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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

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CARROLL D. WOOD,	Associate Justice
FRANK G. SMITH,	Associate Justice
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EDGAR L. McHANEY,	Associate Justice
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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

GRAND NATIONAL BANK OF ST. LOUIS *v.* TAYLOR.

Opinion delivered January 23, 1928.

1. EVIDENCE—RESOLUTION OF BANK AUTHORIZING LOAN.—Where a bank by resolution authorized its officers to effect loans from a named bank from time to time, the fact that the name of the bank's president was affixed thereto by its cashier did not make it inadmissible in evidence, if it was in fact the action of the bank's directors.
2. EVIDENCE—MINUTE BOOK OF CORPORATION.—The minute book of a corporation, when identified, is competent evidence as to recitals therein, and, even though unsigned, the minutes may be used to prove what took place at the meeting and that a resolution was passed thereat.
3. CORPORATIONS—FALSE ENTRIES IN MINUTE BOOK.—A corporation is not bound by forged, false, and simulated entries in its minute book, unless, knowing them to be such, it neglects to correct them, and some innocent third person has relied thereon to his prejudice.
4. CORPORATIONS—EFFECT OF BOOK ENTRIES.—Where a corporation seeks to destroy the effect of entries on its books, which purport to be regular records of proceedings of its directors or stockholders, it must offer testimony of a more conclusive character than such as merely creates a suspicion that there was an irregularity in the manner in which the books were kept.
5. BANKS AND BANKING—VALIDITY OF RESOLUTION OF BANK.—The resolution of a bank authorizing its officers to effect loans from time to time in the bank's behalf from a designated bank was sufficiently established as being genuine to be admissible in evidence, where no director denied validity of the resolution, and the bank's president admitted it was genuine, though he did not sign it, and the resolution was the only authority by which money was borrowed by the bank or rediscounted from other banks.
6. BANKS AND BANKING—AUTHORITY TO BORROW MONEY.—Where a bank by resolution authorized its officers to effect loans for the bank from a certain bank, and at the bottom thereof there was a recital that the resolution included all the bank's correspondents, testimony that copies of the resolution were made and sent to other banks, from which the bank obtained loans with the names of the other banks inserted in the resolution, was competent

to show that the directors regarded the resolution as a compliance with Crawford & Moses' Dig., § 700, as amended by Acts 1923, p. 532, § 18, and broad enough to cover borrowing of money from other banks than the one named.

7. BANKS AND BANKING—VALIDITY OF PLEDGES AND DISCOUNTS.—Under Crawford & Moses' Dig., § 700, as amended by Acts 1923, p. 532, § 18, pledges of collateral security for loans or rediscounts of the bank's paper are prohibited and made void without the action of the bank's directors authorizing the same.

8. BANKS AND BANKING—AUTHORITY TO REDISCOUNT PAPER.—Under Crawford & Moses' Dig., § 700, as amended by Acts 1923, p. 532, § 18, it is not necessary that there be express authority in the minutes of a bank in each instance that a loan or rediscount is effected by the bank, but the bank may draw a resolution to cover loans or rediscounts to be made during the period of one year.

9. BANKS AND BANKING—INNOCENT HOLDER OF COLLATERAL.—A correspondent bank rediscounting paper on a State bank under arrangements with the State bank's cashier, authorized by a resolution of the State bank's directors to effect loans and to rediscount paper, in substantial compliance with Crawford & Moses' Dig., § 700, as amended by Acts 1923, p. 532, § 18, became the innocent purchaser of notes before maturity without notice of defenses thereto, and in liquidation of the State bank could claim them and money collected therefrom as against the Bank Commissioner.

Appeal from Franklin Chancery Court, Ozark District; *J. V. Bourland,* Chancellor; reversed.

Albert D. Nortoni and *Grover C. Carter,* for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

McHANEY, J. Prior to January 22, 1926, the People's Bank of Ozark was a banking corporation under the laws of Arkansas. On that date its doors were closed and its affairs taken over by the State Banking Department for liquidation as an insolvent institution. L. L. Ford was its president, J. T. Greer vice president, and Finis E. Stockton its cashier and active officer. Like too many small banks, its business was very largely intrusted to and its destiny largely controlled by one man—its cashier, Finis E. Stockton.

Appellant is a national banking corporation of St. Louis, with Mr. W. C. Johnson as its vice president and

cashier. Johnson, being a friend and acquaintance of Stockton of about ten years' standing, solicited the account of the People's Bank, through Stockton, for appellant. As a result thereof Stockton went to St. Louis in August, 1925, and, on the 25th, opened an account with appellant, by rediscounting to it notes of customers held by his bank, and receiving a credit of $19,733.55. Said notes were indorsed, "People's Bank of Ozark, F. E. Stockton, Cashier." These notes are not involved in this controversy, as they were all thereafter taken up by the People's Bank before failure, but are mentioned to show the history of the whole matter.

On November 30, 1925, Mr. Johnson, for appellant, wrote Stockton in part as follows:

"Finis, I have been thinking more about handling your entire St. Louis business, and in this connection wish to say that, if you still have bills payable, we would be more than pleased to take this up and carry it for you, and with the view of taking care of your needs for the coming year. If you would be interested in figuring on the account along this line I will be glad to run down and see you, and feel quite confident that it can be arranged in such a way as would be very agreeable and satisfactory to you, and then, too, in doing business with some one you know it is worth something to feel that when you are in need of an accommodation you can know where to go for it.

"I will be glad to have you think this matter over and advise me, and, if you are interested, will be a pleasure to me to run down and pay you a visit and line the account up.

"Awaiting your reply with the assurance that it is a pleasure to us when we can be of service to you, and with kindest personal regards, I am,

"Yours very truly,
"Vice-Pres. & Cashier."

On December 8, 1925, Stockton replied as follows:

"Dear Will: I was glad to get your letter, and had been thinking along the same line myself. Things have

been coming slow, but it is going to come out all right. I had rather come up and see you, but it will be after the first of the year before I can come. I am sending you a little bunch of notes that I wish you would handle like you did the other ones.

"I am willing to give you the whole St. Louis a/c after the first of the year. We still have $30,000 bills payable, $15,000 in Fort Smith and $15,000 in St. Louis.

"I am checking on you for part of this, and if you cannot handle this $10,051.25 for sixty, give me credit for it temporary, and I will fix it as you wish. I want to see you and go over the whole proposition with you. There would be a personal friendship about doing business with you that would be worth while. We will take up the other customer notes you have soon. This list of notes is some that I have renewed the last few days, and are on some of our best customers."

Appellant accepted these notes, rediscounted them for 60 days at 8 per cent. and credited the People's Bank with the proceeds, $9,883.73, on December 10, 1925. On January 2, 1926, appellant rediscounted notes for the People's Bank of the face value of $30,882.52, deducting the discount at 8 per cent. for 30 days and crediting its account with the balance. On January 14 and 16 like rediscounts and credits were made on notes aggregating $10,171.95 and $36,075.90, respectively, the credits being $10,104.14 and $35,594.90, respectively. The People's Bank did not execute notes to appellant and deposit its customers' notes as collateral, but rediscounted bills receivable for 30 or 60 days at 8 per cent., with an agreement to take them up at that time. As a result of all these transactions, appellant had on hand, at the time of the failure of the People's Bank, paper of the face value of $69,925.72, of which $36,779.51 in notes were indorsed "without recourse," and $33,146.21 in notes bearing the unqualified indorsement of the People's Bank. During all this time the People's Bank, by its cashier or assistant cashier, was checking out the funds to its credit in appellant bank in the usual

course of business and for the uses and purposes of the bank, and on January 22 the last check was cashed, which resulted in an overdraft on appellant's books of $2,938.67.

When this account was opened in August, 1925, Stockton told Johnson he had authority so to do by virtue of a resolution of the board passed in February, 1925. This resolution is as follows:

"Resolved, that the president, vice president, cashier and assistant cashier are, and each of them is, hereby authorized to effect loans from time to time in behalf of this bank from the National City Bank of St. Louis, Missouri (the proceeds of such loans to be credited this bank by National City Bank on its books), and to renew or extend the same from time to time; and for such loans (and any and all extensions or renewals thereof) to make, execute and deliver the promissory notes of this bank, and to pledge as collateral security for such loans (and any and all extensions or renewals thereof) any of the bonds, stocks, bills receivable, bills of exchange or other securities of this bank, and that such officers are also respectively authorized to rediscount, from time to time, with the National City Bank of St. Louis for this bank any of the bills receivable, bills of exchange and acceptances held and owned by this bank, and deliver any collateral securing the same, respectively; and may secure such rediscounted paper in the manner above provided for securing loans made by the National City Bank of St. Louis to this bank on its notes or otherwise. The above resolution was passed, and includes all our correspondents."

This resolution appears in the minute-book of the People's Bank in connection with the minutes of a meeting of the board of February 3, 1925. The president of bank, L. L. Ford, says that he did not sign the resolution, or the minutes—that his name was signed by Stockton without his authority—but that he attended the meeting on that date, and that "we passed a resolution like that." It is admitted that, acting under the authority of the above resolution, the People's Bank borrowed money

from the National City Bank of St. Louis, the Merchants' National Bank of Fort Smith, the Bankers' Trust Company of Little Rock, and rediscounted the notes heretofore set out to appellant, with all of which Mr. Ford was cognizant, except the dealings with appellant.

After the People's Bank was taken over by the Bank Commissioner, appellant presented its claim to the liquidating agent, exhibiting said notes, for the full amount thereof, with interest, which was disallowed, and the court then made an order directing appellant to deliver same to the liquidating agent, to be held by him in a separate account pending a final hearing by the court, and this order was complied with by appellant. Thereafter it brought this action to recover possession of said notes and for the allowance of its claim to the extent of the notes bearing the open indorsement of the People's Bank. On a hearing the court found "that the plaintiff (appellant) took from Finis E. Stockton, cashier of the People's Bank, *in the form of rediscounts,* notes of the People's Bank," etc., describing the dates and amounts rediscounted and credited, as already set out. And further, "that the amounts so credited to the People's Bank by the plaintiff, in its account with it, were all drawn out from the plaintiff bank by Finis E. Stockton, as cashier, prior to the failure of the People's Bank." The court further found that the cashier did not have authority from the board of directors to "rediscount said notes," and that appellant was not an innocent purchaser thereof, and thereupon entered its decree denying the relief prayed, from which comes this appeal.

1. We are of the opinion that the resolution of February 3, 1925, was sufficiently established to justify its admission and consideration by the court. It is true that it is a typewritten sheet attached by a clip to page 22 of the minute-book containing the minutes of that date, and that the name of the president was affixed by Stockton. That fact, of course, did not add to its evidentiary value, neither did it destroy it, if, in fact, it is the genuine action of the board. If the board in fact passed this

resolution, or one like it, as it did, according to Mr. Ford, president, then, whether it was properly attested or not could make no possible difference, as the attestation is merely evidence of the action taken by the board. The minute-book of a corporation, when identified, is competent evidence as to all recitals contained therein, and, even though unsigned, the minutes may be used to prove what took place at the meeting, and that a resolution was passed thereat. Cook on Corp., 8 ed., vol. 3, p. 2967. Of course the corporation would not be bound by forged, "false and simulated entries thereon, unless, knowing them to be such, they have neglected to correct them, and some innocent third person has relied thereon to his prejudice." 7 R. C. L., p. 155. But, as stated by the same authority on the same page, "when a corporation seeks to destroy the effect of entries on its books, which purport to be regular records of the proceedings of its board of directors or stockholders, it should offer for that purpose testimony of a more conclusive character than such as merely creates a suspicion that there was an irregularity in the manner in which the books were kept." Not only did the directors not deny the validity of the resolution of February 3, but the president, Mr. Ford, virtually admitted that it was the genuine action of the board, although he did not sign it, and that it was the only authority by which money was borrowed or notes rediscounted from the three other banks, as there was no other such resolution in the minute-book. The minutes of the next meeting show that the minutes of this meeting were read and approved. We therefore conclude that this resolution was the genuine action of the board.

2. The next inquiry is, whether it was authority to rediscount these notes to appellant, and whether it met the requirements of the Banking Act, § 700, C. & M. Dig., as amended by § 18 of act 627 of 1923, p. 515. It will be noticed that the authority conferred in the body of the resolution was to borrow money and pledge its securities, and rediscount its bills receivable from and with the

National City Bank of St. Louis. Written at the bottom of the page after the resolution is: "The above resolution was passed, and includes all our correspondents." Appellant offered to prove by Ralph Floyd, assistant cashier, that copies of this resolution were made and sent to the other banks, from which they obtained loans, with the names of such other banks inserted in the place of the National City Bank, to show the authority in the premises, but the court refused to permit such testimony. We think this was competent testimony, as it showed that the board regarded this resolution as broad enough to cover the borrowing of money from banks other than the National City of St. Louis. While appellant was not one of its correspondents at the time the resolution was passed, it did become such, and all the transactions occurred within one year from the date thereof. Neither was a copy of this resolution presented to appellant, and it did not see it until after the failure, yet Stockton assured Mr. Johnson that he had the authority by virtue of this resolution, and we think he did. Section 18 of said act 627 of 1923 reads as follows:

"That § 34 of act 113 of the Acts of the General Assembly of 1913 be so amended as to read as follows:

"'All pledges or rediscounts made by any bank organized under the laws of this State, as collateral security for money borrowed, of any of the bills, notes, bonds or other assets owned or held by it, without the prior express authority reflected in the minutes in each instance, or for not more than one year of its board of directors, as also all such pledges or rediscounts made from and after the date when this amendment to this act takes effect, the face value of the principal whereof exceeds, at the time when the same are made, in the aggregate, of all of the collateral of said bank then securing the said loan, one and one-half times the principal sum of the said loan, to the extent of said excess shall be in all respects null and void, and the said bank may recover the same or the actual value of such parts thereof as have been disposed of by the lender; provided, that

the said margin of said collateral over the amount of said loan may be increased upon the prior written consent of the Bank Commissioner in each instance."

The above statute is almost, if not entirely, unintelligible. We have examined the original bill which became act 627, as well as the enrolled copy thereof, and find same correctly copied in the printed Acts. Section 700 of C. & M. Digest, which this section amends, takes the place of, and therefore repeals, reads as follows:

"The president, cashier or other officer or employee shall have no power to indorse, sell, pledge or hypothecate any notes, bonds or other obligations received by said corporation for any money loaned, until such power and authority shall have been given such president, cashier or other officer or employee by the board of directors, a written record of which proceeding shall first have been made; and all acts of indorsing, selling, pledging and hypothecating done by said president, cashier or other officer or employee, without the authority from the board of directors, shall be null and void."

We hesitate to believe that it was the intention of the Legislature to repeal this wholesome statute, yet it would appear from the language of said § 18 that the only thing made null and void is the depositing or pledging of collateral to secure a loan in excess of "one and one-half times the principal sum of said loan," and then only to the extent of the excess. But we are of the opinion that it may be inferred from the language in the first part of the section that pledges of collateral security for loans or rediscounts of the bank's paper are prohibited and made void without the prior action of the board authorizing it, and we so hold, regardless of the loose manner in which said section is drawn. And we further hold that the act does not require this "express authority reflected in the minutes in each instance" that a loan or rediscount is consummated, but that the resolution may be drawn to cover all loans or rediscounts to be made during a period of one year, as this requirement is in the alternative in the act. This section was enacted

for the benefit of the bank, its stockholders and depositors, to prevent, as far as possible, the officers from making way with the assets of the bank for their private purposes. We think it is conclusively shown, and the chancellor so found, that all the funds realized from these rediscounts were properly checked out by an officer of the People's Bank for the uses and benefit of said bank, including the amount of the overdraft, $2,938.67. We therefore conclude that this resolution of February 3, 1925, was sufficient authority to authorize Stockton to rediscount the notes in question, and that it was, to say the least, a substantial compliance with said § 18 of act 627 of the Acts of 1923.

3. We think it necessarily follows, from the conclusions heretofore reached, that appellant was an innocent purchaser of said notes, and acquired same in good faith before maturity and without any notice of any defenses thereto. It is not claimed that there are any defenses to the notes by the makers thereof, but the principal contention made by counsel for appellee is that the notes were negotiated without authority from the board, which we have already decided adversely to appellee's contention. The fact that Stockton drew a draft on the bank in August, prior to having arranged for the negotiation or rediscount of the first notes, is not sufficient to put appellant on notice that Stockton was without authority. And the fact that they did not demand a certified copy of the resolution of February 3, 1925, before accepting any of the rediscounts from Stockton, is explained by Mr. Johnson's confidence in Stockton, who told him such a resolution was passed, and by his desire to get the account of the People's Bank. Good business judgment would probably suggest that to have done so would have been the better course to pursue, but the law does not require the discounting bank to obtain a copy of such resolution, but only that such resolution shall have been passed by the borrowing bank.

We conclude therefore that appellant is entitled to the notes which it delivered to the Bank Commissioner,

and which are yet in his hands, as well as all money collected by the Bank Commissioner thereon, if any, and that the Bank Commissioner, or his agent in charge thereof, should surrender and deliver up to the appellant all such money aforesaid.

The judgment of the chancery court is therefore reversed, and remanded with directions to enter a decree in accordance with this opinion. It is so ordered.

WILKERSON v. FUDGE.

Opinion delivered January 23, 1928.

APPEAL AND ERROR—FAILURE TO ABSTRACT TESTIMONY.—Under Supreme Court rule 9, where appellant in his abstract and brief merely stated what he conceived the facts were, and did not set out the substance of each witness' testimony, nor abstract the judgment, the motion for new trial and the order overruling it, the judgment of the trial court must be affirmed on motion.

Appeal from Independence Circuit Court; *H. L. Ponder,* Special Judge; affirmed.

J. Paul Ward, for appellant.

S. M. Casey, for appellee.

McHANEY, J. This is an appeal from a judgment against appellant, holding him jointly liable with S. S. Wilkerson and Robert Wilkerson on a promissory note for $411 in favor of appellees. Counsel for appellees have filed a motion to affirm the case for failure to comply with Rule 9 of this court, in that appellant failed to abstract the pleadings, the evidence, the instructions, the judgment of the court, the motion for a new trial, if one was filed, and the order overruling it, if one was made. The abstract and brief as originally filed on behalf of appellant failed to comply with said rule in the above particulars, and, after counsel for appellees had filed his brief urging an affirmance on this account, appellant applied to and obtained leave of this court to comply with said rule. He thereafter filed an amended abstract, setting out the instructions of the court, and interlined in his statement of facts page references to the transcript.

Ten witnesses testified in the case, but this evidence is not abstracted. Appellant contents himself by a statement of what he conceives the facts to be, but does not set out the substance of each witness' testimony. He does not abstract the judgment of the court, nor the motion for a new trial, if one, and the order overruling it, if one, and we cannot tell, without an examination of the record, whether there was a motion for a new trial, and, if so, whether the errors complained of were assigned in the motion for a new trial.

Under this state of facts we feel that we will have to sustain the motion to affirm for the noncompliance with this rule. The judgment is therefore affirmed.

COLLINS v. COLLINS.

Opinion delivered January 30, 1928.

1. DIVORCE—SUFFICIENCY OF EVIDENCE.—In a suit for divorce, where both parties asked for divorce and reconciliation was improbable, the evidence, although unsatisfactory, *held* to justify granting divorce to the wife on the ground of indignities rendering her condition in life intolerable.
2. HUSBAND AND WIFE—TAKING TITLE IN WIFE'S NAME.—Where the title to property is taken in the wife's name but the husband pays a portion of the purchase price, there is a presumption in law that his money thus used was intended as a gift to his wife, but this presumption is rebuttable by any evidence, including antecedent and contemporaneous declarations or circumstances which tend to prove the intention of the parties who furnished the consideration for the property.
3. TRUSTS—EVIDENCE OF RESULTING TRUST.—In a divorce suit evidence *held* not to justify holding that there was a resulting trust giving the husband an interest in the homestead to which the wife had title, but of which the husband paid a part of the consideration.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; reversed.

STATEMENT OF FACTS.

Alice Collins brought this suit in equity against F. D. Collins to obtain a divorce on the statutory ground that her husband had offered her such indignities to her per-

son as to render her condition in life intolerable. F. D. Collins filed an answer in which he denied the allegations of the complaint, and, by way of cross-complaint, asked for a divorce on the same statutory ground. He also asked for a trust to be declared in his favor in their home place, the title to which had been taken in the name of his wife. His wife filed a response to the cross-complaint, in which she denied its allegations and averred that the title to their homestead was in herself.

The record shows that the parties to this action married in September, 1918, and lived together as husband and wife until the first day of April, 1926. Each of the parties had been married before, and had children at the time of their intermarriage. The husband had a home in Van Buren, Arkansas, in which he lived at the time of their marriage. Subsequent to their marriage they purchased a home in Fort Smith, in Sebastian County, Arkansas, and moved into it, and lived there until their separation. The title in their home in Fort Smith was taken in the name of the wife, and she paid $1,000 of the purchase money at the time of the purchase. The price agreed to be paid for the home was $2,750.

According to the testimony of the wife, she continued to make monthly payments on the note for the deferred payment of the purchase price, which bore eight per cent. interest, until some time in April, 1920, when there was a balance due of $1,539. Her husband gave her a check for this amount, and told her to finish paying for the house. According to her testimony, the title to the property was taken in her name because her husband wished to provide a home for her, and because her children were helping to support the family. Her husband had some insurance for the benefit of his children of a former marriage, and, for that reason, thought he ought to put the title to the home in his wife's name. The testimony of the wife in this respect is corroborated by that of her daughter.

According to the husband, it was understood, at the time the home was purchased, that he was to have an

interest in it, and he made the monthly payments after the payment of the first $1,000, and then gave his wife the check for $1,539 to finish paying for their home, with the understanding that he was to have an interest in the property. Other evidence will be stated and discussed in the opinion.

The chancellor denied the divorce to both parties, and their respective complaints were dismissed for want of equity. The chancellor further found that the husband paid $1,539 toward the purchase price of their home with the understanding that he should have a joint interest in the property with his wife. It was further decreed that he have a lien on the homestead for the sum of $1,539, taking effect on the first day of April, 1920, and that the sum draw interest at six per cent. from that date. The plaintiff has duly prosecuted an appeal to this court.

Holland & Holland and *E. D. Chastain,* for appellant.

Roy Gean, for appellee.

HART, C. J., (after stating the facts). On the question of the divorce we do not deem it necessary to make an extended statement of the evidence or to discuss it in detail. Each party sought a divorce from the other on the statutory ground of indignities to the person. The parties to the action were married in September, 1918, and lived together as husband and wife until the first of April, 1926. The record shows that they got along very well together until about two years before their separation. The testimony of the plaintiff and of the defendant shows that they were continually quarreling with each other for the past year or two of their married life. Their testimony, however, is in irreconcilable conflict as to who was to blame for their quarrels.

According to the testimony of the wife, her husband was continually quarreling with her, and on one occasion threatened to strike her, and on another occasion told her that he had been advised that he could obtain alimony from her, and was continually guilty of such abusive language and ill treatment that she could not occupy his bed, and that she moved upstairs and stayed

with her daughter in the homestead, the title to which was in her name. The responsibility for their quarrels was placed upon the husband by the testimony of a daughter of the wife by a former marriage. She is also corroborated to some extent by her son-in-law.

On the other hand, the husband, in his testimony, places the entire responsibility for their quarrels in the nagging disposition of his wife. He testifies that she got tired of him because he was in ill health, and was continually nagging and quarreling at him.

The testimony is not very satisfactory on the question of divorce, but, after considering the whole of the testimony carefully and the situation and condition of the parties, we are of the opinion that the preponderance of the evidence entitles the wife to a divorce. It is perfectly apparent from the testimony of both of them that they were continually quarreling with each other and that there was no likelihood of their becoming reconciled to each other. Each of the parties had children by a former marriage, and there was no hope of them ever living together again. Hence we are of the opinion that a preponderance of the evidence will sustain a decree granting the plaintiff, Alice Collins, a divorce from the defendant, F. D. Collins, on the statutory ground of indignities rendering her condition in life intolerable. *Scales* v. *Scales,* 167 Ark. 298, 268 S. W. 9.

On the question of a resulting trust in favor of the husband, we also find that a preponderance of the evidence sustains the contention of the wife that the title to the homestead was taken in her name, because she made the first payment on it, and that the payment of $1,539 was paid by the husband as an advancement or gift to her. Where the title to property is taken in the name of the wife, even where the husband has purchased and paid for the same, there is a presumption in law that his money thus used was intended as a gift to his wife, and the law does not imply a promise on her part to return the money or to divide the property purchased, or to hold the same in trust for him. His conduct will

be referable to his duty and affection rather than to a desire on his part to have his wife hold the property as a trustee for him. This presumption, however, may be rebutted by any evidence, including antecedent and contemporaneous declarations or circumstances, which tend to prove the intention of the person who furnished the money to purchase the estate, that the grantee should hold as a trustee. *Wood* v. *Wood,* 100 Ark. 370, 140 S. W. 275; *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 867; *Mann* v. *Mann,* 164 Ark. 43, 260 S. W. 731; and *Dillard* v. *Battle,* 166 Ark. 241, 266 S. W. 80.

On this branch of the case we again find the testimony in irreconcilable conflict. The husband testified that, when the homestead was purchased, they bought it jointly for their home and it was their intention to live there as husband and wife with both sets of children. By agreement the deed was made in the name of the wife, and he sold his homestead in Van Buren for the purpose of finishing paying for the homestead in Fort Smith. After the wife made the first payment of $1,000, the husband, according to his testimony, began making monthly payments on the place until of the principal and interest there was only left unpaid a balance of $1,539. He sold his homestead in Van Buren and gave his wife a check for $1,539 for the purpose of paying out their home in Fort Smith. This was done with the understanding that he was to have a joint interest in the property.

On the other hand, according to the testimony of the wife, the original price of the homestead in Fort Smith was $2,750. She paid $1,000 on it, with the understanding that the title should be taken in her name. This was done because her husband had some insurance for the benefit of his children by a former marriage and it was his intention that her own children should inherit from her the homestead which was purchased in Fort Smith. Her son and daughter were working at the time, and lived with her, paying board. She took $30, which her son paid for board, and paid it monthly toward reducing

the principal and interest of the balance due on the purchase money. She admitted that her husband gave her money monthly during this period of time, but states that she used it for their living expenses, and that her husband so understood it. She admitted that he gave her $1,539 on the first day of April, 1920, with which to finish paying the purchase price of the place. She stated, however, that this was a gift, and that she refused to accept it until it was expressly understood that it was a gift, and that her husband was to have no interest in the place. Her testimony in this respect is corroborated by that of her daughter.

It is also a circumstance in her favor that the husband did not at that time ask that the title be changed so as to give him a joint interest in the place, and that no claim was made by him for a joint interest until after their separation and the bringing of this suit.

Under these circumstances we are of the opinion that the husband failed to establish a case for a resulting trust in his favor for a joint interest in the place.

The result of our views is that the decree will be reversed, and the cause will be remanded with directions to the chancery court to grant a divorce to the plaintiff, Alice Collins, and to dismiss the complaint of F. D. Collins for a divorce for want of equity, and to dismiss also his complaint for a resulting trust in the homestead for want of equity. It is so ordered.

TEMPLE COTTON OIL COMPANY v. SKINNER.

Opinion delivered January 30, 1928.

1. MASTER AND SERVANT—ASSUMED RISK.—An employee assumes all the risks naturally and reasonably incident to the service in which he engages, where hazards of the service are obvious and within the apprehension of a person of his experience and understanding.
2. MASTER AND SERVANT—JURY QUESTION.—In an action by a mill employee for injury from falling sacks of meal, evidence *held* to make the assumption of risk a jury question.

3. EVIDENCE—TESTIMONY AS TO CONDITIONS OF INJURY.—In an action by a mill employee for an injury done by falling sacks of meal, a witness who examined the scene of the accident shortly thereafter was competent to testify to the conditions under which he found the sacks immediately after the accident.
4. TRIAL — COMPLETENESS OF INSTRUCTION. — If an instruction undertake to tell the jury when a verdict should be returned for either party, it should be complete in itself; and where the body of the instruction does not contain every material fact proper to be established, the stereotyped "find for the plaintiff" or "for the defendant" should be omitted.
5. TRIAL—INCONSISTENT INSTRUCTIONS.—Separate and disconnected instructions, each complete and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole.
6. TRIAL—INCOMPLETE INSTRUCTION.—An instruction in a personal injury case, which leaves to the jury the determination of the defendant's conduct as the sole issue, but concluding with the phrase, "you will find for the plaintiff," is inherently erreonous in leaving out of consideration the issues involved as to, the plaintiff's contributory negligence and assumption of risk.

Appeal from Hempstead Circuit Court; *James H. McCollum*, Judge; reversed.

STATEMENT OF FACTS.

This was an action by Gordon Skinner against the Temple Cotton Oil Company to recover damages for a personal injury, which, he alleges, was caused by the defendant's negligence while he was engaged in the performance of his duties as a servant of said company.

According to the testimony of Gordon Skinner, he was twenty-five years old on the 15th day of October, 1926. He was injured on the 1st day of May, 1926, while engaged in loading meal and hulls on local orders for the Temple Cotton Oil Company at its cotton mill at Hope, Arkansas. He had been employed by said company since August, 1925. His duties were loading out meal and feeding the hull bran machine. He did not stack any hulls. In March, 1926, he was moved to the warehouse to load out cottonseed meal on local orders. He was engaged in this work at the time he was injured. Whenever a ticket was brought from the office, it was his duty

to fill the order called for by the ticket. The instructions were indicated on the ticket. He loaded out the orders, with the help of the driver who came for the meal. For convenience in loading out the meal, different grades of meal were stacked separately in different parts of the warehouse. Each section had its stacks between a row of posts about sixteen feet apart. The method of stacking in the sections was to begin at the wall of the warehouse at which were laid lengthwise six sacks of cottonseed meal against the wall on the south for support. In like manner the sacks were placed on the top of each other to a height of about twenty feet. The same process was adopted in placing other sacks against these which were piled next to the wall. After the sacks reached a height of about seven or eight feet, they were jammed against each other for the purpose of tying them and thus rounding out the section. The first tier of sacks was piled to its full height against the wall, and the rest of the sacks of meal were piled down somewhat like stairsteps to the front for the purpose of better enabling the servants to handle the same while stacking or unstacking them. The section consisted of six tiers, each running from the aisle in the center of the warehouse back to the south wall. The sacks in each tier were first unloaded.

The accident occurred about 1:30 P.M. According to the plaintiff's testimony, he had taken the sacks from a tier in the back against the wall. There was a sack lying off to one side, and the plaintiff was trying to get it, when a pile in another section fell on him. None of the sacks had been taken off of the stack that fell on the plaintiff. The plaintiff did not examine the stacks for the purpose of seeing whether they were stacked properly, and it was not his duty to do so. He had not noticed that there was any defect in the stacking of the pile of sacks of meal that fell on him. The plaintiff was severely injured, and suffered great pain for a long time. According to the evidence of physicians in his behalf, he was permanently injured.

Webber Skinner, a brother of the plaintiff, was also a witness for him. According to his testimony, he was working at the oil mill of the defendant in what was known as the shaker room at the time his brother was injured. As soon as he heard of the injury to his brother, he ran to him. They had taken the sacks of meal off of his brother and had laid him out in the aisle when he got there. Witness saw the stack from which the sacks of meal had fallen on his brother. He was asked to tell how it was stacked, and we copy from the record his testimony on this point as follows:

"A. It was stacked kindo' looped in front, and another part here stacked up against the walls; stacked properly part of the way, but on top looked like it was just throwed up there. Q. It was stacked up how high? A. About fourteen or fifteen sacks high. Q. You say on top it was just laid crossways on one another? A. Yes sir. Q. Wasn't stacked properly? A. No sir."

The witness said that the defect in stacking the sacks of meal could not have been noticed unless a close examination was made. He also testified that he knew when piles of sacks of cottonseed meal were stacked properly. He had never stacked sacks of meal, but he had seen them stacked, and knew how it ought to be done.

According to the evidence introduced by the defendant, the different tiers of meal in sacks were stacked properly, and the plaintiff was injured by sacks falling down from the section from which he was taking a sack of meal for the purpose of loading it for a customer.

The jury returned a verdict for the plaintiff in the sum of $8,000, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

O. A. Graves, T. D. Wynne and *Charles A. Miller,* for appellant.

William F. Denman, for appellee.

HART, C. J., (after stating the facts). It is first earnestly insisted that the court erred in not directing a verdict for the defendant. In making this contention, coun-

sel claim that the court should have told the jury as a matter of law, under the evidence introduced, that the plaintiff assumed the risk. This court has so often said that the employee assumes all risks naturally and reasonably incident to the services in which he engages, where the hazards of the service are obvious and within the apprehension of a person of his experience and understanding, that a citation of authority is hardly necessary. In short, by the contract of service, the servant agrees to bear the risk of all the ordinary dangers incident thereto, and he therefore cannot recover for an injury resulting therefrom. *C. R. I. & P. Ry. Co.* v. *Grubbs,* 97 Ark. 486, 134 S. W. 636, and cases cited.

In asking for a directed verdict, counsel for the defendant relied expressly upon *Arkansas Cotton Oil Co.* v. *Carr,* 89 Ark. 50, 115 S. W. 925, and *Francis* v. *Arkadelphia Milling Co.,* 153 Ark. 236, 239 S. W. 1067. We do not consider these cases as conclusive that the plaintiff assumed the risk.

In the Carr case the servant was engaged in moving stacks of meal from a pile for the purpose of loading them on railroad cars, and was injured by other bags on the same pile falling on him. He was held to have assumed the risk because the undisputed facts showed that the servant was injured while in the discharge of his duties, which required him to constantly change the condition of the working place. In that case the nature of the work in removing sacks made the working place more or less dangerous, and it was the duty of the plaintiff to make close examination of the place to see that it was safe. In the case at bar, the servant was injured by a sack from a different pile falling upon him. He was not required to make an examination of his working place in order to see that it was safe. He was not changing the condition of the working place at all. The danger was created by the acts of other servants in piling the sacks of meal, and it did not result from the act of the servant in removing a sack from the pile of sacks filled with cottonseed meal which fell upon him.

In the Francis case, the court said that the undisputed facts showed that the danger was so patent and open that it might have been noticed by casual observation. The pile of sacks of meal was not only perpendicular, but was leaning or bulging out at the top. The plaintiff was familiar with the place where he was working, and the condition in which the sacks were left through the negligence of the employees of the defendant was obvious and evident to any one working around the stacks of sacks. We cannot say that this is a matter of law here. According to the evidence of Webber Skinner, the pile of sacks of cottonseed meal which fell and injured the plaintiff was not properly stacked. On the top it looked like the sacks were just thrown up there and were not placed close together as they should have been. The defect was one that was not observable unless a close examination was made. The plaintiff had nothing whatever to do with stacking the sacks of cottonseed meal, and it was not his duty to examine his working place to see if it was safe. He was not injured by sacks falling from the pile on which he was working to remove the sacks. Hence there was no occasion for him to have observed the pile of sacks which fell and injured him.

Under the facts and circumstances shown by the plaintiff, we do not think the court was required as a matter of law to have instructed a verdict for the defendant on the ground that the plaintiff assumed the risk. On the other hand, we think the court properly left the question of assumption of risk by the plaintiff to the jury as a matter of fact to be determined by it.

The next assignment of error is that the testimony of Webber Skinner was not competent because it was not shown that he had any knowledge of the matters about which he was testifying, and that his testimony was purely speculative, because it was only expressive of his own opinion. We do not agree with counsel in this contention. This witness made an examination of the scene of the accident immediately after it occurred. He

examined the pile of sacks of cottonseed meal, and described their condition. He stated facts as they appeared from the condition of the pile of sacks of cottonseed meal, and the jury had a right to give it such force as might be deemed proper, considering his explanation of the way he found the pile of sacks immediately after the accident occurred. *St. L. I. M. & S. Ry. Co.* v. *Flinn,* 88 Ark. 489, 115 S. W. 142; *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 494, 52 S. W. 7, and *St. Louis-San Francisco Ry. Co.* v. *Barron,* 166 Ark. 641, 267 S. W. 582.

Counsel for the defendant also contend that the judgment must be reversed because the court erred in giving instructions Nos. 1 and 3, requested by the plaintiff. The instructions complained of read as follows:

"Instruction No. 1. You are instructed that it was the duty of the defendant to use reasonable care to provide the plaintiff, Gordon Skinner, with a reasonably safe place in which to work; and if you find from a preponderance of the evidence in this case that the defendant, Temple Cotton Oil Company, negligently failed to use such care in the stacking of its meal, by which the plaintiff claims to have been injured, and that by reason of such failure the plaintiff was injured as alleged, without fault or carelessness on his part, then it will be your duty to return a verdict for the plaintiff, Gordon Skinner."

"Instruction No. 3. You are instructed that, while an employee assumes all the risks and hazards usually incident to the employment he undertakes, he does not assume the risk of the negligence of the company for whom he is working or any of its servants. In other words, he has a right to assume not only that the master will perform its duty, but he has a right to assume that each of the other servants will perform their duty, and if, while in the exercise of ordinary care, he was injured, either by the negligence of any other servant of the master, he has a right to recover; and if you find from a preponderance of the evidence in this case that

the plaintfif, Gordon Skinner, while in the exercise of ordinary care, was injured by the negligence of the master for whom he works or by the negligence of any other servant in the stacking of the meal, by which plaintiff claims he was injured, if you find it was negligently stacked, then your verdict should be for the plaintiff."

At the request of the defendant the court instructed the jury upon the doctrine of assumed risk as a defense to the action. Counsel for the defendant claim that the instructions copied above are erroneous, under the doctrine laid down in *Garrison Company* v. *Lawson,* 171 Ark. 1122, 287 S. W. 396, and *Natural Gas & Fuel Co.* v. *Lyles,* 74 Ark. 146, 294 S. W. 395.

On the other hand, counsel for the plaintiff seeks to uphold the action of the circuit court in giving the instructions under the doctrine laid down in *St. Louis, Iron Mountain & So. Ry. Co.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375, 1199.

We all agree that an instruction should be complete in itself when it undertakes to tell the jury when a verdict should be returned for the plaintiff, and that the trial court should not instruct the jury that it must find for the plaintiff or the defendant, as the case might be, upon a partial or incomplete statement of the law applicable to the material facts of the case. We also agree that, where the body of the instruction does not contain every material fact proper to be established, what is called in *Winter* v. *Bandel,* 30 Ark. 362, p. 376, the stereotyped "find for the plaintiff" had better be left off.

The majority of the court, however, is of the opinion that the Rogers case has no application under the record as presented in the case at bar. In the Rogers case, while the instruction complained of wound up with the phrase, "then you will find for the plaintiff," it was immediately followed by an instruction upon contributory negligence; and the court held that, from the language used in the two instructions and their juxtaposition, they were in reality explanatory of each other, instead of being inconsistent and contradictory. The court in that

case reiterated the rule laid down in *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, 123 S. W. 1048, and other cases of this court to the effect that separate and disconnected instructions, each complete and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole. Hence the majority of the court holds that, while an incomplete instruction may be cured by a subsequent one, as laid down in the Rogers case, the instructions in question are inherently wrong, and cannot be cured by a subsequent instruction, for the reason that the two instructions are inconsistent and only serve to confuse and mislead the jury. The majority is of the opinion that the two instructions copied above and the instructions given at the request of the defendant on the doctrine of assumed risk contain inconsistent propositions of law which call for a reversal of the judgment.

The writer thinks that the better view is that a general objection was not sufficient, but that a specific objection should have been made, as explained in *Arkansas Midland Rd. Co.* v. *Rambo,* 90 Ark. 108, 117 S. W. 784, and *St. Louis Southwestern Ry. Co.* v. *Graham,* 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112. It is true that the instruction complained of in each of these cases does not conclude with the phrase, "you will find for the plaintiff," but the writer thinks that equivalent words are used, in which the jury was told that, if it should find the defendant guilty of the negligent acts set out in the instruction, the plaintiff would be entitled to recover.

The result of our views is that it is established as a settled law of this State by the decision in *Garrison Co.* v. *Lawson,* 171 Ark. 1122, 287 S. W. 396, and *Natural Gas & Fuel Co.* v. *Lyles, supra,* that an instruction is inherently erroneous, and therefore prejudicial, which leaves out of consideration the plaintiff's contributory negligence or his assumption of risk, and leaves to the jury the determination of the defendant's conduct, as the sole issue of the jury's verdict, by concluding with the phrase, "you will find for the plaintiff," since, under

the evidence, the conduct of the plaintiff as well as that of the defendant is essential to a proper verdict.

For the error in giving instructions Nos. 1 and 3, at the request of the plaintiff, the judgment will be reversed, and the cause will be remanded for a new trial.

BREASHEARS v. NORMAN.

Opinion delivered January 30, 1928.

1. STATUTES—LEGISLATIVE INTENTION.—Intention of the Legislature in framing a statute is to be collected from the words used, the context, the subject-matter, the effects and consequences; and the spirit and reason for the law.
2. ANIMALS—STOCK DISTRICT TO FOOT OF MOUNTAIN.—Acts 1925, p. 170, § 1, prohibiting grazing of stock in certain areas, including "Lower LaFave township to the foot of Fourche Mountain on the south side," *held* to prohibit grazing to the foot of the mountain on the south side of the township, and not to the south side of the mountain, where the top of the mountain constituted the south boundary line of the township, and the mountain itself was only fit for grazing lands, and not susceptible to cultivation.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The verdict of a jury as to a disputed question of fact cannot be disturbed on appeal.

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

STATEMENT OF FACTS.

This action was commenced by H. L. Norman against A. L. Breashears before a justice of the peace to recover the possession of four head of cattle. The suit was defended on the ground that the cattle had been impounded under an act prohibiting the running at large of horses, cattle, etc., in certain parts of Yell County, and that the owner of the cattle had failed to pay the fee allowed by the statute for impounding them. There was a verdict and judgment for the plaintiff in the justice court, and the defendant appealed to the circuit court. In the circuit court the case was tried upon a statement

of facts substantially as follows: It was agreed that the cattle belonged to the plaintiff, and that they were taken up while grazing in a field of the defendant in lower Lafave Township, in Yell County, Arkansas.

The record shows that Fourche Mountains are a series of mountains something like ten miles across. Fourche River flows along the north side of Fourche Mountains, and South Fourche River flows along the south side of the Fourche Mountains. On the north side of the mountains Fourche River sometimes runs right up against the mountains, and at other places the mountains are further from the river than they are at the bluffs.

In this particular case the defendant, Breashears', house is situated about 150 yards from Fourche River where you start to climb up the hills. He had 60 acres of land lying south of his house, and the cattle were in a pea-field on the extreme south side of his field, up on the mountain, when the defendant impounded them. They were between a quarter and a half a quarter mile south of his home. The field from which they were taken is up on the side of the mountain. It is about four and one-half miles from the foot of Fourche Mountain to the top of it and about four and one-half miles from the top of it to the foot on the other side. The valley to the south of Fourche Mountain opposite the farm of the defendant is in Crawford Township. The foot of the mountain opposite the farm of the defendant is the dividing line between Lower Lafave township and Crawford Township. The same condition exists as to Compton and Rover townships, which are on the north side of Fourche Mountain and east of Lower Lafave Township. Fourche Mountain is about ten miles across, and extends east and west through the southern part of Rover, Compton and Lower Lafave townships, in Yell County; that is, the top of the mountain is the southern boundary of these three townships. The top of the mountain is the highest part of the mountain, and, in crossing Fourche Mountain, you go over a series of mountains which are all connected together and are in reality

a part of the same mountain. That is to say, commencing at the first abrupt rise on the north side of Fourche River, you go up one ridge and down another until you come to the top of the mountain about four and one-half miles from Fourche River. Then you continue in the same way up one ridge or mountain and down another for four and one-half miles until you come to South Fourche River, on the south side of the mountain.

According to the evidence for the plaintiff, there is an abrupt rise in the ground after you leave the defendant's house and go towards the field from which the cattle were impounded. In other words, it is fairly inferable from the testimony of the plaintiff that the field in which the cattle were impounded was on the side of the mountain. On the other hand, the jury might have inferred that the field of the defendant was on a slope from Fourche River, and no abrupt rise in the land had begun.

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

Robinson & George and *Robert Bailey,* for appellant.

Wilson & Wilson and *Hays, Priddy, Rorex & Madole,* for appellee.

HART, C. J., (after stating the facts). The Legislature of 1925 passed an act to prohibit the running at large of horses, cattle, sheep, hogs, etc., in certain parts of Yell County. Acts of 1925, p. 170. Section 1 of this act reads as follows:

"It shall be unlawful for the owner, agent, or any person having charge of any horses, mules, cattle, sheep, goats, hogs, jacks, jennets or geese to permit or allow same to run at large in the following described territory of Yell County, Arkansas, to-wit: Wilson Township; Galla Rock Township; Centerville Township; Rose Creek Township; all of Dawson Township; all of Lamar Township; all of Mason Township; Ward Township; all of Gilkey Township; Lower Lafave Township to foot of Fourche Mountain on south side; Rover Township to

foot of Fourche Mountain on south side; and Compton Township to foot of Fourche Mountain on south side; Dardanelle Township; Delaware Township; Magazine Township; Prairie Township; all of Danville Township north of Petit Jean River and Chicago, Rock Island & Pacific Railroad; Sulphur Springs Township; Ferguson Township; Riley Township; Richland Township; Waveland Township."

It is agreed that the cattle belonged to the plaintiff, and that they were impounded on land belonging to the defendant in Lower Lafave Township, in Yell County. It is conceded that the case turns upon the construction of the words "Lower Lafave Township to foot of Fourche Mountain on south side."

We have copied all of the section defining the territory in the stock-law district in order to show the condition and situation of the lands as indicated by the Legislature when it passed the law. The intention of the Legislature in framing a statute is to be collected from the words used, the context, the subject-mater, the effects and consequences, and the spirit and reason for the law. *Turner* v. *Edrington,* 170 Ark. 1155, 282 S. W. 1000; *Gay Oil Co.* v. *State,* 170 Ark. 587, 280 S. W. 632; *Harris* v. *State,* 169 Ark. 627, 276 S. W. 361, and *Summers* v. *Road Imp. Dist.,* 160 Ark. 371, 254 S. W. 696.

It will be observed that the description with reference to Rover and Compton townships is identically the same as that of Lower Lafave Township. All three of these townships lie on the north side of Fourche Mountain, and the top of Fourche Mountain is the south boundary line of each of the townships. Fourche River runs along the north side of Fourche Mountain, and in some places there are abrupt rises, and in other places there is a narrow valley, and the first abrupt rise leads up the mountain. Fourche Mountain is from eight to ten miles across from the foot of it on the north side to the foot of it on the south side. The mountains are only fit for grazing lands, and are not susceptible to cultivation. Indeed, a large part of the mountain in Lower Lafave

and the adjoining townships in Yell County is in the forest reserve of the United States Government, and permits, under certain conditions, are given to cattle owners to graze their cattle there. The plaintiff had one of these permits.

Bearing in mind the situation and condition as it existed at the time the act was passed, we think it was the evident intention of the Legislature to exclude all of Fourche Mountain from the boundaries of the stock district. There is no conceivable reason why Fourche Mountain in Lower Fafave, Rover and Compton townships should have been included in the district and the rest of the mountain left out.

We have already seen the particular description applicable to this case, *i.e.*, "Lower Lafave Township to the foot of Fourche Mountain on south side." The word "to" is a word of exclusion, and the Legislature evidently meant to exclude Fourche Mountain from the limits of the stock district. We think the words, "Lower Lafave Township to the foot of Fourche Mountain on the south side," meant to the foot of Fourche Mountain on the south side of the township and not on the south side of the mountain. In the first place, the south side of the mountain opposite Lower Lafave Township would be in Crawford Township, as the top of the mountain is the dividing line between Lower Lafave and Crawford townships. While the description is somewhat awkwardly expressed, we think there can be no doubt but that this is the meaning of the Legislature, when the object and purpose of the act and all the surrounding circumstances and the situation of the land are considered together. This is the view of the matter taken by the circuit court in trying the case.

The court submitted to the jury the question of whether or not the field from which the cattle were taken was situated on the side of the mountain, at such a place where there was an abrupt rise in the land as distinguished from a gradual slope constituting the narrow valley between the southern bank of Fourche River and

the foot of the north side of Fourche Mountain. The jury settled this question of fact in favor of the plaintiff, and, under our settled rules of practice, the verdict cannot be disturbed on appeal.

It follows that the judgment of the circuit court was correct, and it will therefore be affirmed.

FLANAGAN v. DRAINAGE DISTRICT No. 17.

Opinion delivered January 30, 1928.

1. APPEAL AND ERROR—DISMISSAL FOR WANT OF FINAL JUDGMENT.—Where there is no final judgment, no appeal lies, and an appeal will be dismissed under Crawford & Moses' Dig. § 2129, for want of final judgment.
2. APPEAL AND ERROR—TIME FOR APPEAL.—Under Crawford & Moses' Dig., § 2129, an appeal will lie and must be taken from a final decree within the time prescribed by statute for perfecting of appeals.
3. APPEAL AND ERROR—ORDER OVERRULING OR SUSTAINING DEMURRER.—An order overruling or sustaining a demurrer to a pleading without further action is not appealable.
4. APPEAL AND ERROR—FINAL JUDGMENT.—A judgment to be final must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject-matter in controversy.
5. APPEAL AND ERROR—FINAL JUDGMENT.—In a cross-action by a contractor to recover from a drainage district profits anticipated from the construction work which he lost by alleged breach of the district to carry out its contract, a decree finding the contractor not entitled to anticipated profits *held* final so as to be appealable, though there was no formal dismissal of the cross-complaint with reference thereto.
6. APPEAL AND ERROR—TIME FOR APPEALING.—Where a decree relative to a cross-complaint merely disposed of such pleading, an appeal from such decree must be taken within six months, as provided by Crawford & Moses' Dig., § 2140.
7. DRAINS—SUBSTITUTION OF NEW CONTRACT.—Substitution by the parties to a contract for the purchase of drainage district bonds, of a new oral contract for the previous one, *held* to have relieved both parties from the obligation of the original contract.

8. DRAINS—DAMAGES FOR BREACH OF CONTRACT.—Damages for breach of a contract for the purchase of drainage district bonds should be estimated as of the time the breach occurred.

9. EQUITY—OBLIGATION OF PLAINTIFFS TO DO EQUITY.—He who seeks equity must do equity.

10. DRAINS—REIMBURSEMENT OF CONTRACTORS.—Where contractors had made arrangements with the drainage district to complete a drainage project, but, after the contractor had done work and expended money in preparation for performing the job, the district refused to proceed under the contract, *held*, in a suit by taxpayers to cancel the contract, the drainage district should be required to remunerate the contractor for the work he had done and the outlay made in endeavoring in good faith to perform the contract before he was apprised of its abandonment.

11. PARTIES—WHEN OBJECTION INTERPOSED TOO LATE.—Defense that a cross-complainant was not the real party in interest is a plea in bar which should have been interposed in the answer to the cross-complaint.

12. CORPORATIONS—WAIVER OF ISSUE OF CAPACITY TO SUE.—By answering the cross-bill of a cross-complainant, cross-defendants thereby waived any issue they might have raised as to the cross-complainant's incapacity to sue because the nonresident corporation was not qualified to do business in the State.

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

J. T. Coston, for appellant.

Trieber & Lasley and *Coleman & Riddick,* for appellee.

WOOD, J. Drainage District No. 17 in Mississippi County, Arkansas, was a very large district, created by act No. 103 of the Acts of 1917, p. 485. The plans of the district showed that it would require many drains or ditches to complete the project. Among these was a ditch or drain designated as Improvement No. 48, which hereafter, for convenience, will be so called, which would drain approximately seventy thousand acres of the district.

On the 15th of July, 1920, a contract was entered into by one J. T. Flanagan and District No. 17 for the construction of improvement No. 48 as called for by the plans. On February 8, 1921, Flanagan assigned the contract to the Harding Construction Company, a Minne-

sota corporation, and on the same day the Harding Construction Company in turn assigned a two-thirds interest in the contract to Andrew and Toleff Jacobson, and they in turn conveyed a one-sixth interest in the contract to J. O. and A. G. Shuland. On the 10th of October, 1921, after Flanagan had done considerable clearing on the right-of-way under the contract, and was ready to commence excavation, he was notified by the directors of the district that his contract would not be carried out by the district.

In December, 1920, J. R. McGibbon entered into a contract to purchase $450,000 worth of the bonds of the district. John R. McGibbon was manager of the Northwestern Mortgage & Security Company of Fargo, North Dakota, which the Jacobsons controlled. The contract for the purchase of the bonds was in his name, but he was buying the bonds for the company he was managing. On November 7, 1921, Baker and Shepherd, two landowners in the drainage district, filed a bill in the chancery court of Mississippi County against Flanagan and his associates and McGibbon and his associates, and later filed an amended complaint in which it was alleged:

(1) That Flanagan was in reality the purchaser of the bonds, and that the two contracts were let at one and the same time, one being the consideration for the other; (2) that the construction contract was let privately, for an exorbitant price, without competition; (3) that an error of two feet was made in establishing the levels of Improvement No. 48; (4) that, on account of said error, Improvement District No. 48 would not give the relief intended to be given to the landowners; and (5) that, if the plans were changed so as to construct Improvement No. 48 deep enough to give the relief intended, it would be so deep that it could not be maintained, owing to quicksand and other defects in the soil.

