Arkansas, and listed on certain inventories attached to the contract. The consideration recited in the contract was the payment of $140,564.29 to the United States in the form of a banker's acceptance, payable on the 19th day of November, 1922, which said banker's acceptance was furnished by the Surplus Trading Company, which was composed of certain nonresident individuals and corporations.

In the agreement between the honorary commission and the Surplus Trading Company, it was agreed that this banker's acceptance should be repaid to the Surplus Trading Company out of the proceeds of the sale of said surplus property. It was understood that the remaining proceeds of the sale of said surplus property should belong to said honorary commission, in trust for the State of Arkansas, for the use of the National Guard. The agreement provided that the Surplus Trading Company should act as the selling agent of said honorary commission in disposing of said property, and it was to receive a certain per cent. in addition to the repayment to them of the banker's acceptance above referred to.

Max Kalter was a member of the Surplus Trading Company, and took out an auctioneer's license under the

provisions of chapter 13 of Crawford & Moses' Digest. Section 630 provides that no person shall exercise the trade or business of a public auctioneer, by selling any goods or other property subject to duty under the law, without a license, to be issued according to the law. Section 634 provides that there shall be levied and paid upon all sales of property at auction, except as hereafter excepted, a tax or duty to the county of one and one-half per cent. on all sales of said property. The record shows that Max Kalter, as auctioneer, sold something over $500,000 of said property, and that, if the tax was due to the county, it was entitled to recover $7,617.84.

The chancellor found that the proceeds of the sale in question belonged to the State, and that no tax, under the provisions of the statute licensing auctioneers and levying a tax upon the sales of personal property at auction, could be recovered in this suit. It was therefore decreed that the complaint should be dismissed for want of equity. The case is here on appeal.

Poe & Poe and *J. C. Marshall,* for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, J., (after stating the facts). It is earnestly insisted by counsel for appellant that the chancellor erred in holding that the property in question belonged to the State and, on that account, was not subject to the auctioneer's tax under the provisions of the statute referred to in our statement of facts. We cannot agree with counsel in this contention. It is well settled that a State may acquire real or personal property by conveyance, gift or otherwise, and sell or dispose of it as it sees fit. 36 Cyc. 869, and 25 R. C. L., p. 388, § 21.

This court has held that, under our Constitution, the power of the State in respect to its property rights is vested in the Legislature. *Little Rock & Fort Smith R. Co.* v. *Howell,* 31 Ark. 119, and *Bartlett* v. *Crawford,* 36 Ark. 637. It does not follow, however, that, because the Legislature has not acted in respect to the property

in question and provided for its disposition, it did not belong to the State.

The record shows that the Governor, acting in behalf of the State, appointed an honorary commission to accept the property in question and to use the proceeds for the National Guard of the State of Arkansas. In *Hawkins* v. *The Governor*, 1 Ark. 570, it was said: "It will be borne in mind that the office of President of the United States and the office of Governor of our State are, in many respects, like each other, with this essential difference, that the former is intrusted with the executive powers that relate exclusively to the General Government, and the latter is intrusted with the exclusive powers that belong to the State Government. The powers conferred and the duties enjoined upon both of these officers by the respective Constitutions of the two Governments are, in most particulars, identically the same, so far, at least, as regards their legal or constitutional discretion."

Article 6, § 6, of our Constitution provides that the Governor shall be commander-in-chief of the military and naval forces of this State, except when they shall be called into the actual service of the United States.

The object of the War Department in granting the surplus property at Camp Pike to the honorary commission appointed by Governor McRae was to provide a fund for the National Guard of Arkansas. It is true that a substantial money consideration was paid to the United States, but this payment was made by the Surplus Trading Company, which was to act as selling agent for the honorary commission in the disposal of the property, and it was to receive back the consideration to be paid the United States, first, from the proceeds of the sale of said property, and the balance was to be paid to said honorary commission, in trust, for the National Guard of the State of Arkansas, after deducting certain selling commissions of said Surplus Trading Company. The property was sold for something over $500,000. The sale was made within a few months after the property was accepted from the United States by the honorary com-

mission, in behalf of the State of Arkansas. Thus it will be seen that, when the transaction is considered in its entirety, it was, in effect, a gift of the property to the State of Arkansas. The gift was accepted by the honorary commission duly appointed by the Governor, and this, in fact, constituted an acceptance by the Governor.

While affirmative legislative action would be binding as expressing the intention of the State, either in accepting or rejecting a gift of property to the State, yet such affirmative action is not essential in order to render a gift of property to the State valid. As we have already seen, the Governor, by virtue of his office, is commander-in-chief of the army and naval forces of the State, and, through an honorary commission appointed for the purpose, accepted the gift. The Arkansas National Guard was an existing volunteer association, organized pursuant to the terms of the statute, at the time the transaction in question took place. Crawford & Moses' Digest, chap. 119. Under § 7173, the Governor is authorized, and it is made his duty, to establish and prescribe such rules, regulations, forms and precedents as he may deem proper and necessary for the organization, regulation, discipline and instruction of the Arkansas National Guard. The section further provides that the Governor shall have full control and authority over all matters touching the Arkansas National Guard, its organization and discipline. Thus, the gift was accepted by a State officer, whose duty it was to execute and perform the trust imposed under the terms of the gift. He was to become a trustee under obligation to expend the fund derived from the sale of the property in accordance with the provisions of the trust.

The Legislature which convened next after the transaction in question passed an act to promote the efficiency of the Arkansas National Guard. Gen. Acts of 1923, p. 229. Under § 5 of the act, it is made the duty of the Governor to appoint, subject to the approval of the Secretary of War, an officer of the Arkansas National Guard, who shall be regarded as the property and dis-

bursing officer of the United States. The section further provides that this officer shall receive and account for all funds and property belonging to the United States in possession of the Arkansas National Guard. It further provides that he shall render to the War Department such account of the funds intrusted to him as may be required by the Treasury Department. The same Legislature made the usual biennial appropriation for the support of the Arkansas National Guard. Gen. Acts of 1923, p. 656.

The Legislature of 1925 also passed an act to promote the efficiency of the Arkansas National Guard, and amended in some respects the act of 1923, above referred to. Gen. Acts 1925, p. 1072. This Legislature also made the biennial appropriation for the support of the Arkansas National Guard. Gen. Acts of 1925, p. 958.

The gift in question was for a public purpose, and was in accordance with the general legislative policy before and since the time of the transaction in question, and its object and purpose was to promote the efficiency of the Arkansas National Guard. The presumption is that, in making the biennial appropriations, the Legislature acquainted itself with the needs and resources of the Arkansas National Guard. Under the circumstances, the Legislature may be said to have, impliedly at least, ratified the act of the Governor in accepting the gift under consideration.

If it can be said that the Governor, by virtue of his office, had no legal right to accept the property, still it must be admitted that he acted at least under color of his office. Money collected by a State officer, under color of office, without authority of law, belongs to the State, and must be accounted for. It is true that the Legislature might have acted in the premises and provided for the disposition of the property or the proceeds of the sale thereof. However, it has not done so, and the Governor, acting at least under color of his office, has accepted the property and caused the proceeds from the sale of it to be applied to the upkeep of the National Guard of

Arkansas, as contemplated by the War Department of the United States when it granted the surplus property at Camp Pike to the State.

It has been held that, where an agent of the State, without authority, sells property of the State and takes a note in payment therefor, the Legislature may ratify his act and enforce the note. *State* v. *Torinus,* 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395. The principle announced in this case shows that the property in question belongs to the State, because the Legislature could not ratify the illegal act of the State officer unless the property or its proceeds still remained the property of the State.

Again, in *People* v. *Van Ness,* 79 Cal. 85, 21 Pac. 554, 12 A. S. R. 134, it was held that fees collected without legal authority by the Commissioner of Immigration, in his official capacity and under color of law, belonged to the State, and not to him. In that case it was contended that, the money having been collected by Van Ness without legal sanction, he had the right to retain it as his own. The court held to the contrary, and said that the money, having been collected under color of office, should have been paid into the State Treasury, and did not belong, in any view, to Van Ness, and he had no right to retain it.

In the application of this principle to the case at bar, we are of the opinion that the proceeds of the sale of the surplus property at Camp Pike belong to the State, and on this account were not subject to an auctioneer's sale tax under the statute.

Having reached the conclusion that the property in question belonged to the State by grant from the United States, but little more remains to be said. Under art. 16, § 5, of our Constitution, public property used exclusively for a public purpose is exempt from taxation. While the legal title to the property was in the honorary commission as trustee, the whole beneficial interest was in the State. The term "property," as used in the section of the Constitution just referred to, is broad enough to

cover an equitable interest like the one in question. The exemption from taxation is based upon the use which is made of the property, namely, for the support of the National Guard of the State, and not upon the person in whom stands the legal title.

This principle was recognized in *Grand Lodge of Free and Accepted Masons* v. *Taylor,* 146 Ark. 316, 226 S. W. 129. There the court had under consideration a clause of the same section of the Constitution, which exempts from taxation property used exclusively for public charity. The court said that the language of the exemption clause refers not to the character of the corporation or association owning the property sought to be exempted, but, regardless of the character of the owners, to the direction and exclusive use of the property for public charity.

The result of our views is that the holding of the chancellor was correct, and the decree will therefore be affirmed.

TURNER v. STATE.

Opinion delivered November 1, 1926.

1. CRIMINAL LAW—RULING AS TO JUROR'S QUALIFICATIONS.—A recital in the record that each juror, over objection, was permitted to answer a question of the prosecuting attorney whether he would let the unsavory reputation of a State's witness influence his verdict *held* not equivalent to a ruling that only persons answering in the negative were competent to serve as jurors.
2. CRIMINAL LAW—INSTRUCTION AS TO CREDIBILITY OF WITNESS.—It would be error to instruct the jury to disregard the unsavory reputation of a witness in making up their verdict.
3. CRIMINAL LAW—PRESUMPTION OF REGULARITY.—Every reasonable presumption is indulged in favor of the regularity and fairness of a trial.
4. CRIMINAL LAW—PRESUMPTION IN SELECTION OF JURY.—Where the prosecuting attorney was permitted to ask jurors on their *voir dire* whether they would let the unsavory reputation of a State's witness influence their verdict, it will be presumed that the object of the question was to enable the prosecuting attorney to exercise his peremptory challenges.

5. CRIMINAL LAW—REPUTATION OF WITNESS.—While the reputation of a witness should be considered by the jury in weighing the testimony, the jury should not disregard the testimony of a witness if they believed it to be true, though the reputation of the witness was bad.

Appeal from Ouachita Circuit Court; *L. S. Britt,* Judge; affirmed.

L. B. Smead and *J. C. Clary,* for appellant.

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

SMITH, J. Appellant was convicted of the crime of assault with intent to kill, alleged to have been committed by shooting one Mrs. W. M. Skinner, who testified that appellant came into the tent where she was living and demanded a drink of "choc," a kind of beer, which she furnished him. After drinking the choc, appellant demanded that Mrs. Skinner go out of the tent with him, and enforced the command by drawing a pistol on her. She obeyed, and, through fear, permitted appellant to have sexual intercourse with her, after which act he commenced shooting at her with a pistol, and fired three shots at her, and one of the bullets found lodgment in her foot.

The bill of exceptions contains the following recital: "Thereupon, a jury came, and before the selection or rejection of each juror called, the State, over the objection of the defendant was permitted to ask each juror the following question: 'Would you, if the State, relying on a witness for conviction, who has an unsavory reputation, would you let the facts of said witness' unsavory reputation influence you in arriving at your verdict?' And each juror, over the objection of the defendant, was permitted to answer that he would not. To which question and answer the defendant duly saved his exceptions as to each juror."

The action of the court in permitting the prosecuting attorney to ask this question, in qualifying the jurors, is assigned as error in the motion for a new trial, and no other error is insisted upon for reversal of the judgment.

It will be observed that the record does not recite that only those jurors were held competent who qualified by answering this question in the negative. It does appear that each juror, over the objection of appellant, was permitted to answer that he would not let the unsavory reputation of a witness influence him in making up his verdict; but that recital is not sufficient to show that the court ruled that only such persons so qualifying were competent to serve as jurors in the case.

Such a ruling would have been erroneous, because it is the peculiar province of the jury to determine the weight and effect to be given the evidence of any witness, and the court could not, at any stage of the trial, usurp this function. Certainly it would be improper for the court to instruct that the jury should disregard the unsavory reputation of a witness in making up their verdict, and, of course, it would be improper for the court to hold that only jurors were competent who would disregard and not consider reputation.

Indulging, as we must do, every reasonable presumption in favor of the regularity and fairness of the trial below, we presume this question was asked by the prosecuting attorney to enable him to exercise, advisedly, the peremptory challenges which the law allows the State.

In the case of *Gurley* v. *State,* 164 Ark. 397, we said that the trial court has the discretion to permit the examination of a venireman within a range reasonably calculated to disclose whether he has such bias or prejudice for or against the State or the defendant as is calculated to influence his verdict, and that either side may ask relevant questions bearing on this subject, not only to establish actual bias which would disqualify a juror, but for the purpose of enabling the party propounding the questions to intelligently exercise his right of peremptory challenge.

We presume such was the purpose of the prosecuting attorney here, and also that, if the court had ruled that only those persons were qualified who answered the ques-

tion in the negative, that fact would have been made to appear in the bill of exceptions.

At § 97 of the chapter on "Jury," in 16 R. C. L., p. 281, 262 S. W. 636, it is said that "hypothetical questions are not competent, when their evident purpose is to have jurors indicate in advance what their decision will be under a certain state of the evidence, or upon a certain state of facts, and thus possibly commit them to certain ideas or views when the case shall be finally submitted to them for their decision." Here, however, the jurors were not asked what their verdict would be, but whether they would disregard testimony given by a witness of an unsavory reputation. The bill of exceptions does not show what other questions were asked the veniremen, either by the prosecuting attorney or by counsel for defendant, and it may be that the prosecuting attorney desired only to know whether the veniremen to whom the question was propounded entertained such a prejudice against a woman of questionable character that they would not believe any statement she made merely because her reputation was bad.

As we have said, the reputation of a witness, when shown by the testimony, is a proper matter for the jury to consider in weighing the testimony of the witness, but the jury would have no right to disregard the testimony of such a witness if they believed the testimony of the witness was true, even though her reputation was bad. We have applied this principle even when it was shown that a witness had testified falsely concerning some material matter, and have held it to be error for the court to charge the jury that they might disregard all the testimony of a witness if they found the witness had testified falsely in any respect. The jury might consider the fact that the witness had testified falsely in determining whether to believe any of the testimony given by the witness, but, if it were found that some of the testimony of the witness were true, it could not be disregarded in its entirety because some other part of

the testimony was false. *Taylor* v. *State,* 82 Ark. 540, 102 S. W. 367; *Flake* v. *State,* 161 Ark. 214, 255 S. W. 885.