The complaint and amended complaint both concluded with a prayer for the cancellation of both contracts, and that Flanagan be enjoined from attempting

to enforce his contract, and that some sum be fixed by this court, to be deposited with the court by Drainage District No. 17, to protect the same J. T. Flanagan in any judgment for damages that he may secure in this cause for breach of said contract, heretofore set out, in the event it should be finally determined that said contract was a valid obligation on the part of said Drainage District No. 17. Flanagan and his associates and McGibbon and his associates filed an answer, denying all charges of fraud and irregularity in letting the contracts, and embodied in the answer a cross-bill against the district, concluding with a prayer for an injunction enjoining the district from annulling its contract. Later an amendment was filed by the defendants to their cross-complaint, in which they reaffirmed the allegations of the original cross-complaint and alleged that the district had abrogated its contract with Flanagan and had repudiated its contract with McGibbon for the sale of $450,000 worth of the bonds of the district, and had sold and delivered these bonds to other parties; that, if Flanagan and his associates had been allowed to perform the contract, they would have realized a profit of $300,000 net, and if McGibbon and his associates had been allowed to purchase the bonds in accordance with the provision of his contract, they would have realized a net profit of $75,000. McGibbon and his associates therefore prayed judgment in that sum against the district for a violation of the contract for the sale of bonds to McGibbon, and Flanagan and his associates prayed judgment in the sum of $300,000 for the violation of the construction contract with the district for the construction of Improvement No. 48.

The district answered the complaint of the plaintiff, admitted its allegations, and denied the allegations of the cross-complaint, and prayed for cancellation of the construction and bond contracts.

Issues were joined by a denial by the defendants of the allegations of the amendments to the amended or supplemental complaint of the plaintiffs, except the dis-

trict admitted, as stated, the allegations of the complaint, and denied the allegations of the cross-complaint; and there was also an answer of the plaintiffs to the allegations of the cross-complaint and amended cross-complaint, in which the allegations of these pleadings were denied.

On November 7, 1921, a temporary injunction was issued restraining the district, its commissioners and Flanagan from carrying out the provisions of the contract for the construction of Improvement No. 48, and restraining the district from paying to Flanagan any sum of money in settlement or adjustment, as damages, for the breach of such contract, and restraining Flanagan, his agents, attorneys and employees, from instituting any separate action seeking to recover damages from the district, or to interfere or prevent the district from selling or delivering the bonds.

A large volume of testimony was taken, fully developing the facts on the issues joined.

On September 24, 1923, the chancery court of Mississippi County, through its chancellor, J. M. Futrell, rendered the following decree:

"This cause coming on for final hearing, come all of the above-named parties by their respective solicitors, and the cause is submitted to the court on the pleadings filed therein, with the exhibits thereto, and on the depositions of the witnesses filed in this cause, with the exhibits thereto, and the court, after argument of counsel, being well and sufficiently advised in the premises, finds that the contract entered into by and between J. T. Flanagan and the board of directors of Drainage District No. 17 of Mississippi County, Arkansas, dated July 15, 1920, was a valid contract at the time it was entered into, but that Drainage District No. 17 subsequently became entitled to rescind the said contract on account of legal impossibility of performance, subject to its liability to reimburse the said J. T. Flanagan for all expense incurred by him in making the necessary preparations to perform and carry out said contract up to the date he had knowledge of the

fact that the district would not permit him to carry out said contract, together with the contract price of any work done by him under the contract up to said date, and including any damages sustained by him in connection with the performance of the contract up to said date, but not including anticipated profits on materials not furnished or work done.

"Wherefore it is considered, ordered, adjudged and decreed that the injunction heretofore issued restraining the parties from carrying out the contract referred to be and the same is hereby made perpetual, and that the cross-complainants, J. T. Flanagan, J. R. McGibbon, Toleff Jacobson, Andrew Jacobson, J. O. Shuland, A. G. Shuland and Harding Construction Company, have and recover of and from Drainage District No. 17 of Mississippi County the contract price for all work actually done by them in performance of the contract referred to up to the time the said J. T. Flanagan had knowledge of the fact that the drainage district would not permit the said contract to be carried out, together with all expenses necessarily incurred by said parties preparing to carry out and perform said contract prior to the time referred to, including any damages sustained by them in performance of said contract up to said time, the amount of the recovery to be determined hereafter by the court or by the master to be appointed by the court; it is further ordered that such amount shall be determined from the evidence already submitted in the cause, and from such additional evidence and testimony as the parties may see fit to produce on such issue, and jurisdiction of this suit is hereby retained until such issue is finally disposed of.

"The question of liability as between John R. McGibbon, Toleff Jacobson and Andrew Jacobson on the one side, and Drainage District No. 17 on the other, on the contract for the purchase of $450,000 of the district bonds at par, and the damages, if any, for the failure to carry out said contract, is reserved for future decision. The question of costs is also reserved for future decision.

"Archer Wheatley, Esq., is hereby appointed special master in this cause, and the issue noted above is hereby referred to him. He is hereby given the usual powers of a master, and is directed to ascertain and determine the facts with reference to said issue, and to report his findings of facts to the next term of this court, or either to the chancellor in vacation, if possible.

"The question of the liability of J. T. Flanagan and the other cross-complainants for interest on the $100,000 of the district's funds which were held by the bond purchasers, pursuant to the order heretofore made in this cause, is expressly reserved for future decision. It is further ordered that the said $100,000 remain *in statu quo* for thirty days from this date, during which time the said Flanagan and the other cross-complainants may give a good and solvent bond to be approved by the court or master, conditioned to pay the district legal interest on said sum or such parts thereof as they may designate until the final disposition of this cause, and further conditioned as required by law for injunction bonds, and, if such a bond is given within the specified time, the said sum, or such part thereof as said parties shall designate, shall be held as now held under the order referred to until the cause is finally disposed of. If no bond is given as provided herein, or if the parties designate less than the full amount of said sum, the said $100,000, or the excess of such sum over the amount designated, shall be released from the order above referred to and may be made by the parties now holding it to the said district."

The special master made his report, in which, among other things, he states:

"The special master was appointed with directions to state an account on the basis of the actual loss sustained by the contractor, without considering any anticipated profits whatever. This is the theory on which this report has been made up.

"For the convenience of the court and interested parties, the different classes of items have, in a way, been separated. Improvement No. 57, which was com-

pleted just prior to the work of overhauling the dredge-boat for Improvement No. 48, was finished about July 15, 1921. The testimony offered by the district would indicate there was no serious opposition on their part to the allowance of all expenses incurred between July 15 and October 10, the date on which the contractor was notified the district would not have ditch No. 48 dug. A list of the alleged expenses incurred in the overhauling of the boat prior to July 15 was put in evidence. Some of these were eliminated by the contractor. There were 123 items of these expenses. It appeared from the books of the Harding Construction Company that items 1 to 37 had been charged to Improvement No. 57, and had never been credited to that improvement and recharged to No. 48. The district therefore contends that none of these items are properly chargeable to No. 48. As to a large number of these items, the evidence of witnesses is otherwise undisputed that the material called for by the invoices was actually used after July 15, and for this reason the special master has given the contractor credit for these items, but has separated the amount, so that, if his finding in this respect is erroneous, it may be easily corrected.

"As above stated, the district gave notice on October 10, 1921, that the ditch would not be dug. It contends that the contractor should therefore have stopped all expense of every kind and nature on that day, and that it (the district) is not chargeable with anything thereafter. The special master thinks this is an arbitrary position to take, and that the contractor should be allowed a reasonable time in which to adjust matters following this breach of the contract. If a reasonable time is given, the termination of its length must be made without reference to any mathematical basis. The master has arbitrarily adopted sixty days, and has therefore allowed the contractor expenses incurred up to December 10, 1921. The contractor, on the other hand, did not sell the boat until April, 1922, and says credit should be given for all expenses up to that date."

After considering the testimony on the issue submitted to him, the master sets forth in his report an elaborate account of items, which it is unnecessary to here set forth in detail. He states the total indebtedness of the district to the contractor in the sum of $33,129.62, and allows the district a credit of $7,922.50, leaving a net balance due the contractor by the district of $25,207.12. The plaintiffs and District No. 17 filed exceptions to the following items of the master's report:

"(1) To the allowance of item No. 87 for $319, covering the traveling expenses of Jacobson and Flanagan on trips south. (2) To the allowance of $6,800 for rent or usable value of dredgeboat from July 15 to October 10. (3) To the allowance of $4,800 covering the rent or usable value of dredgeboat from October 10 to December 10. (4) To the allowance of $833.32 covering the item of supervision or overhead from October 10 to December 10. (5) To the allowance of $708.20, the amount of the insurance premium covering insurance on the boat from July 16 to December 10. (6) To the allowance of item No. 81, $68.30, covering traveling expenses of Toleff Jacobson to Chicago."

The district also excepted and objected to the allowance of any of the items set forth in the master's report as against it, on the ground that all proof taken before the special master on the statement of the account showed that the Harding Construction Company is a Minnesota corporation, and, at the time of the making of the repairs upon the boat and the expenditures of the items which are charged to the drainage district, the Harding Construction Company, which made the repairs, was doing business in violation of the laws of the State of Arkansas, the same being a foreign corporation which had not been authorized to do business in the State.

The cross-complainants excepted to the report of the master on the following grounds:

(1) No allowance is made in favor of the cross-plaintiffs for the accrued interest on the $450,000 worth of bonds which Drainage District No. 17 sold and refused

to deliver to cross-plaintiffs. (2) The master did not allow the cross-plaintiffs the rental or usable value of the dredgeboat up to the time of the sale of the same. (3) The report does not allow the cross-plaintiffs anticipated profits on the contract for the construction work, which Drainage District No. 17 repudiated and refused to carry out.

On the 27th of September, 1926, the court entered the following decree:

"On this day, September 27, 1926, this cause coming on to be heard, came the plaintiffs, W. H. Baker *et al.*, by their attorneys, Little, Buck & Lasley, and defendants, Drainage District No. 17 *et al.*, by their attorneys, Charles T. Coleman and Little, Buck & Lasley, and the defendants, J. T. Flanagan *et al.* (who are also cross-plaintiffs), by their attorney, J. T. Coston, and this cause was heard on the exceptions of Drainage District No. 17 and its directors, and the exceptions of the cross-plaintiffs to the master's report, and, upon due consideration of the same, it is considered, ordered, adjudged and decreed that all said exceptions to the master's report be and the same are hereby overruled; to which action of the court in overruling their exceptions to said report said Drainage District No. 17 and its directors excepted at the time, and said cross-plaintiffs, J. T. Flanagan *et al.*, excepted at the time to the action of the court in overruling their exceptions to the master's said report.

"It is further considered, ordered, adjudged and decreed that the complaint of the plaintiffs, W. H. Baker and E. H. Sheppard, be and the same is hereby dismissed.

"It is further considered, ordered, adjudged and decreed that the cross-plaintiffs, J. T. Flanagan, J. R. McGibbon, Toleff Jacobson, Andrew Jacobson, J. O. Shuland, A. G. Shuland and Harding Construction Company, do have and recover of and from Drainage District No. 17 of Mississippi County, Arkansas, the sum of $32,515 (the amount found due by the master, with interest thereon), and all cost, including a fee of $1,000 in favor of Hon. Archer Wheatley for his services as mas-

ter, but the respective interests of said cross-plaintiffs in the recovery are not hereby fixed or determined.

"It appearing that in the original decree herein rendered on the.....day of....., 1923, there was a finding that cross-complainants, J. T. Flanagan *et al.*, were not entitled to any damages for anticipated profits on the construction contract or for breach of contract for sale of the bonds, but there was no formal dismissal of the cross-complaint with reference thereto, said cross-complaint with reference to said features is dismissed for want of equity, exceptions of cross-complainants thereto being saved.

"It is further considered, ordered and adjudged that this decree shall draw interest from this date until paid at the rate of 6 per cent. per annum, and R. C. Rose, C. E. Crigger and B. A. Lynch, the present board of directors of said Drainage District No. 17, be and they are hereby ordered, directed and required to issue all vouchers, checks or warrants necessary to satisfy this decree, with costs.

"To which judgment and decree of the court Drainage District No. 17 excepted at the time, and prayed an appeal to the Supreme Court, which is granted.

"To which judgment and decree of the court the cross-plaintiffs excepted at the time, and prayed an appeal to the Supreme Court, which is granted."

1. The appellants contend that District No. 17 is liable to Flanagan in damages for anticipated profits for breach of a valid contract entered into between the district and Flanagan for the digging or construction of Improvement No. 48. But appellees contend that the decree of 1923 was final and conclusive of that issue, since there was no appeal from that decree within the time prescribed by law. In other words, the appellees contend that the appeal lodged here on the issue as to anticipated profits should be dismissed. That issue therefore must be determined *in limine*.

Section 2129 of C. & M. Digest provides as follows: "The Supreme Court shall have appellate juris-

diction over the final orders, judgments and determinations of all inferior courts of the State," etc.

The above provision is § 15 of the Civil Code, as amended by the Acts of 1871, the words "and determinations" and "inferior courts of the State" being added by the Legislature of 1871. This court has always held, before and ever since the adoption of the Code (1869), that, where there is no final judgment, no appeal lies, and that an appeal will be dismissed for want of a final judgment. See *Adams* v. *Owens,* 1 Ark. 135; *Bailey* v. *Ralph,* 4 Ark. 591; *Campbell* v. *Sneed,* 5 Ark. 398; *Ex parte Hawley,* 24 Ark. 596; *Mirror* v. *O'Brien,* 36 Ark. 200; *Davie* v. *Davie,* 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170; *Davis* v. *Hale,* 114 Ark. 426, 170 S. W. 99, Ann. Cas. 1916D 701; *Darbin* v. *Montgomery,* 144 Ark. 153, 221 S. W. 855, 223 S. W. 17. Other cases are cited in 1 Crawford's Arkansas Digest, at page 130. But this court has likewise always held, and it necessarily follows, that, under the above statute, an appeal will lie and must be taken from a final decree within the time prescribed by statute for the perfecting of appeals. So the issue on the motion of appellees to dismiss the appeal of appellants as to anticipated profits is whether or not the decree of September 24, 1923, is final.

What is a final decree? This court, in numerous cases, beginning as early as *Campbell* v. *Snead, supra,* and on down as late as *Temple Cotton Oil Co.* v. *Davis,* 167 Ark. 449, 268 S. W. 38, has held that an order overruling or sustaining a demurrer to a pleading without further action is not appealable. See also *Moody* v. *Jonesboro, etc. Ry. Co.,* 83 Ark. 371, 103 S. W. 1134; *Fairview Coal Co.* v. *Ark. Central Ry. Co.,* 153 Ark. 295, 239 S. W. 1058.

This court, in *Campbell* v. *Snead, supra,* in giving its reasons for declaring such a judgment not final, said:

"Because it neither in form nor effect dismisses the parties from the court, discharges them from the action, *or concludes their rights in respect to the subject-matter in controversy in the case;* and no proceeding in court,

not attended with at least one of these consequences, can, in our opinion, be considered as embraced by the law allowing 'writs of error upon any final judgment or decision of any circuit court'."

In *State Bank* v. *Bates,* 10 Ark. 633, we said:

"A judgment, to be final, must dismiss the parties from the court, discharge them from the action, *or conclude their rights to the subject-matter in controversy.*"

And in *Tucker* v. *Yell,* 25 Ark. 420-429, we quoted Bouvier's definition of a final decree as follows: "A final decree is that which finally disposes of the whole question so that nothing is left to adjudicate upon."

It is further held in that case, quoting syllabus:

"In peculiar cases this court may decree as to certain defendants or property, while all the equities as to other defendants and property are reserved for further consideration; and yet this decree, as to certain defendants or property, may be final. If, in the course of the proceedings, final decrees vital to the interests of any of the litigants are made, an appeal may be had."

In *Marlow* v. *Mason,* 117 Ark. 360-362, 174 S. W. 1163, we quoted the language quoted from the case of *State Bank* v. *Bates, supra.*

In *Davie* v. *Davie, supra,* it is said: "But the unnecessary splitting of causes by courts of chancery creates confusion and difficulty in practice, and is condemned." Citing cases, among them *Tucker* v. *Yell, supra.*

Learned counsel for the appellants cites and relies upon Arkansas cases to support his contention that the decree of September 24, 1923, was not a final decree, and he cites numerous cases from other jurisdictions, which, he also maintains, support his contention, if the court desires to pursue its investigation further than our own decisions. We have examined all the cases on this issue from our own court cited and relied on by counsel both for appellants and appellees, and find it unnecessary to investigate the decisions of other courts; for we have concluded that the issue is clearly settled against the

appellants by decisions of our own court. This court has never departed from the doctrine announced in *Campbell* v. *Sneed, State Bank* v. *Bates,* and *Yell* v. *Tucker, supra,* to the effect that, where a decree concludes the rights of the parties to the action in respect to the subject-matter in controversy in the case, it is a final decree. That doctrine, announced so early, has been reaffirmed expressly and in legal effect in all subsequent cases.

In *Davie* v. *Davie, supra,* a leading case on the subject, it is said: "An appeal is allowed also *where a distinct and several branch of the case is finally determined, although the suit is not ended.*" See also *Seitz* v. *Meriwether,* 114 Ark. 289, 169 S. W. 1175, where it is held, quoting syllabus: "A decree which disposes of all the matters in issue between the parties and gives all consequential directions necessary to carry it into execution, is a final decree."

In *Young* v. *Rose,* 80 Ark. 513, 98 S. W. 370, it is said:

"A decree which settles the rights of parties and leaves nothing to the master but a statement of an account on a basis fixed by the decree, is a final judgment. A report of a master is not subject to exceptions when it simply follows the decree directing the reference and makes a report based on findings contained in such decree, as, if there be error, it is in the original decree, and not in the report of the master, whose duty it was to obey the decree."

In the comparatively recent case of *Newald* v. *Valley Farming Company,* 133 Ark. 456, 467, 202 S. W. 838, 841, we quoted from *McGourkey* v. *Toledo & Ohio Central Ry. Co.,* 146 U. S. 536, 13 S. Ct. 170, 36 L. ed. 1079, as follows:

"It may be said in general that, if the court make a decree fixing the rights and liabilities of the parties, and thereupon refers the case to a master for a ministerial purpose only, and no further proceedings in a court are contemplated, the decree is final; but, if it refers the case to him as a subordinate court and for a judicial purpose, as to state an account between the

parties, upon which a further decree is to be entered, the decree is not final."

And also, in the same case from Jones on Mortgages, vol. 3, par. 1600, the following:

"A judgment which settles all the rights of the parties and directs a sale of the premises, and that the defendant pay any deficiency which may arise after such sale, is a final decree from which an appeal may be taken; though, in a limited sense, it is interlocutory, inasmuch as further proceedings are necessary to carry it into effect. It leaves nothing further to be adjudicated."

In *Lewisburg Bank* v. *Sheffey,* 140 U. S. 445, 11 S. Ct. 755, 35 L. ed. 493, it is said:

"Where the entire subject-matter of a suit is disposed of by a decree, the mere fact that accounts remain to be adjusted and the bill is retained for that purpose, does not deprive the adjudication of its character as a final and appealable decree."

Now, when the above rule of our court and of the Supreme Court of the United States is applied to the decree of September 24, 1923, it is impossible to escape the conclusion that the same was a final decree on the issue as to whether Flanagan and his associates were entitled to recover anticipated profits by reason of the alleged breach of contract on the part of the district for the construction of No. 48. It must be remembered that this issue was not determined on demurrer to the answer and cross-complaint of appellants, but on the merits of the issue as raised by such answer and cross-complaint after the allegations thereof had been denied by the plaintiffs and after proof on the issue thus raised had been fully developed. The recitals of the decree show that it was rendered on final hearing and determined on this issue. We will not set out again all of the recitals of the decree. The court, after finding that the original contract was valid, found that the district was entitled to rescind the same on account of impossibility of performance, and that it was only liable to Flanagan and his associates for the expenses incurred in making prep-

arations to perform the contract up to the time that he was notified by the district that it would not carry out the contract, including all damages sustained by him in connection with the performance of the contract to that date, but *"not including anticipated profits on materials not furnished or work done."* The decree recites: "Wherefore it is considered, ordered, adjudged and decreed that the injunction heretofore issued restraining the parties from carrying out the contract referred to be and the same is hereby made perpetual." In other words, the court found that the appellants could never recover from the district any damages by way of anticipated profits, and entered a decree so holding. A reading of the whole decree will show that it was a final disposition of that issue. Nothing whatever was left to be determined concerning such issue. On the contrary, the court, by expressly reserving other issues and giving the master specific directions to take proof and make his report at a future term of the court with reference to the sole and only issue submitted to him as designated in the decree of September 4, 1923, completely, without reservation, and finally disposed of the issue of anticipated profits for alleged breach of the contract for the construction of No. 48. After entering the decree in this form, it was wholly immaterial that the court did not have the decree recite that the complaint of the appellants on the issue of anticipated profits was dismissed. If the cause on this issue had been disposed of by sustaining a demurrer to appellants' cross-complaint, then, in order to make the decree final, it would have been necessary for the record of the decree to recite that the appellants, cross-complainants, stood on their cross-complaint, and that the same was dismissed. But, as already stated, the cause on this issue was not determined on demurrer to the cross-complaint, but the issue was joined by answer to the allegations of the cross-complaint and fully developed by the taking of testimony, and finally submitted and determined on its merits. Therefore the decree as actually rendered was tanta-

mount to a dismissal of appellants' cross-complaint on the issue of anticipated profits, and as completely and effectually disposed of it as if there had been a formal recital in the decree dismissing the cross-complaint for want of equity; because all parties were forever restrained from carrying out the contract for construction of No. 48, and it was decided that the appellants were not entitled to damages by way of anticipated profits because the district would not allow the appellants to complete the construction of No. 48 under the contract. The issue therefore as to anticipated profits for this alleged breach of contract was finally disposed of by the decree of 1923.

Both the master and the court itself so construed the decree. The report of the master states that "he was appointed with directions to state an account on the basis of the actual loss sustained by the contractor, without considering any anticipated profits whatever," and the recitals of the decree of September 27, 1923, in which the court states: "It appearing that, in the original decree herein rendered on the ..... day of ..... 1923, there was a finding that cross-complainants, J. T. Flanagan *et al.*, were not entitled to any damages for anticipated profits on the construction contract or for breach of contract for sale of the bonds, but there was no *formal* dismissal of the cross-complaint with reference thereto," etc. After the lapse of the term when the decree on the issue of anticipated profits was rendered, that decree became final. *Spivey* v. *Taylor*, 144 Ark. 301, 222 S. W. 57. When therefore the appellants failed to perfect their appeal from the decree of the court on the issue of anticipated profits within the six months prescribed by § 2140 of C. & M. Digest, they forever lost their right to prosecute an appeal on that issue. Consequently their so-called appeal on that issue must be, and is, hereby dismissed.

2. It is next contended by appellants that the district is liable for accrued interest on $450,000 worth of the bonds which appellants allege the district sold and refused to deliver to appellants. On the 15th day of

July, 1920, the district entered into a contract with J. R. McGibbon for a purchase of $450,000 worth of bonds of the district bearing interest at the rate of 6 per cent. payable semi-annually, and to be dated August 2, 1920. The contract was assigned to Jacobson. The purchaser was to pay for the bonds in the sum of $450,000 for Improvement No. 48, as the payrolls for the construction of such improvement were due. The appellees contend that the construction contract is voidable because it was not let publicly, as the statute requires, and further, that the construction contract was excessive, and therefore voidable; and still further, that the construction contract and bond contract were coupled and interdependent, and therefore voidable.

We have considered the testimony in the record bearing upon these contentions of the appellees, but we do not set out and discuss it, because it is exceedingly voluminous and would unduly extend this opinion to do so. Besides, it is wholly unnecessary to do so, inasmuch as we have concluded that, if these contentions of counsel for appellees were unsound, still there could be no recovery by the appellants for breach of the bond contract for two reasons: (1) because the undisputed evidence shows that the district was released by the Jacobsons from the obligations of the bond contract; (2) if the district was not released from the bond contract, and if there was a breach of the contract, nevertheless there could be no recovery of damages, because the appellants sustained no loss on account of such breach.

The facts, briefly stated, on the alleged breach of the bond contract are substantially as follows: The district had made a tentative agreement with Carbough & Company, bond buyers, of Chicago, for the purchase of $2,330,000 worth of bonds, but the tentative purchasers were unwilling to take any of the bonds of the district unless $450,000 worth of bonds which the district had contracted to McGibbon were included in the purchase. Lange, the secretary of the district, arranged a meeting in Chicago with Jacobson for the purpose of arranging

for the sale of the bonds of the district, including the bonds contracted to McGibbon. The result of the meeting was that the Jacobsons agreed that "if they were relieved of the burden of purchasing $450,000 worth of bonds at par, a reduction should be made in the contract price for constructing No. 48." They were *relieved,* and the bonds that were to be purchased by the Jacobsons were sold by the district on November 9, 1921, to a St. Louis syndicate at 85c on the dollar. While Lange testified that the district and the Jacobsons never reached an agreement about the extent of the reduction that the board should receive on the construction contract, there is no uncertainty in his testimony, and no contradiction thereof, that the Jacobsons were relieved, by agreement with the district, of the obligations of the contract for the purchase of the bonds. The substitution of this new contract, by oral agreement concerning the purchase of the bonds, necessarily relieved both parties from the obligations of the original contract for the purchase of bonds. Furthermore, the testimony shows that, during the time negotiations were pending for their sale and purchase, the bonds had a market value ranging from 85c to 93c, or an average market value of about 90c. The district notified the contractor, October 10, 1921, that the contract for the construction of Improvement No. 48 would not be carried out. The bonds were to be dated August 2, 1920, and they bore interest at the rate of 6 per cent. per annum, payable semi-annually, therefore fourteen months' interest had accrued at the time the contract was repudiated. If there was a breach of the contract for the purchase of the bonds, the damages for such a breach should be estimated as of the time the breach occurred, because the right of action, if any, accrued at that time. Now, if the Jacobsons had been required to take the bonds, they would have had to pay $450,000, but the market value of the bonds at the time of the alleged breach of contract for their purchase, calculated 93c on the dollar, the highest estimated market value shown by the evidence, would be $418,000; this, including the inter-

est on $450,000 (which the Jacobsons were entitled to) from August 2, 1920, the date of the bonds, to October 10, 1921, the date of the alleged breach of contract, would amount to $31,500 which, added to $418,000, would make the market value of the bonds and the interest equal to $449,500. Therefore, by simple mathematical calculation, it is demonstrated that Jacobson was *not* damaged by breach, if any, of the bond contract; *but,* on the contrary, he gained instead of lost by such breach.

3. This brings us, in conclusion, to determine whether or not the court erred in overruling all exceptions to the master's report and in rendering judgment against the district in the sum of $32,515.

In its decree of 1923 the court found that the contract for the construction of No. 48 was valid, but that the district subsequently became entitled to rescind the contract on account of legal impossibility of performance, and directed the master to ascertain the expense that Flanagan, the contractor, had incurred in necessary preparation to perform and carry out the contract, and also the contract price of any work done by him, including any damage sustained by him in connection with the performance of the contract to the date when he was notified that the district would not permit him to carry out the contract.

Counsel for appellants and appellees have favored the court with an exceedingly elaborate brief on the issues as to whether or not the construction contract was valid when entered into, and also on the issue of whether, if valid, the district had the legal right, under the act February 23, 1920, to abandon the performance of the contract.

Here again we regard a decision of these issues as wholly immaterial, and we therefore pretermit a discussion thereof, for the reason that we are convinced that the district is liable to the contractor on the matters involved in the issue referred to the master, under the plainest principles of equity, whether the district had the discretion to abandon the contract or not.

Flanagan and the district entered into the contract believing the contract was valid. Flanagan made preparations for, and entered in good faith upon, the performance of the contract, and was engaged in such performance when he was notified by the district that it would not further perform the contract on its part. Conceding, without deciding, that the district had a perfect right to thus repudiate the contract, equity would not allow it to do so without reimbursing the other party to the contract for the necessary expense incurred by him in the performance of the same.

"If a party calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases to do equity in order to get equity." *Spring F. Company* v. *School Dist. No. 4, Faulkner County,* 67 Ark. 236, 54 S. W. 217. In *McMillan* v. *Brookfield,* 150 Ark. 518, 234 S. W. 621, we said:

"This suit is in equity, and the court has the right to impose conditions upon the plaintiffs in granting them the relief prayed for. He who seeks equity must do equity, is a favorite maxim. In the broadest sense it is regarded as the very foundation of all equity and as the source of every doctrine and rule of equity jurisprudence. Its practical meaning is that, whatever be the nature of the controversy and of the remedy demanded, the court will not give equitable relief to the party seeking it unless he will admit and provide for all the equitable rights, claims and demands of his adversary growing out of, or necessarily involved in, the subject-matter of the controversy. I Pom. Eq. § 385." See also *Grider* v. *Driver,* 46 Ark. 64; *Comstock* v. *Johnson,* 46 N. Y. 521; *Hitchcock* v. *Galveston,* 96 U. S. 350, 24 L. ed. 659, and other cases cited in appellant's brief.

Under all the circumstances disclosed by this record, it occurs to us that it would be rank injustice upon the part of the district to fail to remunerate Flanagan and his associates for their necessary outlay in endeavoring

in good faith to perform the contract on their part, even though the district was justified in abandoning the same. As a part of said outlay, the master correctly concluded that the contractor should be allowed at least sixty days to rearrange its affairs and should be reimbursed the amount necessarily expended in doing so. It must be remembered that this was a stupendous project, and a sudden termination of the contract made it necessary for the contractor to incur a large expense in readjusting his affairs to meet the situation caused directly by the act of the district in repudiating its contract.

But the appellees contend that the Harding Construction Company was in fact the real party in interest in this litigation, it being the exclusive owner of the contract and the real contractor which was to do the construction work. One of the exceptions of the appellees to the master's report is that the Harding Construction Company is a Minnesota corporation, and was doing the business contemplated by the contract under review in violation of the laws of Arkansas, not being authorized to do business in the State. Conceding that the Harding Construction Company was the real party in interest, the trial court did not err in overruling this exception to the master's report. This, in effect, was a plea in abatement, or rather a plea in bar, of the appellant's action as set forth in their answer and cross-complaint, and the appellees should have entered their plea in their answer to such cross-complaint or by special plea in bar at the beginning of the lawsuit, instead of at the end thereof. About two and one-half years after the district filed its answer denying the allegations of appellant's cross-complaint, and after proof on the merits of the issues thus joined had been taken, the original plaintiffs in the action file an amendment to their amended complaint, alleging, for the first time, that the Harding Construction Company was not qualified to do business in Arkansas. This was too late for a plea in abatement, or in bar of the action. The appellees must be held to have waived the incapacity of the Harding Construction

Company to maintain its cross-action by answering this cross-complaint and permitting the proof to be developed on the merits, without raising the issue of incapacity of the cross-complainant, Harding Construction Company, to maintain the action. See § 1189, C. & M. Digest, subdiv. 2; also § 1192, C. & M. Digest. See also *Pettigrew* v. *Washington County,* 43 Ark. 41; *Files* v. *Reynolds,* 66 Ark. 316, 50 S. W. 509; *Triggs* v. *Ray,* 64 Ark. 151, 41 S. W. 55, and cases from other jurisdictions cited in brief of counsel for appellant.

The master was a former chancellor of the district, and his report and its exhibits cover fifteen pages of the record. It could serve no useful purpose to set out and discuss the evidence upon which the master based his findings, as only questions of fact are mainly involved. The report of the master shows that he was thoroughly capable, and that he apprehended fully the directions of the court. He made a painstaking and exhaustive examination of the evidence already in the record, and took further testimony on the issue submitted to him.

After a careful consideration of the master's report, we have reached the conclusion that the same is correct, and that the trial court did not err in overruling all the exceptions thereto, and did not err in approving the same and rendering a decree in accordance therewith. We find no error in the entire record calling for a reversal of the decree, and the same is therefore affirmed.

ARKANSAS SHORT LINE *v.* BELLARS.

Opinion delivered January 30, 1928.

1. RAILROADS—PEDESTRIAN USING TRACK.—An adult woman walking upon a railroad track in preference to using a path alongside the the track, was not an invitee but a bare licensee in using the track, and refusal of an instruction on contributory negligence was reversible error in an action for injuries resulting from being struck by a motor car.
2. RAILROADS—DUTY TO MERE LICENSEE.—Railroad company owes to trespassers and bare licensees no affirmative duty to care, and

the only requirement is that the railroad must not willfully or wantonly injure them and must exercise ordinary care not to injure them after discovering their peril and inability to escape.

Appeal from Poinsett Circuit Court; *G. E. Keck,* Judge; reversed.

Denver L. Dudley and *N. F. Lamb,* for appellant.

M. P. Watkins and *Aaron McMullin,* for appellee.

WOOD, J. Two suits were filed in the circuit court of Poinsett County, one by Ollie Bellars and J. J. Bellars, husband of Ollie Bellars, the other by Jennie Tankersley and her husband, Thomas Tankersley. The two cases were consolidated and tried as one case. There was a verdict for each of the women plaintiffs for $5,500 and a verdict against the husbands. Motion for new trial was filed by defendants, overruled, and appeals taken.

The Tankersley case has been settled, and there is now only the case of Mrs. Bellars to be decided.

The plaintiff alleged, in substance, that she was in good health and perfect physical condition; that defendant, Arkansas Short Line, is a railway corporation; that on August 1, 1926, without fault or negligence on her part, she was struck and run over by a motor-car operated by defendant, Rufus Walters, an employee of the Arkansas Short Line, while he was in the line of his duty; that she was upon and about to cross the railway track within the city limits of Truman, Poinsett County, Arkansas, and at a point where the track had for a long time been used by pedestrians for the purpose of passing along or across the track; that such use of the track had been of long duration, open, notorious, and well known to defendants; that, while she was upon the tracks, defendant Walters wrongfully, carelessly and negligently ran a motor car against her, breaking and fracturing her leg, etc.; that the injuries so received were permanent, etc.; that Walters was operating the motor-car in a careless and negligent manner, in that he was running it at a dangerous and reckless speed, and did not keep a lookout, and did not make any effort to avoid striking plaintiff after discovering her peril; that he gave no alarm or

warning; that it was at a point where he knew the track was frequently used by pedestrians.

Defendants answered, denying all the material allegations of plaintiff's complaint; alleged that plaintiff was a trespasser without knowledge or consent of defendants; that plaintiff was guilty of contributory negligence.

The appellee testified that she lived at Truman, and, on August 1, last year, she and Mrs. Jennie Tankersley were going to her daughter's. It was a little after eight o'clock P.M. They went on the railroad track, and turned up the track toward town. They were walking between the rails when a motor-car hit her. Somebody hollered: "It was a motor car," and appellee started to get off. She testified that it hit her on the leg and head and rendered her unconscious. When the man hollered, she tried to jump off. Before she was hit she was in good health, but now her leg hurts her all the time. She is 48 years old. Before she went on the track she looked down the track and did not hear or see any trains. There is a path that goes up onto the railroad track. She went up there. Children went that way to school. Appellee had often walked on the track before, and others did too. People walked that way to town every day. Witness does not remember the path just south of the gravel road and right by the side of it. She just knows that they always went the other way because everybody else did. At the sides of the railroad and at the end of the ties there are two level, well-beaten paths, one on one side of the track and one on the other side. Witness testified that she got between the rails, as she met a man who went past her, and that he hollered, "Look out, here comes a motor-car." She had not heard the motor-car. The path along the gravel road was not a well-beaten, smooth one. There were weeds on either side, and they couldn't get along that path for that. They did not hear any motor-car that night. It was dark.

Mrs. Jennie Tankersley testified that she was on the track with Mrs. Bellars, and they started out about

seven-thirty; walked up the track for a bit; could not walk down on the side of the road because it had been raining. That everybody walks on the track that wants to. That they passed a man, and he told them that they had better get off the railroad, that a motor-car was coming, and, just as they went to step off, the car struck them. It threw witness one way and appellee another. Witness did not know that they ran any trains on that road on Sunday. This was Sunday night. There was a little path on each side. They had walked that way before, and everybody that wanted to walked it. It was the ordinary way for them to go. Children, men and women went that way. Witness had seen others on the track when she was on it. They had not heard a motor-car until the man hollered. Witness looked both ways. Mr. Walters, who operated the motor-car, came to witness, asked her if she was hurt, and told her he was trying to get home in time to put into headquarters the story about the wreck they had on the road the day before. He said he was going pretty fact. Witness did not know how far he went after he hit her before he stopped. Everybody walked on the railroad. Does not remember a little path along the road. Can't say that the path along the south side of the gravel road isn't a smooth and well beaten path used by pedestrians. All the path witness ever saw along the railroad was in the middle of the track. Mrs. Bellars said witness stepped up on the railroad track about the same time. They had walked on the railroad about the distance of the court room before being struck.

W. F. Webb, a farmer, testified that he had been to Memphis, and was returning home along the railroad track; saw he was going to meet a couple of ladies, and heard a noise coming. It was very dark, and there was quite a little driving on the hard road. It had been raining that day. It made it pretty dark, but you could tell how to walk. When witness got close to the ladies they saw him, and stepped up on the center of the track. Witness kept listening, and finally decided what he heard

was a motor-car. It must have been seventy-five or eighty feet from him, and he could see the bulk of something, but knew from the noise it was a motor-car. Witness saw that the ladies had not discovered the noise, and he called to them and told them they were going to get hit. One of them started to the right and one to the left. Another step would have put them off the track. Witness stopped and looked, and it looked like they went up five feet high. The car ran on up to a little crossing, and the man operating it came back as quickly as he could. Witness did not know how fast the motor-car was coming, but at a pretty good gait. It looked to witness like it was going around twenty-five miles an hour. Did not see that any apparent effort was made to stop it before it hit the ladies. Witness thinks that most of the people from Mr. Stacy's to Mr. Moose's walk the railroad more than they do the dirt road. You will see school-children and Singer men walking the track, either on the side of the track or between the track. Witness had not passed the women when he hollered at them. In going from Stacy's crossing to Lovell's store you will see them walking all the places. Witness did not hear any conversation between Mr. Walters and Mrs. Tankersley. Motor-cars don't have any signal that witness knows of. Witness used the railroad track all of the time.

A number of other witnesses testified substantially the same as the witness whose testimony is set out above, with reference to people walking on the track at this particular place.

The motor car had no light, and the accident occurred close to Truman, a town of three or four thousand people.

One witness testified that where the accident occurred was ninety feet from one of the streets.

R. S. Walters, one of the defendants, testified, in substance, that he was operating the motor-car and coming into town after he had finished his work. A cloud was coming up, and it began to look like rain, and wit-

ness started into town. He was one-quarter of a mile from Truman and within thirty or forty feet of some object, and he heard a man holler, and as he did, he could see the bulk of something, so he threw his car out of gear and threw on the brakes, and by that time hit the women. He went over to Mrs. Tankersley and asked her how bad she was hurt, and helped her up, and they got a doctor. To stop the car witness threw it out of gear and applied the brakes. It was dark, and he was looking ahead, because he did not want to hit anybody, and sometimes there were objects on track, and they have to go through that part of town very carefully. If a motor-car strikes something it will jump the track. The car was a small one. There was nothing else witness could have done after he discovered the people. The wheels slid on the rails. They were wet. A car cannot be stopped on a wet rail as quickly as on a dry one. Witness said he was coming between twelve and fifteen miles an hour. He had been driving faster, but it was dark, and he could not see the rail or anything else. Had seen a few pedestrians every day up and down the road. The majority of them walk on the side, each side of the track.

Witness had been with the company nineteen months. It was about eight o'clock or a little bit after when the car struck the women. He was not aware that there might be anybody on the track at night, but cannot say that he had ever been along there at that time of night before. He was looking for any obstacle. Was running the car with caution, so he could stop it. Saw these people possibly 30 or 40 feet. That was as far as he could see. He could stop the car in 100 or 125 feet. Witness could not see the rails. Had no light, but did not expect people out at that time of the night.

There are several witnesses that testified for the defendant and corroborated Walter's testimony as to the people using the track.

The defendants, in their prayer for instruction No. 1, asked the court to instruct the jury to return a verdict

for the defendants. Among other prayers, they also asked instruction No. 8, as follows:

"If you find from a preponderance of the evidence that the plaintiffs came from their home on Smith Street, on the north side of the railway track, out to the track and between the rails, and were walking between the rails along the track when struck by the motor-car; that near or adjacent to the railway and parallel with it was a gravel road; that upon the side of the road nearest the railway track was a pathway used by pedestrians; that on each side of the railway and at the end of the ties, but on the dump or grade, were well-beaten paths used by pedestrians; and that, instead of using or walking upon the road or any of these paths, the plaintiffs, Jennie Tankersley and Ollie Bellars, without any necessity therefor, elected to walk between the rails, then, in so doing, they were guilty of contributory negligence, and cannot recover in this suit."

The court refused above prayer for instruction, to which the defendants duly excepted.

From a judgment in favor of the plaintiffs is this appeal. The cause as to Mrs. Tankersley has been settled pending this appeal, and therefore only the appeal of the defendant as to Mrs. Bellars remains.

Giving the evidence its strongest probative force in favor of the appellee, Mrs. Bellars, she was a bare licensee. She was not on the tracks under circumstances which constituted an implied invitation on the part of the railway company to use its tracks as a footpath. The appellee herself and her companion, Mrs. Tankersley, both testified that there was a path on each side of the railroad tracks and a path leading up on the tracks "where everybody who wanted to walked—it was the ordinary way for them to go; children, men and women, went that way." Nevertheless the railway company did not extend to them any invitation, either express or implied, to use its tracks for a footpath. Travelers went that way purely from their own volition, because they thought it smoother or more convenient, and the railway

company merely passively acquiesced in such use of it. While the railway company did not forbid foot travelers to use its tracks, it certainly did not invite them to do so by any conditions which it created causing the foot travelers to use its tracks.

In *Mo. & North Ark. Ry. Co.* v. *Bratton,* 85 Ark. 326, 108 S. W. 518, passengers going to and from the station were accustomed to use the roadbed for a short distance. The passengers, when they arrived at the depot, usually went along the tracks of appellant in going to the town of Leslie, which was some distance from the railway station. In that case we held that the jury were warranted in finding that Bratton was on the tracks by the implied invitation of the railway company.

In *Moody* v. *St. L. I. M. & S. R. Co.,* 89 Ark. 103, 115 S. W. 400, 131 Am. St. Rep. 75, the railway company permitted its roadbed to obstruct the natural drainage of water from an adjacent street so that it washed away the sidewalk, in consequence of which pedestrians used the railroad track as a footpath. Under these circumstances we held that foot travelers were using the railroad track as a highway by at least the implied invitation of the railway company.

In *Arkansas-Louisiana Ry. Co.* v. *Graves,* 98 Ark. 638, 132 S. W. 992, Graves, the plaintiff, was on a footpath crossing the railroad track that had been openly and notoriously used by the public as a crossing and as one of the approaches to the depot platform. Those who used the crossing did so, not only by permission, but upon the implied invitation of the company.

In all the above cases the parties injured had a right to be on the railway tracks because they were invitees or licensees. But no such circumstances exist in the case at bar. Appellee, as we have stated, was not on the railway tracks by invitation of the railway company. Appellee was on the railway tracks under practically the same circumstances as shown in the case of *St. L. I. M. & S. R. Co.* v. *Tucka,* 95 Ark. 190-194, 129

S. W. 541, 542, where Judge BATTLE, speaking for the court, said:

"It was proved that the deceased and many others had for many years used a part of the railroad track upon which he was killed as a pathway, and had thereby acquired the right of licensees thereon. But this did not exonerate him from the perils of his situation while upon the track. * * * He was there without invitation and at his own peril, and was guilty of contributory negligence. There was no evidence that the appellant discovered him in time to protect him against injury, and his administratrix had no right to recover damages."

Another case almost parallel on the facts, and precisely so in doctrine, is that of the *C., R. I. & P. Ry. Co.* v. *Payne,* 103 Ark. 226, 146 S. W. 487, 39 L. R. A. (N. S.) 217, where we said:

"The undisputed evidence shows that appellee was a mere or bare licensee. She was using the footpath upon appellant's right-of-way for her own convenience, and not for any purpose connected with the business of appellant or for the common interest or mutual benefit of appellant and appellee. Appellant did no affirmative act to compel or induce appellee to use the footpath upon its right-of-way. It merely acquiesced in such use by appellee and the public. Under such circumstances it cannot be said that there was any implied invitation upon the part of appellant for the use of its right-of-way by appellee. Appellant therefore did not have to exercise ordinary care to make the pathway safe for appellee."

Appellee was likewise on the track under the same circumstances as in the case of *Todd* v. *Ry. Co.,* 106 Ark. 390-392, 153 S. W. 602. Todd was on the crossing, which was the usual route of pedestrians crossing the railroad track. It was the usual custom of people going in that direction to use that path over the railroad track. The court, in that case, at page 397 (153 S. W. 604), used the following language:

"This case is unlike the cases where parties injured are upon the railway company's track or right-of-way

not only by permission but upon the implied invitation of the company. In such cases the railway company owes the duty of exercising ordinary care to avoid injury. Nor is it like the cases of travelers at a public crossing, where the right to use the public highway is not by permission of the company, but by virtue of the law. In all such cases the railway company owes to the traveler the duty of exercising care to avoid injuring him. But the present case is differentiated from the above by reason of the fact that the appellant here was not upon the track of the railway company at the time of the injury by reason of any invitation of the company, either expressed or implied. He was not about any business pertaining to the company, and, as already stated, he was a bare licensee."

In many cases before the lookout statute, which does not apply here, this court has held that a railroad company owes trespassers and bare licensees no affirmative duty of care, and only the duty not to willfully or wantonly injure them, or the duty to exercise ordinary care not to injure them, after discovering their peril and inability to escape. To bare licensees railroad companies owe no affirmative duty of care, for such licensees take their license with the concomitant perils. *Ark. & La. Ry. Co.* v. *Sain,* 90 Ark. 278-284-285, 119 S. W. 659, 22 L. R. A. (N. S.) 910. See also *St. L. I. M. & S. R. Co.* v. *Pyles,* 114 Ark. 218, 169 S. W. 580; *St. L. I. M. & S. Ry. Co.* v. *Duckworth,* 119 Ark. 246, 117 S. W. 1148; *Mitchell* v. *Ozan-Graysonia Lumber Co.,* 151 Ark. 6, 235 S. W. 44; *Knight* v. *Farmers' & Merchants' Gin Co.,* 159 Ark. 423, 252 S. W. 30.

In *Knight* v. *Farmers' & Merchants' Gin Co., supra,* we said:

"In all our decisions on the subject—and there are many—we have adhered to the rule that one who goes upon the premises of another as a mere licensee is in the same attitude as a trespasser, so far as concerns the duty which the owner owes him for his protection; that he takes his license with its concomitant perils, and that

the owner owes him no duty of protection except to do no act to cause his injury after his presence there is discovered."

The above doctrine is firmly embedded in the jurisprudence of our State, and thus far no case has arisen of peculiar or unusual circumstances calling for an exception or modification of the doctrine, which in some jurisdictions is the case. See 3 Elliott on Railroads, § 1795 (1257) and cases there cited; 33 Cyc. 779-80, 22 R. C. L. 970; *Mason* v. *Southern Ry. Co.*, 58 S. C., 36 S. E. 440; *Southern Ry. Co.* v. *Chapman,* 124 Ga. 1026, 53 S. E. 693, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675, where the Supreme Court of Georgia, through Judge Lumpkin, discusses the subject in a learned opinion. The case of *Davis* v. *Scott,* 151 Ark. 34-44, 235 S. W. 407, is not in conflict with the doctrine above announced in all our cases. Neither does that case state an exception or modification to the above doctrine of our cases. The case differs from the case at bar on the facts. Likewise the cases of *St. L. S. W. Ry. Co.* v. *Mitchell,* 115 Ark. 339, 171 S. W. 895, Ann. Cas. 1916E, 317; *Cook* v. *Mo. Pac. Rd. Co.,* 160 Ark. 523, 254 S. W. 680; and *Jonesboro, L. C. & E. R. Co.* v. *Wright,* 170 Ark. 815, 281 S. W. 374, are not applicable here. The Mitchell case, *supra,* although a motor-car case, was nevertheless a public crossing case, and the Cook case and the Wright case were public crossing cases. These cases all arose since the passage of the lookout statute, § 8568, C. & M. Digest, and none of them are applicable here.

We do not mean to decide, and do not decide, that there may not be peculiar circumstances calling for modification or exception to the rule. It will be time enough to recognize a modification or exception to the rule when a case is presented that calls for a modification or exception. Here the appellee was an adult, in the full possession of all her faculties. She deliberately chose to walk upon the railroad tracks to subserve her own convenience, when there were other ways she might have gone and been wholly free from danger of passing

trains or motor-cars. The undisputed evidence shows that she chose this way because it was a way frequently traveled by pedestrians, and she deemed the same a more convenient or pleasant way to go rather than to pursue the paths along the sides of the track that involved no danger whatever. Under such circumstances appellee is nothing more nor less than a bare licensee, and is not in an attitude to claim that the appellant is liable to her under a modification or exception that might perhaps be made under other peculiar and extraordinary circumstances.

The record presents a typical case of a *bare licensee,* and, since the cause must be reversed on this ground, we find it unnecessary to consider any other. It follows from what we have said that the court erred in refusing appellant's prayers for instructions Nos. 1 and 8, set out above. For the error indicated the judgment is reversed, and the cause is remanded for a new trial.

HUMPHREYS and MEHAFFY, JJ., dissent.

FITZGERALD v. CHICAGO MILL & LUMBER COMPANY.

Opinion delivered January 30, 1928.

1. MORTGAGES — TRESPASS OF MORTGAGOR IN CUTTING TIMBER. — A mortgagor who cuts, removes and sells timber from the mortgaged property is a trespasser, though the whole proceeds were used in his farming operations and in minor improvements on the land.
2. MORTGAGES—TITLE OF MORTGAGEE.—The legal title to the land passes to the mortgagee, subject to be defeated by the performance of conditions of the mortgage.
3. MORTGAGES—RIGHTS OF MORTGAGOR IN POSSESSION.—The mortgagor in possession of the land is entitled to take the annual crops and wood for fuel, and do any acts in carrying on the farm which are usual and proper in the course of good husbandry.
4. MORTGAGES — WILLFUL TRESPASSER IN REMOVING TIMBER.—The mortgagor, in cutting, removing and selling timber from the mortgaged land without obtaining the consent of the mortgagee, is a willful trespasser acting in bad faith.

5. MORTGAGES—BUYERS OF TIMBER FROM MORTGAGOR—LIABILITY.—Where a mortgagor was a willful trespasser in selling timber from mortgaged land, persons buying from him without actual notice of such willful trespass, but with constructive notice of the mortgage lien, are *held* to have placed themselves in the mortgagor's shoes as to liability for actual damages for conversion of the timber.

6. MORTGAGES—EFFECT OF REMOVAL OF TIMBER.—Removal of timber worth $9,000 from mortgaged land *held* to impair the security of a second mortgagee.

7. MORTGAGES—REMOVAL OF TIMBER—LACHES.—A second mortgagee was not barred by laches nor estopped by her conduct from making claim for the value of timber against the purchasers of timber removed from the mortgaged property by the mortgagor, and sold without the mortgagee's knowledge, notwithstanding proof that the logs were stacked on the river bank before shipment.

8. MORTGAGES—REMOVAL OF TIMBER—BURDEN OF PROOF.—In an action by a mortgagee against the purchaser of timber cut from mortgaged premises, and removed without the mortgagee's knowledge, the purchaser having constructive notice of the mortgage, *held* that the buyer has the burden of showing what amount, if any, of the proceeds of the timber was expended on the mortgaged property in conformity with good husbandry.

9. MORTGAGES—WRONGFUL REMOVAL OF TIMBER—LIABILITY.—The mortgagee is entitled to recover against the buyers of timber from the mortgagor selling same without authority from the mortgagee the amount paid by them to the mortgagor for timber sold with interest at the rate of 6 per cent. per annum from the date of conversion, where the buyers failed to show what amount, if any, was expended on the premises by the mortgagor in conformity with good husbandry.

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

Gerald Fitzgerald and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Moore, Walker & Moore, for appellee.

WOOD, J. Mrs. N. R. Fitzgerald instituted an action against R. L. Cobb and wife in the chancery court of Phillips County to foreclose a deed of trust executed by Cobb on a large plantation to secure an indebtedness to plaintiff of approximately $104,000. The deed of trust was subject to a prior deed of trust in favor of the Deming Investment Company in the sum of $110,000. The

investment company was made a party defendant, but filed no answer. It was alleged that Cobb, the mortgagor, had wrongfully and unlawfully cut timber from the mortgaged premises and sold the same to the Chicago Mill & Lumber Company, and also cut timber from the mortgaged premises and sold same to the Howe-Neely Lumber Company. The value of the timber alleged to have been sold to the Chicago Mill & Lumber Company was not set forth, and the plaintiff asked that that company be required to produce its books to enable the plaintiff to ascertain the correct value of the timber sold to it. The value of the timber alleged to have been sold to the Howe-Neely Lumber Company was set down at $2,202.47. Judgment of foreclosure was prayed against the mortgagors, R. L. Cobb and wife, and for damages in the sum of three times the value of the timber removed and sold, and against the lumber companies for the value of the timber purchased by them from Cobb.