This was of course a proper subject to be covered by instructions given by the court, and it must be presumed this was done, especially so as it affirmatively appears that "there were no refused instructions."

We think no showing of prejudice was made, and the judgment will therefore be affirmed.

GARRISON COMPANY *v.* LAWSON.

Opinion delivered November 1, 1926.

1. TRIAL—APPLICATION OF INSTRUCTIONS TO CASE.—An instruction relating to negligence regarding a blowpipe and oily floor, in a personal injury case, should not have been given where the evidence did not show that these conditions contributed to plaintiff's injury.
2. MASTER AND SERVANT—SAFE TOOLS—INSTRUCTION.—Where an employee, injured while operating a shaper machine, was supposed to change the knives of the machine when dull, it was error to submit the question whether the knives were dull and the dullness contributed to the injury.
3. TRIAL—CONFLICTING INSTRUCTIONS.—Where an employee was injured while operating a shaper machine, it was error to submit grounds of negligence under instructions taking no account of assumed risk, even though this question was submitted under another instruction, if the instructions, when taken together, were so conflicting as to confuse or mislead the jury.
4. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION WHEN.—Whether an employee, injured while operating a shaper machine, assumed the risk of such injury, *held,* under the evidence, for the jury.

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

T. D. Wynne and *Pryor, Miles & Pryor,* for appellant.

J. F. O'Melia, for appellee.

SMITH, J. Appellee recovered judgment to compensate a personal injury sustained by him while employed by appellant in the operation of a "shaper"

machine in appellant's furniture factory. Six separate acts of negligence were alleged on the part of appellant, and, in separate instructions, the court submitted each of these acts of negligence, each instruction being complete in itself, and each told the jury to find for the plaintiff if it were found that appellant was guilty of the act of negligence to which the particular instruction related.

The shaper machine which appellant was operating at the time of his injury was a heavy steel table, with a perfectly smooth, polished steel top, about five feet square, through the outer edges of which there were two holes, through each of which the end of a shaft protruded.

These shafts turn at a high speed, and on the end of them the operator fastened various saws and blades, which cut the edge of the timber and lumber in various shapes, to be used in decorating and manufacturing furniture, and, because of the use thus made of the machine, it is called a "shaper" machine. In the operation of the machine the operator determines the particular kind of knife or saw required, and he also determines when the knife or saw has become too dull for further use, in all of which instances it is the duty of the operator to change the knife, and it was not unusual for as many as a dozen of these changes to be made in a day. It was the duty of another employee to see that the knives were kept sharp.

Appellee testified that he was shaping a vanity dresser top, on which another piece of timber had been glued, and, when the revolving knives hit the cross-grain of the part that was glued to the dresser top, it jerked the piece of lumber he was shaping in a way to throw his hand into the knives, and all four of the fingers on his right hand, with which he was holding the lumber, were amputated.

The acts of negligence submitted to the jury were as follows: (1) the shaper did not have a proper guard or shield; (2-3) the shaper vibrated, rendering it dangerous, a condition which could have been remedied by fastening or bolting it more securely to the floor; (4)

there was no proper footing for appellee to stand on, in that the floor was oily and slippery; (5) there was no sufficient blow-pipe to carry away the shavings which accumulated on the shaper and on the floor; (6) the knives on the shaper were dull.

The instructions given permitted a recovery if it were found that appellant was guilty of any of the acts of negligence alleged, and to each of these instructions the objection was made that no account was taken of the defense of assumed risk set up in the answer. Appellant objected to the giving of any of the instructions, upon the ground that, under the undisputed evidence, a verdict should have been directed in its favor.

It may be first said that certain of these instructions should not have been given, for the reason that the acts of negligence complained of were not the proximate or contributing causes of the injury. This is true of the allegations of negligence in regard to the blow-pipe and the oily condition of the floor. There is no testimony showing that these conditions, even though their existence constituted negligence, contributed to appellee's injury, and the instructions on those subjects were therefore abstract and erroneous.

We are also of the opinion that it was erroneous to submit the question whether the knives were dull, and, if so, whether their lack of edge contributed to the injury, for the reason that sharp knives were available, as they were required in the operation of the machine, to appellee, who would be the first person to know whether a knife had lost its edge, and it was his duty to change the knives when this happened.

We are also of the opinion that it was error to submit the other grounds of negligence under instructions which took no account of the defense of assumed risk. It is true this question was submitted under instructions requested by appellant, but this was done after the various instructions requested by appellee had been given, a number of which undertook to define the conditions under which the jury should find for the plaintiff, and

these instructions eliminated or failed to take into account the fact that appellee might have assumed the risk of the negligence complained of, and could not recover if he had done so.

This court has many times held that the instructions, when taken together, should not be so conflicting as to confuse or mislead the jury, not giving them a certain guide to follow in making their verdict. One of our leading cases on this subject is that of *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, 124 S. W. 1048.

The instructions do not come within the apparent exception to this rule announced in the case of *St. L. I. M. & S. R. Co.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375, where it was said that, "though the instructions given may be apparently conflicting, if, from the language used or the relation which the instructions are made by the whole charge to bear toward each other, it is readily seen that they are to be read together without conflict and as a harmonious whole, and they can be so read, then it is our duty to so treat them."

There was no intention, however, in the Rogers case *supra,* to depart from the rule that the instructions must, as a whole, give the jury a certain guide to follow in making up their verdict, for in that case it was also said: "It has been decided by this court, in an unbroken line of cases, that an instruction which ignores a material issue in the case about which the evidence is conflicting and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge. Where the instructions are thus conflicting, it is impossible for an appellate court to tell which of them the jury followed, and such an error calls for a reversal. Separate and disconnected instructions, each complete in itself and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole." Among the numerous cases cited by the court in thus

announcing the law was that of *Southern Anthracite Coal Co.* v. *Bowen, supra.*

It is the opinion of the majority, however, that, although the case must be reversed, because the instructions were conflicting and could not be read as a harmonious whole, and also because acts of negligence were submitted which were not shown to be proximate or contributing causes of the injury, the case should not be dismissed. It is the opinion of the majority—in which the writer and the Chief Justice do not concur—that it cannot be said as a matter of law that the injury was the result of one of the assumed risks of the employment.

Appellee was a man thirty-one years of age, had been in service in France during the World war, and, after his return, had worked in and around machinery in furniture factories for about four years before his injury. He had, for a period of ten days or two weeks, operated a similar shaper machine at another factory, and had operated the machine at which his injury was sustained for about two and one-half months prior to his injury. It was shown, however, that all shaper machinery was dangerous, and required skill and care in its operation to avoid injury to the operator, and one of the shapermen who had operated the machine in question told the foreman, shortly before appellee's injury, that the machine in question was dangerous because it had no hood, and because of its vibration. Appellee testified that he had never seen a guard on such a machine, and, although there was testimony that a guard had been prepared by another employee for this machine, it had never been placed in position, and there was testimony to the effect that, had this been done, the chance of injury to the operator would have been greatly lessened.

Other employees testified that the work of a shaper was one requiring much skill, and that years of experience were required to make one a skilled shaper, and that the chance of injury was in proportion to the lack of skill.

It is the opinion of the majority that, although appellee must have known, as any one would know, that he would be cut if he permitted his hand to come in contact with the knives, yet he did not appreciate the danger of this happening because of the lack of a guard, and that this lack of appreciation of the danger of operating the machine without a guard, together with his inexperience as a shaper, made a question for the jury whether he had received sufficient instruction or had had sufficient experience to appreciate the danger of the employment.

It is the opinion of the writer and the Chief Justice that the dangers attending the operation of the shaper were so open and obvious that they must have been known and appreciated, and that they were therefore assumed, and that the skill which the shaper acquired by years of employment added nothing to the appreciation of the danger, although it increased his skill in following the patterns designed for the ornamentation of the furniture in the manufacture of which he was employed.

It follows therefore that, although the case must be reversed, because of the erroneous instructions given the cause should not be dismissed, and it will therefore be remanded for a new trial.

FARMERS' EXCHANGE v. DRAKE.

Opinion delivered November 1, 1926.

1. PLEADING—WAIVER OF DEMURRER.—Any error in overruling a demurrer to a complaint and a motion to strike was waived when the defendant filed an answer and went to trial.
2. SALES—IMPLIED WARRANTY—JURY QUESTION.—Whether a dealer acted as plaintiff's agent in securing seed from defendant, so as not to preclude plaintiff from relying on an implied warranty in the sale, *held* for the jury.
3. APPEAL AND EVIDENCE—CONCLUSIVENESS OF VERDICT.—A verdict based upon substantial, though conflicting, evidence is conclusive.

4. TRIAL—APPLICABILITY OF INSTRUCTIONS.—Where the sale of seed was consummated by a telephone conversation, an instruction that, in determining whether defendant had sold seed direct to plaintiff, the jury should not consider oral evidence contradicting a written order, was properly refused.
5. TRIAL—APPLICABILITY OF INSTRUCTIONS.—In an action for breach of an implied warranty in the sale of seed, an instruction on the question whether defendant sold the seed direct to plaintiff, ignoring the plaintiff's theory that an intermediate dealer was acting as agent for plaintiff, on which issue the evidence was conflicting, *held* properly refused.

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

W. N. Ivie, for appellant.

H. L. Pearson, for appellee.

HUMPHREYS, J. Appellee instituted suit in the circuit court of Washington County against appellant, a corporation, and J. L. McConnell jointly, to recover damages in the sum of $411.30 for the alleged breach of an implied warranty in the sale of Honey Drip sorghum-cane seed to him. The gravamen of the complaint was that appellee applied to J. L. McConnell, a feed and flour merchant in Prairie Grove, for twenty-five pounds of Honey Drip cane seed, to plant seven acres of land for the purpose of growing sorghum-cane to make molasses; that, not having the seed in stock, McConnell called appellant over the telephone, which was in the seed business at Fayetteville, and informed it of appellee's desire, whereupon they agreed to furnish him seed of the kind and character desired; that he paid McConnell for the seed, and later received and planted same; that, when the crop matured, it proved to be a mixture of various kinds of cane, wholly unfit for making sorghum, and was of no value, except of a small value for feed.

Appellant and J. L. McConnell filed separate demurrers to the complaint, alleging that the facts were not sufficient to constitute a cause of action against either, and that there was a defect of parties therein.

Appellant also filed a motion to strike and dismiss the complaint, alleging, first, that appellant was improp-

erly joined as a defendant; second, that a privity of contract between appellee and appellant was not alleged; third, that facts sufficient to show a joint liability of appellant and McConnell were not alleged; and fourth, that the complaint was indefinite and uncertain in several particulars.

The court overruled the demurrers and motion, over the separate objection and exception of appellant, as well as McConnell.

Appellant then filed a separate answer, denying that it ever sold any cane seed directly or indirectly to appellee, but that it sold the seed to J. L. McConnell.

J. L. McConnell filed a separate answer, denying that he sold the seed to appellee, and alleging that, in telephoning to appellant for the seed, he acted in the capacity of agent for appellee.

The cause was submitted to a jury upon the pleadings, the testimony introduced by the parties, and the instructions of the court, which resulted in a verdict and consequent judgment for $205.50 in favor of appellee, from which is this appeal.

Appellant first contends for a reversal of the judgment because the court overruled its demurrer and motion to strike. If the court committed errors in overruling these pleadings, which it is unnecessary to determine, appellant waived them by pleading over. It did not stand upon its demurrer and motion, but filed a separate answer, joining issue upon the material allegations in the complaint, and proceeded to a trial of the cause, thus abandoning its demurrer and motion. *Jarrett* v. *Wilson,* 1 Ark. 137; *McLaughlin* v. *Hutchins,* 3 Ark. 207; *Tatum* v. *Tatum,* 19 Ark. 195.

Appellant next contends for a reversal of the judgment upon the alleged ground that the undisputed evidence showed that there was no privity of contract between the appellee and appellant, and, for that reason, claims that appellee was precluded from any benefit under the implied warranty growing out of the sale of said seed. We cannot agree with learned counsel for

appellant in his assumption that the undisputed evidence showed that appellant sold the seed to J. L. McConnell and not to appellee.

J. L. McConnell testified, in substance, that he called appellant over the telephone, and, after ascertaining that it had Honey Drip cane seed for sale, told it that a man was present who wanted a half bushel, and to put that much aside for him, which it agreed to do; that he accepted pay for same, and had the truck bring the seed out two days later and send same to appellee.

Appellee testified that he requested J. L. McConnell to call up Fayetteville and see if he could get Honey Drip sorghum seed for him; that McConnell called appellant, and told it that a man was there who wanted Honey Drip cane seed to make sorghum, and, when informed that it had such seed, instructed it to hold a half bushel for appellee.

This was testimony of a substantial nature tending to show that McConnell acted as purchasing agent for appellee in securing the seed, so it was not error to deny appellant's request for an instructed verdict.

The opposing theories of appellant and J. L. McConnell were submitted to the jury in carefully worded instructions, and the jury found the issues against appellant upon conflicting testimony. The verdict is conclusive against appellant, because supported by some substantial evidence.

Appellant's next contention for a reversal of the judgment is that the court erred in refusing to give appellant's requested instruction No. 2, which is as follows:

"In ascertaining whether or not the defendant Farmers' Exchange sold the seed in question direct to McConnell, or McConnell & Cravens, you are instructed that, if you find from the evidence that said seed was sold on a written order and by a written bill to said purchaser, then in this event you will not consider any oral evidence introduced in this case which tends to contradict, vary, or add to or take from such writings."

The undisputed testimony in the case shows that the seed was sold over the telephone on the 27th day of May, and that same was put up and set aside on that day, and that the order referred to in the instruction was a written order, given to the truck-driver for the seed, who called at appellant's store and got same on the 29th day of May, two days after the sale had been completed. To have given this instruction would have been tantamount to eliminating from the consideration of the jury the telephone conversation by which the sale and purchase of the seed was consummated.

The next and last contention of appellant for a reversal of the judgment is that the court erred in refusing to give its requested instruction No. 4, which is as follows:

"You are instructed that, if you find from the evidence that the defendant Farmers' Exchange, in the ordinary course of business, received an order from the defendant McConnell, or McConnell & Cravens, for the seed in question, and that said defendant Farmers' Exchange, in compliance with said order, sold, billed and delivered to said McConnell, or McConnell & Cravens, and said McConnell, or McConnell & Cravens, paid defendant Farmers' Exchange for said seed in the ordinary course of business, your verdict must be for the said defendant Farmers' Exchange."

If this instruction had been given, it would have prevented the jury from considering and determining J. L. McConnell's theory of the case, to the effect that he was acting as agent for appellee in ordering the seed. This was the real issue in the case as between appellant and J. L. McConnell, and it would have been improper to take this issue from the jury, in view of the fact that the testimony responsive to this issue was conflicting.

No error appearing, the judgment is affirmed.

HUTSON v. STATE USE OF HEMPSTEAD COUNTY.

Opinion delivered November 1, 1926.

1. JUDGES—CIVIL LIABILITY.—A county judge is not civilly liable to the county for fraudulently allowing claims within the jurisdiction conferred by Crawford & Moses' Dig., § 2279.
2. COUNTIES—ALLOWANCE OF CLAIMS.—County courts act judicially in allowance or disallowance of claims against the county.
3. JUDGES—CIVIL LIABILITY.—So far as civil liability is concerned, no distinction is drawn between the acts of judicial officers which are mistakes and errors committed in good faith and those acts which are committed willfully, knowingly and corruptly.

Appeal from Hempstead Circuit Court; *J. H. McCollum,* Judge; reversed.

O. A. Graves, U. A. Gentry, and *Shaver, Shaver & Williams,* for appellant.

Dexter Bush, Luke F. Monroe and *Steve Carrigan,* for appellee.

HUMPHREYS, J. This suit was instituted by appellee against appellant to recover $2,510.33 for willfully, knowingly and corruptly allowing a claim for jail cells to his alleged co-conspirator, A. F. Pickett, while acting in his official capacity as judge of the county court of Hempstead County, instead of making the allowance to E. T. Barnum Iron Works, a corporation, that furnished the cells to said county, under a written contract signed "Hempstead County, Owner, by Wash Hutson, County Judge," and approved by A. F. Pickett. The complaint is very long, but the gist is set out in appellee's brief as follows:

"The complaint alleges, among other things, that Wash Hutson, without first advertising for the work of the installing of the jail cells, negligently, carelessly, recklessly, indifferently, unlawfully, and willfully contracted with his co-defendant, A. F. Pickett, to do his work; that Wash Hutson negligently, carelessly, recklessly, indifferently, unlawfully and willfully contracted and agreed to pay the said A. F. Pickett a large price for said work; that Wash Hutson negligently, carelessly,

recklessly, indifferently, unlawfully and willfully, and with full knowledge and understanding of the exorbitant and unjust amount of the claim, examined and allowed to his co-defendant, A. F. Pickett, payment on said cages and for said work; that Wash Hutson at the time knew and had positive affirmative knowledge of the fact that Hempstead County, acting through him, Wash Hutson, county judge, had purchased direct from E. T. Barnum Iron Works the cells and cages, under written contract dated December 5, 1921; that Wash Hutson, with direct and positive knowledge at the time, knew that his co-defendant, A. F. Pickett, had not furnished said cells and cages to Hempstead County, Arkansas, and had no right, title, or interest to the money for same, which belonged solely to the E. T. Barnum Iron Works of Detroit, Michigan, negligently, carelessly, recklessly, indifferently, unlawfully and willfully had two vouchers issued for said claim to A. F. Pickett at the time, one in the sum of $800 and one in the sum of $3,000; that fraud was practiced on Hempstead County by the defendant, Wash Hutson, county judge of Hempstead County at the time, in colluding, conspiring and agreeing with his co-defendant, A. F. Pickett, to allow said claim and order warrants issued for the same, which warrants were appropriated by the said A. F. Pickett; that the said claim or claims of the said A. F. Pickett were allowed by the defendant, Wash Hutson, county judge, with full knowledge and understanding at the time that the defendant, A. F. Pickett, had no right, title, or claim to said amounts, and that said Hempstead County was not liable to him for said amounts."

Appellant filed a demurrer to the complaint, and, when same was overruled over his objection and exception, he filed a separate answer, controverting the allegations of the complaint.

The cause was submitted upon the pleadings, the testimony adduced by the parties, and the instructions of the court, which resulted in a verdict and a consequent judgment in favor of appellee for $2,510, from which is this appeal.

Appellant requested the court to peremptorily instruct a verdict for him, which request was denied, over his objection and exception, and the cause was sent to the jury under instructions to the effect that appellee was civilly liable if he allowed the claim filed by Pickett, willfully, knowingly, and corruptly, with intent to defraud Hempstead County, while acting in his official capacity.

The testimony introduced by appellee tended to support the allegations of the complaint, and there is substantial evidence in the record in support of the verdict, to the effect that appellant, while acting in his official capacity, willfully, knowingly and corruptly allowed the claim to his co-conspirator, A. F. Pickett, which rightfully belonged to the E. T. Barnum Iron Works, with intent to defraud Hempstead County. After the claim had been allowed, collected and converted to the use of A. F. Pickett, the E. T. Barnum Iron Works sued Hempstead County for the price of the jail cells appellant had bought directly from it for said county, and recovered $2,510, which was afterwards paid by the county. In other words, the county was compelled to pay for the jail cells twice, through the action of appellant in willfully, knowingly and corruptly allowing said claim to his co-conspirator, A. F. Pickett.

Appellant contends for a reversal of the judgment because, under the law, a judicial officer is exempt from civil liability so long as he acts within his jurisdiction and in his official capacity.

There can be no question in this case that appellant was acting within his jurisdiction in the allowance of the claim filed by A. F. Pickett. Section 2279, C. & M. Digest.

It is also the rule that county courts act judicially in the allowance of claims filed against the county. *State use of Izard County* v. *Hinkle,* 37 Ark. 532; *Monroe County* v. *Brown,* 118 Ark. 524, 177 S. W. 40; *Johnson County* v. *Bost,* 139 Ark. 35, 213 S. W. 388; *Echols* v. *Lincoln,* 154 Ark. 142, 241 S. W. 881.

Reverting to the contention of appellant, that judicial officers are exempt from civil liability when acting within their jurisdiction and judicially, it seems that the rule contended for is universal. 15 R. C. L., page 543, par. 31.

Cooley on Torts, at page 408, says: "Whenever the State confers judicial powers upon an individual, it confers them with full immunity from a private suit; in effect the State says to the officer that those duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State, and the peace and happiness of society; that, if he shall fail in a faithful discharge of them, he shall be called to account as a criminal; but that, in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be sufficient to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer."

Our own court, in the early case of *Trammell* v. *Town of Russellville,* 34 Ark. 109, states: "It is a universally recognized principle that one acting judicially in a matter within the scope of his jurisdiction is not liable in an action for his conduct."

In the recent case of *Casey* v. *Casey,* 142 Ark. 246, 218 S. W. 678, our court uses the following language: "The question of the civil liability of a judicial officer for a false arrest or for false imprisonment has been much discussed, both by courts and text-writers. On the one hand, the inviolability of personal liberty except under the forms of the law is involved, and, on the other, the dignity and independence of the judiciary should be considered. It has been frequently said that the general rule applicable to all judicial officers is that, where the officer has jurisdiction of the person and of the subject-matter, he is exempt from civil liability for false imprisonment, so long as he acts within his jurisdiction and in his judicial capacity."

No distinction is drawn in any of the authorities between the acts of judicial officers which are mistakes and errors committed in good faith, and acts committed willfully, knowingly and corruptly, so far as civil liability is concerned.

Appellee complains that the remedy open to taxpayers of becoming parties and contesting claims is not effective, and that on this account judicial officers should respond in damages for their willful and corrupt misconduct. Such officers are criminally responsible for their corrupt acts, so a county is not without effectual remedy.

On account of the error indicated the judgment is reversed, and the complaint is dismissed.

ARMSTRONG v. STATE.

Opinion delivered November 1, 1926.

1. CRIMINAL LAW—MOTION FOR NEW TRIAL—ASSIGNMENTS OF ERROR.—Assignments of error in a motion for new trial that the court erred in excluding the testimony of various witnesses and in admitting testimony objected to, without pointing out what testimony was excluded or improperly admitted, are too general to raise any questions for review.
2. CRIMINAL LAW—SUFFICIENCY OF ASSIGNMENTS OF ERROR.—Assignments of error in a motion for new trial need not be specific as to the grounds on which the exception is based, but must be sufficient to identify the particular witness and the testimony to which the assignment is directed.
3. CRIMINAL LAW—SUFFICIENCY OF ASSIGNMENTS OF ERROR.—An assignment of error in a motion for new trial that the court erred in giving each and every instruction, without mentioning them by number or substance, is an exception in gross, which is not permissible.
4. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of murder in the second degree.
5. HOMICIDE—HARMLESS ERROR.—Appellant cannot complain because the jury found him guilty of murder in the second degree when the evidence established his guilt of the higher degree.

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

White & White, for appellant.

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

McCULLOCH, C. J. Appellant was indicted for the crime of murder in the first degree, committed by killing his wife, Marie Armstrong, and on the trial of the case he was convicted of murder in the second degree, and his punishment fixed at six years in the penitentiary.

There were several exceptions saved to the rulings of the court in the introduction of testimony, and those rulings are assigned here as grounds for reversal of the judgment, but the exceptions were not sufficiently raised in the motion for a new trial in order to preserve them for review by this court. The only assignments in the motion for a new trial relating to those rulings are as follows:

"1. The court erred in excluding the testimony offered by the defendant, and committed several errors in excluding the testimony of the various witnesses offered by the defendant and excluded by the court.

"2. The court erred and committed several errors in admitting the testimony admitted over the objection and exception of the defendant."

These assignments are too general to properly raise the question as to the admissibility of the testimony pointed out in the exceptions made during the progress of the trial. *Lomax* v. *State*, 165 Ark. 386. It is not essential that the assignments in a motion for a new trial be specific as to the grounds upon which the exceptions were based, but they must be sufficient to identify the particular witness and the testimony to which the assignment is directed. An assignment as general in its nature as those set forth in the motion for a new trial now before us does not apprise the trial court of the errors sought to be reviewed, and gives the court no opportunity to correct its errors, hence there can be no review here.

The same may be said about the assignments of error relating to the court's charge to the jury. The instructions to which the exceptions related were not mentioned in the motion for a new trial, either by number or by substance. It is merely alleged in the motion that the court "committed separate and several errors in the giving of each and every instruction given by the court." This is an objection in gross, which is not permissible.

The only other assignment of error relates to the legal sufficiency of the evidence.

Appellant and deceased were negroes, and lived on the farm of a Mr. Horne, about two and a-half miles distant from Paris. Appellant had a daughter by a former marriage, and also had children by decedent. The dead body of appellant's wife was found in a well about sixty yards from their dwelling-house, early in the morning of December 28, 1925. The theory of the State is that appellant killed his wife by striking her with some kind of blunt instrument or rock, and that he then threw her into the well where the body was found. Appellant's contention is that his wife accidentally fell into the well and was drowned.

In addition to appellant's wife and family, he had living with him a hired colored boy named Ernest.

Mrs. Nora Horne, who lived about two hundred yards distant from appellant's home, testified that, on the morning in question, before daylight, she heard voices over at appellant's home, which she recognized as those of appellant and his wife. She testified that she heard appellant's voice, but could not distinguish what he said, and that she heard appellant's wife say, "Oh, Mr. Boss, Mr. Boss, Mr. Boss," and also heard her say, "Oh, Ernest, help me!" The witness testified that she hollered to the boy Ernest, and that, when he answered to the call, she called back to him, saying, "If Boss don't quit, we are going to have him arrested." The witness testified that appellant made no answer. The witness further testified that she could hear appel-

lant talking to the boy, and heard the boy answer, "I'm afraid to," but she could not distinguish what it was appellant said to the boy.

Walter Horne, husband of the preceding witness, testified that, about four-thirty o'clock on the morning in question, he walked out on his porch and "heard a racket, and discovered that it was down at Boss's" (meaning appellant), "and heard deceased, Marie, holler, 'Mr. Boss, Mr. Boss, Mr. Boss,' probably half a dozen times"—that, after that, he heard appellant say, "Go on, Ernest." The witness testified that he at once started in the direction of appellant's home and met the boy Ernest, who told him that deceased was in the well, and that he (witness) then ran back to his own house and got a butcher-knife and cut down a swing-rope hanging in the yard, and then went over to appellant's house to try to get the woman out of the well. The witness told all about the removal of the body from the well. The woman was dead at the time she was taken out, and was lifted out, after much difficulty, with grabs or hooks. According to the testimony of the witness, the well was about sixty yards from the house, and it was walled up with rock to the surface of the ground and also to a distance of about a foot or a foot and a-half above the ground. The well was about four and a-half feet square, but the covering lapped over so that there was a space of about two feet wide, and there was an ordinary bucket attached to the rope, which was used in drawing up water. There was no windlass or other appliance, and the custom was to drop the bucket down into the water and draw it up by hand. The water was within four or five feet of the top of well.

Witnesses who testified concerning the removal of the body from the well stated that there were wounds made on the head and face of the body where the hooks came in contact with them. One of the witnesses testified that the body was upright in the water, "just like she was standing in a well." A physician, who assisted in the examination of the body after it was removed

from the well, testified that there was a fracture of the skull in the median line, extending up and back to the right about three-fourths of an inch; that there was a lineal fracture extending parallel to the longitudinal suture about two and a-half inches in length, that appeared to have been caused by a crushing blow, and that blood was continually oozing from it. That on the left side of the head, extending down into the left orbit, was another fracture; that three inches to the left of that was a fracture extending from the outer angle of the left orbit up and back about three inches; that there was a gash to the right of this, extending in the direction indicated by the witness, from which blood was oozing. The witness also testified that he discovered flesh wounds which were made by the grabs, or hooks, being buried in the flesh, and that the fractures spoken of were sufficient to produce death. The witness testified that he and his father, another physician, had held a *post mortem* and removed the lungs, but that they could not find any evidence of water being in the lungs or any other evidence of drowning. Another physician testified to the same effect, describing the wounds, and giving his opinion as to the cause of death and what time death occurred with respect to the body going into the well. The last physician testified that he did not find any water in the lungs, and that "a part of the lungs showed that she was in the well before she quit breathing entirely."

Appellant testified as a witness in his own behalf, and stated, in substance, that, when he and his wife arose early in the morning, he was making preparations to assist in killing hogs for his landlord, and that his wife was making preparations to cook breakfast; that, when he told her to get a water-bucket and wash it for him to get milk in, he put on his shoes, and, after leaving the house, crossed a branch about sixty-five yards from the house, and heard his wife calling, "Mr. Boss, Mr. Boss." He stated that he thought she was trying to scare him, and did not give the matter much consideration, but walked back to the house and into the front room, and

asked the boy where his wife was; that he then got some matches and went back out of the house with the milk bucket still in his hand; that when he reached the well he failed to find the bucket, and concluded that his wife, while drawing the water, had stepped back into the bushes somewhere. He testified that he then went back to the well, and struck a match and looked down into the well, and saw something white in the water, which he found to be clothing on the body of his wife. He testified that he then began to holler, and told the boy to go and get some help, but the boy replied that he was afraid. The witness denied that he struck his wife or had any trouble with her, and that he knew nothing about the accident until he found the body in the well. Other witnesses who came on the scene testified that they examined the surroundings, and found no evidence of a struggle.