The only appeal here is by the plaintiff from the decree dismissing her complaint for want of equity as against the lumber companies. Therefore it is unnecessary to set out the answer of Cobb and wife, further than to say it denied that they had wrongfully and unlawfully cut and sold timber to the lumber companies. The Chicago Mill & Lumber Company answered, denying that it had, without lawful authority, purchased timber from Cobb, knowing that it had been cut and removed from the lands described, contrary to law, and denied that any timber sold to it by Cobb was grown on, or removed from, the property described, and denied that the quantity of timber sold to it by Cobb was unknown to the plaintiff, and denied that appellants should recover any amount for the timber. It alleged that it had purchased certain timber in the form of logs from Cobb which had been delivered to it on the west bank of the Mississippi River, in dumps or piles, where it could be conveniently loaded on barges; that it was not responsible for the cutting and hauling of the logs to the river; that, when the logs were thus delivered to it, they were no longer real estate,

but personal property, and the plaintiff had no lien thereon; that the proceeds of the sale of the logs by Cobb were used by him in the making of necessary improvements on the property described in the deed of trust. It was alleged that the plaintiff and Cobb, on the 25th day of November, 1923, entered into a verbal agreement by which Cobb conveyed to the plaintiff the lands involved, the consideration being the release of the deed of trust; that Cobb, pursuant to the agreement, surrendered possession to the plaintiff and tendered a quitclaim deed to plaintiff to the mortgaged premises; that, at the time the verbal agreement was entered into for the surrender of the possession of the premises, the plaintiff knew that the timber had been removed and therefore she was estopped from claiming any damages therefor. It was further alleged that the Deming Investment Company had a prior lien on the mortgaged property in the sum of $121,000, which the plaintiff had not paid, and the failure to satisfy this prior mortgage was pleaded in bar of plaintiff's right to recover against the lumber company. The Chicago Mill & Lumber Company also entered a demurrer to the complaint on the ground that it did not state a cause of action, and also on the ground that the plaintiff had not paid the prior indebtedness to the Deming Investment Company, and therefore had no cause of action for the removal of the timber by the mortgagor, Cobb.

The Howe-Neely Lumber Company answered and admitted that it purchased some logs from Cobb, but denied that the plaintiff had any interest therein, and denied that it was indebted to the plaintiff in the amount prayed. It also denied that the logs purchased by it from Cobb were taken from premises on which the plaintiff had a mortgage. It denied that it had cut logs from any lands owned by plaintiff or Cobb, and alleged that the logs purchased by it from Cobb were delivered by Cobb to the defendant's millyard at Helena.

The plaintiff replied to the answers, and pleaded the statute of frauds to defeat the alleged verbal contract of sale from Cobb to the plaintiff.

The undisputed testimony shows that E. C. Nelson, the local manager of the Chicago Mill & Lumber Company, during the year 1923 purchased for the company from R. L. Cobb logs for which it paid the sum of $16,661.72. These logs were purchased under a written contract between the Chicago Mill & Lumber Company and Cobb, executed May 12, 1923. The logs consisted of cottonwood, gum, maple, and elm, and were to be delivered on the bank of the Mississippi River at or near Westover Landing, within easy reach of derrick boats at all stages of water, and were so delivered from June to October, 1923. The Chicago Mill & Lumber Company had the right to claim the logs as soon as same were placed on the bank of the river at the place specified. The price to be paid for the logs thus delivered was $16 per thousand feet. Westover Place, on which Westover Landing above mentioned is situated, consisted of about 4,500 acres in the whole plantation, divided into several different small plantations included in this foreclosure. Westover Landing was the landing for all the plantations comprising Westover Place.

The undisputed testimony by those living on the plantations comprising Westover Place was to the effect that timber was cut from Westover Place for R. L. Cobb in the year 1923 between the river and the levee, and that this timber was delivered on the river bank near Westover Landing. They began cutting the timber as soon as the water went down, and continued until the fall. Timber was cut on the places constituting Westover Place on the land side of the levee, or what is known as the "inside of the levee," and the timber thus cut was hauled to Helena.

The undisputed testimony showed that the Howe-Neely Lumber Company purchased timber from R. L. Cobb during the years 1922 and 1923 amounting to $2,209.47.

Without setting out the testimony in detail, we are convinced that the undisputed testimony shows that the timber purchased by both lumber companies from R. L.

Cobb was timber cut by him from the Westover Place. The testimony shows that the proceeds from the sale of the timber by Cobb were used in the farming operations of the place and in making some minor improvements, such as covering some of the houses. The price paid for the timber by the purchasers included the cutting and the hauling—everything that went into the cost of the timber and the cutting and delivering of the same. Mr. and Mrs. R. L. Cobb, at the time of the foreclosure, owed the appellant the sum of $118,000. The land was sold under foreclosure and purchased by the plaintiff for $10,000, and the undisputed testimony is that the foreclosure was subject to a prior mortgage in favor of the Deming Investment Company for $110,000. There is testimony in the record tending to prove that the Westover Place, after the removal of the timber, was worth from $160,000 to $175,000. One witness, A. C. Cobb, son of R. L. Cobb, testified that, in his opinion, the Westover Place was worth $275,000.

Another witness, Gerald Fitzgerald, who was familiar with the land, having purchased the same in 1917, gave it as his opinion that the value of the place was from $160,000 to $175,000. No one had made enough on the place to pay the debt due thereon, the cost of farming the same, and the taxes. The most valuable portion of the plantation was in timber. He had tried to help Cobb sell the place, and never could get an offer that would pay the first mortgage and the plaintiff's mortgage. One hundred and sixty-five thousand dollars was due on the place prior to the last loan made by the Deming Investment Company. The plaintiff had no knowledge of the cutting of the timber.

F. P. Fitzgerald, husband of the plaintiff, testified that Cobb offered to turn the place back by giving a quitclaim deed, but he would never agree to it when he found out about the timber having been removed from the place. Cobb was going to give it up, either by quitclaim deed or by foreclosure, and, when witness was discussing with Cobb concerning taking the place back for his wife by

quitclaim deed from Cobb, Cobb said he had only cut what went on the place for repairs, and witness did not dream that more timber had been removed.

Mrs. Fitzgerald testified that she had no information that Cobb was cutting the timber, and never surrendered her right therein to any one.

There is no testimony in the record tending to prove that the appellees had any actual notice that the timber purchased by them from Cobb was timber on which the appellant had a mortgage, nor is there any testimony to the effect that they had any knowledge that Cobb was selling them the timber without the permission of the appellant. The deed of trust or mortgage of Cobb and wife to the plaintiff was duly recorded before the timber was sold.

The above are substantially the facts upon which the trial court entered a general finding in favor of the appellees and a decree dismissing appellant's complaint against them for want of equity, from which decree is this appeal.

1. The first question to be determined is whether or not R. L. Cobb cut the timber in controversy from land upon which the appellant at the time held a mortgage, and, if so, whether, in cutting such timber, he was a trespasser. The decided preponderance of the evidence—indeed, practically the undisputed evidence—proves that the timber in controversy was cut from the Westover Plantation, upon which the appellant at the time held the second mortgage. Likewise the undisputed testimony shows that the proceeds were used by R. L. Cobb in farming operations and in doing some minor improvements on the land, such as covering several houses and the like. In this State the legal title passes by the mortgagor to the mortgagee, subject to be defeated by the performance of the conditions of the mortgage. *Damenhauer* v. *Dawson*, 65 Ark. 126, 132, 46 S. W. 131, 44 L. R. A. 193, and cases there cited. Therefore the mortgagor, Cobb, would have no right to cut, remove, and sell the timber and use the proceeds of such sale in his farming operations.

The affirmative testimony in the record is that the appellant did not consent to the act of Cobb in cutting and removing the timber in controversy, and there is no proof of circumstances to justify the trial court in concluding that the appellant had given her consent to the removal and sale of the timber. The doctrine in cases like this is well stated in *Searle* v. *Sawyer,* 127 Mass. 491, 494, 34 Am. Rep. 425, as follows:

"If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, * * * it is within the contemplation of the parties that he is entitled to take the annual crops and wood for fuel, and we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry."

It could hardly be said that the usual course of good husbandry justified Cobb in removing the timber from the freehold for purposes indicated in this case, and it cannot be reasonably presumed that the appellant gave her consent to such conduct of Cobb. We conclude therefore that the acts of Cobb were wrong in cutting, removing, and selling the timber for the purposes shown, and such acts constituted him a trespasser.

2. The next question is, was R. L. Cobb a willful trespasser? He must be held to have known that he had no right to cut the timber, except such as was necessary in good husbandry, such as for fuel, for making and repairing fences, and the like, but certainly not for the purpose of paying his expenses of general farming operations, such as the expense incident to the planting, cultivation and harvesting of his crops. Cobb was overwhelmed with debt; he was not able to make financial arrangements to conduct his farming operations, not even to pay his taxes, amounting to about $700. When negotiations were pending looking to the surrender of possession of the plantation by Cobb, he was asked if he had cut any of the timber, and replied, "No, you know I wouldn't do that—only for plantation purposes—for buildings—only what went on the place for repairs."

A. C. Cobb himself, in his testimony, said that nothing was said about his father paying for the timber; that it was not discussed at all. He further stated that the Fitzgeralds knew "that the money my father had got out of the timber had been spent back into the crop." He says: "We discussed what the money was used for." Now, it occurs to us that, under these circumstances, the removal and sale of the timber by Cobb, without having first obtained the consent of appellant, constituted Cobb a willful trespasser. In other words, it must be held that his acts in removing and selling the timber were not in good faith. See *Foreman* v. *Holloway & Son,* 122 Ark. 341, 183 S. W. 763.

3. Such being the case, the next question is, what was the measure of appellant's damages as against the appellees? While appellees had no actual notice that Cobb was a willful trespasser in cutting and removing the timber, they had constructive notice of the mortgage, and therefore must be held to have known that the timber did not belong to Cobb. Therefore, in purchasing and paying Cobb for the timber, instead of the appellant, they placed themselves precisely in Cobb's shoes as to liability for actual damages in conversion of the timber. This court, in *Central Coal & Coke Co.* v. *John Henry Shoe Co.,* 69 Ark. 302, 63 S. W. 49, passing upon a similar question in an opinion voiced by Mr. Justice RIDDICK, said:

"The question here for decision is whether the defendant, who purchased the ties from the trespassers, and then converted them to its own use, is entitled to any reduction in the damages on account of the increase in value caused by the work and labor of the willful trespassers. We must answer this question in the negative. The timber belonged to the plaintiffs. The title to it was not changed by the trespass, or the conversion to cross-ties. It still belonged, in its improved shape, to the plaintiffs. Had Less & Watkins, who knowingly and wrongfully put labor upon these ties, been sued, they, as before stated, would have been entitled to an allowance or reduction of damages on account of the labor expended or value

added to the timber, and could convey no such right to the coal and coke company. Admit that the company was an innocent purchaser, still it purchased property belonging to plaintiffs from those having no right to sell, it converted this property to its own use, and plaintiffs were, by this conversion, damaged to the extent of the value of the property at the time of the conversion. The company, it will be noticed, did not perform any work and labor on these ties, nor add any value to them. Under these circumstances we think the circuit judge correctly ruled that the measure of damages was the value of the ties at the time and place they were converted by the defendant company, with interest at six per cent. from date of conversion." Citing cases. See also, in addition to the authorities from other jurisdictions there cited, *Hudson* v. *Burton,* 158 Ark. 619, 250 S. W. 898, and other Arkansas cases there cited on page 622 (250 S. W. 899).

Of course the rule would have been different if Cobb had been merely a technical trespasser, innocent of any bad faith or intentional wrongdoing. See *Randleman* v. *Taylor,* 94 Ark. 511-513, 127 S. W. 723, 140 Am. St. Rep. 141, and cases there cited. *Foreman* v. *Holloway & Son, supra; Baker-Mathis Lbr. Co.* v. *Bank of Lepanto,* 170 Ark. 1146, 282 S. W. 995.

4. Counsel for the appellees contend that the conversion of the timber did not impair the security of the appellant. This contention cannot be sustained, for the reason that the undisputed testimony shows that 1,063,120 feet of logs were sold to the appellee, Chicago Mill & Lumber Company, for the sum of $16,661.72, and logs of the value of $2,209.41 were sold by Cobb to the Howe-Neely Lumber Company. Thus Cobb removed timber from the freehold upon which the appellant had a mortgage, which timber in its converted form was of the aggregate value of $18,871.19. While A. C. Cobb testified that it cost $9,991.13 to remove the trees, that still leaves a margin of nearly $9,000 that the timber was worth to the freehold while standing. The removal of the timber therefore lessened the value of the mortgaged

property and appellant's security at least to that extent. While A. C. Cobb testified that, in his opinion, the value of the land was $275,000, a decided preponderance of the evidence shows that he was mistaken in this conclusion. The debt to appellant for which the property was sold at foreclosure amounted to $118,606.54; the property was directed to be sold subject to the rights of the Deming Investment Company; the Deming Investment Company's mortgage, principal and interest, amounted to more than $110,000. The property was sold under foreclosure order of the court at public sale to the highest bidder, and the highest and best bid at the sale was the sum of $10,000, which was the bid of appellant. To have obtained an unincumbered title, appellant would have had to pay the debt to the Deming Investment Company. She had the right to pay that debt and to obtain all the security unimpaired that the investment company had under its mortgage. Whatever lessened the security of the first mortgage, necessarily lessened the security of the appellant. The property, under the law, did not belong to Cobb until the mortgage debts thereon were paid. It belonged to the mortgagee. Primarily the Deming Investment Company had the right to the security, but, if it did not elect to avail itself thereof, then the appellant had the right, in the protection of its security, to hold the appellees liable for the value of the property which, by their purchase, they had enabled Cobb to convert to his own use, to the detriment of the appellant.

5. It is urged by the appellees that the appellant was estopped from claiming the value of the timber from appellees because she knew that it was being removed by Cobb, and made no complaint for a period of almost a year. While the testimony of A. C. Cobb and R. E. Scott, the overseer on the plantation, shows that logs were stacked on the river bank on the Westover Place during the year 1923, and that Gerald Fitzgerald was over the plantation several times while the timber was banked there, yet the appellant herself testified that she had no information or knowledge that Cobb was cutting

the timber on these places. Scott, the overseer, testified that he never saw the appellant on the place. F. P. Fitzgerald testifies that he had absolutely no knowledge of the cutting of the timber until after Cobb had surrendered possession thereof to appellant's agent, Marley. Gerald Fitzgerald testified that he had no knowledge of the cutting of timber during the time same was being cut from December, 1922, until October, 1923. Therefore we conclude that the preponderance of the evidence shows that the appellant was not barred by laches or estopped in any way by her conduct from making a claim for the value of the timber in controversy.

6. While the undisputed testimony of A. C. Cobb was to the effect that the proceeds from the sale of the timber were used in farming operations and making minor improvements, such as covering houses and the like, he does not testify what amount was used in the way of the purchase of necessary fuel or in making the necessary repairs. In short, he does not testify what amount, if any, was used in the course of good husbandry. Cobb commingled the entire proceeds paid him by the appellees for the timber. The burden was upon the appellees to prove what amount, if any, was expended on the plantation in conformity with good husbandry. A. C. Cobb was a witness for the appellees, and they were given an opportunity to develop the facts along this line, and presumably did not do so because they could not.

After a careful consideration of the entire record, our conclusion therefore is that the court erred in dismissing the appellant's complaint against the appellees for want of equity. The trial court, instead, should have entered a decree in favor of the appellant against the appellee, Chicago Mill & Lumber Company, in the sum of $16,661.72, and against the appellee, Howe-Neely Lumber Company, in the sum of $2,209.47, with interest at the rate of six per cent. per annum from date of conversion. The decree is therefore reversed, and the cause is remanded with directions to enter a decree in favor of the appellant against the appellee, Chicago Mill & Lumber

Company, in the sum of $16,661.72, and against the appellee, Howe-Neely Lumber Company, in the sum of $2,209.47, with interest at the rate of six per cent. per annum from the date of conversion.

MEHAFFY, J., dissenting on measure of damages.

HAMILTON v. ANDERSON.

Opinion delivered January 30, 1928.

1. DIVORCE—FOREIGN DIVORCE—CHANGE OF CUSTODY OF CHILDREN.—Where parents and children are within this State, the chancery court, upon a proper showing of changed conditions, may change the direction of the court of another State, made at the time a divorce was granted, concerning the custody of the children.
2. DIVORCE—CHANGE OF CUSTODY OF CHILDREN.—Upon a proper and sufficient showing that a change in the direction of a decree, made at the time of the divorce, awarding the custody of children, for the best interest of the children, the chancery court may order the change.
3. DIVORCE—CUSTODY OF CHILDREN.—Conditions *held* to justify an order changing the custody of children and awarding custody to the mother instead of the father, notwithstanding it is under a disposition by a foreign decree of divorce.

Appeal from Lawrence Chancery Court, Eastern District; *A. S. Irby,* Chancellor; reversed.

H. L. Ponder, Smith & Blackford and *Caraway, Baker & Gautney,* for appellant.

E. H. Tharp and *Mahony, Yocum & Saye,* for appellee.

SMITH, J. Appellee, Joseph Max Anderson, was married to appellant, Jewell De Arman, in 1918, and to that union two children were born, Maxine and Nanette, now eight and six years old, respectively. They were married in North Carolina, and later moved to Alabama, where, on January 1, 1925, the wife brought suit for divorce, which terminated in a decree in her favor. This decree provided that each parent should have the custody of one child for the period of a year, after which the custody of the children should be changed, and each

parent then have for the period of a year the custody of the child which the other parent had had for the previous year.

The decree relating to the custody of the children was rendered by the consent of the parties. In February, 1926, this decree was modified by consent of the parties, and it was there ordered that the mother should have the custody of both children until July 1, 1927, after which time the father should have the custody of both children until July 1, 1928, and thereafter the custody should alternate and be changed on the first day of July of each year, so that the children should be kept together by first one parent and then the other for the period of a year.

Prior to the separation which preceded and led to the suit for divorce, appellee was employed at a mill where George C. Hamilton was employed as a foreman. Hamilton at that time was a married man, but he and his wife separated, and he obtained a divorce from her in September, 1924. Hamilton and appellant were married a few months after the rendition of the last decree by the Alabama court, and, after a short residence in Alabama, they moved to Louisiana, but, in March, 1927, they moved to Walnut Ridge, where they have since lived and are now residing. This was the original home of appellant, where her father and mother have long resided and now live. Appellee also returned to this State, and is now residing in Little Rock.

On March 23, 1927, appellant filed this suit in the chancery court of Lawrence County, and prayed that court to make an order awarding to her the permanent custody of both children. The court declined to make this order, and the decree of the Alabama court was left in full force and effect, and this appeal is from the decree of the Lawrence Chancery Court refusing to change the custody of the children as prayed.

The jurisdiction of the Lawrence Chancery Court is conceded, and we think there is no question about the jurisdiction of the Arkansas court to change the direction

of the Alabama court as to the custody of the children, upon a proper showing.

In the case of *Kenner* v. *Kenner,* 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E 587, the Supreme Court of Tennessee said:

"We are of the opinion that, as between the parents, parties to the litigation, the decree of the foreign court awarding the custody of the children is *res judicata,* subject, as between these parties, to modification only by the court that granted the decree. (Citing cases). However, we think this doctrine should be understood with the qualification that, in case of the removal of the child to another State, even within the custody of the parent to whom that custody had been awarded by the foreign decree of divorce, the courts of the State to which the removal has been effected will have the power, on a change of circumstances showing such course essential to the best interests of the child, to make a new disposition of the child. (Citing cases)." See also cases cited in the note to the text, chapter "Divorce," 19 C. J. 366, quoting from this Tennessee case.

The courts of this State have therefore the jurisdiction to order a change of custody of the children upon a proper and sufficient showing that such a change should be made, and prior decisions of this court have announced the conditions under which that jurisdiction should be exercised.

In the case of *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450, it was said:

"The following statement of the law on the subject is found in 9 Ruling Case Law, page 476: 'A decree made at the time of the divorce cannot anticipate the changes which may occur in the condition of the parents, or in their habits and character, and their fitness to have the custody and care of the children. The parent having the custody of the children may marry; may become poor and unable properly to maintain and educate them; may become vicious and morally unfit to have the control of children. These changes, and other sufficient causes, may

make it necessary for the good of the children that their custody should be changed. * * * Moreover, a delinquent parent may, in the course of time, become entirely fit to have and retain the custody of his or her child. And so it has been held that the presumption of unfitness on the part of a father for the custody of his child, raised by refusal of the court to award it to him upon granting a decree of divorce against him, is overcome by evidence of an exemplary life for many months after the passing of the decree. A decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterward unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child'."

The later cases of *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47; *Stone* v. *Crofton,* 156 Ark. 323, 245 S. W. 827, and *Caldwell* v. *Caldwell,* 156 Ark. 383, 246 S. W. 492, recognized the right of the court to change the custody of children where changed conditions make it advisable and for the best interests of the child or children to do so, although the original decree awarding the custody is a final decree from which an appeal might have been prosecuted. These cases are also authority for holding that, in determining whether there have been changed conditions, the court, as was said in the case of *Caldwell* v. *Caldwell, supra,* "must keep in view primarily the welfare of the child," and that "the custody of the child is not awarded for the purpose of gratifying the feelings of either parent or with any idea of punishing or rewarding either parent."

Neither party to this litigation questions the fitness of the other to have the custody of the children, but appellee insists that no change in the circumstances has been shown which will justify a modification of the amended decree of the Alabama court, which, as we have said, awarded the custody of both children to first one parent and then the other, each for the period of a year.

We think, however, that the testimony does show such conditions as warrants a change of custody. At the time of the rendition of the Alabama decree neither parent had a home to which the children could be taken, and the father has none yet. It is true that he clearly shows his devotion to the children and his willingness and ability to provide for them, but he has remained unmarried and has established no home of his own. He shows that his father and his stepmother have a home in which the children can be properly taken care of, and that he can and will provide a home in which some suitable person will be employed to minister to the children, if necessary. But the mother has now a permanent home, and she is anxious to have the custody of the children, and has given every assurance that the children will, if delivered to her, receive the attentions which their tender ages require. The mother has been a teacher, not only of the common school studies, but of music as well, and it is not questioned that the children will, if placed in her care, have the proper environment and the best advantages.

The elder child was called as a witness at the trial below, and stated that she and her sister were living with appellee's father, both slept in the same room with her grandfather and grandmother, and with "Uncle Bruce," and that, when appellee visited them, he slept with "Uncle Bruce," and all in the same room, and she stated that she would like to stay with her mother all the time.

We cannot be unmindful of the fact that, because of their tender age, the children require the constant attention which only a mother's love can give, and for this reason, principally, we think their custody should be awarded to her.

Section 3 of act 257, Acts 1921 (General Acts 1921, page 317) is as follows:

"Where the husband and wife are living apart, there may be an adjudication of the court as to their power, rights and duties with respect to the persons and property of their unmarried minor children. In such cases

there should be no preference between the husband and wife, but the welfare of the child must be considered first in determining the custody of such child, or the control of its property * * *."

This statute has been construed in the cases cited as requiring the courts, in awarding custody of children, to regard, as was said in the case of *Stone* v. *Crofton, supra,* the welfare of the child as "of first importance," and, in the discharge of this duty, we have concluded that the custody of these children should be awarded to their mother, at least during the period of their tender adolescence.

The decree of the court below will therefore be reversed, and the cause remanded, with directions to the court below to award the custody of both children to appellant, reserving to appellee, the father, the right to visit them at any reasonable time and to give him, if he so desires, the right to have them with him during their school vacation periods.

HART, C. J., dissents.

KIRBY, J., disqualified and nonparticipating.

BEAVERS v. AMERICAN INSURANCE UNION.

Opinion delivered January 30, 1928.

1. INSURANCE—MERGER OF ASSESSMENT SOCIETY—PREMIUMS.—Where an assessment society became merged into an association requiring monthly payments, one who was re-insured in the latter association was required to pay the premiums monthly as required by the reinsurer's by-laws.
2. INSURANCE—LAPSE OF POLICY—REINSTATEMENT.—In an action by the beneficiary of a life insurance policy against the association to recover proceeds of a certificate of an insured on her death, evidence *held* not to show as a matter of law that the insured had been reinstated.
3. INSURANCE—ESTOPPEL TO DENY REINSTATEMENT.—In an action against an insurer on a certificate of benefit, it was error to direct a verdict for the defendant where the jury could have found from the evidence that the insurer was estopped to deny

that the insured had been reinstated after a lapse of her certificate by reason of the insurer accepting payment of premium.

4. APPEAL AND ERROR—REVIEW OF JUDGMENT DIRECTING VERDICT.—On review of a judgment directing a verdict, the Supreme Court is required to assume the possible findings of the jury in the light most favorable to the appellant.

5. INSURANCE—ESTOPPEL TO DENY PAYMENT OF PREMIUMS.—An insurer may, in an action on a policy, be estopped to deny that the premiums were paid in proper time to prevent a forfeiture, where it is shown that on previous occasions payments had been made at a time subsequent to that required by the insurer, and yet they had been accepted and the policy continued in force.

Appeal from Sharp Circuit Court, Northern District; *John C. Ashley,* Judge; reversed.

George M. Booth and *Walter L. Pope,* for appellant.

Basil Baker, for appellee.

SMITH, J. On January 1, 1917, the Ozark Mutual Life Association, hereinafter referred to as the Association, issued two certificates of insurance to Mrs. Mary E. Beavers, in which her son, Van Beavers, was named as beneficiary, and at the same time issued certificates of insurance upon the lives of Van Beavers himself and his wife.

On November 9, 1925, a merger agreement was entered into between the Association and the American Insurance Union, hereinafter referred to as the Union, by the terms of which the Association transferred all its assets to the Union, which company assumed the liabilities of the Association, and agreed to, and did, reinsure all members of the Association who were then in good standing.

After this date the premiums on the certificates issued to Beavers and his wife and mother were sent, by direction of the Union, to Fred Van Wagner, at Mena, Arkansas, which had been the home office of the Association, and Van Wagner, after receipting for such payments, remitted them to the home office of the Union, which is in Columbus, Ohio.

The rules of the Association required that payments should be remitted by the 20th of the month in which

the premium was payable, but Beavers testified that he rarely remitted earlier than that date, but oftener later, and that some of his remittances had been as late as the 10th of the following month, and that none of these payments had been refused and the certificates had never been declared lapsed.

It was the custom of Beavers to include in a single remittance the premiums on his own policy and that of his wife, and on both of the certificates of his mother, but he failed to make the remittance to cover the premiums for July, 1926, until the 2d day of August. Upon the receipt of the remittance to cover the July assessments, he was notified that it would be necessary to sign and return reinstatement blanks, which were inclosed for that purpose, before the premiums would be received.

Mrs. Beavers was unable to write, and her son attended to all her correspondence, and had charge of her insurance and the payment of her premiums, and on the 7th day of August the reinstatement blanks were filled in and returned. Those relating to the certificates of Mrs. Beavers were signed by her by mark, and the signature was not witnessed by the person who had signed her name.

In the meantime, notices had been mailed from the Mena office calling for the August premiums. Mrs. Beavers sent sufficient money to pay the July premiums and the reinstatement fees, and later paid the August premiums. This remittance was made on August 7, 1926, and pinned to the reinstatement applications was a note to the effect that, unless all the certificates were reinstated, none should be, and it was requested that the money for this purpose be returned if all the certificates were not reinstated. It is not questioned that Beavers and his wife were reinstated, and they thereafter continued to pay their premiums for a period of several months. The money to pay the August premiums on all the certificates was duly received, and these premiums were marked "paid" by the Union on August 14, 1926.

Mrs. Mary E. Beavers died August 14, 1926, and proof of her death was duly made and received by the Union on August 30, 1926, whereupon Mr. Beavers was advised that his mother had not been reinstated, and on this ground liability on her certificates was denied. Thereupon this suit was brought, and a verdict in favor of the Union was directed by the court, and from the judgment accordingly is this appeal.

It was shown at the trial that all the premiums for both July and August had been marked "Paid" on August 14, 1926, and that the money covering these premiums, as well as the reinstatement dues on Mrs. Beavers' certificates, were retained by the Union until October 12, 1926, at which time they were returned. This suit was begun about that time.

The constitution and by-laws of the Union provide that a member may be reinstated on application, without a medical examination, upon signing an application for reinstatement and the payment of a reinstatement fee, after the approval of the application by the medical examiner of the Union. If a member became delinquent and remained so for as much as six months, a medical reexamination was required before reinstatement.

The application for reinstatement contains the recital that: "For the purpose of securing reinstatement I hereby covenant and warrant that I am now in good health, of sound mind, and free from physical deformities; that I am not now nor have I ever been addicted to excessive drinking of alcoholic beverages, nor the use of narcotic drugs." The application required the applicant to answer specifically certain questions concerning his or her health, and concludes with the following recitals:

"It is understood and agreed between the undersigned and his beneficiary or beneficiaries and the American Insurance Union that this application for reinstatement and the statements, covenants and warranties contained herein shall be a part of my contract of membership and insurance with said society, and that, if this

application for reinstatement and the statements, covenants and warranties herein made be false or untrue in any particular, then the policy reinstated in consequence of this application for reinstatement shall be null and void, and said society shall not be liable to me or my beneficiary or beneficiaries therein, except for the return of the premiums paid thereafter. It is further agreed and understood that the accepting and receipting for my premium or chapter dues or reinstatement fee by the chapter, or cashier, or any chapter officer or national officer, or representative, or any person whomsoever, shall not have the effect of reinstating me, or rendering my policy valid, until the application for reinstatement has been forwarded to the national office and approved."

This application was signed as to each of the certificates held by Mrs. Beavers, and both were signed by her, by her mark.

The truth or falsity of the statements made in the name of Mrs. Beavers concerning the then condition of her health is not discussed in either of the briefs.

The medical director, whose duty it was to pass upon and reinstate delinquent applicants, testified that he was temporarily absent from his office when these applications were received, and that they were never passed upon or approved by him, and that he would not have approved the application of Mrs. Beavers without making some investigation of the signature of the applicant, which was not attested by the person who had signed Mrs. Beavers' name. He also testified that, as the answers to the questions contained in the application showed that Mrs. Beavers had consulted a physician because of an attack of chills, he would have asked for further proof as to her health before ordering the reinstatement, and that such investigations ordinarily required about ten days or two weeks, and that the application was first submitted to him upon his return to his office on August 21, 1926.

Appellant insists that the judgment of the court below should be reversed for several reasons.

(1). That it was not shown that an authorized assessment had been made, and it is therefore insisted, upon the authority of the case of *Mutual Aid Union* v. *Perdue,* 162 Ark. 551, 258 S. W. 375, that there was no delinquency.

It appears that the Association had the same provision in its constitution and by-laws for levying assessments as the Mutual Aid Union had in the Perdue case, *supra,* whereunder assessments were not levied unless the death of a member made that action necessary, but it is shown here that the Association had been absorbed, and it was not made to appear that, since the consolidation, the right to make assessments was dependent upon the death of a member, or that the directors of the Association, whose duty it was, under the constitution of the Association, to levy the assessments, had been continued in existence as functioning officers. On the contrary, as we understand the record, it was the duty of the certificate holders, after the consolidation, to make monthly payments not later than the 20th of each month. If we are mistaken in this, the fact may be more fully developed on the remand of the cause, which is ordered for another reason.

(2). It is next insisted that the facts and circumstances summarized above support the inference that Mrs. Beavers had, in fact, been reinstated; but we do not agree with counsel in this contention.

(3). It is also insisted that the Union is estopped by its conduct from asserting a forfeiture, or, at least, that the jury might have so found, and in this contention we think counsel for appellant are correct.

It was shown that Mr. Beavers had charge of the four certificates and paid the premiums on all of them, and that, when he remitted the amount necessary to reinstate all of them, he directed that none of them should be reinstated unless all were reinstated. This letter was addressed to the home office, and in due course would

have had the attention of the medical director, whose duty it was to pass upon applications for reinstatement. Mr. Beavers, for himself and as the agent of his wife and mother, had the right to stipulate that no one of the certificates should be reinstated unless all of them were, and, unless the officers of the Union having the matter in charge were willing to follow this direction, they had no right to appropriate any part of this conditional tender. It is an undisputed fact that Beavers and his wife were reinstated, and if the jury should find (as we must assume would have been done, in view of the fact that a judgment in favor of the Union was pronounced upon a verdict directed in its favor by the court), that this condition was imposed in the remittance letter, the acceptance of any part of the tender was an acceptance of the condition under which the tender was made. In this connection, it may be recalled that the Union did not return the money tendered to reinstate the certificates of Mrs. Beavers until in October, after her death in August.

It is also insisted for the reversal of the judgment that the Union is estopped, through its conduct in receiving belated premiums, from asserting a forfeiture resulting from a payment not longer delayed than the payment of other premiums had been delayed, which had been accepted without question. We are of the opinion that the testimony raises this question. According to Mr. Beavers, none of his payments had been made before the 20th of the month, and some had been made even later than the one here in question.

In the case of *Sovereign Camp W. O. W.* v. *Newsom*, 142 Ark. 132, 219 S. W. 759, 14 A. L. R. 903, it was said:

"The law applicable to such a state of facts is accurately stated in case-note (in 11 Ann. Cas. 533) to *Trotter* v. *Grand Lodge*, 132 Iowa 513, 109 N. W. 1099: 'Where a mutual benefit association has, in repeated instances, received from a member the payment of overdue assessments so as to establish a custom or course of dealing between the parties and led the member to believe that a strict observance of a requirement as to the time of pay-

ment is not required, it is held that the certificate of insurance is not forfeited by failure to pay an assessment at the time when the by-laws of the society or a stipulation in the certificate requires it to be paid, and that a provision for forfeiture for nonpayment at such time is waived within the customary period of extension of the time of payment.' Numerous cases are cited to support the text (Citing cases)."

In the opinion on rehearing in the Newsom case, *supra,* it was pointed out that, while a subordinate collecting officer of a fraternal benefit society might not waive the provisions of the constitution and by-laws, the society might be estopped through the action of such officer from asserting a forfeiture, and the doctrine of that case is applicable here. The jury might have found that, while Van Wagner could not waive the provision requiring that payments be made on or before the 20th of each month, the insurer might, by knowingly accepting payments made after that date to its agent, estop itself from asserting that the payments had not been made as required, when they were in fact made as early as other premiums, which, though not made in time, had been accepted.

We conclude therefore, for the reasons stated, that the court was in error in directing a verdict against appellant, and the judgment will therefore be reversed, and the cause remanded for a new trial, and it is so ordered.

KIRBY, J., dissents.

THURMAN v. STATE.

Opinion delivered January 30, 1928.

1. CRIMINAL LAW—CROSS-EXAMINATION OF EXPERT.—In a murder trial, wherein the defendant proved a wound in the head and subsequent suffering from headaches in an effort to show irresponsibility for his acts, it was not error to permit the prosecuting attorney to ask, on cross-examination of a physician introduced on the issue of insanity, as to whether such headaches

were the result of the wound, or of dissipation or drunkenness, the purpose of the cross-examination being to test the physician's knowledge of the cause of headaches, rather than to assail defendant's character, which had not been put in issue.

2. CRIMINAL LAW—FORM OF HYPOTHETICAL QUESTIONS.—In a murder trial, failure of the prosecuting attorney in hypothetical questions to include all of the undisputed facts as a basis of hypothetical questions was cured by an instruction of the court to the expert witness to consider all the undisputed facts in his answer.
3. CRIMINAL LAW—HYPOTHETICAL QUESTIONS.—In a murder trial, the prosecuting attorney's hypothetical questions to defendant's expert witness, describing defendant's acts in firing the gun ten or twelve times in interim between date of purchasing it and of killing deceased as practicing shooting at a target, *held* not improper as assuming a fact not inferable from the evidence.
4. CRIMINAL LAW—EXCLUSION OF TESTIMONY—HARMLESS ERROR.—Error, if any, in excluding the answer of defendant's expert witness as to whether he believed defendant was mentally responsible for killing deceased, was cured by his subsequent testimony that one in defendant's condition could not distinguish between right and wrong as could one in normal condition, and the defendant could not so distinguish in the particular act.
5. CRIMINAL LAW—OPINIONS OF NON-EXPERT.—Opinions as to defendant's sanity by non-expert witnesses, who had known him a long time and associated and conversed with him before and after the crime, *held* admissible to rebut expert testimony as to his insanity at the time of the killing.
6. CRIMINAL LAW—OPINIONS OF NON-EXPERT WITNESSES.—In weighing the opinions of non-expert witnesses as to defendant's sanity, the jury were properly told to consider the sources of their information, and to attach such value to their opinions as the facts upon which they based same warranted.
7. CRIMINAL LAW—INSTRUCTION AS TO EXPERT TESTIMONY.—It was not error to instruct the jury that, if they believed any fact or facts stated to the medical experts in the hypothetical questions asked them were not true, they should disregard the opinions of such experts as to defendant's sanity at the time of the killing.
8. CRIMINAL LAW—REFUSAL TO DUPLICATE INSTRUCTIONS.—It is not error for the court to refuse to duplicate instructions.
9. HOMICIDE—INSTRUCTIONS—HARMLESS ERROR.—An instruction on a charge of murder in the first degree to find defendant guilty of murder in the second degree if the jury entertained reasonable doubt as to whether there were premeditation and deliberation being favorable to defendant, he cannot complain on appeal on the ground that the facts showed that he was guilty of murder in the first degree or nothing.

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

Cobb & Cobb, for appellant.

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

HUMPHREYS, J. Appellant was indicted in the circuit court of Garland County for murder in the first degree for shooting and killing Lafayette Branam. On the trial of the alleged crime he was convicted of murder in the second degree, and adjudged to serve a term of fifteen years in the penitentiary as a punishment therefor, from which is this appeal.

When arrested, appellant voluntarily confessed that he shot and killed Lafayette Branam on the day charged in the indictment. The confession was reduced to writing, and introduced in evidence on the trial of the cause, which is as follows:

"My name is Wayne Thurman. I am twenty-one years old, and reside at Red Oak, nine miles from Hot Springs. I will make a statement of my connection with the killing of Lafayette Branam. I left the house Monday morning about 8:30, and I was going down to Bill Farr's place. Just before I got to Bill's I saw Branam and some of his children on a wagon. He was sitting in the back, and the best I could judge he had a shotgun. I couldn't tell just what kind of a gun it was. I waited awhile after he had gone down the road, and then went on to Bill's place. I was down there about a half an hour, I judge, and then I went back home. I got my rifle, a 30-caliber rifle, and I went about three-quarters of a mile west of our place, and then I turned to the right and went on about a mile, and then I turned back to the right and went up White Oak Creek about a mile, to where Branam was at work in his field, plowing, and when I got there it was about 12 o'clock, and Branam was eating dinner, and so I waited until after he had eaten dinner and started back to work in the field, and I went up to the wire fence, about one hundred yards of where he was at work, and I waited—he had gone a

couple of rounds—and then I went on up closer, probably within fifty yards of him, and he came down to the creek to get a drink, and just as he got to the creek I raised up from where I was hiding, and kicked the wire fence and said, 'Branam, I am here to get you.' When I spoke he was standing with his right side to me, and he turned his head and facing me, and, just as he turned facing me, I started firing. I shot five times, and, after I had shot what shells I had in my gun, I turned and went down the fence for about 250 yards, crossed the creek, and then recrossed it, and went across the road right in front of the Scott house, the old Scott house, and went down the road for about—an old road—for about 150 yards, and then turned back toward home. I went straight home, and when I got there Dr. Housley and his wife were there, and they had already told the folks that Branam had been killed. I went to my room and changed clothes, and lay down across the bed and waited for the officers. I bought the gun at Hall's pawnshop, after Branam had killed my brother. After I left home, and before I got to Branam's field, I fired one shot to test the gun. I had fired the gun previous to that time ten or twelve times. I kept the gun in my room. Branam staggered at the first shot, and I think he was on the ground when I fired the last. The gun was a 30, lever action, and it threw the shells when I worked the lever. I threw all of the shells out at that place. I carried the gun back home, and carried it over in the field, and there I hid it. This confession is made voluntarily, and signed and sworn to on the day after the occurrence."

The other evidence introduced by the State corroborated the statement made by appellant that he killed Lafayette Branam in the manner detailed in the confession.

Appellant made no attempt to contradict the evidence introduced by the State relative to the charge, but interposed the defense of insanity thereto.

The first assignment of error for a reversal of the judgment is that the court allowed the prosecuting attor-

ney, on cross-examination of Dr. T. B. Hill, introduced by appellant on the issue of his alleged insanity, to ask whether the headaches from which appellant suffered, and which he was called upon to treat, were the result of a wound appellant had received in his head some years before, or from dissipation or drunkenness. Appellant contends that the purpose of the question was to get before the jury a statement that he was given to excessive dissipation and drunkenness, in an effort to assail his character, which had not been put in issue. We cannot agree with the construction placed upon the question by appellant. Appellant had proved the injury to his head and subsequent suffering from headaches, in an effort to show irresponsibility for his acts. This question was asked to test the physician's knowledge of the cause of the headaches, whether the result of the injury, or from other causes. The witness answered that he did not know what caused the headaches, which discloses the wisdom of permitting the question. The impression had been left, after direct examination, that the headaches were the result of an injury to the head, as tending to prove irresponsibility. When the physician could not connect the headaches with the injury, it weakened the effect of his testimony. The interrogatory was legitimate on cross-examination.

The next assignment of error for a reversal of the judgment is that the court allowed the prosecuting attorney to propound a cross-interrogatory to Dr. J. P. Randolph, one of appellant's expert witnesses on the issue of insanity, which did not embrace all the undisputed facts in the testimony essential to the issue. The witness was not permitted to answer the question until instructed by the court to consider all the undisputed facts embraced in both appellant's and the prosecuting attorney's hypothetical interrogatories. This cured errors of omission in the prosecuting attorney's interrogatories. Appellant also objected to the hypothetical question of the prosecuting attorney because it assumed as a fact that, after appellant bought the rifle with which

he shot Lafayette Branam, he practiced shooting with it at a target. The argument is made that there is no evidence from which a legitimate inference might be drawn to the effect that he practiced shooting the gun at a target. Appellant did not claim to have fired the gun ten or twelve times at random in the air or at game. The legitimate inference is that he shot at some object, and any object at which he shot might have been characterized as a target. There was no error in thus describing the acts of appellant in firing the gun ten or twelve times in the interim between the date of purchase and the killing of Branam.

The next assignment of error for a reversal of the judgment was the refusal of the court to allow appellant to ask Dr. George M. Eckels, one of his expert witnesses on the issue of insanity, after he had answered a hypothetical question, whether he believed appellant was mentally responsible for the act of killing Lafayette Branam. If the question in the form asked was proper, the error in excluding the answer was cured by the subsequent testimony of the witness, to the effect that one in appellant's condition could not distinguish between right and wrong the same as one in a normal condition, and that appellant could not, in his opinion, distinguish between right and wrong in the particular act of killing Lafayette Branam.

Appellant's next assignment of error for a reversal of the judgment was the admission of the opinion of a number of non-expert witnesses touching the sanity of appellant, in rebuttal to the testimony introduced by him tending to show that he was insane when he killed Lafayette Branam. The admission of their testimony was challenged on the ground that they did not detail the facts upon which they formed their respective opinions. We have carefully read the evidence of each, and are of opinion that each disclosed evidence growing out of their conversations with him which warranted each in giving an opinion. Most of them had known appellant for a

long time, and had associated with him and conversed with him both before and after the commission of the offense. Appellant also contends, in this connection, that the court erred in allowing the jury to pass upon the admissibility of the testimony of the non-expert witnesses, instead of assuming that responsibility himself. It is argued that this was the effect of instruction number 12, given by the court over appellant's objection. We do not so interpret the instruction. The purport of the instruction, as we construe it, was to tell the jury, in weighing the opinion of each to consider the sources of his information and to attach such value to his opinion as the facts upon which he based same warranted. The instruction correctly announced the law.

Appellant's next assignment of error for a reversal of the judgment was in giving instruction number 11 by the court. The part of the instruction criticised by appellant is as follows:

"But, if the jury should believe that any fact, or facts, stated to the medical experts in the questions asked them, are not true, then you should disregard whatever opinion they expressed on the question of the defendant's sanity at the time of the killing."

Appellant suggests that the court should have used the following language instead of the language used:

"If the jury finds any fact, or facts, in the hypothetical questions, material to the issue of defendant's insanity, untrue, then they would be at liberty to disregard the opinion of the experts as to the sanity of the defendant at the time of the killing."

The questions referred to by the court in that part of the instruction objected to related to hypothetical questions which had been propounded to the medical experts, material to the issue of appellant's sanity or insanity, as may readily be seen by reference to other parts of the instruction. We think the language used by the court, when interpreted in the way the court used it, meant exactly what the suggested language of appellant means. The whole instruction given by the court

conforms substantially to the rule announced by this court in the case of *Kelly* v. *State,* 146 Ark. 509, 226 S. W. 137.

Appellant's next assignment of error for a reversal of the judgment was the refusal of the court to give his requested instructions numbers 2, 3, 5 and 6, in connection with instruction No. 6, which was given by the court. We deem it unnecessary to set these instructions out at length in this opinion. Suffice it to say that we have examined them, and find that the requests of appellant numbered 2, 3, 5 and 6 were fully covered by instructions 9 and 10 given by the court. It is not error for the court to refuse to duplicate instructions, in fact the court should avoid multiplying instructions.

The next and last assignment of error for a reversal of the judgment was the giving of instruction number 16, which is as follows:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant was of sound mind, and the killing was unlawful and felonious and done with malice aforethought, but entertain a reasonable doubt as to whether or not there was any premeditation and deliberation, then you should find the defendant guilty of murder in the second degree, and fix his punishment at imprisonment in the penitentiary for a period of not less than five nor more than twenty-one years. If, on the whole, you should entertain a reasonable doubt of the defendant's guilt of either of the grades of homicide included in the charge, then you should find the defendant not guilty."

It is argued that there was no place in the case for the instruction, because the facts showed that he was guilty of murder in the first degree or nothing. This court ruled, in the case of *Williams* v. *State,* 50 Ark. 511, 9 S. W. 5, a case where the undisputed proof showed a deliberate killing and where the defense was insanity, that, "as there was ground for a difference of opinion as to the insanity of the accused, under the evidence and the instructions of the court, the verdict will not be

disturbed by this court for the want of testimony to support it."

The instruction was favorable to appellant, and he is in no position to complain.

No error appearing, the judgment is affirmed.

MARSHALL v. DAVIS CONSTRUCTION COMPANY.

Opinion delivered January 30, 1928.

HIGHWAYS—AUTHORITY OF COMMISSIONERS TO COMPROMISE ACTION.—In an action by a contractor against a highway improvement district created by Acts 1917, p. 2181, where all the commissioners were served with notice, and a majority of them were present in court when the cause was set for trial, they had authority to compromise the action by confessing judgment for an agreed amount.

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

S. M. Casey, for appellant.

George T. Humphries and *H. A. Northcutt*, for appellee.

HUMPHREYS, J. North Arkansas Highway Improvement District No. 2, running through Independence, Izard and Fulton counties, was created by act No. 473 of the Legislature of 1917, and provided for three commissioners, one from each county. A part of the roadbed in the district was constructed under written contract between said commissioners and Davis Construction Company, the appellee herein.

Appellee instituted suit in the circuit court of Izard County, at the March term, 1926, against the district for $17,232 for additional estimates which it alleged it should have received from the engineer in charge of the construction of the road. An amended complaint was filed in September, 1926, to which the district filed an answer, through its employed attorneys, denying the material allegations in the complaint. The cause was passed until the March term of court, 1927. During the

pendency of the suit, and a short time before court convened, the Legislature of 1927 passed act No. 22, making the county judges in each of the three counties commissioners of said district to succeed the old commissioners. Two of the new commissioners, C. C. Aylor and E. H. LaMore, Ayler being president and LaMore secretary of the board of commissioners, attended court and, while the employed attorneys were trying to get a continuance of the cause, compromised and settled the case by agreeing in open court that a judgment for the sum of $8,000 might be rendered against the district. The agreement upon which the judgment was rendered is as follows:

"We, the undersigned, president and secretary of North Arkansas Highway Improvement District No. 2, hereby agree in open court that the judgment for the sum of eight thousand dollars ($8,000) may be rendered against said district, instead of $17,232 as asked for in the complaint of the plaintiff. It is understood that this judgment for the sum of $8,000 shall be rendered against said district in full settlement of all claims in the suit herein pending for $17,232.

Signed: "Davis Construction Company,
"By Northcutt & Humphries,
"Attys. for plaintiff.
"North Arkansas Highway
Improvement District No. 2,
"By C. C. Aylor, President.
"E. H. LaMore, Secretary."

After the rendition of the judgment and final adjournment of court, appellants herein instituted suit in said court to set aside the judgment, upon the alleged ground, amongst others, that the confession of the judgment by two members of the board, in the absence of the third, without notice to him, was void. This issue was controverted, and submitted to the court upon the testimony introduced by the respective parties, which resulted in a dismissal of appellant's complaint to vacate the judgment, from which is this appeal.

The sole question therefore presented by this appeal is whether two members of the board, in the absence of the third, could compromise and settle the suit against the district and bind it by confession of judgment for the amount agreed upon.

Appellants contend that, under the rule announced by this court in the cases of *School District* v. *Bennett*, 52 Ark. 511, 13 S. W. 132, and *Kirst* v. *Street Improvement Dist. No. 120*, 86 Ark. 1, 109 S. W. 526, the compromise agreement was not binding upon the district, being made by two members of the board in the absence of the third, without notice to him. In the first case cited this court said: "We conclude that two directors might bind the district by a contract made at the meeting at which the third was present, or of which he had notice; but no contract can be made at a meeeting, and no meeting can be held, unless all are present, or unless the absent member had notice." And in the last case cited, said: "Two members of a board of assessment of an improvement district are not authorized to act as a board in the absence of the third member, and without notice to him."

The character of business referred to by the court in the two cases cited had no reference whatever to the conduct or disposition of suits brought against the district. The district was a party defendant in the instant case by virtue of a summons which had been duly served upon the commissioners of the district at the time of the institution of the suit, and by virtue of an answer which the commissioners had filed, denying each and every allegation in the complaint. It was the duty of each of the commissioners to be present when the case was called, for the purpose of taking such steps as were necessary to protect the interest of the district. The successors to the original commissioners took their place, and it was incumbent upon each of them to be present when the case was called for the purpose of either procuring a continuance, defending against the suit, or compromising and settling same. Each was bound to know

that the case was pending and that the court could not be expected to delay business for the new board representing the district to give additional notice to an absent member to meet for the purpose of determining what course to pursue when the case should be called. Notice of the pendency of the suit and when the court would meet was sufficient notice to all members to be present and perform their duty. An emergency confronted the majority of the board who were present in the performance of their duty. Appellee was pressing for a trial, and appellants had failed to file a motion in accordance with the law for a continuance. The commissioners present sought a conference with the representatives of appellee, and finally effected a compromise and consented to the judgment. As no additional notice was required for the absent commissioner to be present, the court is of opinion that the other two, constituting a majority of the membership, had authority to compromise and settle the case and agree to a consent judgment.

No error appearing, the judgment is affirmed.

GIBSON v. STEADMAN.

Opinion delivered January 30, 1928.

1. HIGHWAYS—ORDER TO LAY OFF ROAD.—Where the county court had ordered a public road to be laid out along a certain line, adjoining landowners had a right to have the road laid off as ordered, substantial compliance with the order not being sufficient.
2. JUDGMENT—CONCLUSIVENESS.—On a petition by adjacent landowners to have a public highway laid out according to the order of the county court, wherein defendants pleaded a prior court order relative to the road's location as *res judicata, held* that such prior order, holding that the road was laid out substantially in compliance with the court's order, was not *res judicata* as to the road having been laid out exactly according to the court's order.
3. HIGHWAYS—COMPLIANCE WITH ORDER OF COURT—EVIDENCE.—On a petition by adjacent landowners to have a highway laid out as

prescribed by the order of the county court, evidence *held* sufficient to sustain a finding and judgment that the highway had not been laid out as ordered by the court.

Appeal from Lawrence Circuit Court, Western District; *S. M. Bone,* Judge; affirmed.

G. M. Gibson, for appellant.

R. C. Waldron, for appellee.

HUMPHREYS, J. On September 6, 1926, appellees filed a petition under and by virtue of § 5249 of Crawford & Moses' Digest (act No. 422 of the Acts of 1911) in the county court of Lawrence County, Arkansas, to lay out and establish a public road beginning at the northeast corner of the southeast quarter of the southeast quarter of section 7, township 16 north, range 1 west; thence south on the east line of said southeast quarter, southeast quarter to the southeast corner thereof; thence southwesterly to the west bank of said draw or branch; thence along said bank to the intersection of the Powhatan-Clover Bend Highway. On October 4, 1926, the county court established a highway along the line designated in the petition, and ordered the road opened, from which an appeal was duly prosecuted to the circuit court by appellants herein.