We think the evidence was sufficient to warrant the inference that the woman did not accidentally fall into the well, but that she was either slain by blows on the head and thrown into the well, or that she was thrown into the well and drowned. In the first place, the testimony of the physicians tends to show that several serious fractures of the woman's skull, caused by blows on the head, were sufficient to produce death, and that she was entirely dead, or was in the last throes of death, when she was thrown into the well. In the next place, the testimony of Mrs. Horne and her husband was sufficient to warrant the inference that appellant and his wife were engaged in some sort of hostile encounter, at least hostile on his part, a few moments before she got into the well. The account given by appellant is quite unreasonable, and it is also improbable that the woman could have gotten into the well by accident. According to the testimony, there was a narrow opening about two feet wide, and, though it was dark at the time, the woman was familiar with the well, and had been accustomed to drawing water there. The jury had a right, in considering all of this testimony, to determine that appellant had killed his wife and thrown her into

the well. The verdict of the jury can scarcely be said to be a consistent one, for if, as the testimony tended to show, appellant killed his wife and threw her into the well, he was guilty of murder in the first degree, and should have been punished accordingly. The fact, however, that the jury has mitigated the punishment affords no reason for setting aside the verdict.

Judgment affirmed.

PORTER v. HOT SPRINGS.

Opinion delivered November 8, 1926.

1. MUNICIPAL CORPORATIONS—DELEGATION OF LEGISLATIVE POWER.—An ordinance authorizing the mayor and city clerk to issue a permit to persons to haul swill, and prescribing the terms and manner in which the permit shall be granted, is not a delegation of legislative powers to an executive officer, but confers power to determine whether the applicant is equipped to do the work.
2. MUNICIPAL CORPORATIONS—GARBAGE CONTRACTS—VALIDITY OF ORDINANCE.—An ordinance requiring a fee of $10 for a permit to haul swill, and requiring a bidder for a general contract to remove all garbage and other refuse to deposit $500, is not arbitrary or unreasonable.
3. MUNICIPAL CORPORATIONS—GARBAGE CONTRACTS.—An ordinance relating to the removal of "dry refuse," limited to such accumulations as are unhealthy or a nuisance, *held* not unreasonable.
4. MUNICIPAL CORPORATIONS—GARBAGE CONTRACTS.—An ordinance authorizing the board of public affairs to contract for the removal of garbage and other refuse, and prohibiting others from engaging in such work, with the exception of the removal of swill by licensee, *held* valid.

Appeal from Garland Chancery Court; *W. R. Duffie*, Chancellor; affirmed.

Cobb & Cobb, for appellant.

Geo. P. Whittington and *Leo P. McLaughlin*, for appellee.

McCULLOCH, C. J. Appellants instituted this action in the chancery court of Garland County against the city of Hot Springs and its executive officers to restrain the

enforcement of an ordinance providing for the collection and removal of "garbage, night soil, dead animals, and other refuse" from the city, and regulating the manner of collecting the same. Appellants alleged in their complaint that they were residents of Garland County, and were engaged in the business of cleaning up the premises of numerous citizens and business men of the city of Hot Springs under contract, and that the effect of the ordinance in question was to unjustly restrict them in their right to contract for such service. The chancery court sustained a demurrer to the complaint, and, after dismissal of the complaint and a failure to plead further, an appeal has been duly prosecuted to this court.

The ordinance provides, in substance, that the board of public affairs of the city may enter into a contract for a period of years with some suitable person "to remove all garbage, trash, night soil, dead animals, and other refuse as defined in this ordinance," and that it shall be unlawful for any person other than the person, firm or corporation having the exclusive contract therefor to remove from any part of the limits of the city "any garbage, night soil, etc., or to remove or attempt to remove any dry refuse or dead animals, * * * or to remove, dump or deposit any such anywhere, except as herein provided." There is, however, a provision in the ordinance authorizing the mayor and city clerk to issue a permit, for a fee of ten dollars, to permit any person "to remove or transport any kitchen refuse, commonly known as swill." The ordinance attempts to define the various terms used therein, and the term "dry refuse" is defined in the following language:

"'Dry refuse,' as used in this ordinance, shall be held to include, and is hereby defined to be, such refuse as accumulates in, around or about stores, shops, hotels, dwelling-houses, or any other place, as is not included in kitchen refuse as herein defined, and any such refuse as ashes, paper, bottles, tin cans, old shoes, old clothing and rags, or articles such as decaying lumber, whether decaying in their nature or otherwise, as are unhealthy,

or a nuisance, or a menace to health, and stable manure and manure of stock or animals which is allowed to accumulate so as to be a menace to health, shall be held and considered as dry refuse for the purpose of this ordinance."

Counsel for appellants cite our decision in the case of *Dreyfus* v. *Boone,* 88 Ark. 353, 114 S. W. 718, in upholding the power of a municipality to regulate the removal of noxious substances and to enter into an exclusive contract therefor, but they seek to distinguish the present case, and contend that the ordinance in question is void. We fail, however, to see the force of the distinction sought to be made by counsel. They contend that the provision in the ordinance for granting a permit to persons to haul swill constitutes a delegation of legislative power to a mere executive officer. Counsel are mistaken in their estimate of the character of the power thus conferred, for it is in no sense legislative. The ordinance itself prescribes the terms and manner in which the permit shall be granted, and only places in the executive officers the power to determine whether or not the applicant is properly equipped to do the work.

Again, it is insisted that the provision in the ordinance requiring a fee of ten dollars for the special permit, and also the requirement for a bidder for the general contract to deposit $500, are both unreasonable. It is urged that these two requirements discriminate against a poor man who is financially unable to pay the fee, or to make the cash deposit when bidding for the general contract. This is not sound argument against the validity of the ordinance, for those requirements are not so harsh and unreasonable as to condemn the ordinance as being arbitrary.

It is next insisted that that feature of the ordinance which relates to the removal of dry refuse is unreasonable, because it applies to a substance the accumulation of which does not constitute a nuisance. We are not called on to decide whether or not the argument would be sound, even if the effect of this feature of the ordi-

nance was as contended by counsel for appellants, for, from an examination of the language of the section defining dry refuse, it is seen that it only applies to such accumulations "as are unhealthy, or a nuisance, or a menace to health." Counsel rely on the decision of the Nebraska court in *Iler* v. *Ross,* 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, as sustaining their contention that an ordinance regulating the removal of a substance, the presence of which does not constitute a nuisance, is void. That decision does not, however, support the contention of counsel in the present case, for the opinion clearly recognizes the power to regulate the removal of rubbish and waste material when it has been allowed to accumulate in such quantities as to become a nuisance. In the opinion the court said: "There can be, in the nature of things, no reasonable necessity for the city to gather and remove from the private premises of the inhabitants the accumulation of rubbish and waste material which are not in themselves, and when not allowed to accumulate in unreasonable quantities, nuisances."

It seems to us that all of the questions in this case are settled by the decision in *Dreyfus* v. *Boone, supra,* and that the ordinance involved in the present case must be upheld under the doctrine of the decision just referred to.

Decree affirmed.

CLEVELAND COUNTY *v.* PEARCE.

Opinion delivered November 8, 1926.

1. COUNTIES—EMERGENCY SESSION OF QUORUM COURT.—A quorum court levying appropriations for payment of claims for county home and farm demonstration work was lawfully in session on giving notice of the session in any manner to the justices of the peace affected; such session being an emergency session under Crawford & Moses' Dig., §§ 1945-7; section 2270, *Id.,* being inapplicable.
2. COUNTIES—CONTRACTS BY OUTGOING JUDGE.—Contracts of employment of county home and farm demonstration agents for the

succeeding year entered into by the county judge immediately before going out of office are binding on his successors.

Appeal from Cleveland Circuit Court; *L. S. Britt,* Judge; affirmed.

George Brown, for appellant.

J. C. Clary, J. Bruce Streett and *W. G. Streett,* for appellee.

WOOD, J. On October 22, 1924, the quorum court of Cleveland County, the Honorable N. A. McKinney presiding, met in regular session, and, among other proceedings, a motion was made and seconded to appropriate $1,000 for home demonstration work. The motion was lost. There being no further business, the court adjourned. Thereafter, the court called a special session of the county court, which was convened on November 18, 1924. This court, in special session, voted to appropriate $1,500 for farm demonstration work and $1,000 for home demonstration work. This court made other appropriations which exceeded the amount authorized by law. On December 15, 1924, the county court found that the levying court, in a recalled session held for the purpose of levying taxes and making appropriation, on the 18th of November, 1924, made appropriations exceeding the amounts prescribed by law, and that, by reason thereof, the normal progress and activities of the county would be greatly hindered, and the court thereupon declared that an emergency existed, and ordered that the quorum court be called in special session on December 18, 1924, for the purpose of rectifying the appropriations and readjusting the entire appropriations, to the end that the same may be brought within the legal limit, and that the appropriations made be legally sufficient, and that the progress and prosperity of the county be not hindered. The court, in its order, directed the sheriff to serve notice on the several justices of the peace and summon them to appear on the day mentioned. The court met in special session, pursuant to the order, on the 18th day of December, 1924, a majority of the justices being present, and, by a majority vote,

the court appropriated $1,500 for farm demonstration work and $1,000 for home demonstration work. The court also adjusted all of the appropriations so that they did not exceed the amount which might be legally appropriated.

On December 19, 1924, N. A. McKinney, county judge, entered into a contract with the dean and director of agriculture of the University of Arkansas, by which Joe Pearce was employed as county farm demonstration agent for Cleveland County and Miss Clytice Ross was employed as home demonstration agent for Cleveland County. They performed services under the contract. The amount due Pearce was between $750 and $800, and the amount due Miss Ross was $500.

On or before December 6, 1925, the Honorable R. F. Foster, then county judge, notified Pearce and Miss Ross and the party at headquarters having charge of the farm and home demonstration work that he would not cooperate with them, and he instructed the sheriff to tell them, and entered an order to that effect. The county judge did not notify the sheriff to inform them of the order, but he had notified them himself several times before. An order of the court was entered on February 12, 1925, directing notice to be given Pearce and Miss Ross that the county court would not cooperate with them in any way for the year 1925. Notice was served on Pearce and Miss Ross by the sheriff on February 12, 1925. The notice of the call for the November and December special sessions of the quorum court was served on the justices by written notice through the mail and by the sheriff over the telephone. On May 14, 1925, the county court entered an order which recites, among other things, that the court finds: First, that no legal valid appropriation has been made by the levying court of this county from which to pay for home and farm demonstration work. Second, said home demonstration work and farm demonstration work, as heretofore operated, would entail upon the county an expenditure of funds which is not justified by the results to accrue and by the

funds available. The court thereupon entered a judgment discharging any and all persons assuming to act under the pretended contract, and declaring such contract void.

Separate actions were begun by Pearce and Miss Ross, presenting their verified claims in the usual form to the county court of Cleveland County, which that court disallowed. They appealed to the circuit court. In the circuit court the claims were, by consent of parties, consolidated and tried by the court sitting as a jury. The trial court found as follows: "The court finds that the proclamation convening the quorum court on the 18th of December, 1924, by the county judge was legal, and sufficiently broad in its scope to cover the question in controversy, viz., the question of an appropriation for farm and home demonstration work, and that they did make an appropriation on that date, and that the then county judge, McKinney, entered into a valid and binding contract with Miss Clytice Ross and Joe Pearce, and that the present county judge, Foster, who succeeded him, the said McKinney, on the first day of January, 1925, has no authority to repudiate it." From a judgment entered by the court in favor of Pearce and Miss Ross, the county duly prosecutes this appeal.

1. The appellant contends that the levying court of December 18, 1924, was not lawfully in session and could not therefore make a legal appropriation for these claims. Sections 1945 and 1946 of C. & M. Digest provide for the procedure to be had for a special term of the county and levying court, called for the purpose of rebuilding or repairing public buildings of the county which have been destroyed by fire or otherwise. The statute requires notice of the special term to be given by publication in some newspaper printed in the county ten days, and if there is no newspaper, by written notice posted at some public place at the county seat and at nine other public places in the county ten days before the convening of the special term. This statute is a part of the Acts of 1885, page 85, §§ 1 and 2. Act No.

217 of the Acts of 1917, page 1185, § 1977, C. & M. Digest, provides, in part, as follows: "In case of emergency, the county court may call a meeting of said quorum court and said quorum court shall have jurisdiction and power to act upon any matter designated in the order of the county court calling for such meeting." Sections 1945 and 1946 *supra,* relate solely to the calling of special terms for the repair or replacement of public buildings in the county. These have no reference whatever to the emergency sessions of quorum courts provided for in § 1977 *supra.* If the Legislature had intended that the provision for notice required by §§ 1945 and 1946 *supra* should apply to the called sessions of the quorum court in case of emergency, it doubtless would have so specified. It must be presumed that the Legislature was familiar with the provisions of the prior law relating to the call of special sessions of the county and quorum court for the purpose of rebuilding and repairing buildings of the county which had been destroyed. Doubtless the Legislature of 1917 did not deem these sessions for the repair and rebuilding of county buildings as emergency sessions. Emergency sessions, in the sense of the act of 1917, pertain to other matters than those referred to in the act of 1885. The court cannot supply by intendment a notice for emergency sessions and the time required for such notice to be given. That is purely a legislative function. There is no conflict between §§ 1945, 1946 and 1977 of C. & M. Digest. The facts show and the record recites that the court met pursuant to the call of the county judge December 15, the county judge presiding, and a majority of the justices being present, with the sheriff and clerk of the county, and convened the session of the quorum court on December 18, 1924. The facts tended to prove that the justices were notified of the called session to be convened on December 18, 1924, by written notice through the mail and also by the sheriff over the telephone. It is wholly immaterial whether they had notice by this method or some other, since it is undisputed that they did actually assemble

on December 18, 1924, pursuant to the call for the emergency session. Section 2270, C. & M. Digest (Acts 1879, p. 60), requires a notice of ten days to be given by posting ten written or printed notices in ten of the most public places of the county, etc., before any special term of a county court shall be held. This provision has reference to special sessions of the county court only. It has no application to call emergency sessions of the quorum court authorized by § 1977 *supra.* The call was sufficiently definite in terms to justify the quorum court in readjusting the appropriations and making specific appropriations for home and farm demonstration work. We conclude therefore that the trial court was correct in holding that the quorum court was legally convened on December 18, 1924, and that the appropriations were legally made.