Appellants filed an answer in the circuit court, pleading as a defense that an order was entered in the county court establishing a public road on identically the same line designated in the petition of appellees herein, and that, pursuant to the order, overseers were appointed and the road laid out, and that as laid out it has since been a public highway; that on February 2, 1925, the county court of Lawrence County made another order, on petition of appellees herein, in which it was recited that said road had been ordered to be laid out in 1899, and ordered the road overseer of Road District No. 5, in which said road was located, to open up said road; that appellants herein appealed from that order to the circuit court, and, on the trial of the cause, the circuit court found that the road had been laid out in substantial conformity to the order of the county court entered of rec-

ord on October 8, 1899; that no appeal was taken from said order; that two such roads are unnecessary; that all matters and things now in issue were in issue in the cause above mentioned, and were adjudicated and decided in the circuit court for the Western District of Lawrence County, Arkansas, at its August term, 1925, and that said order is *res judicata* as to all matters and things attempted to be adjudicated in the present action; said order is especially pleaded as being *res judicata.* Appellants further prayed that the order of the county court of October 4, 1926, be quashed; that the petition of appellees herein be disallowed; and that, in case the order was sustained, appellants herein be allowed damages in the sum of $650, and for all other proper relief.

The cause was heard upon the petition of appellees herein and the answer of appellees herein and the testimony introduced by the respective parties by the court sitting as a jury, which resulted in the following finding and judgment:

"Gentlemen: The court does not undertake to establish a line between these quarter sections, and I do not understand that that is before the court, or that it is necessary for the court to establish that line. I find from the testimony in the case that there is a public necessity for a public road through there between these two quarter sections, between Mrs. Gibson and Mr. Steadman; and that an order of the county court of this county was made in 1899 establishing a public road through there, but it seems that the road was never regularly established and has not been maintained as a regular county road; that it has just been drifting along under present conditions. And it shall be the order of this court that the road be established on the section line, in accordance with the order of the county court made on October 4, 1926, and that that be the only road through there. That the order of 1899 be vacated and set aside, and that any roads now leading through there be changed to follow the section line in compliance with the order of the county court herein appealed from; and that the

proper authorities be directed to open the road and place it on the line in accordance with the order of the county court; and that, in the event of a fence having to be moved which belongs to Mrs. Gibson, the county pay the expense of moving the fence. And the court further finds that the amount of damages allowed in the order of 1899 was to cover damages for the public road that should go through there, and no further damages will be allowed other than the expense of moving the fence."

From these findings and judgment an appeal has been duly prosecuted to this court.

The testimony introduced by appellees tended to show that, although a road had been laid out and ordered opened along the line designated in appellees' petition, it never had been actually opened; that, although appellants herein had received an allowance of damages in the sum of $40 for the land supposed to be taken under the county court's order of 1899, they had never moved back their fence, and that the road remained and was used just as it had been prior to the order of 1899 opening the road on the section line; that several surveys had been made to ascertain where the section line was, but that said line was never definitely located and the road opened on said section line in accordance with the order.

All orders of the county and circuit courts pertaining to laying off the road were introduced in evidence by appellants herein, as well as evidence tending to show that the road had been actually laid off and opened in accordance with the order of 1899. Appellants also introduced testimony tending to show that, if the road as actually used is not on the section line, and if, when moved, it should take a strip off of appellants' forty, the land thus taken would be worth, at the time of the trial of the cause, $650.

If, according to the contention of appellants, the road is actually on the section line, in accordance with the order of 1899, for taking it appellants received damages in the sum of $40, they would not be damaged in the least

by re-establishing the road on the lands already occupied by it. The order opening it would be a matter of form, and could not result in any damage whatever to them.

If, on the other hand, appellants received compensation for a road on the section line, which the undisputed evidence showed they did, they would have no right to retain this money and refuse to allow the road to be actually opened on the line designated, unless the matter at issue had once been litigated between the same parties and adjudged to have been opened on the line designated in the order of 1899. Appellants insist that this is exactly what was done, and that all matters now at issue in this proceeding are *res judicata* under the judgment of the circuit court of 1899, on an appeal from the county court's order that the road be opened by the road overseer of that district. The order and judgment of 1899 relied upon by appellants does not say that the road was laid off exactly on the line designated in the order of the county court of 1899. The court only found and decreed that the road was laid off in substantial conformity thereto. Appellees had a right to have the road laid off exactly on the line, and this, we understand, is what they attempted to do in their petition filed in 1926, upon which the judgment and the order of the circuit court is based, from which they are now appealing.

There is ample evidence in the record to sustain the finding and judgment of the circuit court from which this appeal is prosecuted.

The judgment is therefore affirmed.

LANAHAN AND BROWN v. STATE.

Opinion delivered January 30, 1928.

1. INDICTMENT AND INFORMATION—FORMATION OF GRAND JURY—WAIVER OF IRREGULARITY.—By pleading to the indictment, defendants waived any alleged illegality in the formation of the grand jury.
2. CRIMINAL LAW—HARMLESS ERROR.—Any alleged irregularity in the formation of the grand jury is not ground for reversal, where it does not appear that defendants could have been prejudiced thereby.
3. ROBBERY—OWNERSHIP OF PROPERTY TAKEN.—To constitute robbery it is not necessary that the ownership of the property taken should have been in the person robbed; it is sufficient if he had exclusive possession of it.
4. CRIMINAL LAW—FORMER TESTIMONY OF ABSENT WITNESS.—Testimony as to the statement of an absent witness made at the preliminary trial was properly admitted, where the testifying witness heard the absent witness testify and could remember his testimony.

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

Houston Emory and *Berry H. Randolph*, for appellant.

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

KIRBY, J. This appeal is prosecuted from a judgment of conviction for robbery in Garland County. Three errors are assigned for reversal.

1. That the court erred in impaneling the grand jury.

It appears that the court convened in regular term on September 26, 1927, the grand jury was impaneled, and, after returning certain indictments, by permission of the court adjourned to Tuesday, October 18, 1927, at 10 o'clock, and that on the 6th day of October, a day of the regular term, "by order of the court, the grand jury came into open court, and, three of the members being absent, the sheriff, who had been directed to summon the grand jury to meet in special session that day, and to summon a sufficient number of electors to serve

as grand jurors during the absence of any of the regular panel, reported that he had failed to notify three of the regular members of the called meeting of the grand jury, and Bettis Wheatley, J. N. Coppick and Herman Jenks were found to be qualified, and were sworn and impaneled as members of the grand jury." No objection was made at the time to any of said grand jurors, but, when the case was called for trial, appellants' attorney said they desired to save exceptions to the grand jury, which had adjourned to the 18th. The court stated the grand jury had just recessed to the 18th, subject to call.

No motion to set aside or quash the indictment on the ground that the jury was irregularly impaneled was made, and, by pleading to the indictment, the defendants waived the alleged illegality in the formation of the grand jury. *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900; *Holt* v. *State,* 171 Ark. 279, 284 S. W. 1.

The court had the right to complete the panel upon the grand jury being reassembled by its order as though the members who failed to appear had been excused or discharged, and no contention is made that the new jurors were not qualified, or that any of them were prejudiced against appellants, and any such irregularity in the formation of the grand jury was not material and could not have prejudiced the rights of appellants. 12 R. C. L., p. 1019, 28 C. J., § 60, 786; *Perkins* v. *State,* 168 Ark. 710, 271 S. W. 326; *Runnels* v. *State,* 28 Ark. 121.

2. There is no merit in the contention that the court erred in refusing to give appellants' requested instruction telling the jury that, before they could convict either of the defendants, they must find that the money alleged to have been taken "was the property of Peter Grumbley, and, if there is a reasonable doubt as to such ownership," they should give the defendants the benefit of such doubt and acquit; and in instructing the jury that, if they believed from the evidence that defendants took the money from Mr. Grumbley, "and that the money taken was the property of Mr. Grumbley, or that

at the time he had exclusive possession or control of it," then the defendants would be guilty, etc.

The instruction requested was not technically correct, and the one given correctly declared the law, it not being necessary that the ownership of the property taken must have been in the person robbed, it being sufficient if he had the exclusive possession or control of it, as the court told the jury. 17 R. C. L., § 72, p. 67; *Harrell* v. *State,* 169 Ark. 1038, 278 S. W. 45; *Stoddard* v. *State,* 169 Ark. 594, 276 S. W. 358.

3. Neither was error committed in admitting the testimony of W. G. Bouic, relating to the statement of the absent witness, Grumbley, shown to be out of the State, made at the preliminary trial, "that he was riding in an automobile on the highway with Mr. Ferguson and two young ladies, Misses Hawthorne and Murray; that they had parked for a minute on the road, and that two men by the name of Lanahan and Brown came up; that Lanahan had a heavy voice, and a tooth missing above and below, and pulled a gun on him, and a searchlight, and took his money from his person. The court asked if he said whose property it was that was taken, and Bouic replied that he had said he lost this money from his person; did not remember that he had said anything other than that he had lost $11, and that they took it from him."

This testimony shows that the witness had heard the absent witness testify and could remember his testimony. *Petty* v. *State,* 76 Ark. 515, 89 S. W. 465; *Poe* v. *State,* 95 Ark. 172, 129 S. W. 292.

The young ladies also testified about the occurrence, and the evidence is ample to support the verdict.

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

EDWARDS v. JACKSON.

Opinion delivered January 30, 1928.

1. VENUE—ACTIONS ON OFFICIAL BONDS.—Crawford & Moses' Dig., § 1165, providing that actions against public officers for an act done in virtue or under color of office or on official bond, except as provided in § 1175, must be brought in the county where the cause or some part thereof arose, *held* valid.
2. VENUE—ACTION ON SHERIFF'S BOND.—An action against a sheriff, deputies, members of posse, and sureties on sheriff's bond, for killing plaintiff's husband, must be brought in the county where the cause of action arose, under Crawford & Moses' Dig., § 1165.

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

Steel & Edwards, for appellant.

J. I. Alley, for appellee.

KIRBY, J. Appellant, Cynthia Edwards, brought this suit in Polk County, for her own benefit as widow and as next friend for her minor children, against George A. Jackson, sheriff of Montgomery County, his deputies, members of his posse and the sureties on his official bond, for damages for the alleged wrongful act of the sheriff, the willful, wanton and negligent killing of her husband, Carl Edwards, in Montgomery County, Arkansas, while he was driving along the public highway in a Ford touring car.

The complaint also alleged that all the defendants were residents of Montgomery County, except that Ed Lewis and Will Faulkner, who were members of the sheriff's posse at the time Carl Edwards was killed, are residents of Polk County, Arkansas.

A demurrer to the complaint and the jurisdiction of the court was interposed, its allegations showing that neither the cause of action or any part thereof were in Polk County, where the suit was brought, and also that the action was against a public officer, his deputies, members of his posse and the sureties on his official bond for acts done by him in virtue or under color of his office.

The demurrer was sustained, and, appellants declining to plead further, the cause was dismissed, and from the judgment comes this appeal.

Our statutes provide: "Actions for the following causes must be brought in the county where the cause or some part thereof arose * * *. Second. On actions against a public officer for an act done by him in virtue or under color of his office, as for a neglect of official duty. Third. On actions upon the official bond of a public officer, except as provided in § 1175." Section 1165, C. & M. Digest.

The language and meaning of the statute on the questions involved herein is so plain as to admit of no construction. It was within the competency of the Legislature to enact it; is not in conflict with the Constitution of the State, and does not deprive appellants of any rights guaranteed by the Constitution of the United States.

The venue of the action, as shown by the allegations of the complaint, was in Montgomery County, where the cause arose, no part of it having arisen in Polk County, where the suit was brought, and the demurrer was properly sustained. *Bledsoe* v. *Pierce Williams Co.*, 147 Ark. 51, 226 S. W. 532; *Reed* v. *Williams*, 163 Ark. 520, 260 S. W. 438.

No error was committed in dismissing the complaint, and the judgment is affirmed.

JEWEL COAL & MINING COMPANY *v.* WATSON.

Opinion delivered January 30, 1928.

1. MINES AND MINERALS—WRONGFUL TAKING OF COAL.—Persons taking coal from land leased to another, if done under an honest mistake as to the boundaries of the tract from which they were entitled to take coal under an agreement with the lessor, would be liable to the lessee only for the value of the ore as originally in place, but if they took it out wrongfully and intentionally, they would be liable for the value thereof at the mouth of the mine.

2. MINES AND MINERALS—INTENTIONAL TAKING.—In a suit for the value of coal taken by defendants from land leased to plaintiff, testimony of defendants' witnesses that the taking was inten-

tional, *held* not to show that it was wrongful, but only that it was not accidental.

3. MINES AND MINERALS—WRONGFUL TAKING—DAMAGES.—To render one taking coal from land leased to another liable for damages in amount of the coal's value at the mouth of the mine, there must be a determination to take it with a bad intent, and not merely that it was taken voluntarily.

4. MINES AND MINERALS—INTENT IN TAKING COAL.—In an action for the value of coal taken by defendants from land leased to plaintiff, evidence *held* sufficient to show that defendants did not take the coal with bad intent, but thought they had a right to do so under agreement with the plaintiff's lessor.

5. TRESPASS—IGNORANCE OF BOUNDARIES AS DEFENSE.—It is one's duty to know and keep within the boundaries of his own land, and the ignorance thereof does not justify trespass on his neighbor's land.

6. WITNESSES—CREDIBILITY.—In a suit for the value of coal taken by the defendants from land leased to plaintiff, evidence that no suit was begun or action of any kind taken during the life of the lessor under the verbal agreement with whom the defendants claimed the right to take coal, *held* admissible as bearing on the credibility of witnesses.

7. MINES AND MINERALS—LACHES.—In a suit for the value of coal taken by defendants from land leased to plaintiff, evidence that no suit was begun or action of any kind taken during the life of the lessor, under a verbal agreement with whom defendants claimed the right to take the coal, *held* under the evidence to be insufficient to bar the cause of action on account of laches.

8. APPEAL AND ERROR—REMAND OF CAUSE.—The measure of damages for taking coal from land leased to plaintiff as the result of an honest mistake as to boundaries being the value of the coal as originally in place in the ground, the cause will be remanded, on reversal of judgment for defendants, to ascertain the amount of coal taken and the value per ton of coal as originally in the ground.

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

McCune, Caldwell & Downing, H. M. Noble, Ray Blair and *Hill & Fitzhugh,* for appellant.

Hall Brothers and *Evans & Evans,* for appellee.

MEHAFFY, J. The appellant, who was plaintiff below, brought suit against J. D. Watson and sons, appellees, defendants below, to recover the value of coal which plaintiff claimed to have owned and alleged to have been

willfully and wrongfully taken by the defendants, and also for damages for wrongfully transporting coal through entries and haulage ways belonging to plaintiff.

Emil Baerlocher owned approximately 148 acres of land, and, on September 16, 1921, he leased all the coal under 124 acres of said land to the plaintiff. The lease was for a period of 20 years, and provided for a royalty of 21 cents per ton, and minimum royalty of $1,000 per year. This lease, however, did not cover the land in controversy, which was 3.8 acres. Besides the 124 acres included in the lease, however, Baerlocher owned 23.8 acres, and it was 3.8 acres out of this latter tract that it is claimed plaintiff owned and under which it is claimed that defendants took the coal.

On October 20, 1921, the plaintiff secured another lease from Baerlocher, which, it is alleged, covered the entire 148 acres, and the royalty per ton was the same, but the minimum royalty increased to $1,200 per year. It is alleged that this lease covered all of the coal owned by Baerlocher.

Plaintiff alleged that it was later discovered that there was an error in this lease of October 20, 1921, in that it did not properly describe the 3.8 acres. Plaintiff claims that this discrepancy was not discovered until early in the year of 1925.

On March 30, 1925, a new lease was executed which, it is alleged, was for the sole purpose of correcting the description of the 3.8-acre tract. The plaintiff makes no claim that defendants took any coal from any part of the Baerlocher lands, except from the 3.8-acre tract. The plaintiff alleged and contended that the defendants had no claim on said land at all, and that they had tried and failed to secure a lease from Baerlocher, and that they had also tried to secure lease from plaintiff.

Plaintiff alleges that the coal taken by defendants was a willful and intentional trespass, and that the measure of damages is the value of the ore as found at the mouth of the mine. That is, the value of the coal after it had been mined and brought to the surface.

The defendants admit that they are partners and engaged in mining coal, and have been for a number of years, and deny all of the material allegations of plaintiff's complaint. They allege that, in the year 1919, they leased lands from Hunter and from Jones, and were mining coal on these lands, and that in 1924 the defendants extended an entry across the southeast corner of the Baerlocher land, and that these entries on the Baerlocher land were made with Baerlocher's knowledge and consent, and in accordance with a verbal agreement made in 1919 and 1920, and they had settled and paid Baerlocher for the coal in accordance with said agreement. They alleged that this agreement between defendants and Baerlocher was known to the plaintiff at the time they secured a lease, and that there was no proper description of the 3.8 acres, and that they had a right, under the verbal agreement with Baerlocher, to take the coal which they did take, and that all the coal they took from the 3.8 acres was taken under the agreement and with the knowledge both of Baerlocher and of the plaintiff.

Plaintiff introduced in evidence plats showing the location of the lands leased and of the 3.8 acres, the land involved in this controversy.

The appellant states: "The issues in this case are brought to rather narrow confines under the pleadings and evidence."

The only questions involved are, first, did the defendants wrongfully take coal that belonged to the plaintiff? If they did not, it would be unnecessary to discuss or determine any other question. If, however, they did take coal that belonged to the plaintiff which they did not have a right to take, it then becomes important to determine whether they took it in good faith or whether they were willful trespassers, because, even if the coal belonged to the plaintiff and defendants took it as a result of an honest mistake, the defendants would have to pay only the value of the ore as it was originally in place in the ground; whereas, if they took out the coal wrongfully

and intentionally, that is, if they were willful trespassers, they would have to pay the value as found at the mouth of the mine.

Appellant states: "The sole issues are, first, the amount of coal removed, and, second, the measure of damages."

We agree with this statement of the appellant. And since these are the only issues involved, it is necessary to determine whether the coal taken by defendants was taken under an honest belief that they had a right to take it, or whether they willfully and intentionally took the ore, because, if they willfully and intentionally took the ore, the measure of damages would be the value of the coal as found at the mouth of the mine.

Several witnesses were asked by appellant if they intended to take this coal. That is, if it was intentional. They of course said it was. But evidently what they meant was not intentional in the sense that it was wrongful, but that it was not accidental; that it was voluntary.

The word "intentional," when used in connection with the doing of a wrongful act, signifies not only that the party intended to do the particular act, but to do it knowing at the time that it was wrongful. *Ickenroth* v. *St. Louis Transit Co.,* 102 Mo. App. 597, 77 S. W. 162.

It is perfectly plain that the witnesses did not mean that they took it knowing at the time that it was wrongful, but what they did mean was that it was intentional in the sense that it was not accidental.

This court has said, in defining "willfully" and "intentionally" in the Digest: "They mean in such statutes not merely voluntarily, but with a bad purpose. An evil intent without justifiable excuse. Doing, or omitting to do a thing, knowingly and willfully, implies not only knowledge of the thing, but a determination with a bad intent to do it or omit to do it." *St. L. I. M. & S. R. Co.* v. *Batesville & W. T. Co.,* 80 Ark. 499, 97 S. W. 660.

"Intentional" is used in the same sense here. That is, to make the person who takes the property liable for damages in the value of the coal at the mouth of the mine,

there must be a determination to take it with a bad intent, and not merely voluntary. It must be with a bad purpose.

In this case the plaintiff obtained a lease, first, for 124 acres from Baerlocher. At the time it procured this lease, it endeavored to secure a lease also on the lands in controversy, but Baerlocher declined to lease this land. Shortly thereafter another lease was taken, including the 124 acres already leased to plaintiff and 23.8 acres in addition. And of this 23.8 acres this lawsuit involves not the entire tract, but the 3.8 acres only. In this lease, however, the 3.8 acres was not correctly described, and defendants claim that, as the lease was written and recorded, they did not take any coal from the land on which plaintiff had a lease. In other words, as testified to by Watson, if the recorded lease was correct, Watson did not take coal from any part of the 3.8 acres, according to his testimony. It also appears from the evidence that Baerlocher not only agreed with the defendants to let them have this coal, but that he told plaintiffs that Watson should have the right to take coal from this tract of land.

Baerlocher died before the lawsuit was begun, but, before he died, he accepted pay from Watson for coal taken from this tract of land, which he presumably would not have done if there had been no understanding that Watson should take this coal.

Mr. Gaither, one of the witnesses who testified, had been manager and superintendent for the plaintiff for a number of years. He understood that Baerlocher had given Watson the right to take coal. The testimony on this question is conflicting, but it is sufficient to show that Watson did not take it with a bad motive, but that he thought he had a right, under his verbal agreement, to take it.

Appellant refers to many authorities and quotes from some, and, among other things, contends, and the authorities support the contention, that it is the duty of defendant to know the boundaries of his own land and keep within them, and ignorance thereof would not jus-

tify a trespasser upon his neighbor's land. *Jeffries* v. *Hargis,* 50 Ark. 65, 6 S. W. 328.

There is no controversy about this proposition of law. But in this case there is no contention about the boundaries, unless it might be said that the second lease taken, not describing the land accurately, might justify Watson in taking coal up to that line. We do not think that it would justify it, however, for the reason that he knew that Baerlocher had 23.8 acres, and he knew that the lease purported to convey 23.8 acres, and he therefore knew that the lease to the plaintiff included the land about which he and Baerlocher had had the verbal agreement. We think his conversation with the superintendent and manager of the plaintiff and the understanding he had with Baerlocher and all the facts and circumstances justify the conclusion that he was not a willful trespasser.

We deem it unnecessary to set out the testimony at length. It is conflicting, but we think it justifies the conclusion that we have reached. We also deem it unnecessary to comment upon or review the authorities to which attention has been called by appellant, because there is no dispute about the rules of law applicable to this case. And these principles or rules of law are well settled by decisions of this court, which make it unnecessary to refer to any other authorities.

The chancellor was in error in holding that the plaintiff's claim was barred by laches. It is true that no suit was begun and no action of any kind taken during the life of Baerlocher. And it was proper to admit this testimony for the purpose of showing the action of the parties and as bearing on the credibility of the witnesses. But we do not think it sufficient to bar the cause of action.

Since the appellant itself says that the only questions involved are the amount of coal taken and the measure of damages, it is unnecessary to discuss any other questions. The measure of damages is the value of the coal as it was originally in place in the ground. It will therefore be necessary, as contended by appellant, to

ascertain the amount of coal taken, and it will also be necessary to take proof on the value per ton of the coal as it was originally in the ground.

The decree is therefore reversed, and remanded with directions to ascertain the amount of coal taken and the value of the coal in the ground, and to take such further action as may be necessary, not inconsistent with this opinion.

HAGLER v. ARKANSAS COUNTY.

Opinion delivered January 30, 1928.

1. COUNTIES—TRANSFER OF SURPLUS IN BOND ACCOUNT TO GENERAL REVENUE.—Where the county issued bonds under Amendment 11 to cover indebtedness existing prior to October 7, 1924, but county warrants dated prior to that date were accepted in payment of taxes prior to the receipt of bond money, resulting in a surplus in the bond account, *held* under Acts 1927, p. 86, that such surplus was properly transferred to the county general account.
2. COUNTIES—COUNTY WARRANTS PAYABLE FOR COUNTY TAXES.—When county warrants are presented, they must be accepted in payment of county taxes.
3. COUNTIES—INDEBTEDNESS PAYABLE FROM BOND ISSUE.—Under Acts 1927, p. 591, a county which issued bonds to pay indebtedness existing prior to October 7, 1924, was entitled to pay any indebtedness existing prior to December 7, 1924, from the surplus bond account or to have a supplemental bond issue to take up such indebtedness if the funds in the surplus bond account are insufficient.

Appeal from Arkansas Circuit Court, Southern District; *W. J. Waggoner,* Judge; reversed.

Peyton Moncrief and *A. G. Meehan,* for appellant.

J. M. Brice, for appellee.

McHANEY, J. On June 27, 1927, the county judge of Arkansas County issued a citation to appellant, John L. Hagler, county treasurer, directing him to appear on the first day of the next term of the county court, which was July 4, and show cause why an order should not be made by the court requiring him, as treasurer, to transfer the

surplus funds in the bond account to the county general account. The county treasurer appeared on that day, in obedience to the citation, and filed a response, stating that, under Amendment No. 11, and by order of the county court, Arkansas County had issued bonds, under date of May 1, 1925, to cover indebtedness existing prior to October 7, 1924, in the sum of $85,000; that a premium of $250 was paid by the bond purchasers for the issue, plus accrued interest from May 1, 1925, the date of the bonds, to June 15, 1925, the date of receipt of the funds, in the sum of $531.25, making a total amount received on the sale of the bonds in the sum of $85,781.25; that, out of said funds, county warrants dated prior to October 7, 1924, were taken up and canceled in the total sum of $63,-925.36, which left a balance on hand from the original bond issue of $21,855.89, on which he had received interest from the depository banks from June 15, 1925, to June 1, 1927, in the sum of $1,918.71, making a total on hand at the time of his response of $23,774.60 to the credit of the surplus bond account.

He further alleged that the county collector had received in payment of county taxes, during the first and second quarters of 1925, county warrants which had been issued prior to October 7, 1924, in the sum of $20,255.98, which had been turned in by the collector to the treasurer on settlement presented to the county court on the regular quarterly settlements, and canceled by the order of the county court, and the treasurer credited with the payment of same. He further alleged that, had the county court held up the cancellation of the said warrants in the sum of $20,255.98, which had been received by the collector in payment of county taxes as aforesaid, the said warrants could and would have been paid out of the bond account, and not out of the county general funds, as was done by reason of the cancellation of same before the treasurer had received the bond money from the sale of bonds, as aforesaid, and that, as a result thereof, there was to the credit of the bond account a surplus of $23,774.60, with accrued interest to June 1, 1927.

He further alleged that act 30 of the Acts of 1927, approved February 23, 1927, is unconstitutional and void, and that therefore the county court had no authority to order him, as treasurer, to transfer said surplus funds from the bond account to the county general account. Whereupon the county court made and entered an order, which will be hereafter found embodied in the order of the circuit court, requiring appellant to transfer the surplus in the bond account to the county general account. An appeal was duly prosecuted to the circuit court, and, on a hearing, that court rendered the following judgment:

"On this the 6th day of July, 1927, a judicial day of the regular July term of said court, this cause coming on to be heard, and the appellant, John L. Hagler, as county treasurer of Arkansas County, Arkansas, appears in person, and the appellee, Arkansas County, by its county judge, J. R. Parker, and J. M. Brice, employed as special counsel by the county judge, and Guy E. Williams, prosecuting attorney, appear, and both sides announce ready for trial, and, by agreement of both sides, this cause is submitted to the court without the intervention of a jury, upon the pleadings filed in the county court and the order of the county court, from which appellant has prosecuted this appeal, and other testimony, and the court finds that the county court made an order requiring the appellant, as county treasurer, to transfer the surplus proceeds arising from the sale of county bonds from the bond account to the county general account, which order of the county court, omitting the caption, reads as follows:

" 'The matter of making an order transferring certain surplus funds now in the bond account to the county general account coming on to be heard, and it appearing that the county treasurer, John L. Hagler, has been given written notice of this matter, and has entered his appearance herein, and filed a verified response, it is submitted, upon said notice and the response of said treasurer, and other evidence adduced at this hearing, and the court

finds: That a bond issue was made under date of May 1, 1925, for Arkansas County, Arkansas, in the sum of $85,000, and that on June 15, 1925, the treasurer of said county and State received the proceeds from sale of said bonds in the sum of $85,000, plus premium of $250, and accrued interest up to June 15, 1925, of $531.21, totaling the sum of $85,781.25, and further finds that the purpose of this bond issue and sale was to pay off the indebtedness of the county as evidenced by county warrants issued prior to October 7, 1924, and claims allowed by the court prior to the 7th day of October, 1924. The court also finds that county warrants which were dated before October 7, 1924, were paid from the bond account and canceled at various cancellations in the total sum of $63,925.36, and that on June 1, 1925, there remained in the treasury to the credit of the bond account the sum of $21,855.89, plus accrued interest of $1,918.71, totaling the said sum to the bond account in the sum of $23,774.60, and that there were no other outstanding county warrants against this bond account. The court further finds that the county treasurer had received from the collector, W. C. Woodson, during the first and second quarters of 1925, in settlements, county warrants which were issued prior to October 7, 1924, in the total sum of $20,774.98, and that the county treasurer turned these warrants in on quarterly settlements, before receiving the money from sale of bonds, and the warrants were by the county judge or county court canceled and the treasurer given credit therefor, and that these warrants during the first and second quarters paid out of the general fund or account; and that there are now no outstanding county warrants issued prior to October 7, 1924, against the bond account, all having been canceled, or barred on June 4, 1926, under call of county court dated March 2, 1926. The court finds that, under act No. 30 of the General Assembly of 1927, approved February 23, 1927, this sum of $23,774.60, including interest to June 1, 1927, together with interest which has accrued since June 1, 1927, and under the law should be transferred from the bond

account to the county general account, and the county reimbursed. The court finds that the findings of facts herein are in accord with the response of the county treasurer of Arkansas County, but that the county treasurer, John L. Hagler, denies that the court has the authority, under said act No. 30 of the Acts of the General Assembly of 1927, or under any law, to order him to transfer said funds from the bond account to the general funds of the county. Wherefore it is considered, ordered and adjudged by the court that the $23,774.60, with daily balance interest from June 1, 1927, should be transferred from the bond account to the county general account or fund, and that the county treasurer, John L. Hagler, is hereby directed and commanded to transfer said $23,774.60, with daily balance interest from June 1, 1927, to the county general account fund.'

"There was no oral testimony adduced on either side on the trial of the case in this court, but that the court finds, from the pleadings and the verified response of John L. Hagler, filed in the county court, that the findings of the facts of the county court are correct, and adopts the findings of the county court as set out in the foregoing order of the county court as correct and as the findings of this court, and finds that, under act No. 30 of the General Assembly of Arkansas of 1927, approved February 23, 1927, the sum of $23,774.60, including interest to June 1, 1927, together with interest which has accrued since June 1, 1927, under the law should be transferred from the bond account to the county general account, and the county reimbursed.

"Wherefore it is considered, ordered and adjudged by the court that the $23,774.60, with interest from June 1, 1927, should be transferred from the bond account to the county general account or fund, and that the county treasurer, John L. Hagler, is hereby directed and commanded to transfer said sum of $23,774.60, with interest from June 1, 1927, to the county general fund or account.

"It is further considered, ordered and adjudged that the clerk of this court shall certify down to the

county court and the clerk of the county court the order and judgment of this court herein, and the county court is directed and commanded to adopt the order and judgment of this court as its own."

The county treasurer has brought the case to this court for final consideration.

Authority for the action of both the county and circuit courts in making their respective orders is found in act No. 30, Acts 1927, page 86, the title and first section thereof being as follows:

"An act to provide for the relief of all counties in this State which have issued and sold bonds under the provisions of Amendment No. 11, and have erroneously paid some of the indebtedness for which said bonds were sold out of the general revenues for said counties and now have a surplus in said bond account, and for other purposes.

"Section 1. That in all counties in this State which have funded their indebtedness by means of issuing bonds under the provisions of Amendment No. 11, and, after paying said indebtedness, a surplus remains in said bond account, the county court of each county is hereby authorized, upon a finding that any part of the indebtedness existing December 7, 1924, had been erroneously paid out of the general revenues of said county when same should have been paid out of the funds derived from the sale of said bonds, to make an order allowing said amount so erroneously paid as a charge against the bond account, and credit the county general fund of said county with said amount so erroneously paid and charged by order of said court to said bond account. That, in each county where funding bonds have been issued by the county court under Amendment 11, the county treasurer shall promptly remit to the banks designated in the court order authorizing the issuance and sale of such bonds on dates due, the interest and principal from funds collected for this purpose."

The second and third sections of this act are the repealing and emergency clauses, a part of the latter

stating the real emergency, being: "because of the fact that, in all those counties having said surplus caused by the erroneous payment of the outstanding indebtedness out of the general revenue funds of the county for that year, said county will be deprived of sufficient moneys to take care of their current expenses, and be deprived of the use of said moneys in said bond account. This act, account of said emergency, to take effect and be in force from and immediately after its passage."

This holding of the county and circuit courts would appear to be in conflict with the decision of this court in *Airheart* v. *Winfree,* 170 Ark. 1126, 282 S. W. 963, where this court said:

"The principal argument of counsel for appellant is that, since the declared purpose of Amendment No. 11, as construed in *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389, 41 A. L. R. 782, was to enable the counties of the State to 'get out of debt,' as long as the county continues to be in debt after the adoption of the amendment the authority to issue bonds continues, and that it extends to the maximum amount of the outstanding indebtedness at the time of the adoption of the amendment, and includes warrants issued subsequent thereto, even though the amount of the old indebtedness has been reduced by payments out of the general revenue funds of the county. In other words, it is contended that, since the amount of the old indebtedness was borrowed and the old indebtedness has been reduced since the adoption of the amendment from an aggregate of $38,337.48 down to $10,857.49, the remainder of the funds should be used in retiring warrants issued subsequent to the adoption of the amendment. We cannot agree with counsel in this argument, for we think it disregards the plain language of the Constitution, as amended, which limits the issuance of bonds to the procurement of funds 'to pay indebtedness outstanding at the time of the adoption of this amendment,' and declares that it shall be a felony for any officer to 'use any part of the proceeds of said bonds for any other purpose' than the payment of such indebtedness. It is not

the amount of the indebtedness at the time of the adoption of the amendment which necessarily determines the amount of the bond issue, for that is determined solely by the amount of the old indebtedness in existence at the time the money is borrowed and the bonds are issued. As long as the old indebtedness exists, the Constitution authorizes the borrowing of money to pay off that indebtedness, or so much of it as is in existence at the time the bonds are issued. If the old indebtedness has been reduced by payments out of funds of the county, then the authority to issue bonds is limited to the amount of the old indebtedness which remains unpaid. Counsel seek, in the argument, to treat the warrants subsequently issued as in the nature of a renewal of the old indebtedness, for the reason that the latter has been reduced by the payment of funds out of the general revenues, but we are of the opinion that warrants subsequently issued are in no sense a renewal of the old indebtedness. The payment operated as a complete retirement of the old indebtedness to that extent, even though paid out of the general revenues of the county. It must be conceded that the county court had the authority, at the time of the issuance of the bonds, to determine the amount of the old indebtedness, and if, in the meantime, there had been a reissue of warrants, which evidenced the old indebtedness, it was within the province of the county court to include the reissued warrants as a part of the old indebtedness. In other words, the county court has authority to look to the form to ascertain the substance in regard to the amount of the old indebtedness. But it is not shown that the indebtedness represented by appellant's warrant was a part of the indebtedness of the county at the time of the adoption of the amendment, therefore it is not, either in form or substance, such a claim against the county as can be paid out of funds arising from the sale of bonds.

"Counsel for appellant suggest in the argument that perplexities may arise with regard to the disposition of the surplus fund borrowed by the county, if we

hold that it cannot be used in the payment of warrants subsequently issued, but that question is not presented in the present case. The holders of the bonds are not parties to the suit, and we are not called on to determine whether or not they can be required to accept a refund of the unexpended balance in the treasury in payment of the bonds prior to maturity. All that we can decide now is that, under the plain language of the Constitution, the funds cannot be used for any purpose other than the discharge of indebtedness outstanding at the time of the adoption of the amendment."

At the time the above decision was rendered, the Legislature had not spoken on this matter, as heretofore set out in act 30 of 1927, and a majority of this court have reached the conclusion, after very mature deliberation, that, in the light of said act 30, it is better to indulge the presumption of law that the act is constitutional and overrule, if necessary, the decision in *Airheart* v. *Winfree,* than to hold the act unconstitutional and void. *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9, and cases cited.

The decision in that case was not the unanimous opinion of the court, Mr. Justice SMITH writing a vigorous dissent and setting out arguments against it which we now believe to be unanswerable. In addition to what was there stated, it may be further said that the county judge of Arkansas County, and undoubtedly of other counties, thought Amendment No. 11 meant exactly what it said, and that was that he was authorized to issue bonds "to pay indebtedness outstanding at the time of the adoption of this amendment," and not indebtedness outstanding at the time the bonds were issued and paid for. It was not finally determined that the amendment had been adopted until the decision of this court in *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865, February 16, 1925, and it was not definitely and certainly ascertained on what date the amendment became effective, whether October 7 or December 7, 1924, until the decision of this court in *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22, November 23, 1925, where it was held

that Amendment No. 11 went into effect on December 7, 1924, and that bonds might be issued for "indebtedness outstanding" on December 7, 1924. So the several county courts were not advised, prior to February 16, 1925, that they had any authority to issue bonds, and did not know, prior to November 23, 1925, as to the exact amount of indebtedness for which bonds might be issued. Arkansas County took the safe course, and issued bonds to cover debts outstanding to October 7, 1924. Then the enabling act, act No. 210 of 1925, p. 608, requires an order of the county court declaring the total amount of its debts, and publication of such order for one insertion, after which any property owner has thirty days to bring a suit to review the correctness of such order, and thirty days more in which to appeal to this court after an adverse decision. Necessarily, it was contemplated that a considerable period of time might elapse before the county judges knew exactly what they could do. In the meantime outstanding warrants were presented to the collector in payment of taxes. He had no right to refuse them. County warrants must be accepted in payment of county taxes, and the collector of Arkansas County accepted in payment of taxes $20,255.98 of such warrants prior to the receipt of the bond money on June 15, 1925. Suppose, for example, this sum of money had been the total outstanding indebtedness of Arkansas County. Under this construction in the Airhart case, it could not issue any bonds, and would be in no better financial condition than it was before. The Legislature, by act 30 of 1927, has found that this payment of the warrants outstanding on December 7, 1924, from the county general fund, was erroneously paid from such fund instead of the bond fund, and correctly so. It was not only a mistake of law, but of fact. Having erred, we think they should be permitted to correct it by crediting the county general fund with the surplus. In the view of the majority, *Airheart* v. *Winfree* should be overruled and the act sustained.

By the decision of this court in *Matheny* v. *Independence County, supra*, it was held that Amendment No. 11 became effective on December 7, 1924, instead of October 7, as the county judge of Arkansas County, and perhaps of other counties, erroneously thought. To correct this error, the Legislature of 1927 passed act 165, Acts of 1927, p. 591, the first section of which reads as follows:

"The county treasurers of those counties that have heretofore issued and sold bonds, and which still have on hand the proceeds or a portion of the proceeds from the sale of such bonds, are hereby authorized and empowered to use such funds in paying warrants and other legal evidence of indebtedness issued for or on account of indebtedness made or existing to the 7th day of December, 1924, irrespective of the fact that the proceedings or orders providing for the issuance of such bonds may or do provide that the proceeds from such bonds, or the issuance or sale thereof, are to be used or employed in payment of indebtedness made or existing to October 7, 1924, or any other date, or to such date or any other date only."

By virtue of authority of this act, it is the opinion of this court that Arkansas County may lawfully pay, from its surplus bond account, any indebtedness existing prior to December 7, 1924, or might yet have a supplemental bond issue to take up the indebtedness existing on December 7, 1924, if the funds in the surplus bond account are insufficient to cover said indebtedness. The plain mandate of the Constitution as amended was to authorize the counties to get out of debt and to stay out of debt. And it is apparent that the only way that many of them can do this is to take up all indebtedness existing at the time Amendment No. 11 became effective, by a bond issue, to be retired by the levying of a tax not to exceed three mills for this purpose, in addition to the general county levy for county purposes.

The judgment of the circuit court is accordingly affirmed.

BUTLER v. BUTLER.

Opinion delivered January 30, 1928.

1. APPEAL AND ERROR—DISCRETION TO PERMIT AMENDMENTS TO PLEADINGS.—It is within the discretion of the trial court to permit pleadings to be amended, and the Supreme Court will not reverse for failure to do so, unless for an abuse of such discretion.
2. PLEADING—REFUSAL TO PERMIT AMENDMENT.—Where a case has been completely developed by the taking of depositions, and by agreement was being submitted to the chancellor in vacation, it was not an abuse of discretion to refuse to permit the complaint to be amended.
3. HOMESTEAD—ABANDONMENT.—To constitute an abandonment of a homestead, the owner must leave it with the intention of renouncing and forsaking it, or with the intention never to return; the law does not require continuous occupation of the homestead to continue it as such.
4. HOMESTEAD—TEMPORARY REMOVAL.—A temporary removal from a homestead for business purposes does not constitute an abandonment.
5. HOMESTEAD—ABANDONMENT.—The owner of a homestead is held not to have abandoned it by removal to another county to earn sufficient money to pay off a mortgage on the homestead, where he rented the homestead for farming purposes, but refused to sell it, and expressed the intention of returning thereto.
6. HOMESTEAD—ACQUISITION OF ANOTHER HOMESTEAD.—Under Const. art. 9, § 6, the action of a widow in acquiring a homestead in her own right after the death of her husband did not constitute an abandonment of the husband's homestead, so as to deprive her of the rents and profits thereof during her natural life.
7. HOMESTEAD—UNDERLYING COAL.—Coal underlying a homestead is a part thereof, and cannot be sold for payment of debts of decedent's estate, but is protected therefrom in the same manner as the homestead is protected.
8. LIFE ESTATE—AUTHORITY TO WORK MINE.—A mine opened on the homestead during the life of the husband may be leased by the widow as a life tenant after his death, and worked to exhaustion.

Appeal from Logan Chancery Court; *J. V. Bourland*, Chancellor; affirmed.

Cravens & Cravens, Rhyne & Blair and *I. J. Friedman*, for appellant.

White & White and *Evans & Evans*, for appellee.

McHANEY, J. Appellants are the children of John Butler, deceased, by his first wife, and the appellees are his widow and her children by him, with the exception of J. English, who was the husband of Delois Butler, deceased, who was a child of John Butler, who was originally made defendant, but who filed an answer in the nature of a cross-complaint, and is now one of the appellants.

For many years prior to his death, on the 12th day of September, 1918, in Crawford County, Arkansas, the said John Butler was the owner of 119 acres of land in Logan County, Arkansas, on which he had resided for many years with his family, as his homestead. In the fall of 1916 he removed with his family from his homestead in Logan County to Crawford County, where he continued to reside until the time of his death, which, as heretofore stated, was on September 12, 1918. There was a coal mine on this homestead, which had been operated for some years prior to his removal therefrom by John Butler, and the place had been mortgaged by Mr. Butler to W. B. Rhyne for $2,500. After her husband's death, Mrs. Butler went to Fort Smith to live, where she purchased a little home for herself and minor children, as she says, to get the advantage of better schools and to obtain employment for herself, which she did in a garment factory, in order to supplement her income to the rents and profits from the lands in Logan County.

One of the appellants was the administrator of his father's estate. He wound up the estate, and turned the land back to his stepmother, which she has been operating since that time, receiving the rents and profits, both from the farming operations and the mining of coal. In 1921 she made a lease thereof for coal mining purposes to one Brogden. The mine had been operated, after Mr. Butler moved to Crawford County and during his lifetime, by Palley & Miller, who ceased operations, and, when Brogden took charge, there is evidence to show that the mine had partially filled up with water,

and the mouth had somewhat caved in. After Mr. Butler's death a new pit was opened up, but apparently on the same vein of coal as was being operated in the old mine, and Mrs. Butler received the rents and profits therefrom. On a hearing, the chancellor found that John Butler had not abandoned his homestead by his removal to Crawford County, and that the widow, Mrs. A. V. Butler, had not abandoned the same, and entered a decree dismissing the complaint and the cross-complaint of English for want of equity, from which is this appeal.

On the trial of the case, appellants offered to prove by one witness that the value of the land in controversy was in excess of $2,500, the constitutional limit for a rural homestead in excess of 80 acres. There was no allegation in the complaint to this effect, and the appellants offered to amend the complaint in this regard, but the chancellor declined to permit them to do so, for the reason that the case had been completely developed by the taking of depositions, and by agreement was being submitted to the chancellor in vacation in the city of Fort Smith, and that appellees were not prepared to meet this new allegation. It is within the discretion of the trial court to permit amendments to pleadings, and this court will not reverse for failure to do so, unless for an abuse of such discretion, and we do not think that an abuse of discretion was shown in this regard. *Arkansas State Life Ins. Co.* v. *Allen,* 166 Ark. 490, 266 S. W. 449; *Meador* v. *Weathers,* 167 Ark. 264, 267 S. W. 787.

If appellants had desired to raise the issue of the extent of the homestead on account of its value, they should have done so in their complaint, in apt time, so that it could have been met by pleading on behalf of appellees, and by proof. The court did not therefore err in excluding this evidence and in refusing to permit appellants to amend.

The next question to be determined is whether John Butler abandoned his homestead in his lifetime. It is conceded by all parties that the land in controversy was

his homestead until the fall of 1916, when he removed to Crawford County, but it is contended by appellants that, by such removal, he abandoned his homestead. It is not contended that he acquired a new homestead after his removal to Crawford County, and before his death. It is the rule of law in this State, announced by many decisions of this court, that the question of whether there has been an abandonment of a homestead once established, is almost entirely a question of intent on the part of the homestead owner so to do. In other words, in order to constitute an abandonment of a homestead, the owner must leave it with the intention of renouncing and forsaking it, or leaving it never to return. The law does not require continuous occupation of the homestead to continue it as such. As was said in one of the earlier cases before this court, *Euper* v. *Alkire & Co.*, 37 Ark. 283: "When a homestead right has once attached, a continuous actual occupation is not indispensable for its preservation. It is well settled by the authorities that a removal from the homestead for a temporary purpose, or with the intention of returning and again occupying it, is not such an abandonment as will forfeit the homestead right." And in that case the court quoted with approval from *McMillan* v. *Warner*, 38 Tex. 410, as follows: "The question of abandonment is almost exclusively a question of intent, since no legal abandonment can occur without a fixed intent to renounce and forsake, or to leave never to return; and to abandon a homestead, a party must forsake and leave it with the intent never to return to it again as a homestead."

In the more recent case of *Gillis* v. *Gillis*, 164 Ark. 532, 262 S. W. 307, this court said: "The question of whether one who removes from his homestead has abandoned same is one of intention, which must be determined from the facts and circumstances attending each case."

A temporary removal from a homestead for business purposes does not constitute an abandonment. In this case it is shown that Mr. Butler, when he removed to

Crawford County, went there to cultivate bottom lands, by which he thought he could earn sufficient money to pay off the mortgage on his homestead; that he rented his homestead for one year only for farming purposes; that he refused to sell same to persons who offered to purchase. It is also shown by a number of witnesses that he expressed, on many occasions, his intention of returning to his home in Logan County, and these expressions of intention in this regard continued up to the very day of his death. While there is some conflict in the evidence regarding the question of his intention, we do not find that the chancellor's finding is against the preponderance thereof, and we therefore hold with the chancellor, that John Butler did not abandon his home in his lifetime.

The next question for determination is whether his widow, the appellee, Mrs. A. V. Butler, abandoned same. Section 6 of article 9 of the Constitution of 1874 reads as follows:

"If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life. Provided, that if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents and profits till each of them arrives at twenty-one years of age; each child's rights to cease at twenty-one years of age, and the shares to go to the younger children and then all go to the widow; and provided that said widow or children may reside on the homestead or not, and in case of the death of the widow, all of said homestead shall be vested in the minor children of the testator or intestate."

The widow did not have a separate homestead in her own right at the time of her husband's death, and she also had minor children. Therefore, under the plain provision of the Constitution, the homestead of her husband became hers for life, exempt from any debts, except the mortgage indebtedness, together with the rents and prof-

its therefrom, to be shared by her and her minor children until they reach the age of twenty-one years. She could not abandon the homestead so as to be effectual against the minor children, and her act in purchasing a home in Fort Smith for the purpose of supporting and educating her children there, does not constitute an abandonment. The only qualification of her right to enjoy the rents and profits of the homestead during her natural life, contained in this section of the Constitution, is, "if the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right." Here there are children, and she had no separate homestead in her own right at the time of the death of her husband. In such a case the acquisition of a homestead in her own right, after the death of her husband, does not constitute an abandonment of her husband's homestead so as to deprive her of the rents and profits thereof during her natural life. As was said in the case of *Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A, 999: "It is the settled policy of this court that homestead acts are remedial, and should be liberally construed to effectuate the beneficent purposes for which they are intended." And in the case of *Colum.* v. *Thornton,* 122 Ark. 287, 183 S. W. 205, this court said:

"Our Constitution gives the homestead to the widow for life, without any restrictions. It is the settled policy in this State that laws pertaining to the homestead right of the widow and minor children shall be construed liberally in favor of the homestead claimants." In this same case the court further said: "Upon the death of her first husband, a life estate vests in her in his homestead, and she has the right to lease it and receive the rents from it, subject, of course, to the rights of her minor children to share same with her until each of them arrives at the age of twenty-one years; and we do not think she forfeits her homestead by a second marriage and removal to the homestead of her second husband."

Again, in the same case, it is said:

"The general rule is that a remarriage by a widow will not operate to destroy the homestead character of a home left to her and her children by a former husband. Our Constitution does not require a widow to occupy the homestead. There is nothing in it to indicate that the framers intended that the marriage of a widow and her going to her second husband's homestead and occupying it with him should work a forfeiture of her previously existing legal rights. In short, there is nothing in our Constitution to indicate that the right of homestead of a widow should terminate, should she remarry and go to live with her husband on his homestead; and we do not think such an act on her part destroys the homestead character of a then existing homestead of herself and her children by her former husband."

The effect of this holding is that a widow does not destroy her homestead right in her husband's estate by the acquisition of another home in her own right, for her own conveniences and purposes and that of her minor children. We therefore hold against the contention of appellants in this regard.

The final contention of appellants for a reversal of the case is that there had been an abandonment of the mining operations at and after the death of John Butler, that constitute the leasing thereof by Mrs. Butler practically the same as opening a new mine. This contention must also be decided against appellants. It has been held by this court that coal underlying a homestead is a part thereof, and cannot be sold for the payment of the debts of the decedent's estate, but is protected therefrom the same as the homestead is protected. *Russell* v. *Berry,* 70 Ark. 317, 67 S. W. 864.

The rule with reference to the operation of mines by the life tenant is stated by this court in the case of *Cherokee Construction Co.* v. *Harris,* 92 Ark. 260, 122 S. W. 485, 132 Am. St. Rep. 177, as follows:

"If there were mines already open on the land when the tenant takes the estate, it is not waste to continue to

work them. The offense of waste consists in the first penetration and opening of the soil, and so it has been held that a mine which was opened at the vesting of the life estate or estate for years may be worked by the tenant, even to exhaustion." (Citing cases).

In the more recent case of *Warren* v. *Martin,* 168 Ark. 682, 272 S. W. 367, this court held that the widow was entitled to receive the rents and profits from an oil and gas lease executed on the homestead property in the husband's lifetime, but which was not drilled until after his death, and this ruling was based upon the prior decisions of this court, permitting the life tenant to work open mines. A mine so opened may be worked by the life tenant to exhaustion. *Cherokee Construction Co.* v. *Harris, supra; Lee* v. *Straughan,* 146 Ark. 504, 226 S. W. 171. No new mine was opened on this land by Mrs. Butler, but a new pit on the same vein, and it is immaterial that the mines may have been temporarily abandoned, the only question being, were they opened in the lifetime of the husband? See *Deffenbaugh* v. *Hess,* 225 Pa. 638, 74 A. 608, 36 L. R. A. (N. S.) pp. 1102-1104.

We find no error, and the decree is accordingly affirmed.

HENRY v. GULF REFINING COMPANY OF LOUISIANA.

Opinion delivered July 11, 1927.

1. EJECTMENT—NATURE OF ACTION.—The action of ejectment is a possessory one, and may be maintained in this State in all cases where there is a legal right of possession against one who wrongfully holds possession from the person having the better right.
2. MINES AND MINERALS—EFFECT OF OIL AND GAS LEASE.—Leases providing for the drilling of wells on certain land during a period of five years *held* to give the assignee of the leases exclusive right to possession of the land for exploitation and development of oil therein for the time designated in the leases in accordance with their terms.

3. ESTOPPEL—AFTER-ACQUIRED TITLE.—It is only where a grantor attempts to convey a greater estate in lands than he has a right and title to at the time of conveyance that an after-acquired title passes to the grantee, under Crawford & Moses' Dig., § 1498, and then no greater estate passes than was attempted to be passed in the first instance.
4. EJECTMENT—SUFFICIENCY OF COMPLAINT.—In an ejectment suit, a complaint alleging the assignment of oil and gas leases, and that plaintiff had performed all conditions precedent, and that oil was being produced from the leased lands, having extended the life of the leases beyond the five-year term in the first instance, and that plaintiff was ousted from the possession of the lands by the assignor and others claiming under new leases executed by the landowners, about fifteen days before the expiration of the first year under the first leases, *held* good on demurrer, though no facts were alleged showing performance or compliance with conditions of the leases.
5. PLEADING—INDEFINITENESS OF COMPLAINT.—Where the allegations of a complaint are indefinite and uncertain, rather than insufficient, the defects should be corrected by a motion to make more definite and certain, and not by demurrer.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant brought this suit in ejectment against appellees, claiming the right to the possession of the lands in controversy, under certain mineral leases set out in the complaint. The court sustained a general demurrer to the complaint, and dismissed the action on plaintiff's refusal to plead further, from which judgment this appeal is prosecuted.

The complaint alleged that plaintiff was, on February 1, 1923, the owner, seized and possessed of a leasehold estate under a regular 7/8 commercial oil and gas mining lease covering the lands, describing them, and that defendants jointly and severally and unlawfully entered into and upon said lands, and unlawfully withheld possession thereof from plaintiff; alleged further that the parties to the action claim under a common source of title; that the lands described in the complaint are valuable producing oil and gas lands, with a large number of producing oil and gas wells thereon, and that

defendants had appropriated to their own use and benefit the oil and gas products therefrom, to his damage in the value of $20,000,000; prayed for an adjudication of his title, and that possession of the lands be restored to him, damages for the unlawful ouster, and the value of the gas and oil appropriated by defendants ($20,000,000).

The complaint also alleges that the leases were made by the owners of the lands, naming them (the Murphy lease), on the 7th day of May, 1919, setting them out in full, to L. A. Conyers and Hayes Hunt, lessees, who, on December 13, 1919, assigned the leases to O. B. Henry, appellant, with covenants of general warranty, the assignments also being set out *in haec verba* in the complaint.

The Cook lease was made on the 14th day of May, 1919, and assigned to appellant by L. A. Conyers and Hayes Hunt, the lessees, on December 13, 1919.

Complainant further alleged: "That, after the date of all the transactions and conveyances above set out, and while the rights of plaintiff were still extant, and while his leases and assignments were in full force and effect, and while plaintiff had done and performed all of the things required of him to be done and performed under his contract and assignments, the said L. A. Conyers, one of the plaintiff's assignors and warrantors, for the purpose of making plaintiff's title to said leasehold estate more perfect and complete, did obtain and procure from the said T. C. Murphy, A. B. Cook and M. L. Cook certain other leases covering said property, as hereinafter set out under paragraphs D and E and F."

It then sets out the second leases from Murphy to L. A. Conyers, made on the 22d day of April, 1920, from A. B. Cook, April 8, 1920, and from M. L. Cook, April 28, 1920, and alleges that the estate and rights conferred in the second leases are the same as those conferred and granted by the first leases and assignments thereof, and cover the same property; that both the lessors and lessees are direct grantors and warrantors of plaintiff's title under the first leases; that title under the second leases

passed immediately by estoppel and under the statute, § 1498, C. & M. Digest; "and that, by reason thereof, all estates conferred or conveyed by said second leases inured immediately to the benefit of this plaintiff, and all rights and title thereby conferred vested immediately in this plaintiff, and he at once and immediately became the owner thereof."

The leases are alike, except as to the names of the parties in each of the three suits consolidated for hearing, and expressly provide for the drilling of a test well during the first year of the leases, in accordance with the terms thereof; and that the leases shall become null and void if said test well is not drilled within one year from date, and also require the lessee to drill a well upon the particular tracts leased within two years from date, on pain of forfeiture, unless the lessee shall pay the rental reserved in order to defer the commencement of the second well for another year. It is provided that the leases shall remain in force for a term of five years from their date and as long thereafter as oil and gas, or either of them, are produced from the lands by the said lessees. The lessee binds himself to drill a test well on the lands or some block of the leased territory within the first year and upon the lands described in the particular lease within two years from the date.

About fifteen days before the expiration of the first year, after the leases had been executed and assigned by Conyers to appellant, the landowners executed new leases of the same lands to Conyers, appellant's assignor of the first leases, and appellees are in possession and developing oil on the lands under said new leases.

It was also alleged that appellant was ousted from the possession of these lands on February 1, 1923, by Conyers and the other defendants, which are now wrongfully held and occupied by them for the development and production of oil on the leased lands, to the damage of plaintiff, and that the trespass complained of is joint, affecting all the lands, except certain tracts designated, as to which the Gulf Refining Company was a separate

trespasser, etc., but which should be joined in the action for the joint trespasses of the defendants as to the other property.

In February, 1926, nearly seven years after the execution of the first leases, appellant, O. B. Henry, brought three actions in ejectment against the several appellees herein. General demurrer was filed and sustained, and the plaintiff declined to plead further. The suits were dismissed, from which judgments appeals were taken, and the cases are consolidated for hearing.

F. P. Sizer, Coulter & Coulter and *Gordon Huffmaster,* for appellant.

Gaughan & Sifford, Mahony, Yocum & Saye and *Patterson & Rector,* for appellee.

KIRBY, J., (after stating the facts). The action of ejectment is a possessory action, and may be maintained in this State in all cases where there is a legal right of possession against one who wrongfully holds possession from the person having the better right. *Hill* v. *Plunkett,* 41 Ark. 465; *Ritchie* v. *Johnson,* 50 Ark. 555, 8 S. W. 942, 7 Am. St. Rep. 118; and §§ 3686, 3694, C. & M. Digest. See also *Osborne* v. *Ark. Ter. Oil & Gas Co.,* 103 Ark. 175, 146 S. W. 122.

It is not necessary to determine what estate is conveyed in the minerals in the land described in the mining leases before discovery thereof is made, in order to determine the right to the possession of such lands under a lease from the owner of the lands granting the possession thereof, with the exclusive right to develop and mine for such minerals for a designated period.

The court held, in *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837, that by such a lease an exclusive right to make search for and to mine the discovered product is given to the lessee for a limited time. *Osborne* v. *Ark. Ter. Oil & Gas Co., supra,* and *Kolachny* v. *Galbraith,* 26 Okla. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451.

The leases, as specifically set out and relied upon in the complaint, unquestionably gave the appellant the exclusive right to possession of the lands for exploitation

and development of gas and oil therein for the time designated in the leases in accordance with their terms.

The allegations of the complaint show the making of the leases in the first instance by the owners of the lands to Conyers and Hunt and their assignment to appellant; the making of the second leases of the same lands a few days before the end of the year given in the first leases for the drilling of the well, and at the end of which time it was provided the leases should become void if the test well had not been drilled; the ousting of plaintiff, about three years after the making of the second leases, on February 21, 1923, from possession of the lands, which it was alleged are now unlawfully held and occupied by Conyers and the other appellees, to whom the second leases had been transferred for the development and production of oil on the leased lands by them, and the damages to plaintiff on account thereof.

The execution of these second leases by the owners of the lands to appellant's assignor, even conceding it was sufficiently alleged that the right and estate conveyed thereby inured immediately to the benefit of the plaintiff under the terms of the statute, could have had no effect to convey any further or other right to plaintiff than had already been conveyed under the terms of the first leases in any event, and it was not alleged that the lessors did not have a right to convey the leasehold estates in the first instance, as was done.

It is only in cases where the grantor attempts to convey a greater estate in the lands than he has the right and title to at the time of the conveyance that any after-acquired title passes to the grantee under the terms of the statute, and then no greater estate would pass than that attempted to be conveyed in the first instance.

It is true that the complaint alleges that the plaintiff had performed all the conditions precedent, as required in the leases, and that oil was being produced from the leased lands, which would have, if produced by him, extended the life of the leases beyond the five-year term in the first leases executed, under the express terms

thereof, and, although no facts are alleged showing such performance or compliance with such terms and conditions, and another allegation of the complaint, with the necessary inferences arising from the leases pleaded set out therein, appears to be somewhat in conflict and contradictory of the conclusions alleged, we are of opinion the complaint was not subject to demurrer; the allegations thereof, with the necessary inferences arising from the facts alleged, rendering it indefinite and uncertain rather than insufficient; and the defect should have been corrected by a motion to make more definite and certain rather than by demurrer.

The court erred in holding otherwise, and the judgment is reversed, and the cause remanded with directions to overrule the demurrer, and for such other proceedings as are necessary in accordance with the principles of law and not inconsistent with this opinion.

CONNOR v. BLACKWOOD.

Opinion delivered January 30, 1928.

1. BRIDGES—AUTHORITY OF HIGHWAY COMMISSIONER TO BUILD TOLL BRIDGE.—Where the county court had located a public highway, Acts 1927, c. 104, authorizing the State Highway Commission to construct and operate toll bridges on State highways and to issue bonds for payment, was not invalid within Const., art. 7, § 28, giving the county court exclusive jurisdiction of bridges in the county, since no burden was placed on the county for construction or maintenance of the bridge.
2. COURTS—OBITER DECISION.—A question considered, but which was not before the court, and was unnecessary to the decision of the case, is not binding as authority.
3. HIGHWAYS—JURISDICTION OF COUNTY COURTS.—Const., art. 7, § 28, providing that the county court shall have original exclusive jurisdiction in all matters relating to county roads and bridges, does not apply to State highways.
4. STATUTES—REFERENCE TO OTHER STATUTES BY TITLE.—Acts 1927, c. 104, authorizing the State Highway Commission to construct and operate toll bridges on State highways, which, in §§ 2 and 12, extended the provisions of certain sections of other

acts by reference to their title only, *held* not in violation of Const., art. 5, § 23, prohibiting the extension of provisions of other acts by reference to their title only.

5. CONSTITUTIONAL LAW—TAKING OF PROPERTY WITHOUT COMPENSATION.—A taxpayer seeking to enjoin the State Highway Commission from building a bridge as authorized by Acts 1927, c. 104, on the ground that the act provided for the taking of property for public use without compensation, in violation of the Const., art. 1, § 22, *held* not in position to complain, where he did not claim that his land was about to be taken.

6. STATES—BONDS FOR CONSTRUCTION OF BRIDGE.—Acts 1927, p. 282, authorizing the State Highway Commission to issue bonds for the construction of bridge on State highway, *held* not contrary to Const., art. 16, § 1, providing that the State shall not lend its credit for any purpose.

7. STATUTES—PRESUMPTION AS TO ENROLLED STATUTE.—Where a statute is enrolled, signed by the Governor, and deposited with the Secretary of State, it will be presumed that it was validly enacted under Const., art. 5, § 22, unless the contrary affirmatively appears from the records of the General Assembly.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

E. B. Dillon, for appellant.

Coleman & Riddick, for appellee.

McHANEY, J. Appellant, a citizen and taxpayer, seeks to enjoin the State Highway Commission from building "a toll bridge *on the State Highway* across White River, at or near Augusta, in Woodruff County." This action challenges the constitutionality of act 104 of the Acts of 1927, which authorizes the State Highway Commission "to construct and operate toll bridges on the State Highway system, and to fix the rates and collect the tolls thereon." It is claimed that §§ 1, 3 and 6 of said act are unconstitutional and, for that reason, are void. These sections are as follows:

"Section 1. The State Highway Commission is hereby authorized to construct and operate toll bridges on the State Highway system and to fix the rates and collect the tolls thereon. When the cost of construction has been realized from the tolls, and the bonds issued on any bridge, with interest, are paid in full, and all sums advanced or loaned by the State Highway Commission

are repaid, no further tolls shall be collected, and the use of the bridge thereafter shall be free."

"Section 3. The Commission may acquire the land necessary for approaches to bridges by gift or purchase, or by condemnation in the manner provided by law for condemning rights-of-way by railroad companies in this State, but without the necessity of making a deposit of money before entering into the possession of the property condemned. The cost and expense of acquiring such land and the expense of constructing approaches shall be considered a part of the cost of constructing the bridges."

"Section 6. Before issuing bonds for a toll bridge the Commission shall fix the rates of toll to be collected on such bridge. The Commission may, from time to time, raise or lower the rates, but it shall always maintain rates that will produce sufficient revenues to pay the bonds and interest as they mature and become due, and keep the bridge and its approaches in good repair."

It is further alleged in the complaint that the act is unconstitutional, for two reasons:

1. That it offends against § 28 of article 7, which reads as follows: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes; and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided."

2. That it offends against § 1 of article 16, which reads as follows: "Neither the State nor any city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the present existing indebtedness,

and the State shall never issue any interest-bearing treasury warrants or scrip."

A third ground of complaint made against the validity of the act is that it was not read at length on three different days in each house of the General Assembly, nor were the rules suspended by a two-thirds vote of each house, nor was a vote taken by ayes and nays and the names of the persons voting for and against the same entered on the journal, as provided by § 22 of article 5 of the Constitution.

To the complaint alleging these infirmities in the act, a demurrer was interposed and sustained, and, on appellant's refusal to plead further, his complaint was dismissed for want of equity. From this judgment this appeal is prosecuted.

1. The first contention, that the act is void in that it offends against article 7, § 28, Constitution 1874, for the reason that it deprives the county courts of their exclusive original jurisdiction over roads and bridges, cannot be sustained, as this court has quite recently held to the contrary in *Fulton Ferry & Bridge Co.* v. *Blackwood,* 173 Ark. 645, 293 S. W. 2. It was there held that, since the bridge was to be built on an existing highway laid out by the county court, its jurisdiction had been exercised, and was not invaded by the act of the Legislature authorizing the State Highway Commission to build a bridge thereon. So here, the complaint alleges that the bridge is to be built "on a State Highway," and, when constructed, will be a part of the State Highway. The act in question authorizes the Commission to build it by issuing bonds for its cost, and to charge and collect tolls to repay the bonds, and that, when the bonds have been paid and all sums advanced from the highway fund repaid, it shall be toll-free. It is not contemplated that there shall be any tax on the general public, either for construction or maintenance, and no burden is placed on the county, either for construction, maintenance or supervision. These were substantially the facts in *Fulton Ferry & Bridge Co.* v. *Blackwood, supra,* and we there

held that the jurisdiction of the county court was not invaded.

Moreover, a majority of the court is of the opinion that article 7, § 28, of the Constitution has no application to a State Highway; that the word "county" as used in this section is used in its adjective sense, and therefore modifies the nouns "taxes," "roads," "bridges," "ferries," etc. And that the "original exclusive jurisdiction" conferred on the county courts related solely to county taxes, county roads, county bridges, county ferries, etc; and this idea is strengthened by the concluding sentence of this section, "and in every other case that may be necessary to the *internal* improvement and *local concerns* of the respective counties." Nobody would ever contend that the county courts had anything to do with State taxes. They were given jurisdiction over county taxes. If the word "county" modifies the words "roads," "bridges," and "ferries," as we think is necessarily true, then it follows, as a matter of course, that the exclusive original jurisdiction of the county courts extends only to county roads and county bridges, and that they do not have *exclusive* original jurisdiction over State roads and State bridges.

We do not think the framers of the Constitution had in mind any such stupendous advancement in methods of locomotion and means of transportation as exists today. They did not get a vision of the future of their State, with its citizens traveling entirely across the State over a great State Highway, a distance of three or four hundred miles, in ten or twelve hours. Then, with the means at hand, 50 miles was a hard day's journey. Even so, they did not, in framing the Constitution, deny the right, power and authority of the State to lay out, construct, repair and maintain State highways, and necessarily bridges or ferries thereon. As we said in *Bush* v. *Martineau*, 174 Ark. 214, 295 S. W. 9, "the Constitution of this State is not a grant of enumerated powers to the Legislature, not an enabling, but a restraining act, and that the Legislature may rightfully exercise its powers, sub-

ject only to the limitations and restrictions of the Constitution of the United States and the State of Arkansas." We there quoted from *McClure* v. *Topf & Wright,* 112 Ark. 342, 166 S. W. 174, as follows: "It is not to be doubted that the Legislature has the power to make the written laws of the State, unless it is expressly, or by necessary implication, prohibited from so doing by the Constitution, and the act assailed must be plainly at variance with the Constitution before the court will so declare it." See authorities cited in *Bush* v. *Martineau, supra.*

The cases cited by counsel for appellant and *amici curiae* were cases which came before this court before the State had entered upon such a comprehensive road program, comprising a complete system of State highways throughout the entire State, and the acts of the Legislature of 1927, including the act now under consideration, and act No. 11, commonly referred to as the Martineau Road Law, were not before this court. For instance, take the case of *Bonds* v. *Wilson,* 171 Ark. 328, 284 S. W. 24, where the court said: "The question of the 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." It will be noticed that the court proceeded to decide a question which it states is not before the court. Therefore the conclusion reached was not necessary to a decision of the case, and is *obiter.* Since the State has adopted the policy, as specifically declared in act No. 11 of 1927, § 1, "to take over, construct, repair, maintain and control all the public roads in the State comprising the State highways," and since, as we have seen, § 28 of art. 7 of the Constitution does not, either expressly or by necessary implication, prohibit it from so doing, we conclude that appellant's first contention must be overruled.

Appellant raises certain questions on this appeal that were not raised by the pleadings in the court below;

first, that §§ 2 and 12 of the act under consideration attempt to extend the provisions of certain sections of other acts by reference to their title only, in violation of § 23, art. 5; and second, that the act provides for the taking of private property for public use without just compensation, in violation of § 22, art. 1, of the Constitution. We have examined the argument made, and find it without merit. Appellant does not claim that his land is about to be taken, and is in no position to complain. See *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92, on the first matter.

2. It is next urged that the act offends against § 1, art. 16, of the Constitution, because the Highway Commission is authorized to borrow money and issue bonds to construct bridges. This question has been definitely settled against appellant, with no room for controversy, by many decisions of this court, the latest being *Bush* v. *Martineau, supra,* and the cases cited therein. It would serve no useful purpose to quote from them again, or to repeat the reasoning there set out. Suffice it to say that this act does not offend against the Constitution in this regard.

3. It is finally claimed that this act was not passed in accordance with § 22, art. 5, of the Constitution, already mentioned. We cannot sustain this contention. In *Bush* v. *Martineau* we quoted from *Road Improvement Dist.* v. *Sale,* 154 Ark. 551, 243 S. W. 825, as follows:

"The rule is firmly established in this State 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."

Also we have examined the journal entries, and find the constitutional requirement complied with.

No error appearing, the decree is affirmed.

HART, C. J., concurs in the judgment.

HARDING v. HAGLER.

Opinion delivered January 30, 1928.

1. MORTGAGES—EFFECT OF REISSUANCE OF NOTE.—Under Crawford & Moses' Dig., § 7816 and § 7885, subd. 5, a negotiable instrument may be reacquired by the maker or one of the joint makers before maturity and reissued so as to carry the lien of a deed of trust or mortgage with it.
2. MORTGAGES—ACCELERATION CLAUSE.—The acceleration clause contained in notes and deed of trust is a privilege which the holder alone could exercise at its election, and on reacquisition of notes and deed by one of the joint makers after one of the notes was past due, the holder of the second lien could not assert the benefit of the acceleration clause to defeat the priority of the lien of the assignee as taking after maturity.

Appeal from Pulaski Chancery Court; *Frank H. Dodge*, Chancellor; reversed.

Carmichael & Hendricks, for appellant.

Charles W. Mehaffy and *John E. Miller*, for appellee.

McHANEY, J. On May 11, 1923, appellees sold to Clem A. Schaer lot one (1), block thirteen (13), Kimball's South Park Addition to the city of Little Rock, for a consideration of $12,000, $5,500 of which was in cash and $6,500 evidenced by one note signed by said Schaer, having an accelerating clause providing that the whole amount of the note might be declared due on failure to pay any installment of interest thereon. This note was secured by vendor's lien in the deed executed and delivered to Schaer. The cash payment made by Schaer was obtained from the Union Trust Company by the execution of ten notes by said Schaer and his wife, Ethel F. Schaer, nine for the sum of $100 each, and one for the sum of $5,100, all being dated May 11, 1923, the first of said $100 notes becoming due December 1, 1923, and one $100 note due each six months thereafter, and the note for $5,100 becoming due June 1, 1928, and all of said notes being secured by deed of trust on said property. These notes were identical in form, and all contained the following clause: "This is one of ten notes of even date aggregating $6,000, all equally secured and all of which

shall become payable at election of holder upon default in payment of principal or interest of any of them."

The deed of trust executed by Mr. and Mrs. Schaer contained the following provisions:

"Said parties of the first part (Clem A. Schaer and Ethel F. Schaer) are justly indebted unto the said party of the third part (Union Trust Company) in the principal sum of $6,000, gold coin of the United States of America, being for a loan thereof made by the said party of the third part to the said parties of the first part, and payable according to the tenor and effect of the principal notes of Clem A. Schaer and Ethel F. Schaer." Also: "But, if default be made in the payment of said principal or interest notes, or any of them, or any renewals or extensions thereof, when the same may become due and payable, according to the tenor and effect thereof, * * * the whole of said indebtedness herein secured shall, at the election of the party of the third part, or the legal holder or holders of the indebtedness herein secured, become and be considered due and payable, as if due and payable according to the tenor thereof."

The lien retained in the deed from appellant to Schaer was waived in the face of the instrument in favor of the notes and deed of trust to the Union Trust Company in the sum of $6,000. The $5,100 note heretofore described had interest coupons attached thereto maturing every six months, and these coupons were signed only by Clem A. Schaer. The notes due December 1, 1923, and June 1, 1924, were duly paid. In October, 1924, Clem A. Schaer died. The note becoming due December 1, 1924, was not paid at maturity, but on December 11, 1924, Mrs. Schaer took up this note and all the remaining notes in the hands of the Union Trust Company, and it made the following indorsement on each of said notes:

"For value received, we hereby sell and assign to Ethel F. Schaer, or order, all our interest in the within bond and all our rights under the mortgage securing the

same, without recourse. Union Trust Company, agent, by E. J. Bodman."

And on the same date the following indorsement was made on the margin of the record of the deed of trust securing said notes:

"Note of $100 due December 1, 1923, and note of $100 due June 1, 1924, having been paid, for value received the remaining notes, aggregating $5,800, together with the lien of this instrument and all rights hereunder, are hereby assigned to Ethel F. Schaer, without recourse. This 11th day of December, 1924. Union Trust Company, agent, by E. J. Bodman."

Mrs. Schaer thereafter retained said notes until August 10, 1926, when she sold and assigned the same to appellants, J. C. Harding and L. J. Loeb, with similar indorsements on the notes and the margin of the record as had theretofore been made by the Union Trust Company. Interest on the note to appellees was paid by Clem A. Schaer in his lifetime, and, after his death, three installments of interest were paid, two by Joe Schaer, trustee, for Mrs. Clem Schaer, and one by Mrs. Schaer on December 7, 1925, being the last interest payment made. The interest installments due in 1926 not having been paid, appellees exercised the option in their note, declared the whole amount due and payable, and on February 21, 1927, brought suit to foreclose their lien for the whole amount of the note and accrued interest, making Mrs. Schaer and her children and appellants, Harding and Loeb, defendants to this action, in which they prayed a prior and paramount lien upon the property to the lien of Harding and Loeb, on the ground that the reacquisition of said notes by Mrs. Schaer from the Union Trust Company constituted a payment thereof, so far as their second lien was concerned. Appellants, Harding and Loeb, filed an answer and cross-complaint, setting up the facts heretofore stated relative to their acquisition of said paper; that they acquired same in good faith and due course, and that their lien was prior and paramount to the lien of appellees. Under the accelerating clause

contained in said notes they had declared the whole amount thereof due and payable, on which they prayed judgment for a first lien on said property. The court sustained the contention of appellees, entered a decree giving judgment to them for the full amount of their note and interest, and making same prior and paramount to the claim of appellants. It also gave judgment to the appellants for the amount of their notes, with interest, and decreed a foreclosure thereof subject to the lien of appellees. From this judgment against them Harding and Loeb have appealed.

The facts are undisputed, and are substantially as heretofore stated. The question for our determination is, first, whether, on the reacquisition of a negotiable instrument by one of the joint makers before maturity, he may, for a consideration, and before maturity, reissue it after it has become his property; and, second, whether, if such negotiable paper consists of a series of notes with an accelerating clause, providing that the holder may, at his election, declare all subsequent notes due if default be made in the payment of one, and one of such notes is past due at the time of reacquisition, the assignee of such notes from the maker takes them subject to the right of the holder of the second lien to plead payment thereof and thereby make the second lien become the first lien.

Relative to the first proposition, § 7885, C. & M. Digest, subdivision 5, provides: "A negotiable instrument is discharged when the principal debtor becomes the holder of the instrument at or after maturity in his own right." There are four other subdivisions to this same section, but subdivision 5 is the only one applicable to the facts in this case. Mrs. Schaer was a joint maker of these notes, and therefore a principal debtor, and when she became the holder of any one of the notes in controversy, at or after maturity, under this section such notes were discharged. It will be seen from the facts heretofore stated that, at the time she reacquired these notes, one of the $100 notes was past due. It will also be seen that three other of such $100 notes became due in

her possession and before she reissued them. As to these notes there can be no question but what they are discharged. But, at the time she re-negotiated them, there were three of the $100 notes and one $5,100 note unmatured. The first subdivision of the section of the Digest to the effect that an instrument is discharged "by payment in due course by or on behalf of the principal debtor" does not apply because, as to these notes, it cannot be said that her act in having them assigned to her constituted payment, because it was not done in due course, for the reason that these notes were not yet due.

Section 7816, C. & M. Digest, being § 50 of the Negotiable Instrument Act, provides: "Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he is personally liable."

Construing this same section of the Negotiable Instrument Act, the Missouri Appellate Court, in the case of *Arthur* v. *Rosier,* 217 Mo. App. 382, 266 S. W. 737, a case exactly like this on the question now under consideration, except that the husband reacquired and reissued the note before maturity, said:

"The maker of a promissory note, who is *sui juris,* may, for a consideration, before maturity, reissue it after it has become his property, but he cannot enforce payment against any intervening party to whom he was personally liable. Section 836 R. S. 1919; *Sater* v. *Hunt,* 66 Mo. App. 527; *Curry* v. *Lofou,* Mo. App. 163, 113 S. W. 246. In view of the law authorizing the maker to reissue a note that has become his property after its first issue, we hold that Morris occupied the position of an original payee. All parties dealing with this note knew that it was originally secured by a trust deed on the Siloam Springs property."

The Supreme Court of Tennessee had the same question under consideration in the case of *Horn* v. *Nicholas,* 139 Tenn. 453, 201 S. W. 756, and, in construing this same

section of the Negotiable Instruments Law, quoted the English rule stated by Lord Abinger, C. B., in *Morley* v. *Culverwell,* 7 M. & W. 174, 151 Eng. Reprint 727, as follows:

"A bill is not properly paid and satisfied according to its tenor unless it be paid when it is due; and consequently if it be satisfied before it is due, by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it."

Continuing, the court said:

"Mr. Daniel, in the last edition of his Negotiable Instruments (page 914), after quoting the language of the above decision, states that in the first edition he had stated the law to be in accord with the New York or minority rule, but that 'examination of the English authorities, and of the South Carolina case (*White* v. *Williams,* 8 S. C. 290, 28 Am. Rep. 294), has satisfied him of the error, and that the English view is correct.'

"This, we believe, is also the conception of bankers and men of commerce as to the rights of such parties; and it evidently was the one acted upon in the instant case. The doctrine admits of convenient results in practical operation, as the facts of this case manifest. The maker was permitted to keep alive the lien securing the note by being allowed to acquire for reissue; whereas, if the note were to be treated as paid, it would be necessary to create a new lien to secure a fresh note. The Negotiable Instruments Law, it appears, is framed to accord with this view."

The court then refers to § 119 (5) of the Negotiable Instruments Law, which is § 7885, C. & M. Digest, heretofore referred to, to the effect that "a negotiable instrument is discharged when the principal debtor becomes the holder of the instrument at or after maturity, in his own right," and said that this section indicates "that, by acquisition before maturity, a discharge, precluding re-negotiation, does not result." The court then quotes § 50 of the Negotiable Instruments Law, § 7816, C. & M. Digest, heretofore quoted, and says: "The privilege of

acquiring in negotiation and of reissuing is thus broadly in favor of any prior party. And by § 30 (7796, C. & M. Digest), an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof."

We therefore conclude on this point that a negotiable instrument may be reacquired by the maker or one of the joint makers before maturity, and reissued so as to carry the lien of deed of trust or mortgage with it.

On the second proposition it will be noticed that all the notes and the deed of trust had an accelerating clause which provided in substance that, upon default in the payment of any note or the interest thereon, the whole amount then due and unpaid might, at the option of the holder, be declared due and payable. But for this provision in the notes, and/ or deed of trust, no person could have declared them due and payable upon default in the payment of any one, not even the Union Trust Company. This was a privilege accorded the Union Trust Company, or the holder of the notes—any person to whom it might sell or assign them. It was a privilege accorded the holder of the notes by virtue of the contract between the makers and the Union Trust Company, personal to the holder. In other words, it was the privilege of a holder that he could exercise or not at his election, and he alone had the right to elect. It was not a privilege accorded the holder of the second lien, and there are no equities in the case that could extend the privilege to any one but the holder. The authorities cited by counsel for appellee on this question are correct propositions of law, but they are not applicable to this case, as they refer to defenses on the notes themselves in an action by an assignee or subsequent holder against the maker.

These authorities apply as between Mrs. Schaer and Harding and Loeb, but it is a defense available only to the maker or person primarily liable. Certainly the appellees in this case could not interpose a defense peculiarly applicable to Mrs. Schaer which she does not see

proper to interpose or make for herself. We therefore conclude that the fact that one of these notes was past due when Mrs. Schaer reacquired them, and that three others of them fell due in her hands, would not preclude her from re-negotiating the remainder of the notes to the appellants, which carried with them the lien of the deed of trust, and that it continued to be a first lien on the property.

The judgment of the chancery court is therefore reversed, and the cause is remanded with directions to enter a decree foreclosing the lien of appellants on the notes acquired by them before maturity, and declaring it a first lien on the property, and to decree a foreclosure on the note of appellee and declare it to be a second lien on the property. It is so ordered.

MEHAFFY, J., disqualified and not participating.

WOODSON v. STATE.

Opinion delivered January 30, 1928.

1. INTOXICATING LIQUORS—EVIDENCE OF MAKING MASH.—In a prosecution for making mash fit for the manufacture of distilled spirits, evidence based on finding of barrels of mash in defendant's house *held* sufficient to sustain a conviction.
2. CRIMINAL LAW—EVIDENCE OBTAINED THROUGH UNLAWFUL SEARCH.—Evidence of defendant's violation of the liquor law by making mash, obtained by unlawful search of defendant's premises without a search warrant, in violation of State and Federal Constitutions, *held* competent and relevant to prove guilt; the admissibility of evidence not being affected by the illegality of the means by which it was obtained.

Appeal from Lee Circuit Court; *W. D. Davenport*, Judge; affirmed.

F. P. Fitzsimmons and *Griffin Smith*, for appellant.

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

MEHAFFY, J. The appellant, Sidney Woodson, was indicted by the Lee County grand jury on April 7, 1926,

charged with making and fermenting mash fit for the manufacture of distilled spirits, etc.

Z. C. Smith, the sheriff of the county, testified that, acting on information that the defendant was making whiskey, he went to his residence to arrest him, and approached by way of the kitchen, the door of which was open. That there were two fifty-gallon barrels of mash and possibly two or three smaller barrels against the wall of the kitchen.

Appellant objected to this testimony, the objection was overruled, and exception saved.

Witness said the fifty-gallon barrels were full of mash, the kind used for making whiskey; that appellant at that time was fifty or a hundred yards away, cutting corn or cotton stalks. Witness was accompanied by his deputy, Mr. Clay, who started to arrest the defendant. The defendant escaped arrest. Witness had a warrant for defendant's arrest from the time the indictment was returned until the arrest was actually made. Defendant was first arrested "just a short time ago; around four or five weeks ago." Witness did not have a search warrant to search the premises, and did not have a warrant for the arrest of the defendant. The stuff was in the kitchen, and he could not tell what was in the barrels until he went into the house. When the witness saw the mash, defendant was cutting stalks. When they saw what they thought was mash, Clay went out to arrest defendant, and then they went into the house and poured the stuff out and found that it was mash.

On cross-examination witness said he could not tell what was in the barrels until he went into the house. Did not find any whiskey.

The evidence offered by the defendant tended to show that what they found was not mash, and the defendant himself testified that he was out cutting cornstalks, and the first knowledge he had of the presence of the officers was when Mr. Clay came out and asked him if he lived up there. When defendant answered "Yes," Mr. Clay said, "Come on up here." Witness told him all

right, and went down to the lower end, and intended to go back to the house, and looked back, and the deputy had run about 30 or 40 yards with a pistol in his hand. Witness said he did not know who it was, and, for that reason, he ran. He was gone about an hour before he came back. He stayed there, and helped make and plant a crop, and helped pick it. He left home the 7th day of August and came back the 23d of September. He testified that the containers in the house were used for holding slop. That he had purchased some bran and chops from Mr. McClintock; that he had four hogs; that there was no sugar in the mixture, nor syrup.

Appellant contends that the evidence obtained by an unlawful search of his house should have been excluded, and this was the only evidence tending to show that there was mash in the barrels. If this evidence was properly admitted, it was sufficient to justify a verdict of conviction.

A majority of the court is of the opinion that, although defendant's constitutional rights were violated, this court would not take notice of the manner in which witness obtained the evidence; that it was competent and relevant, although obtained in violation of the Constitution of the State of Arkansas and the Constitution of the United States.

Mr. Justice SMITH, Mr. Justice McHANEY and the writer do not agree to this, but they believe, as held by the United States Supreme Court in *Marron* v. *United States,* 275 U. S. 192, 48 S. Ct. 74, 72 L. ed., that the effect of the Constitution is to put the courts in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted with the enforcement of the laws.

But, as we have said, the majority of the judges are of opinion that this case is controlled, so far as the admissibility of this evidence is concerned, by the case of *Benson* v. *State,* 149 Ark. 633, 233 S. W. 758, in which the court said:

"Tisdell made the search without a warrant or other process from any court especially authorizing him so to do. It is insisted therefore that, as the search was illegally made, any evidence of guilt thus discovered was inadmissible in evidence. The authorities are against appellant on this proposition. Without inquiring or deciding what right Tisdell had to search appellant's premises, it suffices to say that the evidence of appellant's guilt thus discovered is not rendered inadmissible because Tisdell may have been a trespasser. * * * For these reasons it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned, it is merely ignored."

The court then cites numerous authorities, including *Starchman* v. *State,* 62 Ark. 238, 36 S. W. 940, 8 R. C. L. 96, 24 R. C. L., § 22, 10 R. C. L., § 97.

It is useless to review the authorities further, the only question being whether evidence obtained by an unlawful search is admissible, and, as a majority of the judges hold that it is, the evidence is sufficient to sustain the verdict, and the judgment is therefore affirmed.

TAYLOR v. ROGERS.

Opinion delivered January 30, 1928.

1. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—A contract for improving a road under the Alexander Road Law (Acts 1915, p. 1400), and Acts 1925, pp. 297, 627, let prior to the Martineau Road Act (Acts 1927, p. 17), could not be abrogated or impaired by the latter act.
2. STATUTES—IMPLIED REPEAL.—To constitute a repeal by implication, there must be such a positive repugnancy between the two

laws that they cannot stand together, and there must be irreconcilable conflict or a substitution of one for the other.

3. HIGHWAYS—LIMITATION ON BOND ISSUES.—Acts 1925, p. 297, removing the 30 per cent. limitation on bond issues for road construction, was not impliedly repealed by Nos. 11, 112, 238 of Acts 1927.

4. BRIDGES—VALIDITY OF CONTRACTS FOR CONSTRUCTION OF BRIDGE.—Contracts of a road improvement district for the construction of bridges on a road forming part of the State Highway System, made subsequent to the Martineau Road Act (Acts 1927, No. 11), *held* void, as that act intended to give the State exclusive jurisdiction of the State Highway System; but contracts relating to improvement of lateral roads not part of the State Highway System are valid and binding.

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

L. P. Biggs, for appellant.

J. T. Coston, for appellee.

McHANEY, J. Appellants are citizens and taxpayers in Osceola & Little River Road Improvement District No. 1 of Mississippi County, and appellees are the board of commissioners of said district. The district was organized some ten years ago by an order of the county court of the Osceola District of Mississippi County, on a petition of property owners in the district, under the act of 1915, commonly known as the Alexander Road Law. Bonds were issued to the extent of 30 per cent. of the assessed value of real property within the district and construction begun, but the sum of money realized from the sale of bonds was insufficient to improve the roads in the district, and at the session of the Legislature in 1925 the limitation of 30 per cent. of the assessed value in the Alexander Road Law was removed by acts Nos. 99 and 215, which authorized the district, on petition of a majority of the property owners in numbers or acres, to issue bonds sufficient to complete the work of improving the roads in the district. Acting under the authority of said act 99, a majority of the property owners petitioned, and the county court made additional orders authorizing the issuance of additional bonds, which were sold and the money used in the construction and improve-

ment of the roads in the district. All of which was done prior to the passage of act 11 of the Acts of 1927, commonly known as the Martineau Road Act. The plans of the district provided for the improvement of the road from Osceola west to Little River, a distance of fifteen miles, and the construction of more than thirty miles of laterals. The main line of the road crosses several drainage canals, and the plans for the work provide for bridges to be built across said canals, which, it is alleged, will cost approximately $42,000. The improvement contemplated on the main line of this road has been completed except the construction of the bridges, and no contract was let for the construction of such bridges prior to the passage of the Martineau Road Act, but a contract has been let therefor since that time. A contract was let prior to the passage of the Martineau Act to construct and improve the laterals, but the work thereunder has not been done, and the district seeks to issue additional bonds to construct and improve such laterals, and it is alleged it will be necessary to issue bonds to the extent of $90,000 in addition to a sum sufficient to build the bridges on the main line to carry out the contract on the laterals, which had already been entered into prior to the passage of the Martineau Act; and, in addition, that it will require at least $75,000 more to improve other laterals within the district, which are necessary to the efficiency of the system of road improvement for which the district was organized. In other words, the district desires to issue additional bonds to raise money for three purposes:

(1) For completing the work of improving the laterals embraced in the contract let prior to the passage of the Martineau Act. (2) For building the bridges on the main line for which contract was let subsequent to the passage of the Martineau Act. (3) For improving the laterals within the district for which contract was let after the passage of the Martineau Act.

The State, under the Martineau Act, has assumed the payment of the bonds heretofore issued by this dis-

trict, and has taken over the main line, the road from Osceola west to Little River, fifteen miles, but has not taken over the laterals, the main line being a part of the State Highway System, but the laterals were not included therein.

By this action appellants seek an injunction against the commissioners of the district to prevent them from issuing any additional bonds for any purpose. Appellees filed an answer, setting up substantially the facts as heretofore stated, to which appellants demurred. On a hearing, the court sustained the demurrer as to the issuance of any additional bonds, except enough to raise funds sufficient to pay for work contracted prior to the passage of the Martineau Act, and perpetually enjoined the road district from issuing any bonds to pay for bridges, or any work not contracted prior to the passage of the Martineau Act. From this judgment both parties have appealed.

The first question raised by counsel for appellant relates to the authority of the district to issue bonds to carry out the contract for the improving of the laterals called for in the original plans, which contract was let prior to the passage of the Acts of 1927. This question must be decided against appellant's contention, as all valid contracts for road construction let prior to the passage of the Martineau Act could not be abrogated or impaired by any action of the Legislature. In *Morgan Engineering Co.* v. *Cache River Drainage Dist.*, 115 Ark. 437, 172 S. W. 1020, this court said:

"It is well settled under our Constitution that the Legislature may not pass an act impairing the obligation of a contract. The board of directors of the drainage district made a valid and binding contract with the engineering company to furnish all the engineering services that would be required in the preliminary surveys, and also for the construction of the ditches required under the terms of the act. Any law passed by the Legislature, the effect of which would be to impair the binding force of

this contract, would be contrary to the Constitution, and void."

It is next insisted by counsel for appellant that act 99 of the Acts of 1925 is impliedly repealed by acts Nos. 11, 112 and 238 of 1927. As already stated, said act 99 removed the limit on the right to issue bonds in this district. It is conceded by appellant that these acts of 1927 do not expressly repeal said act 99. In the recent case of *Cordell* v. *Kent,* 174 Ark. 503, 295 S. W. 404, we said:

"The repealing clause in act 126 does not expressly repeal act 114. It merely recites that all laws in conflict are repealed, and to hold that the one repeals the other we would have to say that there is such a repugnancy in the later act as that the earlier is necessarily repealed, or that the Legislature took up the whole subject-matter anew in the later act and evidently intended to enact the later as a substitute for the earlier, which we cannot do, under the rule announced."

The rule referred to, in substance, is that a statute is repealed by an express provision to that effect, or by necessary implication, and that, where a statute is repealed by implication, there must be such a positive repugnancy between the two laws that they cannot stand together, and that the later statute therefore repeals the earlier; that there must be irreconcilable conflict or substituting one for the other. Without setting out the provisions of act 99 of 1925, and the several provisions of the acts of 1927, we hold that there is no irreconcilable conflict between them, such as would repeal them by implication. See *Baugher* v. *Rudd,* 53 Ark. 418, 14 S. W. 623; *Nemier* v. *Bramlett,* 103 Ark. 209, 146 S. W. 486; *Ward* v. *Wilson,* 127 Ark. 266, 191 S. W. 917; *Jones* v. *Oldham,* 109 Ark. 24, 158 S. W. 1075; *Bank of Blytheville* v. *State,* 148 Ark. 504, 230 S. W. 550.

An examination of the Acts of 1927, however, especially act No. 11, the Martineau Road Act, convinces us that it was the policy of the State, as declared in § 1 of act 11, "to take over, construct, repair, maintain and control all the public roads in the State comprising the

State Highways as defined herein." By § 3 the State undertook the payment of the outstanding bonds issued by road improvement districts issued for the construction of both primary and secondary roads.

Under this paragraph of the act the State has lifted from the shoulders of the taxpayers in this district the burden of all bonds becoming due subsequent to January 1, 1927. And it is further provided, in § 3, that "all roads of the road districts referred to in this section are hereby taken over by the State, but only such portions of said roads which are now or may hereafter be embraced in the State Highway System shall be maintained by the State." In other words, it was the intention of the Legislature that the State Highway Department should assume the bonded indebtedness of road improvement districts, and that thereafter it had exclusive jurisdiction to construct, repair, maintain and control all of the roads comprising the State Highway System. There is no prohibition in the several acts against the building of county roads, or roads not a part of the State Highway System, under the Alexander Road Law, and we do not understand that the Alexander Road Law has been repealed by the provisions of the Acts of 1927. See *Arkansas State Highway Commission* v. *Kerby,* 175 Ark. 652, 300 S. W. 377.

In so far therefore as the roads in Osceola & Little River Road Improvement District No. 1 form a part of the State Highway System, its board of commissioners is without authority or jurisdiction to act or to issue bonds for the purpose of building roads, bridges or any other part of such highway. But as to those laterals or roads embraced in this improvement which do not form a part of the State Highway System, its board of commissioners has the authority, under the acts heretofore referred to, to issue bonds for the completion thereof on compliance with the provision of act 99 of the Acts of 1925. Therefore all contracts which the appellees have made for the construction of bridges on the main line of the road here involved, and which form a part

of the State Highway System, made subsequent to the passage of act No. 11 of the Acts of 1927, were made without authority, and are void. But that all contracts made either prior or subsequent to the passage of the Acts of 1927, relating to the improvement of roads not a part of the State Highway System, are valid and binding, if made in compliance with the law authorizing same.

The result of our views is that the decree of the chancery court will be modified in the manner herein stated, and the case will be reversed, and remanded with directions to enter a decree in accordance with this opinion.

SHULL v. TEXARKANA.

Opinion delivered February 6, 1928.

MUNICIPAL CORPORATIONS—ISSUANCE OF BONDS—VALIDITY OF ELECTION.—In a suit by a property owner to restrain proceedings for the issuance of bonds for erection of a municipal building and the election of taxes therefor, *held* that the election to vote bonds for erecting, equipping and furnishing a municipal building was for a single purpose and the bonds were valid, though the municipal building was to contain an auditorium, a fire station, city hall, courtroom, council chambers, offices for city officials and vaults for records.

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

STATEMENT OF FACTS.

Hubert Shull, a resident and property owner of the city of Texarkana, Arkansas, brought this suit in equity against the city of Texarkana and David Elkins, county clerk of Miller County, Arkansas, to restrain them from proceeding further in issuing bonds for the purpose of erecting a municipal building and in levying a tax to pay bonds pursuant to the provisions of an amendment to our Constitution relating to municipal improvement bonds, purporting to amend § 1, article 16, of the Constitution. Pursuant to the provisions of said amendment the city

council of Texarkana, Arkansas, passed an ordinance for the issuing of bonds for three separate purposes: (a) $300,000 for a municipal building; (b) $10,000 for fire apparatus; (c) $7,000 for street cleaning equipment.

All of the propositions carried at the election. On the proposition of the issuance of bonds in the sum of $300,000 for a municipal building, 709 votes were cast in the affirmative and 502 votes were cast against the proposition.

Section 5 of the ordinance relates to the issuance of bonds for a municipal building, and reads as follows:

"Section 5. The purposes for which such bonds shall be issued are as follows: (a) Three hundred thousand dollars of said bonds shall be issued, and the proceeds shall be used, for the erecting, equipping and furnishing of a municipal building, which shall contain a public auditorium with a maximum seating capacity of fifteen hundred persons; a fire station with not more than three apparatus exits, together with proper quarters to house the central station of the fire alarm system, and proper dormitories for the firemen needed for such station; a city jail equipped with steel cells, and an office for the police force; a chamber for the municipal court and city council; and offices and vaults for the city officials and records. Said building shall be erected on the lots now owned by this city at Third and Walnut Streets, being lots..... The building shall be fireproof throughout; the floors shall be of cement and tile and marble, and it shall be equipped with steam and hot water heat throughout. The frame of the building shall be of concrete and steel and the exterior shall be of brick, terra cotta, stone and algonite."

The court sustained a demurrer to the complaint, and, the plaintiff refusing to plead further, his complaint was dismissed for want of equity. The case is here on appeal.

G. G. Pope, for appellant.

B. E. Carter, for appellee.

HART, C. J., (after stating the facts). At the general election held in this State on October 5, 1926, an initiative petition to enable cities of the first and second classes to issue bonds in certain cases was adopted. The amendment may be found in the Acts of 1927, page 1210, and in Castle's Supplement to Crawford & Moses' Digest of the Statutes of Arkansas, page 22. The bonds involved in this suit were issued under the proviso to § 1 of the amendment, which reads as follows:

"Provided, that cities of the first and second class may issue, by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in the sum and for the purposes approved by such majority at such election, as follows:

"For the payment of any indebtedness existing at the time of the adoption of this amendment; for the purchase of rights-of-way for construction of public streets, alleys and boulevards within the corporate limits of such municipality; for the construction of, widening or straightening of streets, alleys and boulevards within the corporate limits of such municipality; for the purchase, development and improvement of public parks and flying fields located either within or without the corporate limits of such municipality; for the construction of sewers and comfort stations; for the purchase of fire-fighting apparatus and fire-alarm systems; for the purchase of street-cleaning apparatus; for the purchase of sites, for construction of and equipment of city halls, auditoriums, prisons, libraries, hospitals, public abattoirs, incinerators or garbage disposal plants; for buildings for the housing of fire-fighting apparatus; for the construction of viaducts and bridges; and for the purpose of purchasing, extending, improving, enlarging, building, or construction of waterworks or light plants, and distributing systems therefor."

Another section of the amendment which is pertinent to the issues raised by the appeal reads as follows:

"Said election shall be held at such times as the city council may designate by ordinance, which ordinance shall specifically state the purpose for which the bonds are to be issued, and, if for more than one purpose, provision shall be made in said ordinance for balloting on each separate purpose; which ordinance shall state the sum total of the issue, the dates of maturity thereof, and shall fix the date of election so that it shall not occur earlier than thirty days after the passage of said ordinance. Said election shall be held and conducted and the vote thereof canvassed and the result thereof declared under the law and in the manner now or hereafter provided for municipal elections, so far as the same may be applicable, except as herein otherwise provided. Notice of said election shall be given by the mayor by advertisement weekly, for at least four times, in some newspaper published in said municipality and having a *bona fide* circulation therein, the last publication to be not less than 10 days prior to the date of said election."

It will be noted that the amendment provides that the ordinance shall specifically state the purpose for which the bonds are to be issued, and, if for more than one purpose, provision shall be made in said ordinance to ballot on each separate purpose. The ordinance specifies a bond issue of $300,000 for the erecting, equipping and furnishing a municipal building, which shall contain a public auditorium, a fire station, a city hall, a chamber for the municipal court and city council, and offices and vaults for the city officials and records. The ordinance further provides that the building shall be erected at Third and Walnut Streets, on lots owned by the city.

It is earnestly insisted by counsel for the plaintiff that the decree must be reversed because a municipal building containing an auditorium, city jail, a chamber for municipal court and city council, and offices and vaults for city officials and records, constitutes more than one purpose, and that the election was void because, under the terms of the amendment, provision must be made in the ordinance for balloting on each separate purpose.

The design of this provision is to prevent improper measures, which may result from combining a good purpose with a worthless one, where the two subjects have no proper relation to each other, and, if the two are submitted together, the voter cannot vote for one and against the other. Hence the framers of the amendment intended to prevent the joining of one subject to another of a different kind so that each should gather votes for both.

Careful consideration of the subjects mentioned in the ordinance, however, leads us to the conclusion that they were all different parts of a single plan, and, as combined, were so related as to constitute a single purpose. A municipal building was to be erected on lots belonging to the city. The ordinance provided that the building should contain a public auditorium, a fire station, a chamber for the municipal court and city council, a city jail, with an office for the police force, and offices and vaults for the city officials and records. All these matters related to the proper equipment of a city hall for the purpose of administering the city government.

Under the provisions of the constitutional amendment, the majority of the qualified electors might vote for the construction and equipment of city halls, auditoriums, etc. A fire station, a city jail, a chamber for the municipal court and city council, and offices and vaults for the city officials and records, are all manifestly parts of a city hall and are necessary to its proper equipment for municipal administrative purposes. While it cannot be said that a public auditorium is an absolute necessity to the proper administration of the city government, it is useful and necessary, so that the inhabitants of the city may have a place to meet and discuss their municipal affairs. Before voting on the issuance of the bonds for any purpose, the inhabitants would have been likely to congregate together for the purpose of discussing the advisability or feasibility of issuing bonds for the contemplated purpose. The object of erecting a municipal

building, as we have already seen, is to accomplish a single purpose, and that is to properly administer the city government. All the subjects embraced in the ordinance are proper parts of the proposition to accomplish that purpose, and are so related and connected with each other as to constitute one purpose within the meaning of the amendment to the Constitution in question.

It follows that the decree will be affirmed.

JONES v. ADKINS.

Opinion delivered February 6, 1928.

1. STATES—LEGISLATORS AS PARTIES—STAY OF PROCEEDINGS.—Under Crawford & Moses' Dig., § 429, providing for the stay of proceedings in which members of the State Legislature were parties during the session and for fifteen days before and after such session, the term "proceedings" implies action, procedure and prosecution, indicating some steps to be taken or adopted in the prosecution or defense of an action.
2. STATES—LEGISLATORS AS PARTIES—STAY OF PROCEEDINGS.—Where the court had made an order that the action should be dismissed if the plaintiff did not make a deposit for the payment of the fees of the master and give bond as required by the court within ten days, and plaintiff refused to do so, asserting that he was a member of the General Assembly and under Crawford & Moses' Dig., §§ 429, 430, was not required to do so, *held* that no steps were to be taken which required the presence of plaintiff, and no proceedings which required any action on his part, and the order of dismissal was not a proceeding under § 430, which should have been stayed by reason of his membership in the General Assembly.

Appeal from Pulaski Chancery Court; *J. W. House*, Special Chancellor; affirmed.

STATEMENT OF FACTS.

This suit was brought in equity by Arthur J. Jones against Homer M. Adkins, as sheriff and collector of Pulaski County, to require an accounting of all moneys received by him in excess of the salary allowed him under the Constitution and laws of the State. The plaintiff asked that the defendant, Adkins, be required to bring

into court the sheriff and collector's general ledger and cash journal for the years 1923 and 1924, and also any books, papers or other writings relative to the cost of feeding prisoners in the Pulaski County jail for said years.

The chancery court appointed a master to ascertain all fees received by Adkins as sheriff and collector during said years from all sources. On May 19, 1925, it was further ordered that each of the parties to the suit deposit with the clerk of the court one thousand dollars in cash, or a bond for that amount, to guarantee the expenses of said master. The plaintiff refused to comply with the order of the court, and it was adjudged and decreed that no further steps should be taken in the suit until the plaintiff complied with the order of the court. The plaintiff excepted to the ruling of the court, and prayed an appeal to the Supreme Court, which was granted. This court held that the chancery court, under its general discretionary powers to adjust and allot costs, may adopt reasonable rules to protect and secure a master in the payment of the compensation for his services as a necessary part of the costs of the litigation. Therefore the decree of the chancery court was affirmed. *Jones* v. *Adkins,* 170 Ark. 298, 280 S. W. 389. The opinion was delivered on February 1, 1926.