2. The appellant next contends that the contract entered into on December 19, 1924, by the outgoing judge was not binding on the incoming county judge for the succeeding year. We cannot concur in this view of the law. The contracts were entered into by the appellees with N. A. McKinney, who, at the time, was the duly elected, qualified and acting county judge of Cleveland County. At the time the contracts were executed he was authorized to make such contracts for the county, and he was the only person so authorized. It being within the power and duty of the county judge to enter into the contracts when they were made, these contracts were valid at that time, and they did not become invalid because of the change in the personnel of the individual holding the office of county judge. The expiration of the term of the individual who was county judge at the time the contracts were executed did not invalidate the contracts. *Searcy County* v. *Jordan,* 136 Ark. 138, 206 S. W. 129. See also *Gates* v. *School Dist.* 53 Ark. 469, 14 S. W. 656; *School District* v. *Garrison,* 90 Ark. 335, 119 S. W. 275; *Manley* v. *Scott,* 108 Minn. 142, 29 L. R. A. (N. S.), p. 652.

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

FALCON ZINC COMPANY v. FLIPPIN.

Opinion delivered October 4, 1926.

1. APPEAL AND ERROR—PRESUMPTION AS TO ERROR.—Where the language in the record is ambiguous, the Supreme Court will interpret it in such a way as to support the court's ruling rather than to discredit it.
2. APPEAL AND ERROR—HARMLESS ERROR—SELECTION OF JURY.—From a panel of 24 jurors a list of 18 jurors was selected as required by Crawford & Moses' Dig., § 6383, and each party struck off three names. The court asked the clerk if there was another name on the list not challenged besides the first 12, and was told that there was. *Held* that substitution of such juror for one of the first 12 jurors on the list was harmless error.
3. NUISANCE—EVIDENCE.—In a suit for damage to a farm caused by gases and other products from a smelter, evidence of similar damage to other lands in the vicinity, and also of similar results from smelters elsewhere, *held* competent on the issue whether it was possible or probable in the operation of the smelter for noxious gases and products to injure land as alleged.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

E. L. Matlock, for appellant.

Pryor, Miles & Pryor, for appellee.

McCULLOCH, C. J. Appellee is the owner of a small farm in Crawford County, situated near a zinc smelter owned and operated by appellant, and this action was instituted by appellee against appellant to recover compensation for alleged injuries to the land by reason of contact with "noxious gases, sulphur and sulphates, oxides of lead, and other poisonous products" which escaped from the smelter. Appellant, in its answer, denied the injury to the land or that it was caused by the operation of the smelter, and on the issue thus raised there was a trial, which resulted in a verdict in favor of appellee for the recovery of a substantial sum of money.

The first ground urged for reversal is that the court erred to the prejudice of appellant in substituting a juror after the parties had impaneled a drawn jury by each striking three names from the list. The following is all

that appears in the bill of exceptions with respect to the impaneling of the jury:

"After the parties plaintiff and defendant had each used three challenges by striking the names from the lists given them, and after the clerk had called the names of the first twelve not challenged, as directed by the court. THE COURT: Mr. Clerk, is there another name not challenged on your list? MR. BUSHMAIER, circuit clerk: Yes sir, Sid Robinson. THE COURT: I want to use Mr. John W. Smith as a jury commissioner, and will use Mr. Robinson as a juror instead of him. MR. MATLOCK: We save our exceptions to the court's action in so doing. THE COURT: Save your exceptions."

The recital that each party "used three challenges by striking the names from the lists given them" clearly indicates that a list had been drawn from the box in accordance with the statute, and that, after selecting eighteen qualified jurors, the parties were each permitted to strike three names from the list. Crawford & Moses' Digest, §§ 6383, 6384, 6385.

If the foregoing recital means that, after the number of names on the list of qualified jurors had been reduced to twelve by each party striking off three names, the clerk, on the direction of the court, drew another name, that of Mr. Robinson, from the box containing the names of the additional veniremen, and the court substituted Robinson for Smith, one of the jurors already selected, then this would be prejudicial error, or must be treated as such, and a reversal would follow. Appellant had the absolute right to demand a drawn jury, and to have it done in the manner prescribed by the statute. The substitution, if made in that way, deprived appellant of the right to participate in the selection of the jury. It is, however, the duty of this court to place such interpretation upon the language of the record, if there is any ambiguity, as will support the court's ruling, rather than to discredit it. *American National Ins. Co.* v. *Mooney,* 111 Ark. 514. Upon consideration of the language used in the record, we think it is open to the interpretation that the court did not

substitute a new name from those of the veniremen in the box, but that there were more than twelve names left on the list of qualified jurors, the names of both Robinson and Smith appearing thereon, and that the court substituted Robinson for Smith, whose name appeared above that of Robinson on the list. This situation could have resulted from both parties striking one or more of the same names and thereby leaving more than twelve names on the list. The court's inquiry to the clerk and the latter's response clearly indicate that there were more than twelve names on the list after the parties had exercised their privilege to strike three names. And it is also clear, we think, that the names of both Smith and Robinson were on the list. Taking this view of the record, we have an instance of the court substituting for one of the first twelve names on the list, another name farther down the list. The question then presented is whether or not this constitutes error which calls for reversal.

The statute (Crawford & Moses' Digest, § 6384) provides that, after the parties strike the names of three jurors on each side from the list, "the first twelve names remaining on such original list shall constitute the jury." This provision is, we think, merely directory, so as to provide an orderly procedure in the selection of the jury. It merely provides, where more than twelve names are left on the list, how the selection shall be made. This is done after eighteen have been found qualified and placed upon the list and each party has had a chance to challenge by striking off three names. All of those whose names are left on the list are deemed acceptable to the parties, and it constitutes no violation of their rights for the court to fail to observe the statutory direction in selecting twelve to constitute the jury. In other words, the parties cannot complain of any change or substitution by the court among those who have been duly accepted by the parties. Our conclusion on this branch of the case is that there was no prejudicial error committed in the court's failure to follow the statute in the order in which the names shall be taken on the jury.

The court permitted appellee, over the objection of appellant, to introduce testimony concerning damage to other lands in the vicinity in the operation of the smelter —a damage shown to have resulted in the same manner in which it is claimed that appellee's land was damaged. We think this testimony was competent and that the court did not err in admitting it. There was an issue as to whether or not it was possible or probable, in the operation of the smelter, for noxious gases and other products to come in contact with the land to the extent that they would produce an injurious effect. The testimony of numerous witnesses introduced by appellee tended to show that the land was injured by gas and other substances which came from the smelter. Two expert witnesses were introduced, one by each party. The expert introduced by appellee testified to the effect that, in the operation of a zinc smelter, one hundred pounds of ore produces sixty-four pounds of sulphur dioxide, or eighty pounds of trioxide, which, when combined with moisture, makes ninety-six pounds of sulphuric acid, and that that quantity of sulphuric acid was sufficient to "kill" one hundred pounds of carbonated lime. The expert witness introduced by appellant testified in substance that, while a small percentage of sulphuric acid is produced from zinc ores, it is hot and light when it comes from the roaster, and, when mixed with air, the percentage of acid is not high enough to destroy the alkaline contents of the soil and was not harmful to vegetation. In this state of the case it was competent to show that other farms in the vicinity had been damaged by the escape of gas from the smelter, and it was also competent to prove that similar results came from similar operation of the same kind of a smelter in Fort Smith. In other words, the issue was whether it was possible or probable that the operation of this smelter could cause the injury claimed by appellee, and it was competent to show by proof of injury in the same way to other farms that the injury to appellee's farm was caused in this manner.

Judgment affirmed.

McCAULEY v. ARKANSAS RICE GROWERS' COOPERATIVE ASSOCIATION.

Opinion delivered October 11, 1926.

1. AGRICULTURE—CONSTRUCTION OF COOPERATIVE MARKETING CONTRACT.—In construing the contract of a cooperative marketing association, organized under the Cooperative Marketing Act (Acts 1921, p. 153), the existing conditions and the situations of the producers must be considered, in order to ascertain the intention of the parties from the language used in the contract.
2. AGRICULTURE — BREACH OF CONTRACT — ENFORCEMENT.—Where plaintiffs, members of a cooperative marketing association, entered into a contract with the association for the marketing of their rice, a breach by the association of independent covenants in such contract did not absolve such members from performance of their contract, since otherwise the usefulness of the association would be impaired if not defeated.
3. AGRICULTURE—COOPERATIVE MARKETING CONTRACT—RESERVE FUND.—Where, under a cooperative marketing contract, a reserve of 2 per cent. was to be deducted from the value of the rice marketed "for credits and general purposes," the association may retain the unexpended balance as a continuous surplus or reserve fund to be used in case of need.
4. AGRICULTURE—METHOD OF POOLING RICE.—Where a marketing association's agreement with its members provides that the association shall pool or mingle the rice of its members, and that it may sell same in the rough or otherwise, and to the trade or to the public, it may pool and sell the rice either in the rough or in the clean.
5. AGRICULTURE—AUTHORITY OF COOPERATIVE MARKETING ASSOCIATION.—Where an association was organized merely to sell the rice of its members, it was not authorized to buy rice, whether mortgaged or not.
6. AGRICULTURE—COOPERATIVE MARKETING ASSOCIATION—MORTGAGES.—A cooperative marketing association may pay off a mortgage upon a member's crop when, in good faith, it believes the value of the rice to exceed the mortgage, in which case, if the rice sells for less than the amount of the mortgage, the loss must be borne by the mortgagor.
7. AGRICULTURE—COOPERATIVE CONTRACT—ADVANCES.—Under a cooperative marketing contract, the association, in making advances to its members, should do so in uniform percentage; otherwise the member receiving an advance should pay interest thereon.
8. RECEIVERS—APPOINTMENT TO TAKE CHARGE OF CORPORATION.—Courts proceed with great caution in the appointment of receivers

to take charge of the affairs of a corporation, as such action amounts to displacement of the directors.

9. Receivers—other adequate remedy.—Receivers are not appointed when the acts complained of may be remedied by injunction or other available means.

10. Agriculture—marketing contract—distribution of profits.—Profits made by a marketing association during the year through unauthorized dealings with nonmembers are to be distributed at the end of the year, since no accumulation of a surplus fund therefrom was contemplated by the contract of association.

11. Costs—allowance in equity.—The granting of costs in equity is within the court's discretion, and the principle which should guide that discretion is that the party who, by his fault, has unnecessarily involved another in litigation, should pay the costs.

12. Costs—allowance—discretion.—Where the trial court found that defendant marketing association breached its contract with plaintiffs in several important respects, though the particular relief sought was denied, it was not an abuse of discretion to charge defendant with the costs in that court.

13. Costs—allowance on appeal.—Though the chancellor's decree in part was reversed, yet, where such ruling inured to the benefit of the appellee, costs will be awarded against the appellants.

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

STATEMENT BY THE COURT.

Lee McCauley and others brought this suit in equity against the Arkansas Rice Growers' Cooperative Association.

The defendant is a corporation organized under the act of February 14, 1921, which expressly provides that the act should be referred to as the Cooperative Marketing Act, and the plaintiffs are members of that corporation.

The suit was originally brought by Lee McCauley for himself and for other members. From time to time other members joined in the suit until there were 118 members joined as plaintiffs; and it may be stated here that this number constituted but a small part of the membership.

The defendant commenced to operate under the act in the fall of 1921, and since that time it has handled the

rice grown by the plaintiffs and the other members of the corporation. What was termed a "marketing agreement" was entered into between the defendant and each member of the corporation, including the plaintiffs in this action.

That part of the "marketing agreement" which is material to a decision of the issues raised by the appeal reads as follows:

"5. The association shall pool or mingle the rice of the growers with rice of a like variety, grade and quality delivered by other growers. The association shall grade all the rice, and its grading or classification shall be conclusive. Each pool shall be for a full season.

"6. The association agrees to resell such rice, together with rice of like variety, grade and quality, 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 rice delivered by each of them, after deducting therefrom, within the discretion of the association, the costs of maintaining the association, and costs of handling, cleaning, grading, processing and marketing such rice; 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 rice in that year on the basis of deliveries.

"7. The grower agrees that the association may handle, in its discretion, some of the rice in one way and some in another; may sell some in the rough or otherwise; may contract for or effect the milling of all or any thereof and sell the finished product to the trade or otherwise; may adopt such marketing, advertising, merchandising methods as it may deem advantageous; but the net proceeds of all rice of like quality and grade, 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 the amounts of each pool are settled.

"8. The association may sell the said rice within or without this State, directly to millers or brokers, or the trade or the public, or otherwise, at such times and in such conditions and terms as it may deem profitable, fair and advantageous to the grower, and it may sell all or any part of the rice to or through any agency, now established or to be established hereafter, for the cooperative marketing of the rice of the 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.

"9. The grower agrees that the association shall borrow money in its name on the rice, by the issuance of commodity bonds or bearer certificates, or through drafts, acceptances, notes or otherwise, or on any warehouse receipt or bills of lading, or upon any accounts for the sale of rice, or on any commercial paper delivered therefor. The association shall prorate the money so received among the growers equitably, as it may determine, for each district and period of delivery.

"The association agrees to accept drafts drawn against it by the grower for any amount specified and determined by it, upon delivery of rice hereunder, and to assist the grower to discount such drafts, secured by the warehouse receipts, through the most advantageous banking system.

"10. The association may establish selling office, warehouses, plants, marketing, statistical or other agencies in any place.

"11. The grower shall have the right to stop growing rice and to grow anything else at any time at his free discretion; but, if he produce any rice under the terms hereof, it shall be included under the terms of this agreement, and must be sold only to the association.

"12. Nothing in this agreement shall be interpreted as compelling the grower to deliver any specified quantity of rice per year; but he shall deliver all the rice produced or acquired by or for him as landlord or lessor.

"13. (a) This agreement shall be binding upon the grower as long as he produces rice directly or indirectly, or has the legal right to exercise control of any commercial rice or any interest therein, during the term of this contract.

"(b) If this agreement is signed by the members of a copartnership, it shall apply to them and each of them individually, in the event of the dissolution or termination of the said copartnership.

"(c) If the grower places a crop mortgage upon any of his crops during the term hereof, the association shall have the right to take delivery of his rice and to pay off all or part of the crop mortgage for the account of the grower and to charge the same against him individually.

"The grower may place a crop mortgage upon his rice, and agrees to notify the association prior to making any crop mortgage; and the association will advise the grower in any such transaction."

Section 17 of the Cooperative Marketing Act provides that the association and its members may execute marketing contracts requiring the members to sell, for any period of time not over ten years, all or any specified part of their agricultural products or specified commodities, exclusively to or through the association or any facilities to be created by the association. Under the section, the contracts may provide that the association may sell the products of its members, with or without taking the title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead and other costs and expenses.

The section also provides that the marketing contract may fix, as liquidated damages, specified sums to be

paid by the member to the association, upon the breach by him of the marketing contract.

It further provides that the association shall be entitled to an injunction to prevent further breach of the contract and to a decree for specific performance thereof. The contract follows the powers conferred by the act authorizing the incorporation of the association. Gen. Acts of 1921, page 153.

Pursuant to the terms of the act, the marketing contract provides the sum of one cent per pound for rough rice, as liquidated damages for a breach of the contract by the members. The contract also provides that the association shall be entitled to an injunction to prevent a further breach of the contract and to a decree for specific performance thereof.

It is conceded by counsel on both sides that the findings of fact made by the chancellor in this case are sustained by the evidence. Therefore, for a statement of the facts and questions involved in this appeal, we quote from the decree:

"The court makes the following findings as to the material issues in this case:

"First: That the method of pooling rice in the clean, adopted by the association, was a proper and permissible method of pooling, and also that the association had the right to consent to the sale of mortgaged rice of certain of its members, in the rough, in the seasons of 1921-22 and 1922-23, and accept a commission of 10 cents per barrel for such services as it rendered these members.

"Second: That the $54,872.69 which was deducted by the association from the first year's expenses of milling and storing rice was wrongfully deducted and spread over the five-year period, and should be charged to and paid entirely by the members of the association for the season of 1921-22.

"Third: That the reserve of 2 per cent. deducted each year for credits and general purposes can be used to pay only contingent expenses of the crop for which

it is collected, and must, after the contingent expenses of that season are paid, be returned to the members who paid it, in proportion as they paid it. The unexpended balance of this reserve cannot be returned to the members until the season's business has been entirely disposed of. Any unexpended part of this reserve then belongs to the particular members who contributed it, and not to the association generally.

"Fourth: That the association cannot purchase rice at all, whether mortgaged or not, and the purchase of mortgaged rice in 1923-24 was a violation of its contract with its members. The association has a right to pay off a mortgage when it honestly believes the value of the rice exceeds the mortgage, and to take the mortgaged rice upon the same terms and conditions that it takes rice of other members, but if the value of such mortgaged rice, when sold, is less than the mortgage, the difference must be borne by the grower of the rice, and likewise, if its value exceeds the mortgage, such excess goes to the grower.

"Fifth: That the method adopted by the association in making advances is incorrect. The same percentage should be advanced to all members at the same time, or, if this is not done, members to whom advances are made should pay interest on the amount of the advances received.

"Sixth: The issues raised with reference to the salaries paid the officers, the stolen rice, the cost of milling rice, the payment of attorneys' fees and the selection of directors, are material only to show such gross inefficiency or mismanagement of affairs of the association on the part of its officers as would justify the appointment of a receiver. The court is of the opinion that the facts proved as to these issues do not establish a right to a receiver. The amount of salaries paid officers and employees is entirely within the discretion of the board of directors. The facts established in connection with the stolen rice do not justify the court in finding that the officers were in any way connected therewith. The

cost of milling rice is not shown to be excessive, under the conditions. The cost of milling rice would perhaps never be the same in different mills nor the same in the same mill under different managements. The manner in which the directors of the association were elected was in accordance with the by-laws and articles of incorporation of the association. The court is also of the opinion that the association had a right to aid the 'buyers' association' in the manner in which it did, and that the contract with the Connell Rice Company was one which the association could properly make.

"The court finds that the violations of the contract herein found to exist are due to a mistaken or wrongful construction of such contract on the part of the officers and directors of the association, and that any wrong done can be corrected by a restatement of the accounts of the members and that such violations do not relieve the members from a further compliance with their contract to deliver their rice to the association, nor do they justify the appointment of a receiver. However, unless the two auditors employed by plaintiffs and defendants, respectively, can agree upon a restatement of the accounts of all the members of the association for the season of 1921-22 and upon a distribution of the unexpended annual reserves up to this date, in accordance with this opinion, an auditor will be appointed by the court to make such a finding. No other adjustment of accounts is deemed necessary, but such adjustments are made to apply to all members of the association, whether plaintiffs or not.

"The association will be enjoined from making purchases of rice in the future, whether mortgaged or not, and will be ordered to make advances only as found herein to be in compliance with the law.

"The association will be enjoined from proceeding in any other court to collect penalties from plaintiffs for alleged breach of their contracts to deliver rice up to this date, but plaintiffs will be required to specifically perform their contracts in the future by delivering their rice to the association.

"The cost of this proceeding, including the stenographer's fees, will be taxed against the association."

A decree was entered of record in accordance with the findings of the chancellor. The plaintiffs have duly prosecuted an appeal to this court, and the defendant has been granted a cross-appeal.

Charles A. Walls and *George C. Lewis,* for appellant.

Joe T. Robinson, A. G. Meehan, C. E. Pettit and *W. A. Leach,* for appellee.

HART, J., (after stating the facts). At the outset, it may be stated that the validity of contracts under our Cooperative Marketing Act was sustained in the *Arkansas Cotton Growers' Cooperative Association* v. *Brown,* 168 Ark. 504, 270 S. W. 946, and it was held that equity has jurisdiction to grant relief where legal remedies are inadequate. In addition to the authorities cited in the opinion and by the reporter in a footnote, we refer to the case-notes in 25 A. L. R. 1113 and 33 A. L. R. 247, for a full discussion and review of the decisions of the various courts of the different States on the subject of cooperative marketing of farm products by producers' associations.

In *Brown* v. *Staple Cotton Cooperative Association,* 132 Miss. 859, 96 So. 849, the validity of contracts of a cotton growers' cooperative association was upheld, where its declared purpose was to promote, handle and encourage the marketing of cotton intelligently, minimizing speculation and stabilizing the market. The court said:

"The plan of appellee association, considered in connection with the marketing and association contracts between appellee and its members, does not undertake to fix prices of long staple cotton. The outstanding purpose is to promote intelligent warehousing and marketing of such cotton. Appellee association goes out in the open market and hunts purchasers who compete against each other. It is simply a sales agency or a plan for group marketing. It is true it has large powers, but not even all the power at one end of the bargain. One

of the main purposes is to prevent long staple cotton growers from being forced, on account of their financial necessities, to dump their cotton on the market for the producer the year round, instead of for only three or four months. Another object is to save expense to the producer by means of having large quantities of long staple cotton stored, classed, and marketed by appellee association, instead of by thousands of producers, who know nothing about classing cotton. Appellee association, under the arrangement, is able to sell direct to the mills as well as to others."

In all the cases cited and referred to, it is recognized that the purpose of such associations is to secure for their members the advantages of cooperative bargaining in selling their crops. It has been well said that such associations, wisely and economically administered, tend to work to the advantage of the producers, and that the pooling arrangement tends to stabilize prices, and, in the long run, to secure to the members better prices by affording them better and cheaper warehouse facilities and by enabling them, when necessary, to sell direct to the manufacturers. Again, the associations enable them to sell in larger markets, extending over a much longer period of time and a greater area of territory. It was found out that, individually, the producers could not dispose of their crops at a fair and reasonable price. Those in debt were forced to sell, as fast as their crops were gathered, to local buyers. All were forced to sell in the local markets and to store their products in warehouses furnished by prospective buyers. The buyers, by combining, might practically eliminate competition and thus greatly depreciate the market value of the crops. Single-handed, the producers could not successfully combat this evil; collectively, the producers, by pooling their products and placing them in the hands of a selling agency selected by themselves, might obtain better prices. By acting together, they could greatly lessen the cost of storing their products until ready to sell and could greatly lessen the cost of sale by using the same selling agencies,

and could better secure competitive bidders by being able to sell in larger or smaller quantities, at their option, through the same selling agency.

The decisions in the cases cited and referred to above recognize that, in construing contracts of this kind, the existing conditions and the situations of the producers must be considered. This is merely an application of the general rule of construction in ordinary contracts. It is a cardinal rule of construction that the meaning of a contract is to be gathered from the instrument as a whole, and, in construing a contract, words should be given their usual and ordinary meaning when this can be done.

It is also a fundamental rule of construction that courts may acquaint themselves with existing conditions and place themselves in the same situation as the parties to the contract, so as to view the attendant circumstances as they viewed them, in order to ascertain the intention of the parties from the language used in the contract. *United States Fidelity & Guaranty Co.* v. *Sellers,* 160 Ark. 599, 255 S. W. 26; *Alf Bennett Lbr. Co.* v. *Walnut Lake Cypress Co.,* 105 Ark. 421, 151 S. W. 275; and *Arlington Hotel Co.* v. *Rector,* 124 Ark. 90, 186 S. W. 622.

The chancellor found that there had been certain breaches of the marketing contract by the officers of the association, but that the violations of the contract were due to a mistaken or wrongful construction of the contract. The chancellor was of the opinion that any wrong done the members could be corrected by a restatement of the accounts, and that a violation by the officers did not relieve the members from a further compliance with their contracts to deliver their rice to the association, nor did the wrongs justify the appointment of a receiver.

Counsel for appellants contend that this rule is wrong; they quote the well-established rule that the one who first breaks a contract cannot maintain a suit to recover upon it, and that the failure of one party to comply with the contract releases the other party from per-

formance. *Jerome Hardwood Lumber Co.* v. *Beaumont Lumber Co.,* 157 Ark. 220, 247 S. W. 1059, and cases cited.

The reason for the rule is that, where covenants are mutual and dependent, the failure of one party to perform absolves the other and authorizes him to rescind the contract. *Emigrant Co.* v. *County of Adams,* 100 U. S. 61.

There are certain well-known exceptions to the general rule, and one of them is the effect of a failure to perform an independent covenant. In 5 Page on Contracts, § 2976, the rule is stated as follows: "From the nature of the independent covenant, the essential characteristic of which is that the parties intend that the performance thereof shall not depend upon the performance of the adversary party, it follows that the breach or nonperformance of such covenant does not operate as a discharge of the covenants which, by the terms of the contract, are to be performed by the adversary party. If such independent covenant is broken, the adversary party has a right of action for damages thereon, but he cannot treat such breach as a discharge."

In *Taylor* v. *Patterson,* 3 Ark. 238, it was held that, in the case of independent covenants, either party may recover damages for a breach of the covenant in his favor, and the nonperformance of one is no excuse for the other. See also *Desha* v. *Robinson,* 17 Ark. 228, at 243.

In principle, the effect of the failure of the association to perform certain covenants of the contract is no wise different from the failure to perform an independent covenant.

As will appear from our statement of facts, both the statute and the contract provide for an injunction to prevent a breach, and for liquidated damages in compensation therefor.

The services of the association in pooling and marketing the rice of its members were to be furnished continuously during the life of the contract. Each season's

business was separate and distinct. Manifestly, each member signed the contract upon the faith of the signature of the other members.

Appellee has no capital stock, and is not operated for profit. The association is not allowed to purchase, handle and sell rice, except for its members. It is dependent for its existence and an opportunity to serve its members upon their observance of their contracts and upon the continued existence of the association. Members join the association for a stated number of years, and are permitted to cease growing rice at any time they see fit to do so. New members are being admitted year by year. The purposes of the association are fully set out above, and need not be recited here. In consideration of the members' promises in signing the "marketing contract," the association agrees specifically to receive, handle and market the rice of its members and to settle therefor according to specified terms.

Appellants signed the "marketing contract" with the other members of the association. Hence appellants' agreements were made in consideration of like agreements of the other members and for their mutual advantage. If appellants could be absolved from the performance of the contract because the officers of the association had committed breaches of the contract in certain respects, it is certain that the other members of the association would suffer by this course. The action of the appellants in rescinding the contract would tend to cripple the association and thereby harm the other members of it.

To illustrate, if a sufficient number had joined in this suit, and it should be held that they were released from a performance of the contract because of the breaches committed by the officers, this might result in destroying the association and in depriving those remaining in it of the advantages all members expected from joining the association. It will be noted that the members of the association joined for a specified number of years, and doubtless in the expectation that all the

members would remain in the association for the specified time.

The "marketing agreement" contains a clause that a member may cease to grow rice at any time while a member of the association. It is fairly deducible from the entire contract that it was contemplated between the parties that all the members who did grow rice should deliver it to the association to be marketed, during the period of time provided for in the contract. Under these circumstances, we think the chancellor was right in holding that the breaches of contract in this case, on the part of the officers of the association, did not absolve the members from delivering their rice to the association to be marketed during the period of time stipulated in their contracts.

This question has not been directly passed upon by this court or by any other court of last resort to which our attention has been called, but we think our present holding is in accordance with the principles of law laid down in cases of this sort cited above. Any other rule would certainly impair the usefulness of such associations, if it did not wholly defeat their purpose and destroy them. It will be noted that, in construing similar contracts, it has been held that, while the contract was one which could not be specifically enforced in equity because such course would require the performance of continuous duties, still this did not prevent the courts from entering injunctions restraining its breaches, which indirectly accomplish the same result. In addition to the cases above cited, see *Pratt* v. *McCoy,* 128 La. 570, 54 So. 1012.

It follows that the chancellor's holding on this branch of the case was correct.

The chancellor held that the reserve of two per cent., deducted each year for credits and general purposes, can be used to pay only contingent expenses of the crop for which it is collected, and must, after the contingent expenses of that season are paid, be returned to the members who paid, in proportion as they paid it. The chancellor, however, held that the unexpended balance

of this reserve cannot be returned to the members until the season's business has been entirely disposed of.

Counsel for appellee challenge the correctness of this holding and contend that the reserve should be construed as a permanent continuing fund and corporate asset. They insist that such construction is necessary to make the association a complete workable organization.

The correctness of the holding of the chancellor depends upon the construction to be placed upon article 6 of the "marketing agreement," which is set out in our statement of facts, and need not be repeated here. The majority of the court is of the opinion that the contention of counsel for appellee should be sustained.

Bearing in mind the general rule for the construction of contracts above announced, we all agree that the intention of the parties should be gathered from the language used as a whole, and that the paragraph should be read in connection with the remainder of the contract and in the light of the situation of the parties when the contract was executed. Each member signing the contract agrees to be bound by its terms for a designated number of years. Members may cease to grow rice during a particular year or years during the life of the contract. New members are constantly coming in. The success of the association in accomplishing the purpose of its organization depends upon its continued existence. The accumulation of a moderate reserve will enable the directors to have at their disposal a sum to be used whenever occasions of sufficient urgency arise. It is pointed out that this is the usual practice in commercial undertakings, and it is equally desirable in cooperative ventures.

That this meaning was intended is shown by the clause "and of reserves for credits and other general purposes." It is said that this language, when read in connection with the context, evinces an intention on the part of the parties to the contract that the officers of the association should retain out of each year's operations a certain percentage to be set aside as a surplus or reserve fund to be used in case of need.

Such is the line of reasoning made by counsel for the association and adopted by the majority of the court. It is said that the words "annual surplus," used in the last sentence of paragraph 6, is not the unused portion of the reserve but is the sum remaining after all deductions have been made.