On January 7, 1927, the defendant filed a motion in the chancery court to dismiss the suit because the plaintiff had failed and refused to comply with the order of the chancery court requiring the plaintiff and defendant each to deposit the sum of one thousand dollars with the clerk of the court to defray the expenses of the master. On the same day the plaintiff filed a response to the motion, in which he denied the right of the court to hear the motion, because he was at the time a member of the General Assembly of the State of Arkansas and could not be compelled to attend court. The plaintiff stated in his motion that the General Assembly would convene in three days. Under the order of May 19, 1925, it was ordered by the chancery court that, unless the

plaintiff should deposit the sum of one thousand dollars, in compliance with the order of the court, within ten days, his cause of action should stand dismissed. It was subsequently ordered that the cause of action be dismissed because the plaintiff had failed to comply with the previous order of the chancery court. The case is here on appeal.

Arthur J. Jones, for appellant.

Emerson, Donham & Fulk, for appellee.

HART, C. J., (after stating the facts). The sole ground relied upon by the plaintiff for a reversal of the judgment is that, because he was a member of the Legislature, no order of dismissal could have been made by the chancery court in the case.

Section 429 of Crawford & Moses' Digest provides that the members of the Senate and House of Representatives shall be privileged from arrest during the session of the General Assembly and for fifteen days before the commencement and after the termination of each session. Section 430 provides that all proceedings in suits pending in any of the courts of this State, in which any of the persons named in the preceding section are parties, shall be stayed during the time aforesaid. It is the contention of counsel for plaintiff that the dismissal of the action for the failure to give the bond for costs or to deposit one thousand dollars with the clerk of the court for the payment of the fees of the master, was a proceeding which should have been stayed under the provisions of the statute. We do not think so.

Proceedings, both in common parlance and in legal acceptance, imply action, procedure, and prosecution. Hence it indicates some steps taken or adopted in the prosecution or defense of an action. *Beers* v. *Haughton,* 9 Pet. (U. S.) 329, 9 L. ed. 145.

It is questionable, upon the facts appearing in the record before us, whether there was any proceeding before the court for trial. The court had already made an order that the action should be dismissed if the plaintiff did not make the deposit or give the bond required

by the court within ten days. This the plaintiff not only failed, but refused, to do. At the time the order now complained of was made, he was still refusing to comply with the former order of the court, and did not ask for time in which to comply with it. There was nothing to be done in the case except to enter of record a final order dismissing the case. No step requiring the presence of the plaintiff was necessary. No proceeding was to be taken in the case which required any action on his part or his presence in court. The simple entry of dismissal was not a proceeding in the case which it was the intention of the framers of the statute to stay during the session of the General Assembly and for fifteen days before the commencement of and after the end of it.

Therefore the decree of the chancery court will be affirmed.

YOUNG v. STATE.

Opinion delivered February 6, 1928.

1. CRIMINAL LAW—FORMER ACQUITTAL.—A former acquittal of seduction will not preclude a trial for the killing of an unborn quick child, though the woman involved in each case was the same and the same general testimony might be adduced at the trial.
2. CRIMINAL LAW—IMPROPER ARGUMENT OF PROSECUTOR.—Where, in a prosecution for the killing of an unborn quick child, the prosecuting attorney in his closing argument remarked, "I dare say that everybody within the sound of my voice will say that it is as plain a case as they ever heard," such remark, if error, was harmless, where the court admonished the prosecuting attorney that his remark was improper, and directed the jury to disregard it.

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

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

WOOD, J. Dewey Young was indicted in the Sevier Circuit Court for the crime of killing an unborn quick child. He was tried, convicted, and sentenced by judg-

ment of the court to imprisonment in the State Penitentiary for a period of five years, from which judgment is this appeal.

1. The defendant entered a plea of former jeopardy. The district attorney and the counsel for appellant agree that the following are the facts concerning such plea: "About a year and a half ago the defendant was tried in the Howard County Circuit Court upon a charge of seduction growing out of the same state of facts, and the same witnesses who testified in that case will be used in the trial of this case, and the facts as developed in that case will be approximately the same as will be developed in this case. Upon a trial of the issues in that case a verdict of not guilty was returned by the jury." The trial court ruled correctly in overruling the plea of former acquittal. The statute under which the present indictment was lodged against the appellant provides as follows:

"The willful killing of an unborn quick child by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be adjudged manslaughter." Section 2357, C. & M. Digest.

The above statutory offense is wholly separate and distinct from the offense of seduction as defined in § 2414 of C. & M. Digest. Although the same testimony might be adduced on the trial of the same party for the killing of an unborn child as was adduced at the trial on a charge of seduction, that is not the test, because, as we have stated, the crimes of seduction and killing of an unborn quick child are entirely different. The proof to sustain the one would not sustain the other, and the accused might be acquitted on the one charge and convicted on the other, although the same witnesses testified and the same facts were developed as far as relevant in each of the cases. In a charge of seduction it will be necessary for the State, in order to sustain the charge, to prove that the accused had sexual intercourse with the prosecutrix under an express promise of marriage. But no such proof would be essential to the crime of

killing an unborn quick child, although, in the development of the circumstances of the alleged killing of the unborn quick child, proof of sexual intercourse between the mother and the accused might become competent and relevant testimony. The court therefore did not err in overruling appellant's plea of former jeopardy.

2. There are twenty-three assignments of error in the motion for a new trial. The appellant has not favored the court with a brief arguing these several grounds of his motion, but the Attorney General has made a complete and impartial abstract of the record, and calls to our attention the several grounds of appellant's motion for a new trial. Since this is a felony case, notwithstanding the fact that no brief has been filed for the appellant, we have examined the grounds of his motion for a new trial, and find that the court did not err in overruling such motion. The indictment was valid. It followed substantially the language of the statute. The charge of the court was full, fair, and correct. The rulings of the court on the admission of testimony were likewise correct, and there was evidence to sustain the verdict.

The prosecuting attorney in his closing argument used the following language: "I dare say that everybody within the sound of my voice will say that it is as plain a case as they ever heard." The defendant objected to the remark, and the court admonished the prosecuting attorney that his remarks were improper, and directed the jury to disregard them. The remarks were but the expression of the opinion of the prosecuting attorney. It is not at all probable that a sensible jury would be influenced by such an *ad captandum* argument. It occurs to us that such remarks were not calculated to prejudice the rights of the appellant, but, even if we were mistaken as to this, the admonition by the court that such remarks were improper and directing the jury to disregard them, removed all possibility of any prejudice being created in the minds of the jury against the appellant.

The record presents no new questions in criminal law that would be useful as a precedent, and therefore

we do not discuss all the grounds of the motion for a new trial.

Since there is no error in the rulings of the trial court, its judgment must be affirmed. It is so ordered.

WALBERT v. STATE.

Opinion delivered February 6, 1928.

1. INTOXICATING LIQUORS—TRANSPORTATION.—Evidence *held* to warrant defendants' conviction of unlawfully transporting intoxicating liquors.
2. CRIMINAL LAW—OPINIONS OF NONEXPERTS.—In a prosecution for unlawful transportation of intoxicating liquor, testimony of officers that some of the defendants appeared to have been drinking, *held* admissible as testimony concerning a fact about which a nonexpert might express his conclusion and was not objectionable as mere expression of opinion.
3. INTOXICATING LIQUORS—ADMISSIBILITY OF EVIDENCE.—Where, in a prosecution for unlawfully transporting liquor, officers testified that some of the defendants appeared to have been drinking, it was not error to exclude testimony of defendants that they had been acquitted for the charge of being drunk on a public highway at the time of the arrest, as such testimony involved a collateral issue, and defendants may have been drinking without being drunk.

Appeal from Independence Circuit Court; *S. M. Bone*, Judge; affirmed.

Mrs. Vera Street and *I. J. Matheny*, for appellant.

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

SMITH, J. Appellants were tried and convicted in the court of a justice of the peace upon a charge of transporting intoxicating liquors, and duly appealed to the circuit court, where they were again tried and convicted, and have prosecuted this appeal to reverse the judgment of the circuit court. For the reversal of this judgment they insist that the evidence is insufficient to sustain the verdict, and that the court erred in the admission and in the exclusion of certain testimony.

Three deputy sheriffs testified that they saw appellants in front of a store in Locust Grove, and some of them appeared to have been drinking, and the officers suspected that appellants were transporting intoxicating liquors in the automobile in which they drove out of the village. The officers followed in another car, and saw two or three of appellants leave their car at a place where there was a mudhole in the road and a cultivator near the road. Appellants drove on for about a quarter of a mile, and stopped their car, and the officers overtook them, and searched appellants' car and the weeds around it, but did not find any liquor. The officers then retraced their course, and stopped at the mudhole where appellants had previously stopped. They found a half-gallon jug of whiskey at the edge of a cotton patch about eight feet from the road, and a sack containing some bottles. They crossed the road, and found another half-gallon of whiskey near the cultivator and another sack of bottles.

There was some conflict in the testimony as to the distance the officers were from appellants when they first stopped their car and the distance appellants had driven from that point when they were overtaken by the officers, but these conflicts presented questions for the jury. We think the above testimony warranted the jury in finding that appellants had placed the whiskey found by the officers near the road where appellants' car had stopped, and, if they did this, they had transported liquor within the meaning of the law under which they were convicted.

There was no error in permitting the officers to testify that some of the appellants appeared to have been drinking. This was not a mere expression of an opinion, as appellants contend, but was testimony concerning a fact about which any nonexpert might express his conclusion. *Prewitt* v. *State,* 150 Ark. 279, 234 S. W. 35.

Appellants, testifying in their own behalf, denied that they, or any of them, had been drinking, and they then offered to prove that they they had been arrested for being in a drunken or intoxicated condition on a

public highway on the day in question, and had been acquitted of that charge by a justice of the peace, but the court excluded this testimony.

There was no error in excluding the testimony that appellants had been acquitted of being drunk on a public highway. Such testimony would have involved the trial of a collateral issue. Appellants may have been drinking without being drunk. In the case of *Simmons* v. *State,* 149 Ark. 348, 232 S. W. 597, it was said:

"In *Brooke* v. *State,* 86 Ark. 364, 111 S. W. 471, the court had under review an ordinance of the city of Morrilton which made it a misdemeanor 'for any person to appear in any public street in a drunken or intoxicated condition.' In that case the evidence showed that the defendant was drinking, and he showed some signs of the effect of strong drink, but he was attending to his own business in an orderly manner, and had not lost control of his faculties. The court held that the evidence was not sufficient to sustain the charge, and we approved the following definition of 'drunk' taken from the Standard Dictionary: 'Under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and, commonly, to evince a disposition to violence, quarrelsomeness and bestiality.' Some of the common effects of being under the influence of intoxicating liquor, or drunk, are there given, to-wit: 'A disposition to violence, quarrelsomeness and bestiality.' But these are by no means the only results of exhibitions that may be included in the definition."

The justice of the peace who acquitted appellants on the charge of drunkenness may have concluded that appellants were not "in a drunken or intoxicated condition," as defined in the case from which we have just quoted, but such finding would not have contradicted the testimony of the officers that they thought appellants, or some of them, were drinking. They might have been drinking without reaching a "drunken or intoxicated condition."

We find no error, and the judgment will be affirmed.

MOCO OIL CORPORATION v. HARRIS.

Opinion delivered February 6, 1928.

APPEAL AND ERROR—MOOT CASE.—In an action to cancel certain assignments of royalties in a mining lease, where the record discloses that the plaintiff had assigned all of his rights and interest to a third party, who was not objecting to the assignments sought to be canceled, the questions in the case became moot and will not be determined on appeal.

Appeal from Union Chancery Court, Second Division; *A. L. Hutchins,* Chancellor on exchange; affirmed.

N. A. Cox, Pat McNalley and *Jordan Sellers,* for appellant.

Mahony, Yocum & Saye, for appellee.

HUMPHREYS, J. This is an appeal from the decree of the chancery court of Union County, Second Division, dismissing the complaints for want of equity in the cases consolidated brought by appellant against each appellee for the purpose of canceling certain oil assignments, in the nature of overriding royalties, in an old and gas mining lease covering twenty acres of land in section 5, township 16 south, range 15 west, in said county.

One of the oil assignments sought to be canceled was executed by appellant on the 14th day of July, 1923, by its vice president, William McComb, and its secretary, C. C. Beach, to appellee, City State Bank of Chicago, Illinois, for a valuable consideration for one-fourth of all the oil and gas produced, saved and marketed from said lease until the bank should receive therefrom the sum of $24,000. Cancellation of the oil assignments was sought upon the alleged ground that it was never authorized or ratified by the stockholders or board of directors of appellant, and that it was not within the scope and power of its vice president and secretary to execute same. The prayer of the complaint was in the alternative, that, if the court found the assignment to be valid, it be declared a mortgage for the security of $10,000 alleged to have been borrowed by appellant from said appellee bank, and for an accounting and application of the proceeds of the oil received to the payment thereof.

The other oil assignments sought to be canceled were executed by appellant, acting through the same officers, to Gary G. Harris, by which it conveyed to him, on November 15, 1925, for a valuable consideration, four-sixteenths of the oil and gas produced, saved and marketed from said lease until Harris should receive from the oil and gas the sum of $4,500; and an assignment dated November 21, 1925, in which it conveyed to Gary G. Harris, trustee, for a valuable consideration, seven thirty-seconds of all oil and gas produced, saved and marketed from said lease until he should receive $10,500 therefrom.

The grounds upon which the last two assignments were sought to be canceled are as follows:

(1) Because the assignments were not authorized or ratified by appellant either through its board of directors or its stockholders; (2) that, if the assignments should be upheld by the court, they should be declared mortgages for the security of the loans or advances made to appellant by Gary G. Harris, and declared usurious on account of an exaction of more than ten per cent. per annum for the forbearance; (3) that, if the assignments should be declared loans and not tainted with usury, an accounting should be ordered to the end that the proceeds derived from the oil received should be applied as payments upon the indebtedness.

The appellees in the respective suits filed answers controverting the material allegations in each complaint, and the cause was heard and determined upon the issues joined by the Hon. A. L. Hutchins, chancellor of the Fifth Chancery District of Arkansas, in exchange of circuits with the Hon. G. M. LeCroy, chancellor of the Seventh Chancery District of Arkansas. It is unnecessary to set out the testimony introduced by the respective parties responsive to the issues joined, as it is disclosed by the record that all the questions involved between the parties in these suits are moot. The record reflects that, on the 13th day of February, 1926, appellant herein executed an assignment of the oil and gas mining lease

involved in this controversy to H. M. Harrell in consideration of $32,000 and other valuable considerations, with all rights therein and thereunder, together with all personal property used and obtained in connection therewith and all oil and storage land covered by the lease, at 7 o'clock A. M. February 13, 1926, and covenanted in the assignment that it was the lawful owner of said lease and rights and interests therein and of all property thereon and used in connection therewith, and that it had good right and authority to sell the lease, rights, interest and property, and that they were clear and free from all liens and incumbrances, save and except the lien of a certain deed of trust executed to W. G. Forrest, trustee, dated February 12, 1926, securing the bonded indebtedness of appellant, aggregating $93,794, and save and except all valid oil assignments then of record.

The assignments sought to be canceled in this consolidated suit were of record at that time. Under this transfer to H. M. Harrell, all equities in the property passed out of appellant into him. If the assignments are valid, he bought subject to them, and if they are void, then the oil which was pledged to liquidate them would belong to Harrell and not to appellant. If these three oil assignments were canceled, appellant would not profit thereby, as everything it owned had passed to Harrell, and the profit would go to him. He is the only interested party, and is making no objection to the three assignments sought by appellant to be declared mortgage liens instead of absolute transfers.

On account of all questions involved in the appeal being moot, we refrain from determining them, and on that account affirm the decree of the chancellor dismissing the complaints.

MISSOURI PACIFIC RAILROAD COMPANY v. SLOAN.

Opinion delivered February 6, 1928.

1. APPEAL AND ERROR—EFFECT OF REQUEST FOR DIRECTED VERDICT.—Where, at the conclusion of the testimony, each party requested a directed verdict, they in effect agreed that the question at issue should be decided by the court, and the court's finding in favor of plaintiff was equivalent to a finding of a jury in his favor.
2. RAILROADS—INJURY BY TRAIN—JURY QUESTION.—In a suit against a railroad for negligently killing a dog, evidence of her mangled condition and the fact that she was knocked into a ditch 50 or 60 feet from a railroad track made the question whether she was killed by a train for the jury.
3. RAILROADS—PRESUMPTION OF NEGLIGENCE.—Where a dog was killed by defendant's train, the presumption of negligence arose, which placed the burden on the railroad to show that it had not negligently killed the dog.
4. CONTINUANCE—ABSENT WITNESSES.—In a suit against a railroad for negligently killing a dog, where, on the day of trial, plaintiff named the day and the hours between which the dog was killed, and it was shown that six of defendant's trains passed during the hours named, and that defendant was unable to try the case without the presence of the engineers and firemen operating such trains, it was error to deny the defendant a continuance to secure the attendance of such witnesses.

Appeal from Crawford Circuit Court; *J. O. Kincannon,* Judge; reversed.

Thomas B. Pryor and *Vincent M. Miles,* for appellant.

HUMPHREYS, J. This suit was brought in a justice of the peace court in Crawford County, Arkansas, by appellee against appellant, to recover $75 for the negligent killing of a female dog, on December 23, 1925. Judgment was rendered for said amount against appellant, by default, from which an appeal was duly prosecuted to the circuit court of said county, where the case was set for hearing on March 24, 1927. On March 23, the day before the trial, appellant filed a motion to require appellee to make the complaint more definite and certain, whereupon he amended his complaint to allege that the dog was killed by a westbound train on December 23, 1925, and stated in open court that the dog was killed between

6 o'clock P. M. on the 23d and 6 o'clock A. M. on the 24th of said month. After receiving this information, appellant filed another motion to make the complaint more definite and certain by requiring appellee to designate the train that killed the dog, or to state the time within an hour when the dog was killed, upon the theory that it could not make a defense except at great cost, on account of numerous trains that passed west between the alleged hours.

The court overruled each motion, and exceptions were properly saved to the rulings.

Thereupon appellant filed a motion for a continuance on the ground that six of its westbound trains passed between the hours alleged, and that it would require considerable time to confer with the engineers and firemen operating each train, and, as all lived at a distance, it would require time to secure their attendance as witnesses on the court, and, if present in court, each would testify he was maintaining a constant lookout at the point at which the dog was supposed to have been killed, but neither saw the dog, and that the train operated by him did not kill her. The court overruled the motion for a continuance, over the exceptions of appellant. On the following day the cause was called and tried, resulting in a judgment against appellant, from which is this appeal.

Appellant testified that he loaned two dogs, on December 22, 1925, to a neighbor, one being the dog in question; that the other dog returned on the night of the 23d, but that the dog in question failed to come home; that he found her on the 26th or 27th day of December, lying fifty or sixty feet off the railroad track, down in a ditch beside the track, with marks indicating that she had been knocked down there from the east to the west; that one side of the dog was skinned up, and that blood was running from her mouth and nose; that her fair market value was $100; that the railroad track where she was killed was straight in both directions for a distance of about half a mile. Other evidence was intro-

duced tending to corroborate appellant's testimony with reference to the value of the dog.

At the conclusion of the testimony each party requested the court to direct a verdict in his favor, and asked no other instructions. By doing this they, in effect, agreed that the question at issue should be decided by the court, and the court's finding in favor of appellee was tantamount to a finding of a jury in his favor. *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339.

Appellant contends for a reversal of the judgment upon the alleged ground that there is no substantial evidence in the record showing that the dog was killed by the train. We think the mangled condition of the dog and the fact that she had been knocked from east to west down into a ditch fifty or sixty feet from the track made it a question for the jury to say whether she was killed by the train. Appellant is therefore bound upon this issue by the finding of the court against him. As a result of this finding, a presumption of negligence arose, and the burden was then upon appellant to show that it had not negligently killed the dog. *Mo. Pac. Rd. Co.* v. *Bain,* 170 Ark. 594, 280 S. W. 625.

Appellant further contends for a reversal of the judgment because it was prevented from meeting this burden by the court's refusal to sustain its motion for a continuance. Appellant availed itself of the first opportunity to obtain an allegation as to when the dog was killed, with sufficient definiteness to make a defense. It did not have time thereafter or before the trial to get its witnesses, so the court erred in overruling its motion.

In passing it may be said that appellant alleged as definitely as he knew as to the time the dog was killed, and testified as definitely as he could relative to the date. Appellant could only be required, under the allegations and proof, to bring into court the witnesses who operated its westbound trains between 6 o'clock P. M. on the 23d and 6 o'clock A. M. on the 24th of December, 1925. The expense attached to bringing them into court could not relieve

appellant of the duty to meet the burden by showing that it did not kill the dog, or, if so, that it did not kill her negligently.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

ARKANSAS WESTERN RAILWAY COMPANY *v.* ROBSON.

Opinion delivered February 6, 1928.

CARRIERS—INSTRUCTION AS TO SAFE CARRIAGE OF CATTLE.—Where, under bills of lading, shippers were required to accompany their cattle in shipment, an instruction that the carrier was the insurer of the cattle to destination was erroneous, and in conflict with other instructions requiring the shippers to prove negligence.

Appeal from Scott Circuit Court; *J. Sam Wood,* Judge; reversed.

James B. McDonough, Jr., Josephine R. Brown and *James B. McDonough,* for appellant.

A. F. Smith, for appellee.

HUMPHREYS, J. This is the second appeal in this case. On the first appeal the facts were fully stated, and reference is made to that case for a statement of the facts in the instant case, as the facts were not materially different on a retrial of the cause. *Arkansas Western Ry. Co.* v. *Robson,* 171 Ark. 698, 285 S. W. 372.

The judgment was reversed and the cause was remanded for a new trial because the trial court erred in giving instruction No. 7 at the instance of appellees, which is as follows: "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 on account of the negligence or carelessness of the defendant company." The court, in reversing the judgment, said: "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."

In the instant case the court gave instruction No. 3, at the instance of appellees, which is as follows: "You are instructed that, when a railroad company contracts to receive cattle for transportation as a common carrier, and to safely carry and to deliver the cattle to the place of destination, by virtue of its responsibility it becomes an insurer of the cattle against all loss of every kind, except that caused by the act of God, of the public enemy, of public authority, of the shipper, or from the inherent nature of the cattle."

This instruction erroneously told the jury that, under the bills of lading, appellant was an insurer of the safe carriage of the cattle to their destination. This instruction was inherently wrong and in direct conflict with other instructions which the court gave, admonishing the jury that appellees must prove negligence on the part of appellant in order to recover damages for the cattle killed and injured. The latter instructions could not cure the inherent defect in the former instruction, No. 3, which was in conflict with them.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

NATIONAL UNION FIRE INSURANCE COMPANY v. HALFACRE.

Opinion delivered February 6, 1928.

1. INSURANCE—PROOF OF LOSS.—A notice of a fire given by insured to a local insurance agent having power to issue policies and collect premiums, together with a list of the property lost, *held* sufficient compliance with the requirements of the policy and proof of loss, where the insurer made no complaint until the last day of the period within which the proof could be made.
2. INSURANCE—TIME TO FURNISH PROOF OF LOSS.—Where the insured reported a fire and gave a list of the property destroyed to the

local agent of the insurance company a few days after the fire, and no objection was made that the requirements of insurance policy for proof of loss were not met until the last day in which such proof could be furnished, insured was entitled to further reasonable time to complete the proof of loss.

3. INSURANCE—TIME FOR FURNISHING PROOF OF LOSS.—Where a policy provided that proof of loss should be furnished within 60 days after destruction of the property, the proof was furnished within time when supplied within 60 days after cessation of the fire which consumed the property.

4. INSURANCE—REQUIREMENT THAT INSURED SUBMIT TO EXAMINATION. —The requirement in a fire insurance policy that the insured submit himself for examination under oath does not contemplate such examination after the occurrence of the fire.

Appeal from Independence Circuit Court; *S. M. Bone,* Judge; affirmed.

STATEMENT OF FACTS.

This appeal is prosecuted by the insurance company from a judgment rendered against it for the amount of the loss claimed to be due under its policy issued to appellee, with penalties and attorney's fees.

The answer of the defendant admitted the issuance of the policy to the plaintiff, insuring him in the sum of $550 on household goods and $250 on hay, grain, saddles, etc., in his barn, but denied any liability under the policy, because it had not been furnished with an itemized proof of loss, or any proof of loss at all, within 60 days from the date of the fire, as required by the terms of the policy; denied that the fire which caused the loss occurred on the 29th day of April, 1926, as alleged, and denied the right of plaintiff to maintain his action, because he had refused to submit to an examination under oath, according to the terms of the policy. The amendment to its answer alleged that the purported proof of loss was insufficient, and no such proof of loss as was required under the terms of the policy, setting out the alleged defects.

The testimony shows that the fire which destroyed the property started before midnight on the 26th day of April, 1926, and continued into the morning of the 27th; that appellee notified J. Rich, the agent who wrote and

delivered the policy to him, and was told by the agent that he had notified the company of the loss.

Rich asked him for a list of the property destroyed, and gave him one of his books to make the list on. Witness made the list of the stuff on the book and gave it back to the agent, who said it was all right, that he would notify the company, and an adjuster would be sent to see him, and about a week later Mr. Gumm, the adjuster, came out, and he had the list of property lost that witness had given to the agent. That the adjuster came to see him three times, offered him about one-half the amount witness claimed to have lost, and finally said the proof of loss was not satisfactory, and witness, on June 28, had his attorney to fix up a proof of loss which was sworn to by him and sent to the company by registered mail on that day.

The suit was brought on the 13th day of November, 1926, and appellee, a few days before the trial, on ..... day of ....., 1927, refused, on the advice of his attorney, to undergo an examination under oath by the attorney representing the company in the lawsuit.

The insurance agent admitted that he wrote the policy, and was notified by the insured of the loss, and his record showed that he had notified the company, on April 30, of the loss, which had occurred on April 28, at 12:30 A. M. Said he did not tell insured that he had complied with the terms of the policy, but told him that he had already notified the company of the loss, and received a notice from them that they had turned the claim over to the Southwestern Adjustment Company, and that he either wrote to the adjustment company and received an answer or that the insured brought the adjustment company's letter and showed it to him.

The letter stated that he had not complied with the policy, and witness told him to get up his proof of loss, and he told him that had been done by Mr. Pickens at Newport, and he asked him what else he had to do. Witness told him that he had to furnish a proof of loss, and if he had done that, he did not know of anything else.

Witness turned over to Mr. Gumm of the adjustment company the list of the property destroyed by the fire that was made out by the insured upon the book given him by witness. Did not know who the adjuster was representing.

The case was tried by the court without a jury, and from the judgment the insurance company appealed.

Samuel C. Knight, for appellant.

Fred M. Pickens and *Coleman & Reeder,* for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the local agent of the fire insurance company, having power to issue policies and collect premiums, was notified by the insured that a loss had occurred, and received from him a list of the property destroyed, made out upon a little book furnished by the agent for that purpose; that he notified the company of the loss, and the adjuster had the list of the property furnished the agent by the insured when he first called upon him relative to an adjustment of the loss; that, during the negotiations for a settlement, although complaint was made that the proof of loss was not satisfactory, no refusal to settle was made on that account until the 28th day of June, when a formal verified itemized proof of loss was sent by registered mail to the company.

There was no reason to think that a refusal to adjust the loss or pay the claim would be made until that time, and the court properly held that the insurance company had waived the proof of loss, and that the notice given and the action taken by the insured in furnishing the list of the property lost was a sufficient compliance with the requirements of the policy. *Fireman's Ins. Co.* v. *Hays,* 159 Ark. 161, 251 S. W. 360; *Fireman's Fire Ins. Co.* v. *Mitchell,* 122 Ark. 357, 183 S. W. 770; *National Union Fire Ins. Co.* v. *Wright,* 163 Ark. 42, 257 S. W. 773; *Fireman's Ins. Co.* v. *Bye,* 160 Ark. 212, 254 S. W. 465; *American Ins. Co.* v. *Dannehower,* 89 Ark. 111, 115 S. W. 950.

The proof of loss or list of property destroyed, furnished to the agent of the insurance company a few days after the fire and later found in possession of the adjuster, upon the first of his three visits to make the adjustment, was not refused as a proof of loss meeting the requirements of the insurance policy, nor any such objection made to it as amounted to its refusal as such, until what was thought to be the last of the 60 days provided in which such proof should be furnished. This being the case, the insured was entitled to further reasonable time to complete the proof of loss. *Planters' Mutual Ins. Co.* v. *Hamilton,* 77 Ark. 27, 90 S. W. 283, 7 Ann. Cas. 55.

The undisputed testimony also shows that the fire which destroyed the insured property continued into the morning of the 29th, and the law will not allocate the loss to any particular part of the time, nor consider the property destroyed before the cessation of the fire which consumed it. Such being the case, the itemized verified proof of loss was furnished within the time required by the policy, in any event.

There is no merit in the contention that appellee refused to submit himself for examination under oath, long after the loss had occurred and suit had been filed for the recovery of the amount of the loss under the policy. As said in *Conn. Fire Ins. Co.* v. *Boydston,* 173 Ark. 437, 293 S. W. 730, such clause "did not contemplate such examination after the occurrence of the fire, with subsequent loss."

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

KOONCE v. PIERCE PETROLEUM CORPORATION.

Opinion delivered February 6, 1928.

1. TAXATION—REPEAL OF TAX ON CAPITAL STOCK.—Acts 1925, p. 832, § 2, amending Crawford & Moses' Dig., § 9804, and requiring the Tax Commission to charge and certify to the Treasurer for col-

lection as a franchise tax a certain percentage on a proportion of the subscribed capital stock of corporations represented by property owned and used in business transacted in the State, being free from ambiguity, repeals Acts 1925, p. 692, § 7, requiring the tax on capital stock as represented by property owned and business transacted in the State, since it is in conflict with and repugnant thereto, though both acts were passed by the same Legislature, and approved within a day of each other.

2. TAXATION—TAX ON CAPITAL STOCK.—Under Acts 1925, p. 832, § 2, amending Crawford & Moses' Dig., § 9804, the Tax Department of the State is without authority to charge a corporation a franchise tax on its capital stock as represented by property owned and business transacted in the State, but should have charged same on the proportion of subscribed capital stock represented by property owned and business transacted in the State, as provided by act 271 of 1925.

3. TAXATION—INJUNCTION AGAINST COLLECTION OF EXCESSIVE TAX.—Where the amount of franchise tax tendered by plaintiff corporation was the correct amount that could be charged under Acts 1927, p. 831, no error was committed by the court in permanently enjoining State officials from collecting a greater amount.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

STATEMENT OF FACTS.

This appeal comes from a decree enjoining the State Treasurer and other officials from attempting to collect the franchise tax, $3,362, assessed against the appellee corporation by the Tax Department of the Arkansas Railroad Commission for the year 1927.

The assessment was made upon the franchise tax report of appellee, a foreign corporation authorized to do business in this State, filed on March 23, 1927; and in making it the Tax Department ascertained the percentage of the property valuation used in business in the State, as well as a percentage of the business done in the State, levying a tax upon the property owned and the business transacted within the State. It also figured the non-par value stock at $25 per share, in accordance with § 1, act 376 of 1923, upon the amount ascertained as being the value of the property owned and the business transacted in the State; the rate prescribed by § 7 of the amendatory

act 271 of the Acts of 1925 (11/100 of one per cent.), was charged, producing the amount $3,362.01, reported to the State Auditor as franchise tax for 1927 and by him charged and certified to the State Treasurer, as required by law.

Appellee brought suit in the Pulaski Chancery Court, August 6, 1927, asking for an injunction against the State Treasurer and other officials restraining them from proceeding to collect the franchise tax assessed for said year 1927, which it alleged was levied without authority of law, and that the amount due from it for such franchise tax was only $557.26, which it offered to pay, but the tender thereof was refused.

A temporary order restraining appellant from the collection of more than the sum tendered was made. The appellant's demurrer to the complaint was overruled, and, upon their declining to plead further, a decree was entered permanently enjoining appellants from the collection of more than the amount tendered as franchise tax for said year, and from said decree this appeal is prosecuted.

H. W. Applegate, Attorney General, *Hal L. Norwood,* Assistant, and *Sam M. Wassell,* for appellant.

Malcolm W. Gannaway and *A. Carlyle Gannaway,* for appellee.

KIRBY, J. The only question for determination here is whether appellant should have charged, certified and attempted to collect, as a franchise tax from appellee, for the year 1926, upon the proportion of appellee's capital stock as represented by its property owned and business transacted in this State during the said year, or only to collect, as a franchise tax for said year, the proportion of appellee's capital stock as represented by its property owned and used in business transacted in this State during said year.

Appellants insist that the amended statute authorizing the levying of the franchise tax was inadvertently and by typographical error made to conflict with act 236 of the Acts of 1925, which covers the entire subject of levy

and collection of franchise tax, approved on the 27th day of March, 1925, the day before the amendatory act 271 of the Acts of 1925 was approved, and that said amendatory act should be construed accordingly as not affecting the levying of the franchise tax.

The last act, § 2 of No. 271, amended § 9804, C. & M. Digest, to read as follows:

"That § 9804 of Crawford & Moses' Digest be, and the same is, hereby amended to read as follows: 'Section 9804. Upon the filing of the report provided for in §§ 9802 and 9803 the Commission, from the facts thus reported, and from other facts coming to its knowledge bearing upon the question, shall determine the proportion of the subscribed capital stock of the corporation represented by its property and business in this State on or before July 1, and shall report the same to the Auditor of State, who shall charge and certify to the Treasurer of State, on or before July 10, for collection, as hereinafter provided, annually, from said corporation, in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this State, a tax of eleven one-hundredths of one per cent. each year upon the proportion of the subscribed capital stock of the corporation represented by property owned and used in business transacted in this State.' "

Appellee contends that this act, being in conflict with the former statute, necessarily repeals it, and that the franchise tax must be levied only upon its property owned and used in business transacted in the State; while appellants insist that this last act only repeals act 236 as to the rate of taxation.

Said section of the statute it last amended was § 2, act approved February 15, 1917, which provided a privilege or franchise tax as follows: "* * * A tax of one-tenth of one per cent. each year upon the proportion of the subscribed, issued and outstanding capital stock of the corporation represented by property owned and used in business transacted in this State."

Section 7 of Act 236 of 1925 amends said section of the Digest to require the proportion of the capital stock of the corporation as "represented by its property and business in this State," and charge and certify a franchise tax, in addition to the initial fee provided, "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."

The last act 271 of 1925 requires the Commission to determine the proportion of the capital stock of the corporation "represented by its property and business in this State," and to charge and certify to the Treasurer for collection as franchise tax, in addition to the initial fee, "a tax of eleven one-hundredths of one per cent. each year upon the proportion of the subscribed capital stock of the corporation represented by property owned and used in business transacted in this State."

The Constitution provides that, in amending a law, so much thereof as is amended "shall be reenacted and published at length." The language of this section of the statute, as last amended by said act 271, is plain in its meaning and free from ambiguity, and is obviously in conflict and repugnant to the provisions of said statute as amended by and published at length in said act 236 of the Acts of 1925, which it necessarily repeals.

It is argued forcefully that the Legislature could not have intended, by amending this section of the statute, which was to provide means "for the erection of armories for the units of the National Guard, and for other purposes," as shown from its title, to repeal the law enacted the day before, covering the whole subject of franchise tax, in effect destroying it.

Appellants contend, however, that the rate and percentage of taxation as provided in said last act of the Legislature would have to be applied in the charging and collecting of the franchise tax, but that the provision limiting the charge to the capital stock of the corporation, "represented by property owned and used in business

transacted in this State," although necessarily repugnant to the provision of the said act 236, should not repeal it, but be construed to be rather in harmony with the first act covering the entire subject, both having been passed by the same Legislature and approved within a day of each other. There is no ambiguity, however, in this last act, and the law relating to the levying of the franchise tax, before the amendment by act 236, read exactly as does the last act, and there is no less reason to believe that there was a mistake made in the passage of said act 236, changing the former law, than in the last act 271, changing and amending said act 236, and necessarily repealing it.

It follows that the Tax Department of the State was without authority to charge a franchise tax upon the capital stock, as represented by property owned and business transacted in this State, but should have charged same upon the proportion of the subscribed capital stock of the corporation represented by property owned and used in business transacted in this State, as provided by said act 271 of 1925.

It being conceded that the amount of franchise tax as tendered by appellee was the correct amount that could be charged under said act 271, no error was committed by the court in permanently enjoining the State officials from collecting any other or greater amount than said sum, and the decree is accordingly affirmed.

WESTERN UNION TELEGRAPH COMPANY v. BOWEN-OGLESBY MILLING COMPANY.

Opinion delivered February 6, 1928.

1. TELEGRAPHS AND TELEPHONES — ERROR IN TRANSMISSION OF MESSAGE—DAMAGES.—In an action by a flour milling company against a telegraph company for loss due to the sale of flour pursuant to telegram, for negligence in failing to correctly transmit such telegram, stating the price of a certain brand of flour, plaintiff may recover for loss on other brands, the price

of which was governed by that mentioned, where such loss was the proximate result of the incorrect transmission of the message, and was in contemplation of the parties when the telegram was sent.

2. TELEGRAPHS AND TELEPHONES—DAMAGES FOR INCORRECT TRANSMISSION OF TELEGRAM.—In an action against a telegraph company for negligence in failing to correctly transmit a telegram stating the price of flour, thereby causing loss in sales pursuant thereto, evidence that certain sales resulted in loss of 50 cents per barrel, *held* sufficient to prove damages.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; affirmed.

Francis R. Stark, Rose, Hemingway, Cantrell & Loughborough and *Pryor, Miles & Pryor,* for appellant.

Roy Gean, for appellee.

KIRBY, J. This appeal comes from a judgment for damages resulting from the negligence of the appellant in failing to correctly transmit and deliver a telegram.

The appellee, a flour milling company located in Kansas, and buying and milling wheat purchased there, sent to its distributing agency or office, in the city of Fort Smith, which is a distinct business, purchasing for sale from the Kansas corporation flour manufactured by it as though it had no connection therewith, the following telegram from Independence, Kansas:

"Offer Marathon six seventy basis halves Fort Smith."

The message delivered and received in Fort Smith, read:

"Offer Marathon six twenty basis halves Fort Smith."

It was alleged that the Fort Smith office or agency, acting under the telegram, made sales of 873½ barrels of flour at a loss of 50c per barrel, resulting from the negligent transmission of the telegram; that the employees of the defendant at Independence, Kansas, and its Fort Smith agent, knew that plaintiff's quotations on flour were based on Marathon, and that it used such basis for selling its other brands of flour on the basis of Marathon quotations.

The answer denied any injury or damages by carelessness or negligence of the telegraph company; that the milling company made no sales of flour other than the 52½ barrels of Marathon flour, upon which it admitted it was indebted to the milling company in the sum of $26.25, which it tendered in court in satisfaction of plaintiff's claim; denied that its employees at Independence, Kansas, or Fort Smith, Arkansas, ever knew that the plaintiff's quotations on flour were based on Marathon, and that the defendant or its employees knew that plaintiff used Marathon as a basis for selling other grades or brands of flour upon the basis of Marathon quotations; alleged that the use of Marathon as a basis was a trade secret of the plaintiff, and that its employees had no knowledge that the plaintiff would sell Ambassador flour, or B. & O. flour, or any other commodity except Marathon flour, as a result of the telegram; denied that the milling company lost the sum of 50c per barrel on 873½ barrels, or suffered any loss whatever.

The testimony shows that the agents of the telegraph company knew the milling company was engaged in the manufacture of flour at Independence, Kansas, and selling same through its distributing office at Fort Smith, and also that it manufactured different brands other than Marathon, which they understood was a brand or grade of flour.

The manager of the appellee company testified that the message was not received as it had been given to the defendant, and, acting upon it, he sold 873½ barrels of flour at an average loss of 50c per barrel; 365 barrels at $6.70, 356 barrels at $6.70, 52½ barrels at $6.60, and 100 barrels at $6.95; that, in dealing in flour, the company had a basis Marathon for its quotations, and Ambassador flour is always 30c over Marathon, B. & O. brand the same as Marathon, and Heart of Wheat 30c under; the telegram meant that the flour should be sold at $6.70 per barrel, Marathon basis 98's, the cost of manufacture; and that it was sold at an average loss of 50c per barrel, which only included a selling charge of 10c per barrel. Said that

wheat was bought on the sale of flour, and that it was difficult to make 50c per barrel profit on the manufacture of flour.

One of the agents of the telegraph company stated that she understood that Marathon was a particular grade of flour, and had no information that Marathon was a basis on which other grades of flour could be sold.

The court instructed the jury, which returned a verdict for the full amount claimed, and from the judgment thereon the appeal is prosecuted.

Appellant insists for reversal that it is not liable for special damages, the loss on other brands of flour than Marathon, having had no notice whatever from the telegram or otherwise that other brands of flour might be sold thereunder, resulting in a loss from the negligence in failing to deliver the telegram as sent.

It is true that the answer denied that the telegraph company or its agents had any such knowledge or information, but the undisputed testimony shows that its agents knew the appellee company was manufacturing flour at Independence, Kansas, and selling and distributing it from its office in Fort Smith, Arkansas; also some of them knew that Marathon was a particular brand or grade of flour, and that the company manufactured other brands as well. The message itself showed on its face that it was an offer to sell or a direction to offer for sale flour "Marathon six seventy basis halves Fort Smith," and the telegraph company was thereby apprised of the importance of the message, its relation to a business transaction, and that loss would probably result unless the message was correctly transmitted and delivered, and was sufficient, under the circumstances, to render the company liable for the resultant actual damages. 26 R. C. L., p. 605, § 102; p. 602, § 100.

The damages claimed for actual loss on the sale of all the flour are no more than would have resulted from the sale of Marathon alone on the basis quoted in the telegram as negligently transmitted and delivered, and the damages suffered because of such negligence cannot be

said not to have been the proximate result thereof or not in contemplation of the parties when the message was sent.

Neither is there any merit in the contention that no damages were proved, since the undisputed testimony shows that the sales under the quotation in the telegram resulted in a loss of 50c per barrel over the actual cost of manufacture, the sale of the flour being made at a price of 50c below the actual cost, or a reduction of 50c per barrel below the cost of manufacture and sale.

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

RAMEY v. FLETCHER.

Opinion delivered February 6, 1928.

1. ALTERATION OF INSTRUMENT—EVIDENCE.—Evidence *held* sufficient to justify cancellation of a deed on the ground that defendant had altered it before recording, by making herself grantee, instead of her husband, where defendant failed to produce the original deed.
2. EVIDENCE—PRESUMPTION FROM WITHHOLDING EVIDENCE.—In a suit for cancellation of a deed on the ground that it had been altered so as to name defendant as grantee instead of her deceased husband, defendant's failure, upon request by plaintiffs, to produce the original deed created a presumption that such deed, if produced, would favor the claim of plaintiffs.
3. APPEAL AND ERROR—CHANGE OF THEORY.—In a suit for cancellation of a deed on the ground that defendant altered it to name herself as grantee, instead of her deceased husband, defendant cannot contend for the first time on appeal that she was entitled to reimbursement for money paid in purchasing the land in dispute, where such contention was inconsistent with the theory presented and relied on in the trial court.
4. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—The finding of the chancellor will not be disturbed unless it is against the preponderance of the evidence.

Appeal from Logan Chancery Court, Southern District; *J. V. Bourland*, Chancellor; affirmed.

John P. Roberts and *W. L. Kincannon*, for appellant.

Evans & Evans, for appellee.

MEHAFFY, J. The appellees, plaintiffs below, brought suit in the chancery court of Logan County, alleging that they are the only heirs at law of Joe M. Fletcher, deceased, and that the appellant, who was defendant below, is the widow of the said Joe M. Fletcher, deceased; that defendant, Dave Ramey, is the husband of the said Mary Jane Ramey.

It is alleged that on the 20th day of March, 1905, Joe M. Fletcher and his aunt, Elizabeth Hurston, purchased 165 acres of land in the Southern District of Logan County from one J. S. Cotner. The lands were described, and it was then alleged that, on the 20th day of March, 1905, the said Cotner made, executed, acknowledged and delivered to Fletcher a deed to himself and Elizabeth Hurston, jointly, in which deed Florence Cotner, wife of the said J. S. Cotner, joined, relinquishing her rights of dower and homestead. A copy of said deed is attached to the complaint as an exhibit.

Plaintiffs allege that on the first day of September, 1906, Fletcher and Elizabeth Hurston agreed on a division and partition of said land, and that partition deeds were made carrying out the agreement. It is further alleged that Fletcher did not place the deed from Elizabeth Hurston on the record, and that, after his death, the defendants inserted in the said deed the word "Mrs." before the name of the said J. M. Fletcher, and changed the word "his" to "her" in said deed, and then filed the same for record; that by such forgery the defendants undertook to convey the title to the above described land to the defendant, Mary Jane Ramey.

Mary Jane Ramey and Dave Ramey filed a joint answer, admitting that the plaintiffs were related to Joe M. Fletcher, deceased, as set out in the complaint, and that Mary Jane Ramey was his widow, and that, after his death, she married Dave Ramey. And the answer then denied all of the material allegations in the complaint, and alleged that Fletcher and Elizabeth Hurston purchased the land in Logan County, and that Mary Jane Ramey paid one-half of the purchase price with her

individual money, and that the deed was made jointly to him and Elizabeth Hurston, but that Mary Jane Ramey and Elizabeth Hurston agreed upon a division, and that Elizabeth Hurston executed and delivered to the defendant, Mary Jane Ramey, a deed. She further alleged that she had owned, occupied and possessed said lands, paid the taxes thereon under and by virtue of said deed from the said Elizabeth Hurston, continuously since September 1, 1906, to the present, a period of 19 years. She denied that the defendants, or either of them, had any interest in the lands.

Certified copies of deeds were filed with the pleadings.

The chancellor entered a decree in favor of the plaintiffs, and decreed the cancellation of the deed which was alleged to have been fraudulently altered, and that the heirs of J. M. Fletcher are invested with and hold the title to said lands, subject to the rights of dower and homestead of the widow, Mary Jane Ramey. It is ordered that the defendants pay all the costs. From this decree an appeal was taken to this court.

Appellant, in his brief, states: "The issues before the court then are two issues. First, was the testimony offered by the plaintiffs sufficient to warrant the court in canceling the deed? Second, if it was sufficient to warrant the court in canceling the deed, equity should reimburse the defendant, Mary Jane Ramey, for the money paid by her in purchasing the land in dispute."

The first question, of course, is purely a question of fact. The undisputed proof shows that the deed from J. S. Cotner and wife was made to J. M. Fletcher and Elizabeth Hurston, and not to Mrs. J. M. Fletcher. The partition deed from Elizabeth Hurston was not put on record during Fletcher's lifetime, was in the possession of the defendants, and was placed on record after the death of J. M. Fletcher. The undisputed fact is that J. M. Fletcher did not put either of the partition deeds from Elizabeth Hurston to himself upon the records, and that he died in possession of both of them, and that thereafter

they were in the possession of the defendants. The defendants had the deed, had it placed on record, and then it was lost. At any rate, the defendants did not produce it at the trial. They were requested by the plaintiffs to produce the original deed, which plaintiffs claim was changed by adding "Mrs." before J. M. Fletcher and changing "his" to "her." The fact that Fletcher had possession of the deeds and of the property during his lifetime; that, after his death, they were in possession of the defendants; that defendants placed the deed on record, and were then unable to produce the original deed for examination so that it might appear whether or not there had been a change; and the fact that the original deed from Cotner was to J. M. Fletcher, are all circumstances to be considered in determining whether or not the deed was made to J. M. Fletcher or to Mrs. J. M. Fletcher. These circumstances, together with the other evidence introduced by the plaintiff, when considered with the evidence introduced by the defendant, we think justified the chancellor in finding that the deed had been changed.

W. D. Ramey, the husband of Mrs. M. J. Ramey, testified that he had the land changed on the taxbooks from J. M. Fletcher to M. J. Fletcher, and that up to that time he had never seen the deed. He testified that he had this change made through the advice of his wife. He further testified that later he came across the deed, and took it to the courthouse to be recorded. He testified that he did not change the deed. He admitted, however, that he told Mr. Beck that he understood he could pay the taxes on the land for seven years and get a tax title. He did not remember making any statement to Mr. Friddle. He also testified with reference to his conversation with Beck, that he was not paying the taxes for the purpose of getting a title, but that he was just talking to hear his head rattle, and he did not know what he said it for. Ramey never read the deed, never saw it for a year or two, and did not know what the deed contained. He

did not know that it was his wife's deed; just supposed it was.

Mrs. M. J. Ramey testified that, prior to her marriage with Ramey, she was Mrs. J. M. Fletcher. She said that most of the money paid for the land bought of Cotner was her money; that she paid $450 of her own money, but that her husband had the control of this money prior to the purchase of the land; that, after they purchased it, they divided it, and the partition deed was made to her; that Mr. Ramey never saw this deed until the day he put it on record; during the time from Fletcher's death until the day Mr. Ramey put the deed on record she had this deed, but did not have it put on record; that she told Mr. Ramey to change the land on the taxbooks from J. M. Fletcher to her name, M. J. Fletcher.

Witness could not read. Neither of them could read, but she said that a man named Brown read the deed, and she knew that it was Mrs. J. M. when this man Brown read the deed. She does not know what became of the deed after it was recorded, but thought it was carried back to the bank, and has never seen it since. She had had the money about a year before they bought the land, but her husband had had possession and control of it until the time they purchased the land, and he stated that he paid one-half of the price, $1,200.

As we have said, the circumstances and evidence, when considered together, we think clearly show that the land belonged to J. M. Fletcher, and that the deed was changed after J. M. Fletcher's death and before it was put on record. There is really no satisfactory explanation of what became of the deed after it was recorded. It was, however, in the possession of the defendant, and doubtless, if it had been produced, would have shown conclusively whether or not there had been the change claimed by plaintiffs, and the fact that it was not produced is a circumstance very strongly tending to corroborate the theory of plaintiffs.

"An adverse presumption, usually a strong one, is ordinarily indulged against a party on account of his

non-production of documents. If a party, after having been duly notified to produce books and papers at the trial, fails or refuses to do so, it may be presumed that such failure or refusal is because such books and papers, if produced, would operate against his claim and in favor of the claim of the opposite party. Where a party relies on parol evidence of a fact, instead of producing written evidence thereof in his possession, it ought to require much less evidence to defeat him than if he had no written evidence which he could have produced. And a weak case may be strongly corroborated by the opposite party's failure to produce or account for documents that would remove all doubt. Again, where, after notice and refusal to produce documents, it is shown or admitted that they are under the control of the party, and secondary evidence is given, and such evidence is imperfect, vague, and uncertain, every intendment and presumption is to be made against the party who might remove all doubt by producing the higher evidence." Vol. 10, R. C. L., 889.

"The plaintiff's evidence had tended to show that the defendant, having control of the books and papers called for by the plaintiff, and ordered by the court to be produced, had refused to produce them, in defiance of the order; that the reasons given for their nonproduction were frivolous and derisive; that the defendant and its officers stood before the court in the attitude of men who had spoliated or suppressed evidence. The question is whether the court applied the correct rule of law in the instructions to the jury. * * * This language was used in the charge: 'But you can easily see that, if books are destroyed, if books are hidden, if books are carried away, the power of the court is limited in that respect. * * * But the arm of the law is long enough and strong enough to reach cases of that sort, and when the jury feel, in a civil case, when they are satisfied by a fair balance of proof, fair balance of probabilities, that a party has suppressed books, has hidden books, has kept books away that have been called for, and which it has had notice to produce, then the law says the jury may presume from the absence

of those books and papers against the party called upon to produce them, and not producing them, and in favor of the other party."

Further on the court said: "If you find that the defendant, after being notified to produce books and papers, has failed to do so, you have a right to presume that it is because those books and papers would make against its claim and in favor of the claim of the plaintiff. You can give to that presumption such weight as you think it ought to have." *F. R. Patch Mfg. Co.* v. *Protection Lodge, etc.,* 77 Vt. 294, 60 Atlantic 74.

"Mere withholding or failure to produce evidence, which, under the circumstances, would be expected to be produced, and which is available, gives rise to a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties have a legal interest; but the courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable." Jones on Evidence, vol. 1, 152. See also notes on page 582 of L. R. A. 34.

It cannot be doubted that the deed, if produced, would have shown conclusively whether or not the deed had been changed as alleged by plaintiff. Certainly, if there had not been a change, and if defendant's theory is correct, the production of the deed would have demonstrated this—would have removed all doubt.

Appellant's next contention is that, if the evidence was sufficient to warrant the court in canceling the deed, equity should reimburse the defendant, Mary Jane Ramey, for money paid by her in purchasing the land in dispute. Appellants did not ask this relief in the court below, and this contention is inconsistent with the theory presented and relied on in the court below.

"The appellant did not ask the court below to present to the jury the theory of the case it contends for here. Therefore it cannot complain." *Southern Ins. Co.* v. *Hastings,* 64 Ark. 253, 41 S. W. 1093.

"It is contended by counsel for appellant that there was no evidence at all of correctness of the account sued on. This, however, was not made an issue by the pleadings, and the question cannot be raised here for the first time." *Shinn* v. *Platt*, 82 Ark. 260, 101 S. W. 742.