On the other hand, Judge Humphreys and I think the better view of the matter is that urged by counsel for appellants and adopted by the chancellor. We think the language used clearly indicates that each season's pool was to take care of itself, and that it means that the reserve belongs to the members who contribute it, and any surplus remaining after the close of the season's business must be distributed to them. We think the words "annual surplus" refers to a sum to be kept by the association, after the sale of the rice and the payment of the proceeds of sale to the rice growers, until the final close of the season, in order to meet unforeseen liabilities which might arise from the conduct of that year's business.

As stated by counsel for appellants, the evident purpose of the contract as a whole is that the association shall sell the rice of its members as cheaply and expeditiously as practicable and pay the proceeds to its members, and that the "annual surplus" was to meet unforeseen liabilities for the current year and not as a reserve fund for future years.

In this connection we may say that we all agree that, if the directors of the association should undertake to reserve an amount greater than appeared to be reasonably necessary to meet unforeseen emergencies, the members might enjoin them from collecting more than appeared to be reasonably necessary for an economical administration of the affairs of the association.

It results from the view of the majority that the use of the reserve provided for in article 6 of the "marketing agreement" is not limited to the year's business in which it is collected, and that an annual distribution thereof is not required.

The chancellor held that the method of pooling rice in the clean adopted by the association was warranted under the terms of the "marketing agreement." It was the contention of counsel for appellants that the contract means that the rice should be pooled in the rough. According to the view of the association, a pool constitutes a volume of rice of a given quality, variety and grade, handled throughout the season, and its practice in pooling clean rice was to put rice of like variety, grade and quality into one pool, each pool to be for the full season. It will be noted that articles 5, 6, 7 and 8 all deal expressly with the question of pooling and selling the rice of the members, and the correctness of the court's ruling depends mainly upon the interpretation to be given these articles.

Articles 5 provides that the association shall pool or mingle the rice of the growers with that of a like variety, grade and quality delivered by other growers. It also provides that the grading or classification of the association shall be conclusive.

Article 6 provides for the resale of such rice by the association, together with rice of like variety, grade and quality, delivered by other growers, for the best price obtainable.

Article 7 provides that the grower agrees that the association may handle, in its discretion, some of the rice in one way and some in another; may sell some in the rough or otherwise; may contract for or effect the milling of all or any part thereof, and sell the finished product to the trade or otherwise.

Article 8 provides that the association may sell the rice within or without the State, directly to millers or brokers or the trade, or to the public, or otherwise. This article provides that the association may sell all or any part of the rice, to or through any agencies, now or hereafter established, for the cooperative marketing of the rice of growers in other States throughout the United States.

Thus it will be seen that the largest discretion in the premises is given the association. The contract not only does not by implication or otherwise restrict or limit the powers of the association to grading and selling the rice in the rough, but, by necessary implication, as well as by express language, gives the association the authority to sell rice either in the rough or after it has been cleaned or run through the mill.

When the contract provides that the association may effect the milling of all or any of the rice and sell the finished product to the trade or otherwise, this would seem to confer express authority to form a pool of the rice in the clean.

Again, the contract gives the association the authority to sell the rice to or through any agency established or to be established in any other State for cooperative marketing. It is a matter of common knowledge that this could not be as successfully done if the rice was to be pooled in the rough. In such state, it might not be practicable to ship it to a selling agency or purchaser in another State.

For these and other reasons which might be given, we are of the opinion that the holding of the chancellor, that the association was given the authority in the contract to pool the rice in the clean, was correct.

The chancellor correctly held that the association could not purchase rice at all, whether mortgaged or not, and that the purchase of mortgaged rice in 1923-24 was a violation of its contract with its members. The correctness of his decision on this branch of the case is apparent when the "marketing agreement" is read in connection with the act authorizing cooperative marketing associations. As we have already seen, similar acts authorizing pools of farm products have uniformly been upheld by the courts of last resort of numerous States, as against various constitutional objections, and as not being monopolies or contracts in restraint of trade.

Under the articles of incorporation of the association, which followed the terms of the act under which it

was organized, the association was organized for the purpose of pooling and selling the rice grown by its members, and no person was eligible to membership except rice growers. The articles of incorporation do not contemplate that the scope and purpose of the association could be so extended as to become a business corporation conducted for profit. The act authorizing the incorporation of the association contemplates that the association may only make contracts to pool and sell the product of its members. The "marketing agreement" by its terms follows the statute, and does not contemplate that the association should purchase rice from any person or persons at all.

The contract also expressly provides that the association may make advances to its members under certain stipulated terms or conditions. In carrying out the power thus conferred, the chancellor properly held that the association might pay off a mortgage, when, in good faith, it believed the value of the rice to exceed the mortgage, and take the mortgaged rice upon the same terms and conditions as the rice of other members. It was also rightly held that, if the rice was sold for less than the amount of the mortgage, the loss must be borne by the mortgagor. In this connection it may also be stated that the chancellor properly held that, in making advances, the association should do so to all the members at the same percentage, or, if this was not done, the member should pay interest on the amount of advances received.

On the subject of the appointment of a receiver but little need be said. As we have already seen, it is conceded that the finding of facts made by the chancellor is sustained by the evidence in the record. The chancellor held that the facts did not show such fraud and mismanagement of the affairs of the association as would justify the appointment of a receiver. The court expressly found that the cost of milling the rice was not shown to be excessive under the existing conditions, and that the directors did not abuse their discretion in the

payment of attorneys' fees and salaries to officers and employees.

The general rule is that courts proceed with great caution in the appointment of receivers to take charge of the affairs of a corporation, for the reason that such action amounts to a practical displacement of the directors in managing the affairs of the corporation. It may also be said that the rule is not to appoint a receiver when the specified acts complained of may be remedied by injunction or are capable of redress by other available means. Hence the chancellor did not err in refusing to appoint a receiver.

The chancellor correctly held that the $54,872.69 which was deducted by the association from the first year's milling and storing rice, was wrongfully deducted and spread over the five-year period of contract remaining. During the first year of its operation the association handled rice for persons who were not members as well as for those who were members. It sold a large amount of rough rice, which was not pooled, on which it charged a commission of 10 per cent. As we have already seen, the association had no right to handle the rice of persons who were not members of the association, and no right to sell rough rice without pooling it, and no right to sell rice on commission.

These matters were all foreign to the object and purposes of the association, and were extremely hazardous. Such a course of conduct, if pursued, would ultimately tend to defeat the purpose of the organization, which was cooperative marketing, and might destroy the organization. Any member of the association could have obtained an injunction stopping it. Such a course of conducting the business of the association did not result in a loss to the members, and, as a necessary consequence, no damage was suffered. Indeed, this particular transaction resulted profitably to the association, and, in the final settlement of the season's business, $54,872.69 was on hand to be distributed. As we have already seen, the contract does not contemplate that there

should be an accumulation of a surplus fund, except the reserve fund provided for in article 6 of the contract, as pointed out in the opinion. In other respects, the proceeds of sale at the close of the season, and, in this particular instance, the profits made, are to be shared by the members of that season, and are not to be carried forward into succeeding years and spread over the remaining five-year period of the contract and distributed accordingly.

Complaint is made that the chancellor taxes the costs against the association. In equity, the granting of costs rests entirely within the discretion of the court. The principle which should guide the discretion is that the party who, by his fault, has unnecessarily involved another in litigation, should pay the cost thereof; and it does not always follow that the unsuccessful party was at fault, or that the litigation was unnecessary.

In the case at bar the chancellor found that the association had breached its contract with its members in several important respects, and only denied them the relief asked for by them. Considering the matter in all its aspects in connection with the attendant circumstances, we cannot say that there is a plain case of an abuse of discretion in the chancellor's allowance of costs. *Temple* v. *Lawson,* 19 Ark. 148; and *Penix* v. *Pumphrey,* 125 Ark. 332, 188 S. W. 816.

The costs upon the appeal stand on a different footing. The decision of the chancellor in the main has been affirmed. The reversal of the chancery court as to the disposition of the reserve fund inures to the benefit of appellee. Under all the circumstances, the appellee will be allowed to recover the costs of the appeal.

As stated by the chancellor, counsel on both sides have clearly and, with as much conciseness as practicable, presented the issues, and we could do little except adopt their reasoning, which we conceive to be just and plainly warranted by the "marketing agreement," when read and interpreted in connection with the articles of incorpora-

tion and the statute under which they were authorized. The result of our views is that the finding of the chancellor was correct, except as to his holding on the reserve fund, as indicated in the opinion.

It follows that the decree will be reversed, and the cause remanded with directions to the chancery court to hold the reserve fund to be a continuous permanent fund of the association, as held in this opinion. In all other respects the decree will be affirmed.

REEVES v. SAINT LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Opinion delivered October 18, 1926.

1. APPEAL AND ERROR—DIRECTION OF VERDICT—TEST OF SUFFICIENCY OF EVIDENCE.—On appeal from a judgment based on a directed verdict, in testing the legal sufficiency of the evidence, it must be viewed in the light most favorable to appellant.
2. RAILROADS—ORIGIN OF FIRE—PRESUMPTION.—In the absence of direct and positive testimony as to the origin of a fire, which consumed inflammable property situated near a railroad track soon after the passing of a locomotive, the inference may be drawn that the fire originated from sparks from such locomotive.
3. RAILROADS—ORIGIN OF FIRE—EVIDENCE.—Evidence that a pile of lumber situated near a railroad track was discovered to be on fire two or three hours after a train passed, and that it burned so slowly that it lasted for several hours before being consumed, was sufficient to justify a finding that the fire originated from sparks thrown from a locomotive.

Appeal from Mississippi Circuit Court, Chicksawba District; *W. W. Bandy*, Judge; reversed.

J. A. Watkins, for appellant.

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke*, for appellee.

McCULLOCH, C. J. This is an action against the railway company to recover damages arising from the destruction of property by fire communicated by sparks from a locomotive. The property consisted of lumber piled on the right-of-way of the company, placed there

by permission of the company, to be shipped out when sold. The fire occurred on December 23, 1921, and, according to the testimony adduced, there was an old loading platform, about thirty feet in length, next to the railroad track, and the lumber was piled next to this platform. There was dry grass around under the platform, and newspapers and other debris scattered about on the ground. The platform was old and out of repair. It was alleged in the complaint that the fire was communicated to the platform and thence to the lumber, or directly to the lumber, by sparks from a passing engine operated by appellee. The answer contained appropriate denials concerning the origin of the fire, and the issue was tried before a jury, but the court, at the conclusion of the introduction of testimony by appellant, directed a verdict in favor of appellee.

In testing the legal sufficiency of the evidence we must, of course, view it in the light most favorable to the cause of action of appellant. There was, as before stated, testimony to the effect that the grass around the old platform and the newspapers scattered about were dry and inflammable, and there was also testimony to the effect that the platform itself was old and dry and highly inflammable. This was sufficient to warrant the inference that sparks from a locomotive, if of sufficient size and intensity, could communicate fire to the grass or to the platform and thence to the piles of lumber.

The fire occurred at a flag station in Mississippi County, on the east side of the railroad track, and there were several families living in the immediate locality, some of them within one hundred feet of the lumber piles. Most of these residents were introduced as witnesses by appellant, and they testified that the fire was discovered between two and three o'clock in the morning; that the wind was blowing from the southwest, and that about two-thirds of the platform was consumed by the fire, and that two stacks of lumber had been partly consumed, one of them about half and the other to a considerable extent. These witnesses testified that they fought the fire, bring-

ing water from a near-by pool, and that it continued to burn until after daylight, until the two stacks had been fully consumed. They succeeded in preventing the spread of the fire to the other stack of lumber. Two other witnesses introduced by appellant testified that, on the night of the fire, they passed along the track by the platform and stacks of lumber, between eleven and twelve o'clock, and saw no evidence of smoke or fire anywhere about there. One of the witnesses, who lived near by, and who was aroused by the fire later, testified that a train passed there about twelve o'clock that night. Appellee introduced no testimony, but asked for a peremptory instruction, which was given.

We have steadily adhered to the rule that "in the absence of direct and positive testimony as to the origin of the fire which consumes inflammable property situated near a railroad track soon after the passing of a locomotive, the inference might be drawn that the fire originated from sparks from the passing locomotive." *C. R. I. & P. Ry. Co.* v. *Natl. Fire Ins. Co.*, 151 Ark. 218. Other decisions of this court are referred to in the case just cited. But it is insisted by counsel for appellee that none of our cases apply, for the reason that, in the various opinions of the court, it appears that the fire occurred within a very short space of time after the train passed, whereas in the present case the fire was discovered two or three hours after the train passed. This distinction, however, relates more to the weight of the evidence than to its legal sufficiency. Of course, the time between the passing of the train and the discovery of the fire might be so long that the court could say, as a matter of law, that there was no connection between the two events, but that would depend upon the circumstances of each particular case. In those cases where reference was made to the short length of time, it appeared that the property to which the fire was communicated was highly inflammable and the fire was rapid in its progress. Some of the cases were where grass and other dry stuff caught fire from sparks, hence the rapid spread of the fire. In the

present case it is shown that, a short time before the train passed, there was no evidence of fire, and that the fire was discovered between two and three hours after the train passed. Fire communicated to the dry grass or paper would, of course, spread very rapidly, but, in the present case, when the fire reached the timbers composing the old platform or the lumber piled in stacks, whether directly from the sparks or from the burning grass or paper, it burned very slowly. That is shown by the fact that, while the fire was discovered burning in two stacks of lumber between two and three o'clock, it lasted until after daylight before those two stacks were completely consumed. This circumstance leads to the inference that the fire had been burning several hours when it was discovered, and it affords a strong inference, in the absence of proof of other possible causes, that the fire originated from sparks thrown from the engine. At least, under the circumstances of this case, we do not think that the trial court should have taken the case away from the jury, but should have left it to the jury to say whether or not it was fairly inferable that the fire was communicated from the engine.

The court therefore erred in directing a verdict, and the judgment is reversed, and the cause remanded for a new trial.

MILLER RUBBER CO. v. BLEWSTER-STEPHENS SERVICE STATION.

Opinion delivered October 18, 1926.

1. SALES—CONSTRUCTION OF WARRANTY.—A written warranty of pneumatic tires sold by the maker, warranting the tires for 90 days and stipulating that "no dealer or agent is authorized to make any other or additional guaranty or warranty," *held* to be restricted in application to the original users of tires, and not to exclude an implied warranty of merchantability arising on a sale of tires to a dealer.
2. SALES—BREACH OF WARRANTY—JURY QUESTION.—In an action on account for tires sold by the manufacturer to a dealer, testimony

that 5 per cent. of the tires sold were worthless was sufficient to warrant submission of the issue of merchantableness to the jury.

3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Contention that the verdict was excessive, not raised on the motion for new trial, is not available on appeal.

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

John N. Cook, for appellant.

Burgess, Burgess, Sadler, Chrestman & Brundidge, of Dallas, Texas, of counsel.

Frank S. Quinn, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellee in the municipal court of Texarkana to recover a balance upon open account showing a balance due of $65.10, after allowing credits of all payments which had been made to it.

Appellees filed a counterclaim in the sum of $127.39 for tires in the lot which were not merchantable and reasonably fit for the purposes intended, basing their claim upon an implied warranty.

Appellant interposed the defense to the counterclaim that it had furnished a written warranty when the tires were shipped, which had not been complied with by appellees, and for that reason it was not liable on the written warranty; and that it was not liable on an implied warranty, because such warranty had been supplanted by the written warranty.

Appellees denied that the written warranty applied to them, claiming that, by its terms, it applied solely to the original users of the tires.

The cause was appealed to the circuit court of Miller County, where it was submitted upon the issues joined, as detailed above, and testimony adduced responsive to said issues, which resulted in a verdict and judgment in favor of appellees on their counterclaim in the sum of $32.20, from which is this appeal.

The main contention of appellant for a reversal of the judgment is that the court submitted to the jury the question of its liability on an implied warranty which

had been supplanted by an express warranty. This must depend upon a correct construction of the written warranty accompanying the shipment of tires. The undisputed testimony disclosed that appellant was the manufacturer of tires, and that appellees were dealers to whom they sold them. The written warranty is as follows:

"The Miller Rubber Co.
of New York,
"Dallas, Texas, April 30, 1924.
"New 90 Day Warranty.

"To Dealers:

"All agreements are contingent upon strikes, fires or any other causes beyond our control. All prices subject to change without notice.

"Effective May 1, 1924, we have adopted the new 90-day warranty approved of and accepted by the tire manufacturers' division of the Rubber Association of America, Inc., as follows:

"We do not guarantee pneumatic tires for any specified mileage. Every pneumatic tire bearing our name and serial number is warranted by us against defects in material or workmanship developing within 90 days from date of first road wear.

"No claims hereunder will be entertained unless the tire claimed to be defective is presented within the said 90-day period, all transportation charges prepaid, and accompanied by this company's claim form duly filled out, certified, and personally signed by the user of the tire.

"If, upon examination of the tire so presented, it is our judgment that the direct cause of its failure is attributable to defective material or workmanship, we will, at our option, either repair the tire or make a reasonable allowance on the purchase of a new tire.

"Pneumatic tires in which a substitute for air has been used, tires used when not inflated to the pressure recommended by us, used on wheels out of alignment,

abused or misused, used on rims other than those bearing these stamps (), (), (), or which have been injured through accident or design, are not subject to claim hereunder.

"This company's warranty is given solely to the original user and only to the extent above expressed. No dealer or agent is authorized to make any other or additional 'guaranty' or 'warranty.'"

We think the last clause in the written warranty restricts its application to the original users of the tires. The language is plain and unambiguous.

It is in no sense a contract between appellant and appellees, and it was not intended to supplant the implied warranty arising between them when it sold them tires. The learned attorney for appellant frankly admits that the express warranty was to the original users, but claims that the express warranty to the users amounts to a written refusal to make any warranty, either express or implied, to the dealer. There is no express refusal in the written warranty to protect the dealer against unmerchantable and reasonably unfit tires for the purposes for which intended, and no language therein from which a refusal to extend such protection may be inferred. According to our construction of the contract, the cause was submitted to the jury upon the correct theory.

The undisputed testimony revealed that about 5 per cent. of the tires are worthless and unmerchantable. This is a sufficient proportion of the whole number to warrant the submission of the issue of unmerchantableness of the tires to the jury for determination, so that issue was properly submitted to the jury.

Another contention of appellant for a reversal of the judgment is that the verdict is excessive. As we understand the record, no such contention was made in the trial court nor raised in the motion for a new trial, hence is not available here. *Citizens' Fire Ins. Co.* v. *Lord,* 100 Ark. 212, 139 S. W. 1114.

No error appearing, the judgment is affirmed.

APPENDIX

I.

IN MEMORIAM.

JOSEPH W. HOUSE.

On behalf of the Little Rock Bar Association Mr. Deaderick H. Cantrell, with appropriate remarks, presented the following resolutions:

Mr. Joseph W. House was born on June 12, 1847, in Hardeman County, Tennessee, the son of A. B. and Eliza Wilkes House. In 1858 his parents settled upon a farm in White County, in this State. Mr. House was educated in the local schools, and in 1863, at the age of 16, he enlisted in Col. Moseley's regiment, and served in the Confederate Army until the close of hostilities. He then returned home, and entered upon the study of the law at West Point, in White County. He was admitted to the Bar in May, 1869, and removed to Searcy.

His success was prompt, and he early took high ranks in his profession. In 1871, when he had been practicing for but two years, he was elected to the Arkansas Legislature, at a time when great courage and discretion were necessary in combating the evils of the Carpet-bag Regime. Though so young a man, he was a leader amongst the Democrats in the House, and made such an impression that, when the Constitutional Convention of 1874 was called, he was elected to that body, being the youngest member. Despite his youth, he was very influential in the formation of the Constitution under which we are now living.

When the new Constitution was put in force, he was elected to the State Senate, and was made Chairman of the Committee on Education. While holding that position, he did much toward the development of our public school system.

President Cleveland, in 1885, appointed him District Attorney for the Eastern District of Arkansas, and he then removed to Little Rock. He occupied the position throughout both of President Cleveland's administrations.

In 1917 he was elected a member of the Constitutional Convention, and took part in the framing of the admirable instrument of

that year, which was lost at the polls because those interested in the development of our State proved to be too inactive.

This was the last public office held by Mr. House. He was always chiefly a lawyer, and went into politics only at the call of duty and sorely against his will. In the evil days of Reconstruction and in the formation of our Constitution, he felt called upon to serve the people. He was also, for a considerable period, chairman of the State Central Committee of the Democratic Party, endeavoring to guide it along conservative yet progressive lines. He continued in the active practice of his profession until a few years before his death, when failing health compelled him to retire. He passed away at his home in Little Rock on March 10, 1926.

In 1882 he married Miss Ina Dowdy, of Memphis, Tennessee, by whom he had five children. He was fortunate in all things, notably in the fact that his wife and children were with him to the end.

Mr. House was one of the early presidents of our State Bar Association, having been elected in 1906. He was also president of this association.

Mr. House was, for many years, one of the most distinguished leaders of the bar of our State. His natural eloquence, his deep earnestness, coupled with a strong sense of humor, made him very powerful before juries. He was always a diligent student of the law, a weighty and logical reasoner, so that he was listened to with the greatest respect by the courts. He was a man of absolute integrity, with a high sense of the dignity of his profession and a scrupulous regard to all its ethical requirements. He was one of the most conscientious of men, and his native goodness and the remarkable soundness of his judgment of people and things insured his always being found on the right side of every question. This clear judgment made him invaluable as a counselor in the affairs of his clients.

In fact, there has rarely been at this or any other bar so well-rounded a lawyer. Most of us have marked limitations in particular directions, and are compelled by our defects to be something of specialists. Mr. House was equally proficient in every branch of the practice as it exists in our State. In equity suits, in appellate courts, in actions for damages, in criminal cases, as an adviser on matters of business in the examination of titles, he was equally capable, and capable to a high degree.

As a lawyer we all feared and respected him until failing strength compelled his retirement from the practice; and as a man we all loved him to the end. He was indeed one of the most lovable of men, a kind and devoted friend, a delightful companion, full of wisdom and humor, charming in conversation, with great charity for the weakness of his brothers and an infinite patience with the younger

members of the profession. They all felt perfectly free to come to him with their troubles, and the bountiful stores of his knowledge and experience were always at their service.

He was ever so gentle and courteous in his manner that he rarely gave offense; but he was firm as adamant in standing for the right. He was a leader of men, and he always led them in the path to better things. He was public spirited, and interested in every movement for the betterment of our people. His life was singularly pure, and he passed away without one stain upon his fair name, beloved by all who knew him, and mourned by the entire State.

He was blameless in all the relations of life, and was particularly sweet and unselfish in the domestic circle. As a husband and father he was without a fault, and to his brethren of the bar he was very dear.

Therefore be it resolved, that in the death of Mr. House our profession has lost one of its greatest ornaments, our State one of its most distinguished and most useful citizens, whose memory we cherish with affection and respect.

Resolved, that D. H. Cantrell be requested to present these resolutions to the Supreme Court of Arkansas, Ashley Cockrill to present them to the United States District Court, J. H. Carmichael to present them to the Chancery and Circuit Courts of this county, and that the secretary send a copy to the widow of the deceased.

(Signed) G. B. Rose,
Tom M. Mehaffy,
G. W. Hendricks,
Horace Chamberlin,
J. Merrick Moore.

Mr. Stephen Brundidge, of the Searcy Bar, also spoke concerning the character and ability of Mr. House.

OLIVER NEWTON KILLOUGH.

Mr. S. A. Gooch, on behalf of the Cross County Bar, presented the following resolutions:

Oliver Newton Killough was born on a farm near Whitehall, in Poinsett County, Arkansas, on the 18th day of February, 1865. While yet a small boy his family moved to Wittsburg, then the county site of Cross County, and when the county site was removed to Vanndale, the family followed. After entering the practice of law he moved to Wynne and built a beautiful ante-bellum home on the hill in the eastern suburbs where he resided until the evening of August 23, 1926.

His father was John W. Killough, a merchant and many times an official in Cross County, and his mother was Mary E. Rooks.

He received his literary training in the public schools of his county and at the University of Mississippi and his legal education at the University of Virginia.

He was admitted to the bar in 1889, and was actively engaged in the practice until his last affliction settled upon him a few months prior to his death.

Soon after entering the practice of law he became interested in politics. He was prosecuting attorney for this district for two terms, 1896-1900, senator one term, 1903-1905, a member of the House in 1907, president of the St. Francis levee board for several terms, and a member of our lamented Constitutional Convention in 1917 and 1918. While in the Senate he was elected president pro tem. and by virtue of this position acted as Governor in the absence of Governor Davis. He was president of the County Bar Association at the time of his death. He was a patriotic public servant and administered his office in an unselfish manner and with the foresight and wisdom of the true statesman.

He was a born leader, with a bearing that at once commanded attention and respect. His was not a very dominating personality but a very pleasing one. His conversation was both brilliant and interesting. He was a powerful and logical speaker. He spoke extemporaneously as opportunity arose or necessity required. He was in turn humorous, whimsical, earnest and bitter. While a master of sarcasm, he was temperate in its use and of constructive inclination. He was loyal to his friends and severe with his enemies, although always relenting upon the first gesture of friendship. These qualities, with his long and varied experience with men and public affairs, stamped him the sage of the local bar and elevated him to the foremost ranks as a lawyer and statesman.

When so remarkable man passes away, it is proper that some memorial of his achievements be made. Therefore be it resolved,

That in the death of Hon. Oliver Newton Killough the State of Arkansas has lost one of her greatest citizens, and our bar has been bereft of one of its ablest members.

That these resolutions be presented to the Cross County Chancery Court with request that they be spread upon the record, and that a copy be presented to the family.

T. E. Lines, Chairman,
S. A. Gooch,
James Robertson,
Committee.

II.

TABLE OF OPINIONS NOT REPORTED.

Allen *v.* Francis; appeal from Garland Circuit Court; Earl Witt, Judge; affirmed October 18, 1926; per McCulloch, C. J.

Beeson-Moore Stave Co. *v.* Gosney; appeal from Clark Circuit Court; James H. McCollum, Judge; reversed June 28, 1926; per Hart, J.

Booker *v.* Moore; appeal from Cleveland Chancery Court; John M. Elliott, Chancellor; affirmed May 24, 1926; per McCulloch, C. J.

Boyd *v.* Jonesboro; appeal from Craighead Circuit Court, Jonesboro District; G. E. Keck, Judge; affirmed September 27, 1926; per Humphreys, J.

Caudle *v.* Cusick; appeal from Sebastian Circuit Court; John E. Tatum, Judge; reversed October 11, 1926; per Hart, J.

Davie *v* Davie; appeal from White Chancery Court; John E. Martineau, Chancellor; affirmed June 21, 1926; per Smith, J.

Donaghey *v.* Lincoln; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; judgment modified, October 25, 1926; per McCulloch, C. J.

Donaghey *v.* Young; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; judgment modified, October 25, 1926; per McCulloch, C. J.

Dreisbach *v.* Crews; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed November 1, 1926; per Wood, J.

Griffin *v.* State; appeal from Saline Circuit Court; Thomas E. Toler, Judge; affirmed July 5, 1926; per Humphreys, J.

Hays *v.* State; appeal from Clark Circuit Court; James H. McCollum, Judge; affirmed June 14, 1926; per McCulloch, C. J.

Henson *v.* State; appeal from Greene Circuit Court; G. E. Keck, Judge; affirmed October 11, 1926; per Wood, J.

Herring *v.* Evans; (2 cases) certiorari to Pulaski Circuit Court, Second Division; Richard M. Mann, Judge; affirmed June 7, 1926; per Wood, J.

Herring *v.* State; appeal from Nevada Circuit Court; James H. McCollum, Judge; reversed October 11, 1926; *per curiam.*

Higgins *v.* State; appeal from Pike Circuit Court; B. E. Isbell, Judge; affirmed July 5, 1926; per Hart, J.

Jackson *v.* State; appeal from White Circuit Court; E. D. Robertson, Judge; affirmed May 31, 1926; per Humphreys, J.

Johnson *v.* State; appeal from Phillips Circuit Court; E. D. Robertson, Judge; affirmed October 25, 1926; per Humphreys, J.

Kelly *v.* State; appeal from Montgomery Chancery Court; W. R. Duffie, Chancellor; affirmed July 12, 1926; per Humphreys, J.

Larman *v.* State; appeal from Benton Circuit Court; W. A. Dickson, Judge; affirmed September 27, 1926; per McCulloch, C. J.

Leach *v.* Maxwell; appeal from Carroll Chancery Court; Sam Williams, Chancellor; affirmed October 11, 1926; per Smith, J.

Leiper *v.* Harper; appeal from Union Chancery Court, Second Division; George M. LeCroy, Chancellor; reversed May 24, 1926; per Humphreys, J.

Looney *v.* State; appeal from Union Circuit Court; L. S. Britt, Judge; affirmed October 18, 1926; per Smith, J.

Loveland *v.* Purdy; appeal from Dallas Circuit Court; Turner Butler, Judge; affirmed Nov. 23, 1926; per Smith, J.

McCaskey Register Co. *v.* Bowman & Son; appeal from Crawford Circuit Court; James Cochran, Judge; affirmed November 15, 1926; per Hart, J.

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