"It is well settled in this State that a party cannot, on appeal, contend for a theory of the case different from that which was contended for in the trial court." *White Company* v. *Bragg*, 168 Ark. 670, 273 S. W. 7.

It is a well established rule of this court that the finding of the chancellor will not be disturbed unless it is against the preponderance of the evidence.

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

MARTIN v. BOGARD.

Opinion delivered February 6, 1928.

1. CLERKS OF COURTS—DISTRIBUTION OF FUNDS—NEGLIGENCE.—A clerk of court and sureties on his bond are liable for his negligence in not promptly obeying an order for the distribution of a fund paid to him as clerk, which he deposited in bank of which he was director, without order of the court, which bank became insolvent.
2. CLERKS OF COURTS—NEGLIGENCE IN FAILING TO CASH CHECK.—A clerk of court and sureties on his bond are liable for his negligence in not promptly cashing a check drawn by his predecessor in office for a fund paid to him in his official capacity and by him deposited in a bank which became insolvent, without an order of court authorizing such deposit.
3. CLERKS OF COURTS—EXCUSE FOR FAILING TO DISTRIBUTE FUNDS.—In a suit against a clerk of court and the sureties on his bond for negligence in failing to obey promptly an order to distribute a fund in his hands, the clerk is not excused from obeying the order because of a supersedeas bond filed more than 30 days after the order was made, since, under Crawford & Moses' Dig., § 7160, the bond was filed too late to authorize the issuance of supersedeas.
4. APPEAL AND ERROR—TIME FOR FILING SUPERSEDEAS BOND.—Under Crawford & Moses' Dig., § 2160, the clerk was without authority to accept and file a supersedeas bond executed more than 30 days after the judgment had been rendered, or to issue a supersedeas thereon.

5. CLERKS OF COURTS—EFFECT OF ORDER TO DISTRIBUTE FUNDS.—An order of the court directing the clerk to distribute funds held by him in his official capacity, *held* to apply to his successor in office without the necessity for a new order.

6. CLERKS OF COURTS—DEPOSIT OF FUND IN BANK.—A clerk of court who deposits in bank, without authority from the court, moneys which constitute a fund in court, does so at his peril, and will be responsible on his official bond if the bank fails.

7. APPEAL AND ERROR—INEFFECTIVE SUPERSEDEAS BOND.—While a supersedeas bond filed more than 30 days after the judgment is ineffective as a supersedeas bond, it is nevertheless good as a common-law bond, and the sureties are liable thereon for damages sustained by appellees.

8. APPEAL AND ERROR—LIABILITY OF SURETIES ON INEFFECTIVE SUPERSEDEAS BOND.—Where a bank which was one of the distributees of a fund failed to prosecute an appeal from a judgment ordering distribution, the sureties on its ineffective supersedeas bond are liable to the other distributees only for the interest on the fund to which each of such distributees was entitled under the judgment.

9. CLERKS OF COURTS—LIABILITY FOR FAILURE TO DISTRIBUTE FUND.—A clerk of court, though negligent in not promptly obeying an order of court to distribute a certain fund, is not liable to the sureties on an ineffective supersedeas bond for the sureties' liability to certain distributees, because a dissatisfied distributee had not prosecuted an appeal from the order of distribution.

10. BANKS AND BANKING—DISTRIBUTION OF ASSETS OF INSOLVENT BANK.—Distributees of a fund which a clerk of court had deposited in a bank, which became insolvent after taking over another bank which was a distributee, *held* entitled only to the proportionate share of 20 per cent. dividend paid by the Bank Commissioner under order of court, and hence it was error to order a surplus payment on hand to be paid to one of the distributees, since such surplus should have been ordered returned to the Bank Commissioner for distribution among all of the bank's creditors.

Appeal from Cross Chancery Court; *C. D. Frierson,* Special Chancellor; reversed in part.

Mann & Mann, Ogan & Shaver and *Block & Kirsch,* for appellant.

Sivley, Evans & McCadden, Killough, Killough & Killough, and *M. B. Norfleet, Jr.,* for appellee.

McHANEY, J. Appellant R. A. Martin was, until January 1, 1925, and for some years prior thereto, clerk of

the circuit and chancery courts of Cross County, and the appellants R. L. Block and N. B. Martin were the sureties on his official bond. Appellant E. L. Cooper became the clerk of said courts on January 1, 1925, and is now such clerk, and the appellants W. W. Stacy and O. C. Beamon are the sureties on his official bond. In a suit which originated in the circuit court of said county, but which was later transferred to the chancery court, in which the Parkin Home Bank was plaintiff, A. N. Beattie and A. R. Bogard were defendants, and certain insurance companies that admitted liability to said Bogard in the sum of $7,311.19 were garnishees, and appellee F. W. Dewson, doing business as the Shelby County Oil Mill, was intervener, the court made an order, on the 17th day of April, 1924, directing the garnishees to pay said sum to R. A. Martin, as clerk of the court, which they did, and were discharged from any further liability in the case. Martin accepted said sum from the garnishees, and deposited same in the Bank of Parkin, of which he was a director, on April 18, 1924. Thereafter, on the 22d day of September, 1924, the chancery court entered a decree in that cause, by which judgment was given in favor of the Parkin Home Bank against Beattie in the sum of $4,943.45, with interest, against the defendant A. R. Bogard, in the sum of $3,000, with interest at the rate of 8 per cent. per annum from August 4, 1922. In the same suit the intervener, Dewson, recovered judgment against Bogard in the sum of $2,812.70, with interest at the rate of 8 per cent. per annum from April 15, 1924, and it was further decreed that A. R. Bogard recover judgment against the plaintiff, Parkin Home Bank, in the amount of the interest at 6 per cent. per annum from December 17, 1923, on the sum of $7,311.19. And it was further decreed "that R. A. Martin, clerk, from the funds in his hands pay all costs herein accrued, the judgment of F. W. Dewson and the judgment of the Parkin Home Bank against the defendant A. R. Bogard, after first deducting from said judgment of Parkin Home Bank against the defendant, A. R. Bogard, an amount

equal to the interest on the sum of $7,311.19, as stated."

This judgment was rendered on September 22, 1924, as heretofore stated, but was not entered until December 17, 1924. The Parkin Home Bank, not being satisfied with the decree of the court, prayed and was granted an appeal to the Supreme Court, and on December 20, 1924, filed with Martin, as clerk, its supersedeas bond, with R. V. Wheeler, Sidney F. Stallings and R. W. Minnie as sureties thereon. No appeal was prosecuted from this judgment, and the clerk, Martin, did not comply with the order of the court by paying out the funds in his hands, as directed. On January 1, 1925, Martin went out as clerk, and was succeeded by Cooper, and on February 23, 1925, Martin gave his check to Cooper for the full amount of the deposit in the Bank of Parkin.

On January 9, 1924, by direction of the Bank Commissioner, the Parkin Home Bank ceased doing business as a banking institution, and was taken over by the Bank of Parkin, a new institution organized for such purpose, with substantially the same officers and stockholders as the Parkin Home Bank, which purchased all the assets of the Parkin Home Bank, except a list of assets that the Bank Commissioner would not permit to be taken over by the new bank, in the sum of approximately $140,000, for which the Parkin Home Bank executed its note to the Bank of Parkin, and the assets not acceptable to the Commissioner were pledged as collateral to secure the note of the Parkin Home Bank. The Parkin Home Bank was insolvent at the time on account of the paper the Bank Commissioner required to be taken out of the assets. Martin continued to be a director in the Bank of Parkin. Thereafter, on the 23d day of March, 1925, the Bank of Parkin was declared insolvent, and taken over by the Bank Commissioner for liquidation. At the time its doors were closed appellant Cooper had never presented the check given him by Martin for the fund in court, but still held it, without making any effort to collect same or to perform the order of the court in distributing said fund in accordance with the

decree rendered September 22, 1924, and entered December 17, 1924.

So, in August, 1925, appellees Bogard and Dewson brought this suit against all the appellants and all the other appellees, including Sidney F. Stallings, who does not appear to be a party to this appeal, and Loid Rainwater, the then State Bank Commissioner, to recover from them the respective amounts of their judgments as heretofore set out and due them as determined in the prior suit, and which was not paid by reason of the failure of the Bank of Parkin. Neither Martin nor Cooper filed any claim with the Bank Commissioner for the $7,311.19, but later a dividend was paid by the Bank Commissioner, under order of court, to the Cross County Bank, as registrar of the court, in the sum of $1,462.23, which was 20 per cent. of said fund in court, pending determination as to who was rightfully entitled thereto.

The Bank Commissioner answered that, under the terms of the original decree, and of the fund in court deposited in the Bank of Parkin, he was entitled to offset the amount of the judgment in favor of the Parkin Home Bank, which, with interest to the time the Bank of Parkin was taken over by him, amounted to $3,634.70, and which, when taken from the original fund, including interest to said date, amounting to $7,865.62, would leave a balance of $4,241.38, held by him as a general deposit as of said date, on which dividends are payable as made to all creditors of the bank. He further alleged that, on said date, the amount of Dewson's claim, with interest, was $3,024.10, and Bogard's $1,206.82, which latter amount was the balance due Bogard under the terms of the original decree, after paying his indebtedness to the bank, with interest, and taking out the indebtedness due Dewson; that, after paying the 20 per cent. dividend on said respective sums, there was a balance in the hands of the Cross County Bank, as registrar, in the sum of $616.05, which should be paid back to the liquidating agent into the general assets for distribution among the general creditors of the Bank of Parkin.

On a final hearing the court entered a decree in favor of Bogard and against appellants, the two clerks and the sureties on their respective bonds, in the sum of $1,206.82, with interest at 6 per cent. from March 23, 1925; in favor of Dewson against the same appellants in the sum of $3,024.10, with interest at 6 per cent. from March 23, 1925; and in favor of Bogard and Dewson against Minnie and Wheeler for interest on their respective sums due them from the fund in court from the 22d day of September, 1924; and in favor of Minnie and Wheeler against the two clerks and their sureties, the amounts decreed against them in favor of Bogard and Dewson. The court denied the prayer of the Bank Commissioner for the return of $616.05, and ordered the amounts paid to Bogard and Dewson as a dividend on their claims, to be credited therewith, and that the additional sum of $616.05 in possession of the Cross County Bank be paid to Dewson and applied as an additional credit on his claim; that Minnie and Wheeler should pay one-half the costs in this action, and that the two clerks and their sureties should pay the other one-half thereof, and that Minnie and Wheeler should pay all costs in the original action. The court also allowed, as a claim against the Bank Commissioner, the amount due Bogard in the sum of $1,206.82, and the amount due Dewson in the sum of $3,024.10. From this judgment the two clerks and their sureties have appealed, and Bogard and Dewson have taken a cross-appeal against Minnie and Wheeler.

1. As to the liability of the two clerks and their sureties, the lower court found that they were both guilty of negligence in the handling of said fund, and that they were therefore liable to the appellees Bogard and Dewson therefor. We think the court must be sustained in this regard. R. A. Martin, clerk, permitted said sum to remain in the Bank of Parkin from April 18, 1924, until February 23, 1925, at which time he gave a check to Cooper, during all of which time he was a director in the Bank of Parkin, and had been a director in the Parkin Home Bank prior to its failure, and he must have known

of the insolvent condition of the Bank of Parkin at the time of giving this check, and prior thereto. The Bank of Parkin was closed within less than thirty days after giving such check. Cooper was negligent in not cashing said check within a reasonable time after he accepted same, and both were negligent in not distributing the funds to the parties entitled thereto, in compliance with the order of the court. Martin says the reason he did not distribute it was because of the supersedeas bond, and Cooper says the reason he did not cash the check was because he had no order of court to do so. But the filing of the supersedeas bond did not excuse Martin from distributing said funds, for the reason that said bond was filed too late for the clerk to issue a supersedeas thereon, for at that time only the clerk of the Supreme Court could have done so. Section 2160, C. & M. Digest, reads as follows: "Where the appeal is granted by the court rendering the judgment or order, and the bond is executed within thirty days thereafter, before the clerk of such court, the supersedeas shall be issued by such clerk; in all other cases it shall be issued by the clerk of the Supreme Court." Therefore, since the supersedeas bond was filed more than thirty days after the rendition of the judgment, Martin had no authority to accept and file same, or to issue a supersedeas thereon. Hence the filing of the supersedeas bond was no authority for Martin's withholding the distribution of the fund in court. Neither did Cooper require an order of court directing him to cash said check and distribute said fund in accordance with the order of the court, as the fund had not been deposited in the Bank of Parkin by order of the court. It was the voluntary act of Martin in so doing, and was the voluntary act of Cooper in permitting it to remain there after receiving the check from Martin, for the period of time shown here. Cooper was the clerk after January 1, 1925, and the order of the court directing the clerk to distribute the funds applied to him the same as to the previous clerk, after he went into office.

Learned counsel for appellant urgently contend that a clerk who receives custody of private funds under the order of court, and places same in a bank reputed to be solvent, and that later the bank fails and the said fund is lost, without any negligence on the part of the clerk, the clerk and his sureties would not be liable therefor. Several cases from courts of other States are cited to support this principle, but we are of the opinion that this court is committed to the contrary rule. In the case of *State* v. *Watson*, 38 Ark. 96, this court held, quoting the syllabus, which is sustained by the opinion in the case, as follows:

"When money in the control of the circuit court is, by its order, placed in the custody of the clerk, he holds it in his official capacity, and may be punished for contempt for failing to pay it over as ordered by the court, and deprived of his office for malfeasance; and he and his sureties will be liable for it on its official bond to the party entitled to it."

True, in that case, the money had not been deposited in a bank by the clerk, and there is this difference in the facts of the two cases. In that case the court ordered the clerk to pay the money over to the party entitled thereto, which he failed to do, and this court, in discussing the case, commented upon § 4818 of Gantt's Digest, now § 1349, C. & M. Digest, relating to the deposit of funds in court in bank by order of the court. No such order was made in that case, and none was made in this. The clerk, on his own motion, and without any authority from the court, deposited the funds in the Bank of Parkin, a bank of which he was a director, which had taken over a former insolvent bank of which he was a director, and in which the note of the former bank was listed among the assets in the sum of $140,000, and which latter bank failed only a short time more than a year after its organization. See also *Howard* v. *United States* (C. C. A.) 102 Fed. 77.

We therefore hold that, unless the clerk of the court is protected by the order of the court, as provided in

§ 1349 of the Digest, in depositing moneys which constitute a fund in court in a bank, he does so at his peril, and will be responsible therefor on his official bond on failure of the bank. If he desires protection, he should obtain an order of the court directing him to deposit the fund in the bank.

2. The next question for consideration is the liability of the sureties on the supersedeas bond. The lower court held Minnie and Wheeler liable only for the interest on the respective amounts due Bogard and Dewson as of September 22, 1924, with interest thereon from the 23d day of March, 1925, until paid, such amounts being, respectively, $36.85 and $106.40. We think the decree of the court was correct in this regard. The supersedeas bond was filed out of time, and did not become effective as a supersedeas bond, but was good as a common-law bond to pay appellees, Bogard and Dewson, such costs and damages as they might sustain, and the damages sustained would be the interest on the funds to which Bogard and Dewson were entitled, including the costs, which the court adjudged properly. Moreover, even though said supersedeas bond had been effective as such, there could have been no further liability thereon to Bogard and Dewson, as they did not obtain any judgment against the Parkin Home Bank, but only a judgment against the clerk, directing him to distribute the funds in his hands. The bank was dissatisfied with the amount recovered by it in the order of distribution, and was appealing from that order, but not from any judgment of Bogard and Dewson against it. We do not think the appellants are liable to Minnie and Wheeler for these sums adjudged against them.

3. The order of the court directing the Cross County Bank to pay to Dewson the $616.05 held by it was erroneously made. Bogard and Dewson were entitled to the same dividend on their respective claims as the other creditors of the bank. The liquidating agent had deposited a dividend of 20 per cent. on the total fund of $7,311.19, or $1,462.23, in the Cross County Bank, as reg-

istrar of the court, for the benefit of the parties entitled thereto. The claim of Bogard was allowed in the sum of $1,206.82, and the claim of Dewson in the sum of $3,024.10, and 20 per cent. of their respective claims was properly paid to them. The $616.05 left over out of this fund, after paying the correct amount to Bogard and Dewson, should have been ordered returned to the liquidating agent for distribution to all the creditors of the bank. Otherwise, if the order of the court is carried out, Dewson would become a preferred creditor of the bank, which he is not.

We therefore sustain the contentions of the Bank Commissioner on his cross-appeal. The judgment will therefore be affirmed on the appeal and the cross-appeal against Minnie and Wheeler, and reversed on the cross-appeal of the Bank Commissioner and on the judgment against appellants in favor of Minnie and Wheeler, with directions to enter a decree in accordance with this opinion.

NORTHWESTERN RUG MANUFACTURING COMPANY v. LEFTWICH HARDWARE & FURNITURE COMPANY.

Opinion delivered February 6, 1928.

1. EVIDENCE—WRITTEN CONTRACT—PAROL EVIDENCE OF FRAUD.—In actions where the defense is based upon fraud in procurement of the contract, it is competent to show by parol evidence that the execution of the written contract was procured by false and fraudulent representations.
2. APPEAL AND ERROR—WHEN ERROR CURED.—Where the court by specific instructions took a certain issue from the jury, whatever error was committed in admitting evidence upon that issue was cured.
3. EVIDENCE—FORMER TESTIMONY OF ABSENT WITNESS.—It was not error to permit a witness to testify as to the substance of the testimony of another witness out of the State at the time of trial, given before a justice of the peace on a former trial.
4. APPEAL AND ERROR—REVIEW OF TESTIMONY—ABSTRACT.—An assignment of error as to testimony of a certain witness is not reviewable, where the testimony was not abstracted so as to inform the court of the ground of complaint.

Appeal from Logan Circuit Court, Southern District; *J. O. Kincannon,* Judge; affirmed.

W. H. Dumblazier, for appellant.

Evans & Evans, for appellee.

McHANEY, J. Appellant sued appellee in the justice court of Logan County for $87.65 on an order given by appellee to appellant for rugs and pillow tops. On judgment being rendered against it there, appellant appealed to the circuit court, where the case was tried *de novo.* Appellee admitted the execution of the order, but defended on the ground that appellant's salesman practiced a fraud on it in the procurement of the order by agreeing with it that, if it would purchase the goods and execute the order, appellee would become the exclusive agent in Magazine, Arkansas, for the sale of appellant's goods; that said salesman told appellee, before executing the order, that he had not sold any other merchant in Magazine any of said goods, and that he would not do so; that, relying on these representations, it placed the order therefor; that such statements and representations were false and fraudulent, for the reason that said salesman had already sold, and did thereafter, on the same day, sell the same goods to two other merchants in the town of Magazine.

The order which appellee signed contained this clause at the bottom thereof: "Any special terms or agreements with the salesman will not be binding unless specified above."

Witnesses for appellee were permitted to testify, over appellant's objection, that appellant's salesman made the representations heretofore stated, and that appellee would not have executed the order except for these representations and promises.

On the same date on which the order was given, A. M. Leftwich, for appellee, wrote appellant, canceling the order that day given, on the ground that he was not to sell any one else in town, and that he had found that two other sales had been made to other stores, and advis-

ing appellant not to ship the goods, as he would not receive them. Proof of other sales was also made.

The court, over objections and exceptions of appellant, submitted this issue to the jury, under instructions which are not complained of, except on the ground that the evidence admitted and the instructions given for appellee tended to vary the clause in the written contract heretofore quoted. Evidence was also admitted, over appellant's objections, as to the quality of the rugs shipped being different from the samples submitted, but this question was withdrawn from the jury by specific instructions of the court not to consider same. The jury returned a verdict for appellee, hence this appeal.

1. The first assignment of error is that the court erred in submitting to the jury the defense that the order sued on was obtained by fraud. This assignment cannot be sustained. The defense relied on did not vary the terms of the written contract, but, on the contrary, if true, made voidable the whole contract. It related to the matter of inducement to enter into the written contract, and constitutes a good defense to the action. *Keith* v. *Herschberg Optical Co.*, 48 Ark. 138, 2 S. W. 777; *French & American Importing Co.* v. *Belleville Drug Co.*, 75 Ark. 95, 86 S. W. 836, where Judge BATTLE, speaking for the court, said:

"The representation was that plaintiff had not sold any goods of the class contracted for by defendant to any one in the town of Belleville, before the contract sued on was made, when in fact it had already done so. This was one of the material inducements that led to the making of the contract, without which, as shown by the answer, the defendant would not have entered into it. Having been obtained by fraud, it is voidable."

So, in actions where the defense is based upon fraud in the procurement of the contract, it is competent to show by parol evidence that the execution of the contract was procured by false and fraudulent representations, regardless of the fact that the contract is in writing. *Brown* v. *Lemay*, 101 Ark. 95, 141 S. W. 759.

There was therefore no error in the admission of the evidence, or the giving of the instructions in this case.

2. As already stated, the court took from the consideration of the jury the evidence admitted which tended to show that the goods shipped were not in accordance with the samples exhibited. Having taken this question away from the jury, by specific instruction, the court cured any error there might have been in its admission.

3. It is next urged that the court erred in permitting Julian Leftwich to testify to the substance of testimony given by Lee Jones before the justice of the peace in the original trial of this case. Lee Jones had testified before the justice of the peace that he was in business in Magazine, and that he had purchased an order of goods from appellant's salesman, who promised him the exclusive agency of such goods in Magazine. Jones, at the time of the trial in the circuit court, was shown to be out of the jurisdiction of the court, out of the State, and the court permitted Julian Leftwich to testify what Jones had testified to before the justice of the peace. Appellant was represented there by counsel, and cross-examined the witness. There was no error in permitting this testimony.

4. The final assignment of error relates to the testimony of one George Swearingen, with reference to conversations between Julian Leftwich and appellant's salesman, but appellant has not abstracted the testimony of George Swearingen, so as to inform us of the ground of complaint against it.

We find no error, and the judgment is affirmed.

MUTUAL RELIEF ASSOCIATION v. BARTON.

Opinion delivered February 6, 1928.

1. INSURANCE—PAYMENT OF BENEFIT CERTIFICATE.—Where a mutual relief association issued a certificate of membership numbered 683, for $1,000, in which the appellee was named beneficiary, payment being conditioned on the other certificate holders meeting

their assessments, and where, after the holder's death, the association settled the claim with appellee by issuing a check to him in the sum of $500 marked in payment of policy No. 683, a presumption will be indulged that it was in full payment, in the absence of proof to the contrary.

2. INSURANCE—PAYMENT OF BENEFICIAL CERTIFICATE—BURDEN OF PROOF.—In an action against the Mutual Relief Association to recover balance of benefit certificate for $1,000 after receipt of payment of $500 by a check purporting to be in payment thereof, the beneficiary has the burden to show that the check was not intended to be in full payment.

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

John P. Roberts, for appellant.

Pole McPhetridge, for appellee.

McHANEY, J. The Mutual Relief Association issued a certificate of membership to Mary F. Barton, insuring her life, after the expiration of 78 months, in the sum of $1,000, in which the appellee, Basel H. Barton, was named the beneficiary. The payment of $1,000, however, was conditioned upon the prompt and due payment, by all the certificate holders in the circle to which she belonged, of any and all assessments that might be made against them. In other words, the company agreed to pay the beneficiary such a sum as might be realized from an assessment of the members of the circle in which the insured member belonged.

The said Mary F. Barton died after the period of 78 months had elapsed from the date of her policy, in good standing, and it is shown that an assessment was made, from which $250 was realized, and, after deducting the expenses of making the assessment, $20, tendered the balance, $230, to the beneficiary, which was refused. Thereafter, on August 15, 1925, the association settled this claim by issuing a check to appellee in the sum of $500, and there was written on the check that it was issued in the payment "For policy 683 Co. B. Insured: Mary F. Barton." This check was accepted by appellee, and cashed. He thereafter instituted this suit to recover the remaining $500, which he claimed to be due under the policy, and the jury returned a verdict against

appellant and the sureties on its bond in such sum, from which is this appeal.

We think the check was issued and accepted in full satisfaction of all claims and demands arising under the policy, and that the court should have given the peremptory instruction requested by appellant. There is no substantial evidence in the record tending to show that the payment of $500 was in partial settlement of the amount due on the policy, but, on the contrary, the check shows on its face that it was for policy No. 683 on the life of Mary F. Barton. It does not say that it was in partial payment for policy No. 683, and the presumption must be indulged that it was in full payment thereof, in the absence of proof to the contrary, and the burden was on appellee to show to the contrary.

As heretofore stated, there is no substantial evidence in the record tending to show that appellant promised to pay any additional sum. The judgment will therefore be reversed, and the cause dismissed.

SANDERLIN v. STATE.

Opinion delivered February 6, 1928.

1. HOMICIDE—ADMISSIBILITY OF DYING DECLARATIONS.—Where decedent stated, "You had better hurry up and get a doctor, I am dying," and where there was evidence that he was cut to pieces and that he died seven or eight hours after the wound was inflicted, the evidence was *held* sufficient to admit proof that he told witnesses that accused had cut him.
2. CRIMINAL LAW—INSTRUCTION AS TO DYING DECLARATIONS.—In a prosecution for murder, refusal of the court to instruct the jury at the request of accused, that, although the statement of deceased that accused had cut him was admissible as evidence, still it was a question for the jury to determine what weight they should give such testimony, and in determining this question they should take into consideration other statements made at a time when deceased had lost hope of recovery, *held* error.
3. HOMICIDE—ADMISSIBILITY AND WEIGHT OF DYING DECLARATIONS.—It is the province of the court to determine whether a declaration

of a decedent was made under circumstances to justify the court in letting it go to the jury, but its weight is to be determined by the jury.

4. HOMICIDE—INSTRUCTION ON VOLUNTARY MANSLAUGHTER.—Evidence in a prosecution for murder by cutting, *held* not sufficient to warrant giving defendant's requested instruction on voluntary manslaughter.

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

Patrick Henry, for appellant.

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

McHANEY, J. Appellant was indicted, charged with murder in the first degree for the killing of one Harold Robin, by stabbing and cutting him, from which he died a few hours later. On a trial he was convicted of murder in the second degree, and his punishment fixed by the jury at eighteen years in the penitentiary. The facts are substantially as follows:

A party of young people who were boarding with Mrs. Green, in Monticello, went out to the Nelson home, about six miles west of Monticello, on the Wilmar road, to attend a dance, at invitation of Miss Ouida Nelson. A number of them went on a truck. The deceased, with Gertrude and Willie Lassiter, went in a Ford sedan. Appellant, Ed Lane and Basil Boone also attended this dance, without invitation from Miss Nelson, in a Ford roadster. After the dance was over, J. A. Stith, one of the parties on the truck, heard appellant cursing, thought he was referring to him, and they had a difficulty, in which Stith knocked appellant down, and about that time Boone stuck Stith with a knife. The parties on the truck started for home, and, when they had got a short distance down the road, appellant, Lane and Boone passed them in the roadster, and said something about getting them before they got to town. Up until that time the deceased had had no difficulty with appellant or any of the others. As they drove on toward town the truck overtook the sedan in which Robin was riding with the two

young ladies, who had stopped to repair a tire, or to change tires. The boys on the truck assisted Robin in repairing his tire, and, when he had started up, switched on his lights, they saw the Ford roadster stopped in the middle of the road, something like 40 or 50 feet ahead, on a culvert or narrow wooden bridge. According to the State's testimony, when Robin drove up to the roadster, Lane was out of the car, and drew a shotgun on Robin, and Stith says he jumped off the truck and asked Lane not to have any trouble, and that Lane drew the gun on him, which he grabbed, and a scuffle ensued over the gun. While they were tussling over the gun, Stith says Sanderlin ran around the car and stuck a knife in his arm, and that he turned the gun loose and ran something like 25 or 30 yards, crawled through the fence, and got behind a log, where he remained six or seven hours, until after daylight the next morning. He did not see appellant stab Robin.

Jack Fultz testified that, after Stith ran off, deceased was standing to his left, and that Lane and Boone were in front of him, and that it looked to him like appellant ran against Robin, who stepped back two or three steps, dropped to his knees, and that he asked Robin what was the matter with him, and he said "He cut me." Fultz then put Robin in his car, and Handley brought him to town.

Witnesses were permitted to testify, over appellant's objection, to statements made by deceased, in the nature of dying declarations, that Sanderlin had cut him, and it is urged that these statements were not made under a sense of impending death, and therefore inadmissible. We have examined the evidence very carefully on this assignment of error, and find that there was sufficient evidence to sustain the court in overruling appellant's objection on the ground that the declarations were not made at a time when the deceased thought death was impending. Taking into consideration his expression, "If you don't hurry up and get a doctor here, I am dying," "You had better hurry up and get a doctor, I am

dying," and other testimony to the effect that he said he was dying, and was cut all to pieces, together with the nature of the wound, which was a cut in the abdomen, from which his intestines protruded, and the fact that he died some seven or eight hours after the wound was inflicted, we think the court did not err in permitting the witnesses to say that deceased told them that Sanderlin had cut him.

The most serious assignment of error, however, and the one we think calls for a reversal of this case, is the refusal of the court to instruct the jury, on appellant's request, that, although the statements of the deceased, that appellant had cut him, had been admitted in evidence, still it was a question for the jury to determine what weight they should give such testimony, and, in determining this question, they should take into consideration whether the statements were made at a time when deceased had lost all hope of recovery. In *Alford* v. *State,* 161 Ark. 256, 255 S. W. 884, this court said:

"Dying declarations are admitted in evidence by the court upon a *prima facie* showing that they were made *in extremis,* but, notwithstanding their admission in evidence, it is still within the province of the jury trying the case to decide, from the whole evidence and all reasonable inferences therefrom, whether utterances were made under consciousness of impending death. It is error to take this question from the jury."

And in the more recent case of *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643, this court said:

"Under this testimony and the instructions relating to it the jury might have found that Hay had not despaired of hope of recovery; but we do not think this finding was the only one warranted by the testimony. There was a question for the jury, and the testimony was submitted to the jury under proper instructions."

The instructions referred to in this case were not set out by the court, but, on an examination of the instructions given, we find that the exact question now under consideration was submitted by the trial court to

the jury, and they were told therein that, before they could give any consideration to the statement of the deceased as his dying declaration, "it must be shown by the evidence that he was at the time fatally wounded, and made the declaration under apprehension of impending death without expectation or hope of recovery." And they were further told that they must first decide whether the statements made as dying declarations were made under an apprehension of impending death. The instructions given in the Sullivan case are too lengthy to set out in full, but they received the approbation of this court in that case.

The rule therefore with reference to the admissibility of dying declarations is that, in the first instance, it is the duty of the court, on the showing made, to determine whether the declaration was made under such circumstances as to justify the court in letting them go to the jury under proper instructions as to the weight to be given them, and in this respect the court seems to have adopted the same rule applicable to the admissibility of confessions. That is, that the court, in determining the admissibility of a confession, first determines the preliminary question as to whether it was freely and voluntarily made, and, having admitted it, the jury should be instructed that, in determining what weight they should give to the confession, they should first determine whether the confession was made freely and voluntarily. As was said in the case of *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376:

"Now, the court refused to exclude this confession from the jury, but submitted it to the jury upon instructions as favorable as the defendant could ask for, and left it to the jury to determine whether or not the confession was free and voluntary."

We are therefore of the opinion that the court erred in refusing to submit this question to the jury, as requested in instructions G and H, or some similar instructions which have heretofore met with the approval of this court.

Other questions are raised in brief of counsel for appellant, including the refusal of the court to instruct the jury on voluntary manslaughter. We will not enter upon an extended discussion of this assignment, or any others, as they may not arise on another trial. Suffice it to say that we do not think there was sufficient testimony in this record on which to base instruction on voluntary manslaughter. For the error indicated the judgment will be reversed, and the cause remanded for a new trial.

CAMPBELL v. HIGH.

Opinion delivered February 13, 1928.

COUNTIES—CONTRACT FOR CONSTRUCTION OF COURTHOUSE.—In a taxpayers' suit to enjoin the county judge and the courthouse commissioners from proceeding under contract for the construction of a courthouse, the contract having been let pursuant to statute, *held* that the contract was valid and binding in the absence of fraud or collusion between the commissioners and the contractor, as against the taxpayers' contention that the building could be erected for less money.

Appeal from Lonoke Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

Coleman & Riddick and *Pat L. Robinson,* for appellant.

Buzbee, Pugh & Harrison and *Charles A. Walls,* for appellee.

HART, C. J. Appellants, as taxpayers of Lonoke County, brought this suit in equity against E. M. High, as county judge of said county, and certain other persons as courthouse commissioners, to enjoin them from proceeding further in the erection of a courthouse and in the issuance of warrants for the payment thereof. The chancery court found the issues in favor of the defendants, and the case is here on appeal.

In *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389, 41 A. L. R. 782, it was held that a provision of Constitutional

Amendment No. 11, that no county court or other county agent shall make any contract in excess of the revenue from all sources during the fiscal year in which the contract is made, does not forbid contracting for courthouses unless the total cost of construction can be paid out of the revenue of a single year, if payments can be so arranged that the total expenditure of the year shall not exceed its revenues. This holding was reaffirmed in the later cases of *Ivy* v. *Edwards,* 174 Ark. 1167, 298 S. W. 1006, and *Lake* v. *Tatum,* 175 Ark. 90, 1 S. W. (2d) 554.

It is conceded by counsel for the plaintiffs that all the issues raised by the complaint, except one, are settled against them by the decision in the cases just cited. We have examined the complaint, and find that all the issues raised except one have been decided adversely to plaintiffs in these cases, and no useful purpose could be served by restating the issues and again giving our reasons for so holding.

The main reliance for reversal of the decree is that the court erred in not sustaining the following allegation of the complaint:

"Third. That the consideration provided for by the contract was fraudulently fixed at an exorbitant amount to include carrying charges or interest, because of the fact that the consideration is to be paid in warrants maturing in the future over a number of years, instead of in cash. That said contract calls for the payment of $199,500, but that the cost of said courthouse and jail, if paid for in cash, would not exceed the sum of $150,000."

The answer of defendants denies that there was any fraud or collusion entered into between them and the contractor for the construction of the courthouse. They aver that they let the contract at public auction, pursuant to the provisions of the statute, to the lowest bidder, and that the Herman & McCain Construction Company was the lowest bidder of five contractors who submitted bids. The defendants let the contract for the construction of the courthouse to said construction company,

and said construction company proceeded in good faith to comply with their contract for the erection of said courthouse.

In *Stone* v. *Mayo,* 135 Ark. 130, 204 S. W. 752, it was held that, where a contract to build a county courthouse was let to the lowest bidder and there was no evidence of fraud or collusion between the contractor and the courthouse commissioners, there was a valid and binding contract between the parties. In discussing the principles of law governing cases of this sort, the court said:

"That case controls this. Here was a straight contract for the construction of the courthouse for $91,806.90. There was no evidence of any collusion among the bidders to perpetrate a fraud on the court to have the contract let at a higher price because of the depreciated value of the county warrants, nor is there any testimony to warrant the conclusion that the county court entered into a collusion with the contractor to give him the contract at an increased price because the value of the county scrip was less than par. The fact that the bidders made inquiry and ascertained that the value of the county warrants was less than par and made their bid with such knowledge does not establish that there was a collusion between them to stifle the bidding and to defraud the court by securing a contract at a higher price on account of the depreciated value of the county warrants. There is no allegation that the county court, or its commissioner, or the bidder, in securing the contract, were guilty of fraud."

The principles of law announced in that case must govern the present one, there being no proof of fraud or collusion between the commissioners and the contractor. The decree was therefore correct, and will be affirmed.

HARDIN v. TUCKER.

Opinion delivered February 13, 1928.

1. TENANTS IN COMMON—POSSESSION OF ONE TENANT.—The possession of one tenant in common is *prima facie* the possession of all, and the sole enjoyment of rents and profits by him does not necessarily amount to a disseizin.
2. TENANTS IN COMMON—WHEN POSSESSION OF TENANT ADVERSE.—For the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such acts that notice may be presumed.
3. TENANTS IN COMMON—EVIDENCE OF ADVERSE POSSESSION.—Where defendants, owning the record title to a five-ninths interest in land as tenants in common, knew that a tenant in common therein had conveyed his interest to plaintiff and permitted the land to forfeit for taxes in 1908 and knew that plaintiff went into possession in 1909, but made no effort to redeem the land from tax sale, and asserted no right thereto until suit was brought in 1926, a finding that plaintiff acquired title by adverse possession was authorized.

Appeal from Benton Chancery Court; *Lee Seamster*, Chancellor; affirmed.

STATEMENT OF FACTS.

Appellee brought this suit in equity against the appellants to quiet title to 102 acres of land in Benton County, Arkansas. The appellants defended the suit on the ground that they were tenants in common with appellees in the land.

The record shows that J. R. Hardin died intestate, owning the land, in May, 1901. He left surviving him his widow and three children as his only heirs at law. Minnie Lowery, one of these children, conveyed by deed her one-ninth interest in said land to the appellee in November, 1909. About the same time F. M. Hardin, a son of one of the children, who had obtained title to a one-third interest in the land from his mother, conveyed his interest to the appellee. This gave appellee the record title to a four-ninths interest in the land in November, 1909, and appellants had the record title to the remaining five-ninths interest. Appellee went into pos-

session of the land, and has held possession of it ever since, paying the taxes on it and claiming it as his own. The land was forfeited to the State in 1908 for the non-payment of taxes, and in June, 1926, appellee secured a redemption deed from the State to the said land.

The land was very hilly, and had but little commercial value. Very little of it was cleared and in cultivation. Of late years a bathing beach has been established on it by the appellee. Appellee also placed improvements on the land, consisting of a barn and two rooms to the dwelling house, of the aggregate value of $500.

Andrew Hardin, seventy-two years of age, was one of the appellants, and a witness for them. According to his testimony, his father died in 1901, leaving his widow and three children. After their father's death, F. M. Hardin, a grandchild, was permitted to take possession of the land and manage it for the purpose of helping to support his grandmother. The mother of F. M. Hardin conveyed to him her undivided one-third interest in the land.

The chancellor made an express finding of fact to the effect that the appellee had been in the actual and adverse possession of said land for more than seven years, and had obtained title thereto by adverse possession. It was therefore decreed that title to the land should be vested absolutely in appellee, and divested out of appellants. To reverse that decree appellants have duly prosecuted an appeal to this court.

John D. DeBois, for appellant.

Appellee pro se.

HART, C. J., (after stating the facts). In *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958, it was held that, in order for the possession of a tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed. The reason is that the possession of one tenant in common is *prima facie* the possession of all, and the sole enjoyment of rents and profits

by him does not necessarily amount to a disseizin. Hence, for the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such acts that notice may be presumed. *Oliver* v. *Howie,* 170 Ark. 758, 281 S. W. 17, and *Bowers* v. *Rightsell,* 173 Ark. 788, 294 S. W. 21. Tested by this well-settled principle of law, we do not think it can be said that the finding of the chancellor is against the preponderance of the evidence.

The record shows that J. R. Hardin died owning the land, leaving his widow and three children. By some sort of family arrangement, a grandson of J. R. Hardin was put in possession of the land in order to help support his grandmother. He lived with her and supported her, so far as the record discloses, until she died, a few years thereafter. His mother, who owned a one-third interest in the land, conveyed her interest to him, and a child of a sister of his mother conveyed her one-ninth interest to him, so that he became the owner of a four-ninths interest. After his mother died he conveyed his interest to the appellee. None of the other heirs paid any part of the taxes on the land or asserted ownership in it in any way. They knew that their mother had died and that there was no occasion for the grandson to longer remain in the possession of the land for her benefit. They permitted the land to forfeit for taxes in 1908, after their mother had died. Appellee went into possession of the land in November, 1909, and claimed it as his own until this suit was brought, in June, 1926. During all this time appellants made no effort to redeem the land from the tax sale or to assert any rights in it. It is inferable from the record that they knew that F. M. Hardin had conveyed the land to some one, and that his grantee was in possession of it. Under these circumstances we think the chancellor was justified in finding as a fact that appellee had acquired title to the land by adverse possession.

The decree will therefore be affirmed.

PLANTERS' NATIONAL BANK v. LAWRENCE COUNTY BANK.

Opinion delivered February 13, 1928.

1. INSURANCE—ASSIGNABILITY OF POLICY.—The right of action on a fire insurance policy is assignable under the statute.
2. INSURANCE—EFFECT OF ASSIGNMENT OF INSURED'S INTEREST.—An assignment purporting to assign the interest of insured as owner of insured property, subject to the consent of the insurer, made after the property was destroyed by fire, *held* to be an assignment by insured of his right of action against the insurer, regardless of the insurer's consent, and the assignee was entitled to the proceeds paid into the registry of court, as against a creditor of the insured afterwards bringing garnishment proceedings against the insurer.

Appeal from Lawrence Chancery Court, Eastern District; *A. S. Irby*, Chancellor; reversed.

STATEMENT OF FACTS.

It is conceded that the sole issue raised by this appeal is as to whether the appellant or appellees are entitled to the proceeds of an insurance policy for $1,000 paid into the registry of the court for Charles Jones, a debtor of appellant and appellees.

The property insured by Charles Jones was destroyed by fire on November 17, 1926, and the insurance company was subsequently garnished by appellees as creditors of Charles Jones. Appellant also claimed the proceeds of the policy by assignment dated November 20, 1926, which reads as follows:

"Assignment of interest of insured. The interest of Charles Jones, as owner of the property covered by this policy, is hereby assigned to Planters' National Bank, subject to the consent of Home Fire Insurance Company of Little Rock, Arkansas. (Signed) Chas. Jones (Signature of insured). Dated November 20, 1926."

The insurance company paid the $1,000 due on the fire insurance policy into the registry of the court, to be paid out as the court should direct. The chancery court found the issue in favor of the appellees, and it was decreed that the proceeds of the policy should be

paid to them. To reverse that decree the appellant has duly prosecuted an appeal to this court.

Cunningham & Cunningham, for appellant.

G. M. Gibson, for appellee.

HART, C. J. We think the decision of the chancellor was wrong. He evidently proceeded upon the theory that the instrument copied in our statement of facts did not amount to an assignment of a right of action on the policy. This court has held that the right of action on an insurance policy is assignable under our statute, and that a clause in the policy against assignment without consent of the company applies only to assignments during the lifetime of the policy, and not to an assignment of liability which has already accrued under the policy. *McBride* v. *Ætna Life Insurance Co.,* 126 Ark. 528, 191 S. W. 5, and *Garetson-Greason Lumber Co.* v. *Home Life & Accident Co.,* 131 Ark. 525, 199 S. W. 547. To the same effect see *Mosaic Templars of America* v. *Hearon,* 153 Ark. 568, 241 S. W. 35, 27 A. L. R. 1147, where it was held that, unless a contract of insurance contains a restriction concerning assignments, an insurance policy may ordinarily be assigned in any form recognized by law, even by oral assignment.

After the property insured was destroyed by fire, the assignment of the interest of the insured copied in our statement of facts was made. This was done before the garnishment of the company in favor of the appellee. The instrument purports to assign the interest of Charles Jones as owner of the property covered by the policy, subject to the consent of the insurance company. When we consider that this was done after the property had been destroyed, it is reasonable to construe the instrument as an assignment by the insured of his right of action against the insurance company, and we are of the opinion that the chancery court erred in not so holding.

The decree will therefore be reversed, and the cause will be remanded with directions to the chancery court to enter a decree in favor of the appellant.

GORDON v. KANSAS CITY SOUTHERN RAILWAY COMPANY.

Opinion delivered February 13, 1928.

CARRIERS—TIME FOR USE OF LIMITED TICKET.—As between a provision of a railroad ticket covering an interstate trip that it will not be accepted if presented after a certain day, and the provision of the tariff sheet, approved by the Interstate Commerce Commission, that the return trip must be completed before midnight of such day, the limitation in the tariff sheet governs.

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

Pole McPhetrige, for appellant.

James B. McDonough, for appellee.

SMITH, J. On December 22, 1926, appellant purchased a full-fare round-trip ticket for herself and a half-fare round-trip ticket for her granddaughter at Mena, Arkansas, from that station to Kansas City, Missouri, and return. The usual one-way full fare was $13.66, and the round-trip full fare was $27.32. The tickets purchased by appellant were excursion tickets, and the price paid for her own ticket was $20.49, a reduction from the full regular fare of $6.83. Stamped on both tickets was this condition:

"In consideration of the reduced rate at which this ticket is sold, it will not be accepted for passage if presented after 1-6-1927."

At the time these tickets were sold there had been filed with and approved by the Interstate Commerce Commission tariff sheets regulating Christmas excursion tickets, and a copy of these tariff sheets was on file in the office of the ticket agent who sold the tickets. These tariff sheets contained the following limitation upon the sale of these excursion tickets: "Dates of sale—December 21 to 25, inclusive, 1926. Final return limit—January 6, 1927. Transit limit—Going—Tickets must be used from selling station on date of sale, as stamped or perforated on ticket. Return trip—Return trip must be completed to original starting point before midnight of date of final limit."

Appellant went to Kansas City, where she visited her nephew and niece, and remained until January 6, 1927, at which time she presented her ticket and that of her granddaughter to the gateman at the Union Station for admission as passengers to a train of appellee railway company which was due to leave Kansas City at 11:35 p.m. Admission to the train was denied appellant upon the ground that the tickets would expire in twenty-five minutes after the departure of the train, and the journey which appellant proposed to make could not be completed within that time; indeed, the train was not due to arrive at Mena, appellant's destination, until the following afternoon. There was no station at which the train would have stopped in twenty-five minutes, and appellant does not contend that she desired to use the tickets for that period of time. Her contention is that she presented the ticket before its expiration, and that she was therefore entitled to be transported as a passenger on the ticket.

When appellant was denied the right to enter the train and become a passenger, she borrowed from her nephew, who had escorted her to the station, money to pay her fare and that of her granddaughter to her destination. After paying the full regular fare of herself and her granddaughter, she surrendered the return portions of her excursion tickets to the train auditor, and later received from the railway company $10.60 as rebate.

Appellant sued for damages for a breach of the contract of carriage, and offered testimony to the effect that, as a result of the humiliation and chagrin endured by her when her ticket was refused, she suffered a nervous breakdown. Suit was not brought on account of the grandchild. At the conclusion of the testimony the court directed the jury to return a verdict for the defendant railway company, which was done, and from the judgment pronounced thereon is this appeal.

The question presented by this appeal is whether the stipulation above quoted appearing on the ticket or the limitation as to the period of its validity appearing in

the tariff sheets shall govern. As the ticket covered an interstate trip, the tariff approved by the Interstate Commerce Commission must govern. *L. & N. Ry. Co.* v. *Motley,* 219 U. S. 467, 31 S. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671.

The tariff sheet required the completion of the trip to be accomplished not later than January 6, and, as has been shown, it would hardly have been begun by that time, and appellant asked nothing less than that she be carried to her destination, which she could not have reached until the following afternoon.

In 10 C. J., chapter Carriers, § 1080, page 662, it is said:

"Under the Interstate Commerce Act a carrier must publish passenger rates, and cannot charge a less or a different rate than that specified in its published rates, unless such rate is found to be unreasonable by the Interstate Commerce Commission, and neither the misquotation of rates nor ignorance is an excuse for charging or paying less or more than the filed rates, since passengers, as well as the agents of the carrier, are presumed to know such rates."

In the case of *Sanders* v. *Atlantic Coast Line R. Co.,* 85 S. E. 167, 101 S. C. 11, the Supreme Court of South Carolina said:

"It is well settled, too, that, under the act of Congress and the decisions of the Supreme Court of the United States construing it, no liability of a carrier can be predicated upon the misrepresentations or mistakes of its agents as to the rates applicable, or privileges or facilities to be afforded under the tariffs filed with the Commission. Passengers and shippers are conclusively presumed to know them, as well as the agents of the carriers. This question has been so recently and frequently considered and decided both by the Supreme Court of the United States and by this court that it is not deemed necessary to state the reasons therefor, or even to cite the decisions."

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Wolf*, 100 Ark. 22, 139 S. W. 536, Ann. Cas. 1913C, 1384, it was held (to quote the syllabus): "Interstate commerce—Effect of mistake as to rate.—Where a railway agent, by mistake, inserted in a bill of lading for an interstate shipment a rate less than the published rate, the railroad company is not bound thereby; and it is immaterial in such case that the shipper and the agent were both ignorant of the published rate."

In that case this court quoted from Barnes on Interstate Transportation, § 446, as follows: "Under the present law, regardless of the rate quoted, the published tariff rate must be paid by the shipper and actually collected by the carrier." The reason given by the author for this apparently harsh rule is that the integrity of the published tariff must be preserved to prevent discrimination, and that, if it were otherwise, the published tariffs, through collusion or carelessness, would be constantly violated.

See also *Pennington* v. *Illinois C. Ry. Co.*, 252 Ill. 584, 97 N. E. 289, 37 L. R. A. (N. S.) 983; *Samples* v. *Georgia & F. Ry. Co.*, 143 Ga. 805, 85 S. E. 1002; *Sherman* v. *Chicago, etc., Ry. Co.*, 40 Iowa 45.

It follows therefore that the limitation in the tariff sheet must govern, and not that stamped upon the ticket, and, as appellant did not use the ticket within the time limited by the tariff sheet, the railway company had the right to refuse to accept it and to collect the fare, as was done, and the judgment of the court directing a verdict in favor of the railway company must therefore be affirmed, and it is so ordered.

PEERLESS CASUALTY COMPANY *v.* DANIEL.

Opinion delivered February 13, 1928.

1. INSURANCE—NOTICE OF DISABILITY.—In an action on a disability and illness insurance policy, evidence *held* to warrant the jury's finding that insured gave notice within ten days of the time when he had reasonably concluded that his disability from sickness had begun under the policy, as required by its provisions.

2. INSURANCE—REINSTATEMENT—APPEARANCE OF GOOD HEALTH.—In an action on a disability policy in which the insurer denied liability on the ground that insured was not in good health at the time of his reinstatement in June, 1925, it was not error to admit evidence that insured appeared to be in good health in May, 1925.

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

Brouse & McDaniel, for appellant.

A. C. Thomas and *W. R. Donham,* for appellee.

SMITH, J. Appellee, as administratrix of the estate of John W. Daniel, deceased, and in her own right, filed suit against the appellant insurance company to recover a sum alleged to be due by reason of a contract contained in a certain insurance policy issued by the said company to the said John W. Daniel in his lifetime, wherein the company agreed to insure the said Daniel against loss of time on account of disability from illness in the sum of $50 per month.

The policy contained the provision that: "Written notice of injury or of sickness on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury, or within ten days after the commencement of disability from such sickness." Another provision of the policy required strict compliance with all the terms and conditions of the policy as a condition precedent to a recovery thereunder, and provided that a failure in this respect should forfeit to the company all rights to any indemnity.

The insured had failed to pay certain assessments or premiums, as a result of which the policy lapsed, but he was reinstated in June, 1925, by paying the delinquent premiums and by furnishing a certificate that he was in good health at the time of his reinstatement.

The insurance company denied liability upon the grounds that notice of disability had not been given within the time required by the policy, and also that the insured was not in good health at the time of his reinstatement.

There was a verdict and judgment in favor of the plaintiff, from which is this appeal, and for the reversal of the judgment it is insisted that, under the undisputed testimony, a verdict should have been directed in appellant's favor on account of the failure to give notice, and also because the insured was not in good health, as he had warranted himself to be, at the time of his reinstatement. It is also insisted that the judgment should at least be reversed on account of the admission of certain incompetent testimony, and because of the error in submitting the question as to whether the insurance company had waived the requirement of notice as to the insured's illness.

It was contended by the plaintiff that proper notice of the insured's illness had been given, and also that there had been a waiver of this requirement as a result of the correspondence between the parties in regard to proof of the claim for the sick benefits. As we have concluded that the jury was warranted in finding that proper notice was given, we do not consider whether the testimony did not also warrant the finding that this requirement had been waived.

The testimony on the part of the plaintiff was to the effect that the insured operated a small store, and, in connection with this business, ran a truck from his store to both Hot Springs and Little Rock, from both of which cities he hauled the merchandise in his truck which he sold in his store. Insured became ill about the 4th of July, 1925, but evidently did not regard his illness as serious until about the 27th of that month, at which time he first consulted a doctor. The doctor advised the insured to rest from his usual employment for a period of ten days, and later renewed that advice. The insured was not confined to his bed until the 15th of August, and, even after that, went to his store, over which he continued to exercise supervision. Mrs. Daniel testified that her husband, the insured, "finally took his bed and was confined to his room about the last of September, some time in September, when he became worse and was not able

to go to the store. He was not able to work after that. He went to bed on the rest cure about August 15."

The court gave, at the request of the appellant insurance company, an instruction which told the jury that the plaintiff could not recover if the jury found that the insured was not in good health or was suffering from any ailment in June, 1925, when the insurance was reinstated.

The jury was told in another instruction, at the request of appellant, that, before the plaintiff could recover, it must be found by a preponderance of the evidence "that all of the material terms of said contract were complied with by the deceased, and, unless you find from a greater weight or preponderance of the testimony in this case that deceased did comply with the terms of the contract, then the plaintiff cannot recover, and your verdict will be for the defendant company."

Written notice of the illness of the insured was mailed to the insurance company on September 14, 1925, and the illness of the insured continued until September 23, 1926, at which time he died.

The insuring clause of the policy contains the following relevant provisions as to the obligations assumed by the insurer:

"Section (B). Disability resulting from illness which is contracted and begins during the life of this policy and after it has been maintained in continuous force for fifteen days from its date, hereinafter referred to as 'such illness,' and

"Section (C). Indemnity will be paid for 'such injury' or 'such illness' only for the time the insured is under the professional care and regular attendance of a legally qualified physician or surgeon, at least once in every seven days."

The insured, when he first became ill, was not under the care of a physician at least once in every seven days, and he did not go under such care until in September, and he gave the notice within ten days of the time when he did so go under the regular care of a physician every

seven days. The testimony shows that, while the insured did not run his truck after the 15th day of August, he was up and occasionally at his store until September.

The policy provides for indemnity against disability, and no indemnity was to be paid until disability began, and the insured claimed no indemnity until he asserted his disability, and we think the jury had the right to find, from the above testimony, that the insured gave the notice within ten days of the time when he had reasonably concluded that his disability had begun. The insurance was not against sickness merely, but against disability caused by sickness, and we conclude therefore that the jury was warranted in finding that due notice of the disability was given. It is not questioned that the insured was in fact disabled by sickness during the entire period for which the disability benefit was claimed.

Plaintiff offered testimony to the effect that the insured was in good health when the policy here sued on was reinstated, in June, 1925, and among the witnesses so testifying were L. C. Smith and W. J. Canady, and it is insisted that error was committed in admitting the testimony of these two witnesses.

Smith testified that he was a soliciting agent for the Missouri State Life Insurance Company, and that he took an application from the said J. W. Daniel for a policy of insurance in that company in May, 1925. The witness was asked: "You remember that it was in May, 1925, that you took the application?" An objection to this question was overruled, and the witness answered: "Yes, the policy was issued, it seems to me, something like a week after I took the application." The witness was then asked: "So far as you were able to tell, at that time Daniel was in good health, was he not?" An objection to this question was overruled, and the witness answered: "He seemed to be in as good health as any man I ever took an application from."

The witness Canady testified that he, too, was a soliciting agent for an insurance company, and that he took an application from Daniel on May 15, 1925, for a

policy, which was delivered on June 1, 1925, and that Daniel appeared to be in good health at that time, and that witness "had to beg him about two weeks to take the policy."

No objection appears to have been made to the questions asked Canady or to the answers given by him, and the questions asked the witness Smith appear to be competent. It was competent for any witness who knew the insured at the time of his reinstatement to testify that the insured appeared then to be in good health, and the incident related by the witness about taking the application of Daniel in May, 1925, is a mere circumstance fixing the time at which the applicant appeared to be in good health. No objection was made to the testimony upon the ground that it would not be competent to prove that the insured was in good health by proving that another insurance company had issued a policy about the time of the reinstatement. The court would, no doubt, have instructed the jury that the testimony was not competent for that purpose had such a request been made, but it was not.

The testimony warranted the jury in finding that a proper notice of disability was given, and, as no error appears in the record, the judgment must be affirmed, and it is so ordered.

MARLEY v. HACKLER.

Opinion delivered February 13, 1928.

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—The power of attorney by which a widow authorized another to transact all business for her and in her name to execute and acknowledge conveyances and to sign all contracts, checks, drafts, or other instruments, *held*, under the evidence, intended only to enable the attorney to wind up the estate of the widow's decedent.
2. PARTNERSHIP—CONSTRUCTION OF WRITTEN INTRUMENT.—Whether a written instrument is a rental contract or a contract of partnership should be determined by the language of the instrument, unless it is susceptible of more than one interpretation, in which

case parol evidence or the conduct of the parties under it may be resorted to in determining the intention.

3. CONTRACTS—CONSTRUCTION AGAINST PARTY PREPARING CONTRACT.—In construing a written instrument it should be interpreted more strongly against the party who prepared it.

4. PARTNERSHIP—CONSTRUCTION OF INSTRUMENT.—An instrument designated a lease in the opening declaration whereby a party thereto agreed to manage and operate plaintiff's plantation and to be responsible therefor, and provided that the parties should share equally the profits derived therefrom, *held* unambiguous and to create the relationship of landlord and tenant, and not that of a partnership or a share-cropper contract.

5. PARTNERSHIP—DIVISION OF PROFITS.—A division of profits growing out of the business does not necessarily imply a partnership arangement, since such division is often made a basis of salary for business or rents for property.

Appeal from Crittenden Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

A. B. Shafer and *Coleman & Riddick,* for appellant.

Allen Hughes and *John E. McCall,* for appellee.

HUMPHREYS, J. This is an appeal from a decree in favor of appellee against Eva A. Marley, special administratrix of the estate of F. N. Marley, deceased, for $35,160.90, and against Rufus Armistead, special administrator of the estate of K. R. Armistead, for $23,954.41, rendered in a suit brought in the chancery court of Crittenden County by appellee against F. N. Marley, for an accounting of rents on her plantation in said county, known as the Perryland Plantation, for a term beginning January 1, 1920, and ending December 31, 1925, and for $52,145.20 in cash to her credit with K. R. Armistead & Company, and for an accounting with K. R. Armistead for the amount of $52,145.20 in cash to her credit with said company.

The defense interposed by F. N. Marley to the suit was that the plantation was operated under a share-crop agreement for a five-year period at a loss instead of a profit, and that the funds to her credit in her account with K. R. Armistead & Company were checked out under authority contained in a power of attorney, executed by

her to him, in the operation and improvement of said plantation.

The defense interposed by K. R. Armistead to the suit was that he paid out the funds to appellee's credit with his company on checks drawn against it by F. N. Marley, under authority contained in the power of attorney given by her to F. N. Marley. The power of attorney referred to is as follows:

"POWER OF ATTORNEY.

"I, Annie M. Hackler, widow, of Crittenden County, Arkansas, do hereby nominate and appoint F. N. Marley, of Memphis, Tennessee, as my true and lawful attorney in fact, with full power and authority to transact all business for me, and in my name to execute and acknowledge deeds or other conveyances, and to sign all contracts, checks, drafts or other instruments, it being my purpose and intention by this instrument to give him a general power of attorney to transact all business of every kind for me, and I hereby ratify and confirm all his acts and deeds in the premises as fully as if I were present and doing the same in my own hand.

(Signed) "Annie M. her X mark Hackler.

"Witness: K. R. Armistead,
"Rufus Armistead."

Acknowledged before notary public.

The agreement with reference to the operation of the plantation is as follows:

"AGREEMENT.

"This lease agreement this day made and entered into by and between Mrs. Annie M. Hackler and F. N. Marley, witnesseth:

"1. The undersigned, Annie M. Hackler, leases to the said F. N. Marley her plantation at Bruin, Crittenden County, Arkansas, known as the Perryland Plantation, containing about 600 acres, for the term beginning January 1, 1920, and ending December 31, 1925. Also

all the live stock and farming implements of all kinds on said plantation belonging to her and used in operating the same.

"2. The undersigned, F. N. Marley, on his part, agrees to manage and operate said plantation during the term of this agreement, devoting so much of his time thereto as may be necessary; and shall be responsible for the proper management and operation of same.

"3. The undersigned, Annie M. Hackler and F. N. Marley, are to share equally the profits derived from the operations of said plantation during the term of this lease.

"Executed in duplicate this September 24, 1919.

her
(Signed) "Annie M. X Hackler.
mark
"F. N. Marley.

"Witness: M. C. Ketchum, A. W. Ketchum."

Appellants contend for a reversal of the decree upon the theory that the power of attorney conferred authority upon F. N. Marley to check on the account of Mrs. Annie M. Hackler with K. R. Armistead & Company and on deposit in the Bank of Commerce & Trust Company in Memphis for unlimited amounts to operate the plantation which she owned in Crittenden County, Arkansas, under and by virtue of the written agreement set out above, and that the money that Mrs. Annie M. Hackler had on deposit with Armistead & Company and with the trust company, as well as the proceeds derived from the sale of the crops of 1919 and for the five-year period under the agreement, was used for that purpose, except about $6,100. In other words, appellants interpret the agreement relative to the operation of the plantation to be a sharecropper's or partnership agreement, by the terms of which Mrs. Hackler should furnish the land, the live stock, farming implements, and money with which to operate same, and Marley to direct the operation thereof, for which each was to receive one-half of the profits derived therefrom

The chancery court found that the power of attorney was executed to enable F. N. Marley to efficiently administer upon the estate of J. P. Hackler, deceased, with knowledge by K. R. Armistead and his son, Rufus Armistead, of its purpose; and that, when the purpose was accomplished, it had no further force and effect. To state it more directly, the chancery court found that the power of attorney did not confer upon F. N. Marley authority to check out the moneys of Mrs. Annie M. Hackler on deposit with K. R. Armistead & Company and in the trust company in the operation of the plantation, and that K. R. Armistead and Rufus Armistead knew that it was not executed for that purpose. The chancery court also construed the written agreement relative to the operation of the plantation as a rental contract, creating the relationship of landlord and tenant, by the terms of which Mrs. Annie M. Hackler was to furnish the plantation, the live stock and farming implements thereon, and to receive one-half the profits derived therefrom as rents.

The record is voluminous, and it would extend this opinion to unusual length should an attempt be made to set the testimony out in detail. For this reason only a general statement of the facts will be attempted.

J. P. Hackler was a planter, who owned and operated Perryland Plantation, consisting of 850 acres, in Crittenden County, Arkansas, at the time of his death, on June 5, 1919. He had resided upon the plantation forty years with his wife, Annie M. Hackler. For twenty-five years prior to his death he had sold his cotton to and purchased his supplies from K. R. Armistead & Company, merchants and cotton factors in Memphis, and also carried his banking account with them. F. N. Marley was a son-in-law of K. R. Armistead, and the bookkeeper for his firm at and during the time Hackler did business with the firm. During the business transactions Mr. and Mrs. Hackler became well acquainted with the families of Armistead and Marley, resulting in an association of mutual confidence, respect and esteem. The families

visited each other and visited other cities together. Hackler had prospered until he was able to carry over his cotton crop of 1917 and 1918, and, when sold, just prior to his death, he had a cash balance with Armistead & Company of $38,000. Hackler made a will by the terms of which his entire estate was devised to his wife, Annie M. Hackler, with direction that she be appointed executrix without bond, and left the will with K. R. Armistead. Hackler then went into the hospital for the purpose of being operated upon. While waiting for the operation K. R. Armistead, his son, Rufus Armistead, and Marley visited him. The day before the operation he asked all the parties to leave the room, except his wife and Marley. He then stated that he expected to recover from the operation, but requested Marley, in the event of his death, to assist his wife, which Marley agreed to do. He died from the operation on the next day. After his burial the will was opened by Marley and read to Mrs. Hackler, who could not read or write, at the residence of a Mr. Carlos, where Mrs. Hackler was stopping, in Memphis. The following day Mrs. Hackler and a friend went to the Peabody Hotel and had them telephone Marley that they wanted to see him. When he arrived, she stated that she wanted to pay off the debts, which amounted to little, and wind up the estate, but that she did not want to act as executrix. She requested Marley to attend to the details of winding up the estate, which he agreed to do. In order to attend to the details of the estate for the executrix, Marley suggested that, as she would be out on the plantation, it would facilitate matters for her to give him a power of attorney to act in her behalf. She inquired of him about an attorney, and Marley suggested M. C. Ketchum, K. R. Armistead's attorney. The suggestion met with her approval, so Marley procured Ketchum to draw the power of attorney and take charge of the legal features of probating the will and administering upon the estate. The following day Mrs. Marley took Mrs. Hackler to the office of K. R. Armistead, where she met Mr. Ketchum, who had drawn the power of attorney.

According to the testimony of Marley, when first examined, he and K. R. Armistead had talked over the necessity and purpose of a power of attorney to wind up the estate. Marley later testified that he was mistaken about discussing the matter of the preparation of a power of attorney with K. R. Armistead. K. R. Armistead also testified that the matter was not discussed between Marley and himself before the execution thereof. After the power of attorney was read, Mrs. Hackler signed it by mark, which signature was witnessed, at the suggestion of Marley, by K. R. Armistead and his son, Rufus. Mrs. Hackler employed Everett Marley, the son of F. N. Marley, at his suggestion, to assist her in gathering the crop of 1919, which was shipped to Armistead & Company. He continued in her employ until January, 1920. In the meantime F. N. Marley, under the power of attorney, performed all the acts necessary to a complete administration of the estate, and, after collecting the assets and paying the obligations, he informed Mrs. Hackler that everything had been done except selling the plantation. Just before the operation, J. P. Hackler had suggested that the plantation be sold and a home purchased for or by his wife in Memphis. Mrs. Hackler preferred to reside upon the plantation instead of selling same, and, according to Marley, requested him to manage it for her. According to Mrs. Hackler, Marley proposed to rent the plantation from her. After talking the matter over several times they entered into the written agreement heretofore set out, on the 24th day of September, 1919, but Marley did not enter into the possession and control thereof until January 1, 1920. Before entering into the possession of the plantation, Marley transferred the account at K. R. Armistead & Company to Annie M. Hackler. He also transferred the account of J. P. Hackler, of about $8,000, in the Commerce & Trust Company to Annie M. Hackler. He also collected about $4,000 life insurance and placed it in the Annie M. Hackler account at K. R. Armistead & Company. When Marley took possession of the plantation, he employed his

son to assist him. His son remained on the place until 1924. Marley took an inventory of the stock in the plantation store, and opened a set of books, which was kept by him and his son on the basis of a partnership during the entire term of the agreement. The business was run under the name of Perryland Plantation. The names of F. N. Marley and Annie M. Hackler appeared on the letterheads. Marley transferred all the money in both accounts, about $52,000 in all, to the Perryland Plantation, and, during the five-year period, expended all that was produced on the plantation and all the money in Mrs. Hackler's accounts, except $6,100, in the operation thereof, according to his testimony. Mrs. Hackler knew nothing of the manner in which the books were kept, and did not participate in the management of the plantation. It was managed and controlled by Marley and his son without consultation with Mrs. Hackler. According to her testimony, she had no information that Marley had used her money in the operation of the plantation or otherwise until the fall of 1924. He did not make her an annual statement. She testified that she asked him how they had come out, and he always told her that she had come out all right. She said that she had absolute confidence in Marley and Armistead, and trusted them implicitly. She testified that, in the fall of 1921, she observed that a great deal of money was being spent, and heard that Marley had mortgaged her plantation, and that she asked him if he had done so, and he told her no. When pressed with reference to her dissatisfaction on account of the extravagant expenditure of money in 1921, and whether she discovered at that time that Marley was checking out her money, she said "no"; that she had reference to the expenditure of money which she supposed had been made in the operation of the plantation. She said further that she knew Marley had expended some of her money in the construction of some houses on the plantation, but had no idea he had used any of it in the operation of the plantation. She said she thought the

money expended in the operation of the farm had been made on the farm and out of the plantation store.

Marley and Armistead both testified that Mrs. Hackler's individual money was checked out and used in the operation of the plantation under the authority contained in the power of attorney. In the fall of 1924 Marley wanted to rent the plantation for cash rent, but Mrs. Hackler concluded to sell same, and asked him for a statement. The statement disclosed that all of her individual money had been checked out except about $6,000.

As we understand, no question is raised on appeal as to the amount of the judgments appellee is entitled to recover under the facts and law. Appellant challenged the right of appellee to recover any amount. Her right to recover depends upon the effect given the power of attorney and the interpretation placed upon the written agreement.

After a very careful reading and consideration of the testimony, we are of opinion that the power of attorney was executed for the purpose only of enabling F. N. Marley to wind up the estate of J. P. Hackler, deceased. The language is broad, and confers general power upon Marley to transact all business of every kind for her, but, as between the parties to this suit, it only had reference to the business in hand at the time of its execution. The only business in hand at that time was the winding up of the estate of Hackler. The power of attorney was suggested by Marley, and he pointed out that it would facilitate matters (referring to the administration of the estate) for Mrs. Hackler to give him a power of attorney to act in her behalf. According to the first testimony of Marley, the necessity for and purpose of a power of attorney was discussed between him and K. R. Armistead. Mrs. Hackler testified that its purpose was discussed between them at the time it was executed. It was drawn by Armistead's regularly employed attorney, who was employed by Mr. Marley to look after the legal features of probating the will and administration of the estate. It was executed in the

office of Armistead, and witnessed by him and his son. We think, as between Annie M. Hackler, F. N. Marley and K. R. Armistead, it should be limited in its effect and operation to winding up the estate of J. P. Hackler, deceased.

The next, and only other, question involved upon the appeal is whether the written agreement is a rental contract or a contract of partnership. This should be determined by the language of the instrument, unless susceptible of more than one interpretation. The purpose of written contracts is to clearly define the intention of the parties. Agreements are reduced to writing in order to avoid any differences between the parties thereto. Of course, if the written instrument is ambiguous it then becomes necessary to resort to parol evidence or the conduct of the parties under it to determine their intention. In construing a written instrument it should be interpreted most strongly against the party who prepared it. The contract in question was prepared by Marley. Mrs. Hackler could neither read nor write. The agreement is characterized as a lease in the opening declaration thereof. In the first paragraph it is clearly and plainly stated that Annie M. Hackler leases to F. N. Marley her plantation (describing it) and all the live stock and farming implements thereon, for a term of five years.

There is nothing in the opening declaration or the first paragraph indicating that the agreement is one of partnership, or that it is a share-cropper contract. On the contrary, the language clearly states that it is a lease or a rental contract.

The second paragraph defines the duties of F. N. Marley, the second party in the contract. We find nothing in the duties assumed by him inconsistent with the duties of a tenant. He agrees therein to manage and operate the plantation, devoting so much of his time thereto as may be necessary, and agrees to be responsible for the proper management and operation of same.

The third or last paragraph provides that Annie M. Hackler and F. N. Marley are to share equally the profits derived during the operation of said plantation under the lease. We do not think any doubt can arise out of this paragraph as to whether the contract is one of lease. The last paragraph should be construed with the other parts of the agreement so that harmony may prevail throughout, if possible. This effect may be easily accomplished, without doing any violence to the language used, by construing this clause to mean that Mrs. Hackler was to receive one-half of the profits for rent, and Marley the other half for his labor or management and the use of the money advanced in the operation thereof. This interpretation is reasonable in the light of the paragraphs specifically stating what Mrs. Hackler should furnish. If it had been the intention for her to furnish the money for the operation of the plantation, it would have been very easy to have included in the specific statement all the things she was to furnish. The second paragraph provides for Marley to operate the farm, which necessarily implied that he should provide the funds to do so. The contract provided for him to manage and operate same, not to manage or operate same. The management refers to his mental and physical labors, and operation to the expenses incident thereto. A division of profits growing out of a business does not necessarily imply a partnership arrangement. A division of profits is often made a basis of salary for business or rents for property. We are unable to discover any ambiguity in the agreement. The relationship of landlord and tenant was created by the terms thereof.

The decree is affirmed.

GRAHAM v. STATE.

Opinion delivered February 13, 1928.

1. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS.—Denial of a motion for continuance was not an abuse of discretion, where there was no showing that the attendance of an absent witness could be procured by the next term of court.
2. CRIMINAL LAW—EXCLUSION OF EVIDENCE—SUBSEQUENT ADMISSION.—Exclusion of competent testimony was cured by its subsequent admission.
3. HOMICIDE—DECEASED'S REPUTATION OF CARRYING PISTOL.—Testimony that deceased had the reputation of carrying a pistol was inadmissible, since his general reputation for being violent or turbulent was admissible, but not his reputation for any particular unlawful act.

Appeal from Ouachita Circuit Court, First Division; *L. S. Britt*, Judge; affirmed.

L. B. Smead, Dexter Bush and *R. K. Mason,* for appellant.

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

HUMPHREYS, J. Appellant was indicted in the circuit court of Ouachita County, First Division, for murder in the first degree for shooting and killing T. N. Madden. Upon the trial of the cause he was convicted of murder in the second degree, and, as a punishment, was adjudged to serve a term of twenty-one years in the State Penitentiary, from which is this appeal.

A reversal of the judgment is sought upon two assignments of error, the first being the refusal of the court to grant appellant's motion for a continuance, and the second, the exclusion of certain evidence.

(1). It was alleged in the motion for a continuance that appellant could prove by James Cooper, if present, that he heard deceased threaten to take the life of appellant, and that, prior to the killing, he informed him of the threat; that he procured a subpoena for the witness, upon which a *non est* return was made. The motion did not state that the witness was within the jurisdiction of the court, or that he could be procured as a witness

by the next term thereof. It is not an abuse of discretion to deny a motion for continuance for the term unless it is shown that the attendance of the witness can be procured by the next term of court. *Eddy* v. *State,* 165 Ark. 289, 264 S. W. 832; *Harris* v. *State,* 169 Ark. 627, 276 S. W. 361.

(2). A few days before the killing, complaint was made by appellant to the mayor of the town, E. H. Timmons, about the children of deceased imposing upon his children, with the request to the mayor that he see the deceased and prevail upon him to assist him in quelling the disturbance between the children. When the mayor made the request, deceased assumed a hostile attitude to both the mayor and appellant. Appellant sought to show the demeanor of the deceased, and the court refused to allow the witness to answer relative to the demeanor of deceased, over the objection and exception of appellant. Immediately thereafter the court stated the witness might testify to anything that was of a threatening nature.

The appellant then asked the following questions and obtained the following answers thereto:

"Q. State to the court and jury what his demeanor was which gave you the impression that it was a threat? A. After I informed him that Mr. Graham had asked me to take the matter up with him and talk it over with him, he got angry, and grew more hostile as the conversation progressed, and I told him that I only came as a peacemaker, and I told him that if I could not be of any assistance I would withdraw. Q. Was he angry at you or the defendant? A. He appeared to take some offense at my coming there. Q. Well, how about the defendant? A. He took offense at him, too."

The admission of the testimony, after first excluding it, cured the error, if any.

Appellant also complains that the mayor and his wife were not permitted to testify that he advised appellant to avoid deceased. He is mistaken in this assumption. The record reflects that both testified that he (the mayor) told appellant to avoid T. N. Madden.

Appellant also complains that witness Vick was not permitted to testify that deceased had the reputation of carrying a pistol. Vick testified that he had never seen deceased carry a pistol. The rule of evidence is that an accused may prove the general reputation of deceased for being a violent or turbulent person, but not his reputation for committing any particular unlawful act.

Appellant also complains that he was not permitted to tell why he was afraid of deceased. The record reflects that appellant testified as follows:

"Q. Why were you afraid of him A. The way he was doing and talking to me, and then I went over to Mr. Timmons' office and asked him what Madden said when he talked to him, and he would not tell me, only he said, 'You better shun him'."

No error appearing, the judgment is affirmed.

WALKER v. WILMANS.

Opinion delivered February 13, 1928.

1. WILLS—CONSTRUCTION OF DEVISE.—Under a will devising land to daughters for life, share and share alike, with remainder to grandchildren, and providing for devise of certain interests to the grandchildren for life of the surviving daughter, in case one daughter dies first, the intention of the testatrix was to give the surviving grandchildren a remainder in fee on the death of both life tenants, and the estate did not vest in fee so long as either life tenant survived.
2. WILLS—RIGHTS OF PURCHASER OF REMAINDER INTEREST.—Where a will devised a life estate to two daughters and remainder to grandchildren, no interest vested in the grandchildren until the death of both life tenants, and hence a purchaser of the interest of the grandchildren on the death of one life tenant was not entitled to any interest in a fund from the sale of a part of the lands of the estate.

Appeal from Jackson Chancery Court; *A. S. Irby,* Chancellor; reversed.

R. E. Jeffrey, for appellant.

Ira J. Mack, for appellee.

KIRBY, J. This appeal involves the construction of a will which disposes of quite a lot of property, paragraph eleven of which reads as follows:

"I devise and bequeath to my daughters, Lizzie Taggart and Lottie D. Walker, all the lands devised to me by my nephew, James B. Waddill, for and during the term of their natural life, share and share alike, to hold the same unto themselves during the term of their natural life. But if my daughter Lottie D. Walker shall die before my daughter Lizzie Taggart, then I devise and bequeath to my granddaughter, Josephine Walker, a fifth interest in said lands for and during the natural life of my daughter Lizzie Taggart, and the remainder of said lands I devise and bequeath to my daughter Lizzie Taggart for and during the term of her natural life. And in case my daughter Lizzie Taggart dies before my daughter Lottie D. Walker, I devise and bequeath to my grandchildren, the children of Lizzie Taggart, a one-half interest in said lands for and during the term of the natural life of my daughter Lottie D. Walker, share and share alike. And I devise the remainder in fee in said lands to my then living grandchildren, the children of the bodies of each of my daughters Lizzie Taggart and Lottie D. Walker begotten, share and share alike."

Lizzie Taggart died in December, 1910, leaving surviving four children of her body, grandchildren of the testatrix, Laura J. Dills, Malcolm D., Samuel W., James B. and Margaret Taggart, and also Lottie Walker, the other life tenant devisee in the will, and her one child, Josephine Walker, since married, and one of the appellants, Josephine Walker Connell.

J. C. Wilmans, appellee, acquired the interest, vested and contingent, of three of the Taggart heirs, Malcolm D., Samuel W. and James B., and Margaret Taggart conveyed her interest, on the 7th of September, 1921, to Lottie D. Walker.

In May, 1923, the Newport Levee District appropriated some of the lands, and paid into the Jackson Chancery Court for the owners of the fee of the lands

$925.25, and appellee brought this suit for distribution of said fund on the basis of his claim of a 3/5 interest in fee in the lands and being entitled to a 3/8 interest in the income thereof. Appellant denied that the appellee was entitled to any interest in fee in the lands before the death of the surviving life tenant, and, from the decree holding otherwise, has appealed.

It was the intention of the testatrix, clearly expressed, to give her grandchildren then living, the children of her daughters, the two life tenants, the remainder in the lands in fee, share and share alike, upon the death of both life tenants, and such estate did not vest in fee so long as either life tenant survived. Neither could it be sooner determined under the will what interest each grandchild would be entitled to in the remainder in fee which is devised to the then living grandchildren upon the termination of the life estates.

The decree is reversed accordingly, and the cause dismissed.

DESHA v. INDEPENDENCE COUNTY BRIDGE DISTRICT NO. 1.

Opinion delivered February 13, 1928.

1. VENUE—DENIAL OF CHANGE DISCRETIONARY WHEN.—Denial of a motion for change of venue in a suit to condemn a bridge site was not an abuse of discretion, though two-thirds of the county were interested.
2. VENUE—DISCRETION OF COURT TO GRANT CHANGE OF VENUE.—The grant or denial of a change of venue, under Crawford & Moses' Dig., §§ 10339, 10341, rests in the discretion of the trial court.
3. EMINENT DOMAIN—FAIR MARKET VALUE OF LAND.—In determining the value of lands appropriated for public uses, the same considerations are to be regarded as in sales between private persons, the inquiry being in such cases what, from their availability for valuable uses, are they worth in the market?
4. EVIDENCE—VALUE OF LAND CONDEMNED FOR BRIDGE SITE.—Where land at or near a ferry site was being condemned for a bridge site, testimony as to the worth of the land in view of its suitability for a bridge or ferry site, *held* admissible.

5. EVIDENCE—OPINIONS OF WITNESSES AS TO VALUE OF LAND.—An improvement district condemning land near a ferry for bridge purposes may cross-examine the landowner's witnesses as to the elements considered by them, in forming their opinion as to the value of the land, and all other circumstances that affect their credibility or tend to show their knowledge as to such value.
6. EMINENT DOMAIN—VALUE OF LAND—COMPETENCY OF EVIDENCE.—Any testimony tending to show the market value of land sought to be condemned is competent to show its value.
7. EMINENT DOMAIN—MARKET VALUE—INCOME FROM FERRY.—Testimony as to the revenue or income from a ferry *held* incompetent in a suit to condemn land near the ferry site for bridge purposes.
8. EVIDENCE—JUDICIAL NOTICE.—It is a matter of common knowledge that the existence of a free bridge near a ferry site will destroy the value of land for the purpose of a ferry site.

Appeal from Independence Circuit Court; *S. H. Mann*, Special Judge; reversed.

Cole & Poindexter, Culbert L. Pearce, Charles W. Mehaffy and *John E. Miller*, for appellant.

Ernest Neill and *S. M. Casey*, for appellee.

MEHAFFY, J. The appellee, plaintiff below, brought suit in the Independence Circuit Court, alleging that it was an improvement district created by act of the General Assembly for the purpose of constructing and maintaining a bridge across White River, at or near the present location of the ferry owned by the appellant, who was the defendant below. It alleged that it had a right to acquire all necessary land for the purpose of building approaches and embankments, as well as such land as may be necessary to connect the bridge with the public highway. That, in carrying out the purposes of its creation, it was necessary that it acquire title to certain lands belonging to the appellant. It then described the land desired, and asked the court to fix the damages that might be sustained by appellant, and to condemn said land.

An order was made by the judge in vacation, ordering appellees to deposit $3,000 with the Union Bank & Trust Company of Batesville, and this sum was deposited.

The appellant filed answer, admitting the creation of the district and admitting that they had been unable to agree upon the amount of damages. He alleged that he was the owner of the land on both sides of the river where appellant proposed to build the bridge; that he and those under whom he held title had owned the land for more than 100 years; that he was the owner of a licensed public ferry known as Ramsey's Ferry, located within a few feet of the proposed bridge site, which had been so located, owned, used and operated by him and his grantors and their ancestors continuously for more than one hundred years; that they have continuously paid all taxes on said land and license on said ferry as required by law during the entire time of their ownership. That he owned all the land fronting on the bank of the river in fee simple, at the south landing of said ferry, for more than a mile up and down stream and extending back for more than one mile, and also owned the land fronting on the bank of the river at the north end of said ferry for more than one-fourth mile up and down stream and extending far enough back to embrace about seventy acres. That, in order to obtain a ferry license, the licensee must be the owner or lessee of the lands on both banks of the stream. That taking the land as proposed by plaintiff would wholly destroy the approaches to said ferry, render it useless, and thereby destroy the defendant's franchise to operate the same. That the right and privilege to operate a ferry, and the ability and opportunity to operate the same, are wholly dependent upon ownership and possession of the lands on the banks of the stream where the same is to be operated, and, for this reason, the right to establish, operate and run a ferry is a valuable right belonging and appertaining to the land, and makes the land more valuable. That the ferry right and privilege in controversy in this case is especially and peculiarly valuable by reason of the fact that the ferry is established and located on a State highway between important cities, and enjoys a large tourist patronage from both directions, and the value of defend-

ant's lands is enhanced and increased by the net income derived from the ferry and by reason of its availability for such rights and uses. That the right and use comes to the defendant by reason of his ownership of the land, and yields him a net income of $4,500 a year; and, by taking said land of the defendant for use and construction of a free bridge at the approaches of the ferry, the plaintiff destroys the ferry and deprives the defendant of a net income of at least $4,500 a year in perpetuity. That the lands proposed to be taken are advantageously located, peculiarly suited and highly valuable as a ferry site. That, on account of the nature and character of the lands, its location and peculiar fitness as a ferry site, and other elements contributing to and making up its true value, if condemned and taken for a free bridge site, as sought by the plaintiff, the defendant will be damaged not less than $60,000. He asked that he be awarded the sum of $60,000 as damages.

The appellee filed an amendment, asking to condemn an additional two-tenths of an acre, and deposited $40 with the same bank for this additional land.

The defendant filed a motion for a change of venue, alleging that he could not obtain a fair and impartial trial in Independence County and Stone County, on account of undue influence of plaintiff and on account of undue prejudice agaist his defense. He set up that the improvement district was composed of all lands south and a portion north of White River, in Independence County, including the city of Batesville; that most of the advocates of a bridge across White River at Batesville are property owners in Independence County, and some in Stone County; that many who favor building the bridge, including the commissioners of the district, are publicly opposing the defendant's claim for damages because, if he prevails, the cost of the improvement will be increased and borne by the property owners of the district, most of whom are eligible for jury service in Independence County, and some in Stone County; that many of the property owners and newspapers in the district, as well

as the county officials, have publicly expressed opposition to the claims and demands of the defendant, all of which tends to defeat a fair and impartial trial of the cause before a jury in Independence or Stone County. He asked that a change of venue be granted, and that the cause be transferred to Jackson County for trial.

The motion for change of venue was in proper form, and properly verified, and supported by the affidavits of quite a number of witnesses.

The court overruled the motion for change of venue, and the defendant objected and saved his exceptions.

The plaintiff then filed another amendment to its complaint, in which it stated that it did not intend to, and would not, interfere with the operation of the ferry owned by the defendant, but it expressly conceded, granted and reserved to the defendant the right to operate the ferry and the right of ingress and egress on said lands, so far as the same may be necessary for the operation of his ferry, and agreed that the decree and judgment of this court which may hereafter be rendered may contain such reservations and exceptions as will protect the defendant fully in his rights to operate the ferry.

The case was tried, and the court directed the jury to return a verdict in favor of the defendant for $3,040, which was accordingly done. Judgment was entered accordingly, proper objections and exceptions were made, and the defendant filed motion for a new trial, which was overruled on the same day, and the appellant saved his exceptions, and prayed and was granted an appeal to the Supreme Court.

Appellant's first contention is that the court erred in refusing to grant a change of venue.

Section 10339 of Crawford & Moses' Digest provides that any party to a civil action trial by a jury may obtain an order for a change of venue therein by motion, etc.

Mr. Justice HUMPHREYS and the writer believe that the change of venue should have been granted. That, to deny a change of venue where two-thirds of the county

are interested as they are in this case, practically abrogates the statute. A majority of the court, however, is of opinion that, under § 10341 of Crawford & Moses' Digest, the court had a right to deny the motion to change the venue, and that his refusal to grant said motion was not error. The section reads as follows:

"Hereafter the venue of civil actions shall not be changed unless the court or judge, to whom the application for change of venue is made, finds that the same is necessary to obtain a fair and impartial trial of the cause." See also *Louisiana & N. W. Ry. Co.* v. *Smith,* 74 Ark. 172, 85 S. W. 242.

The question has been passed on a number of times by this court, and all of the decisions are to the effect that the granting or denying of a motion for change of venue is in the discretion of the trial court.

The next contention of appellant is that the court erred in directing a verdict for $3,040. Appellant concedes that this is the value of the land, considered solely for agricultural purposes. The undisputed proof in this case is that appellant owns the land on both sides of the river where the bridge is to be built.

Appellant offered to prove the fair market value of the land, and offered to prove by a number of witnesses that the value was $50,000, but the witnesses would testify that, in estimating and fixing the damages, they arrive at the amount by fixing the value of the ferry rights, privileges and franchises attached to the land. The court did not permit appellant to make this proof.

Appellant also offered to prove the income or receipts, or revenue, derived from operating the ferry, and this testimony was also excluded.

This court has said: "In determining the value of lands appropriated for public use, the same considerations are to be regarded as in sales of private parties, the inquiry being, in such case, what, from their availability for valuable uses, are they worth in the market?" *Little Rock & Fort Smith Ry. Co.* v. *McGehee,* 41 Ark. 202.

This statement of the inquiry to be made in such cases has been followed and approved by this court in subsequent cases. And the only question here is whether the testimony offered and excluded was competent testimony to prove the fair market value from the availability for valuable uses of this land. In other words, what was the fair market value of this land for any purposes for which it could be used?—for ferry purposes or bridge purposes?—the purpose of the suit being to condemn it and take it for a bridge site. Then, certainly, testimony as to the value of the land for a bridge site would be competent, and the only way in which the market value could be shown.

In the case of *St. Louis, I. M. & So. Ry. Co.* v. *Theo Maxfield Co.,* 94 Ark. 135, 126 S. W. 83, 26 L. R. A. (N. S.) 1111, the court said:

"The measure of damages which the owner is entitled to recover for property taken for public use or depreciated by such use is the market value of it. This market value is determined, not solely by the uses to which the property has been put or is put at the time of the condemnation proceeding, but by all the purposes to which it is adapted. It may not be used at the time for any purpose that is profitable, but the use to which it may reasonably and probably be put profitably must necessarily be taken into consideration in determining the market value of the land."

How could its use as a bridge site or a ferry site be taken into consideration in determining its value except to prove its value, as the appellant offered to do, by showing its value as a bridge site or a ferry site? In other words, showing its value with the ferry or bridge rights or privileges.

This court said in a much more recent case: "The measure of the owner's compensation for the land condemned is the market value thereof at the time of the taking, for all purposes, comprehending its availability for any use to which it is plainly adapted, as well as the most valuable purpose for which it can be used and will

bring most in the market." *Fort Smith & Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 147 S. W. 440.

This is exactly what the appellant offered to prove. The witnesses were probably not experts, and might not put it in the exact language of the court, but what they were endeavoring to testify to was the market value of the land for a bridge site or for a ferry site. Appellant had a right to introduce testimony of the value of the land for a bridge site or a ferry site.

Appellees could develop on cross-examination what elements they took into consideration, and could also develop on cross-examination the knowledge that the witnesses had of its value, and all other circumstances that affected the credibility of the witnesses or tended to show their knowledge of the thing about which they testified. It is said in the Scott case, above referred to:

"Finally, it is insisted by counsel for appellant that there is no testimony tending to support the finding of the circuit court as to the value of the land taken. They contend that the only value of the land, as shown by the testimony of appellees themselves, was its use as a ferry landing, and that this is not an element of value that can be considered by the court in awarding damages in a condemnation suit. It is true that the testimony on the part of appellees tended to show that the land in question was not dedicated to the public, but was reserved in the dedicator on account of its value as a ferry landing. The court, however, is not concerned with the purpose which caused the dedicator to reserve the land. He might reserve it for ferry purposes as well as for any other purpose. The question to be determined by the court in awarding damages in this case was the value of the land taken, and, in determining this value, its availability for any use to which it is plainly adapted can be considered. In view of our decision in the case of *Fort Smith & Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 147 S. W. 440, it can not be said that the finding of the court that appellees were damaged in the sum of $2,500

by the land taken has no evidence of a substantial character to support it."

Any testimony that will tend to show the market value of the land sought to be taken for any use, or for any purpose for which the land could be used, is competent for the purpose of showing the market value of the land. The market value of the land is the question to be determined.

A tract of land might be very valuable for a bridge purpose and be practically worthless for any other purpose. A tract of land might be very valuable for a railroad right-of-way because of its being a pass between mountains, and yet be almost worthless for any other purpose. But the question to be determined is the value for any purpose for which the land might be suitable, in this case for a bridge or ferry site, and any testimony that would tend to show its value as a site for a bridge or ferry would be competent. The witnesses therefore should have been permitted to testify what their opinion was as to its market value, basing it on the fact that it was suitable for a bridge site or ferry site, or, as they said, including the ferry rights and privileges, which means the same thing.

It is contended also that the revenue or income from the ferry was competent testimony. This would not be competent testimony for any other purpose except as tending to show the market value of the land.

"When a parcel of land is taken by eminent domain, the measure of compensation to be awarded the owner is the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy; in other words, the test is the fair market value of the land. Actual market value at the time of the institution of the condemnation proceedings is usually the inquiry; but, when the defendant has already entered upon the property, and has depreciated its value thereby, the measure of damages is the difference between the fair market value of the whole property at the time of the condemnation and the present market value of the prop-

erty left with the structure thereon. The productive value of land, or the value to its owner, is not the measure of compensation and is not material except so far as it throws light upon the market value." 10 R. C. L. 128.

So, in this case, the productive value or the income to be derived from its use is not the measure of compensation, and is not material except so far as it throws light upon the market value, but, for this purpose, it is competent and material.

In the proceedings to condemn any kind of property having a rental value, the income or rent from the property would be competent evidence to be considered solely for the purpose of determining the market value. There might be two buildings for rent situated in different surroundings, different districts with different environments, and, although the buildings might be the same in every respect so far as the material, structure, building, etc., is concerned, yet, because of different environments, one might rent for two or three times as much as the other. In determining the value of this land, both the buyer and the seller would consider these facts and consider the income derived from each in determining the market value.

The court therefore erred in directing a verdict, but, instead of doing that, should have permitted witnesses to testify as to the value of the land, taking into consideration the uses for which it was suitable, and submitted the question to the jury, under proper instructions. It was also error to permit amendment to the effect that plaintiff did not intend to interfere with the operation of the ferry near said bridge site, etc. Of course, every one knows that a free bridge would destroy the value as a ferry site. The sole question here is the market value of the land taken.

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

Mr. Justice SMITH concurred in judgment.

Mr. Justice McHANEY dissented.

OPINION ON REHEARING.

MEHAFFY, J. The facts are fully stated in the original opinion, and it is unnecessary to restate them. A majority of the court has reached the conclusion that the petition for rehearing should be overruled, but that the opinion should be modified. A majority of the court are of the opinion that the evidence as to the amount of revenue or income from the ferry was not competent testimony. Mr. Justice HUMPHREYS and the writer do not agree in this opinion, but think that the amount of revenue or income is competent for the purpose of showing the market value of the property. But the court now holds that evidence of the amount of tolls or income from the ferry is inadmissible, and that the original opinion should be modified to this extent only.

After a very careful reexamination of the entire case, a majority of the Judges have reached the conclusion that the original opinion is correct, except as to the testimony of amount of tolls or revenue from the ferry, and the petition for rehearing is therefore denied.

SMITH v. LUSTER.

Opinion delivered February 13, 1928.

1. MORTGAGES—PROTECTION AGAINST LABORERS' LIENS.—A mortgagee of a drilling outfit can protect himself against laborers' liens, either by taking possession of the property or by requiring the mortgagor to give a bond to pay the laborers.
2. MORTGAGES—PROTECTION AGAINST LABORERS' LIENS.—One who takes a mortgage on a drilling outfit is bound to know the kind of use to which it is to be put and probability of employment of laborers entitled to a lien superior to that of a mortgage, and should therefore take steps to protect himself against liens of laborers.

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

W. R. McHaney and *H. B. Leathers*, for appellant.

R. M. Hutchins, Goodwin & Goodwin and *J. Hugh Wharton*, for appellee.

MEHAFFY, J. The appellants filed suit in the Second Division of the Union Chancery Court, on the 24th of December, 1925, against appellees, Harry Luster, Tom Nash and R. R. Bondurant, in the aggregate sum of $2,286, for labor and work which they had done and performed in the drilling of an oil well, located on the northeast quarter of the southeast quarter of the southwest quarter, section 1, township 16 south, range 16 west, Union County, Arkansas, and asking that a lien be declared upon the drilling rig, machinery and equipment, and the oil and gas produced from said well, to secure payment of said judgment; that the last of said labor was performed within the last ninety days prior to the filing of this suit; and gave the amount of each laborer's claim.

A decree was rendered by default, and afterwards a motion to set aside was filed and granted, and the chancellor made a finding of facts, finding the interest of each party, and, it appearing that other parties were necessary parties, the court ordered that they be served, which was done, and held that the plaintiffs were entitled to a lien on the leases, but that they were not entitled to a lien against the drilling rig and not entitled to a personal judgment against the defendants, Nash, King and Bondurant.

H. R. F. Goode filed an intervention, claiming that he held a mortgage on the drilling rig, and the court found that said mortgage was prior and paramount to all of the contracts between the parties to the suit, and granted H. R. F. Goode's intervention, holding that plaintiffs had no lien against the drilling rig.

The only question in the case is whether the liens for labor are superior and paramount to the lien of the mortgage.

Act number 513 of the Acts of the General Assembly of 1923 was construed by this court in the case of *Pilcher* v. *Parker,* 173 Ark. 837, 293 S. W. 738. Section one of the act provides:

"Any person or persons working in or about the drilling or operation of any oil or gas well, or any well being drilled for oil or gas, in this State, shall have a lien on the output and production of such oil or gas well for the amount due for such work, and, in addition thereto, his lien shall attach to all machinery, tools, equipment and implements used in such drilling or operation of such oil or gas wells, including all leases to oil or gas rights on the land and upon which such drilling or operations shall be performed. Such lien shall be superior or paramount to any and all other liens or claims of any kind whatsoever, and no contract, sale, transfer or other disposition of said property shall operate to defeat said lien, and said lien shall be enforced in the same manner now provided by law for the enforcement of laborers' liens."

Section two provides: "This lien shall not be construed to be a lien upon the real estate of the employer or lessee, but shall be a lien upon the personal property used and connected with said drilling and operations and the output or production of said oil or gas lease on said land."

In construing this act, this court, among other things, said:

"Our construction of the act is that it gives a lien to laborers working in or about drilling operations of any oil or gas well on all machinery, tools, equipment, and implements used in such drilling operations, irrespective of who may own the machinery. The fact that one man's property may be taken to pay the debt of another does not render the act unconstitutional. In the instant case, according to the undisputed testimony, appellant placed his property in the possession of the lessee, knowing the purpose for which it was to be used by him, and knowing that the statute quoted above gives a lien to laborers for services performed by them in and about the drilling operations, and he therefore voluntarily subjects his property to such liens as are given by the statute. He could have protected himself against the

statutory lien in favor of laborers by requiring his lessee to give him a bond to pay the laborers' claims and to return it to him free from such incumbrances. A statute similar to act 513 was upheld as constitutional by the Supreme Court of California in the cases of *Church* v. *Garrison,* 75 Cal. 199, 16 P. 885, and *Lambert* v. *Davis,* 116 Cal. 292, 48 P. 123. Section 1 of the California statute provides that 'every person performing work or labor of any kind in, with, about, or upon any threshing machines, the engine, horse-power, wagons, or appurtenances thereof, while engaged in threshing,' shall have a lien upon same to the extent of the value of his services."

This court further quoted from the California court the following: "That the actual ownership of the property was an immaterial circumstance—the obvious theory, and, as we deem it, the correct one, being that the one lawfully holding from the actual owner the possession and the right to operate the machine is to be deemed, for the purposes of the statute, the owner of the property."

In the case decided April 25, 1927, construing this act, it will be observed that we said of the owner: "He could have protected himself against the statutory lien in favor of laborers by requiring his lessee to give him a bond to pay the laborers' claims and to return it to him free from such incumbrances."

Our statute with reference to mortgage of personal property provides: "In the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto and the right to possession." Section 7393, Crawford & Moses' Digest.

He would then, of course, stand in the same attitude as the owner of the property, because he is the legal owner and entitled to the possession of said property, and, as we said in the former case, could protect himself against the statutory lien in favor of laborers either by taking possession of the property, as he had authority to do under the law, or requiring the mortgagor to give him a bond to pay the laborers.

One taking a mortgage on a drilling outfit is bound to know the kind of use to which such property shall be put, and when he takes his mortgage he knows that laborers will probably be employed, who, under the statute above quoted, will have a lien superior to the lien of his mortgage. He should therefore take such steps as might be necessary to protect himself against liens of laborers.

We have already held the statute valid, and held that the laborer was entitled to his lien even against the owner of the property, and this case is controlled by the case of *Pilcher* v. *Parker, supra.*

The case is therefore reversed, and remanded with directions to enter a decree for a lien against the property in favor of the laborers.

FEDERAL LAND BANK OF ST. LOUIS *v.* GLADISH.

Opinion delivered February 13, 1928.

1. COURTS—ESTOPPEL TO QUESTION JURISDICTION.—One cannot come into court asserting a claim, and asking for affirmative relief, and then, when there is adverse judgment, claim that the court had no jurisdiction over his person.
2. APPEARANCE—EFFECT OF APPEARANCE.—Where a defendant voluntarily appears and proceeds without objection to the court's jurisdiction over his person, the court acquires jurisdiction, whether summons was issued or served or not.
3. APPEARANCE—PLEADING TO MERITS.—Where a foreign corporation, being sued in a State court, filed a counterclaim seeking affirmative relief, it thereby entered its general appearance and waived any defect in the service or failure to obtain the proper service on it.
4. ATTORNEY AND CLIENT—AMOUNT OF FEE.—In an action by an attorney at law to recover for legal services in foreclosure suits where plaintiff had presented to defendant a bill for $350 for his fee after completion of his legal work, and the evidence tended to show that this amount was a reasonable fee, the judgment of the lower court will be reduced to this amount and judgment entered accordingly.

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

J. R. Crocker, W. H. Bengel and *W. W. Prewitt,* for appellant.

C. M. Buck, for appellee.

MEHAFFY, J. The plaintiff, an attorney at law, practicing in the courts of Arkansas, brought suit against the appellant, the Federal Land Bank of St. Louis, alleging that, at the special instance and request of the Federal Land Bank, he rendered legal services by representing the bank in the institution and prosecution of certain foreclosure suits in the chancery court of Osceola District of Mississippi County, Arkansas, naming the suits which he brought and prosecuted, and alleging that large and valuable tracts of real estate were involved, said real estate being of the market value of $20,000. That he diligently looked after the prosecution of said suits, prepared and filed all papers and legal documents in connection with said suits, and in general looked after and attended to all the matters pertaining to said foreclosures, and that his services were of the value of $1,000, and that the bank refused to pay the same.

It was further alleged that Tolbert Poole was indebted to the Federal Land Bank, and had goods, moneys or chattels in his hands belonging to said bank. He asked for judgment against the bank, and that Poole be required to answer, etc.

The complaint was accompanied by an affidavit of appellee, stating that appellant was a foreign corporation; warning order was issued, and an attorney *ad litem* appointed.

The appellant filed a motion to quash the service and dismiss the suit, appearing solely for that purpose, and, as a reason for said motion, stated that the appellant is a corporation organized and existing under and by virtue of an act of Congress of the United States, approved July 17, 1916; that its domicile and principal place of business is in the city of St. Louis, Missouri; that it had no place of business in Arkansas, and no

agent in said State upon whom service might be had; that the chief officers resided in St. Louis, Missouri, the domicile of the bank, and that it had been a resident of the city of St. Louis continuously since the commencement of this action, and that service had not been had upon the chief officers of said corporation or any other officers thereof, or upon any duly authorized agent or employee. It was further alleged that appellant was not a domestic or foreign corporation, but a local corporation organized and existing under and by virtue of the act of Congress, from which it derives its powers to transact business. It alleged that it was not such a corporation as that service of process could be had by a warning order.

The bank, by agreement, entered its special and limited appearance solely and for the only purpose of hearing on its motion to dismiss the suit.

Thereafter the bank, reasserting that it had never been legally served, and insisting upon its motion to quash service, filed an answer under protest, admitting that appellee represented it as its attorney in certain foreclosure suits, but stated there was an agreement or contract entered into whereby appellee was to represent appellant in certain foreclosure suits in Mississippi County for a fee of $25 in each and every case submitted to him. That, in the two suits mentioned by appellee, it tendered him the sum of $50 as his fee for the services rendered. Denies that it is indebted to him in the sum of $1,000, or in any sum in excess of $50.

It is alleged in the answer that no services of any kind were rendered except as stated in the answer, and that the sum of $50 was to be in full payment of services in these cases.

Defendant then filed a cross-complaint or counterclaim, alleging that the services were unsatisfactory, and the decree or record failed to establish the rights of the bank; that said decree was so carelessly, improperly and imperfectly drawn that it was necessary, in order to protect the rights and interests of the complainant in said cause, to engage in further prosecution in said cause to

correct the errors, imperfections, etc. That plaintiff's services were of no value, and appellant had to employ additional counsel. That it was damaged by reason of appellee's carelessness, and entitled to recover the sum of $150 as damages.

Defendant filed answer to cross-complaint, and denied the material allegations, and thereafter appellant filed an amendment to its motions to quash service.

We deem it unnecessary to set out at greater length the pleadings in the case. There was testimony taken on the part of each of the parties tending to show the value of the services performed or what would be a reasonable fee for the services performed, and on this issue the testimony was in conflict.

The appellee testified about the services performed and the value of said services, and introduced a letter written to him by the St. Louis attorney of the bank, in which it was stated that the usual terms in cases of the kind mentioned was $25. The appellee responded to this letter, stating that he would attend to the matter for the fee indicated. There was some correspondence about the other case, and numerous other letters and correspondence introduced by both parties.

The appellant admitted that appellee had performed certain services not included or contemplated in the original contract, and appellee testified that a reasonable fee in the two cases would be from $600 to $650. Correspondence was introduced showing that appellee had presented a bill for the service in the two cases for $350.

The cause was submitted to the court sitting as a jury, and the court, after having heard the evidence and argument of counsel, found for the appellee in the sum of $600, and judgment was rendered for $600, from which this appeal is prosecuted.

Appellant filed motion for a new trial, alleging nine grounds or reasons for a new trial. We think it unnecessary to set out the motion for new trial at length.

The important question is whether or not the appellant is in court. If the court had no jurisdiction over

the person of appellant, this, of course, would end the case, and there would be no reason to discuss or decide the other questions. The appellant contends that it did not, by its motion to quash service and dismiss suit and its answer and counterclaim, submit itself to the jurisdiction of the court, and calls attention to the statement in R. C. L., which holds, in effect, that the prevailing rule that, in a proceeding by which jurisdiction over the person of the defendant is to be obtained, is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularities, nor is the objection waived when, being urged, it is overruled, and the defendant is thereby compelled to answer. It is only when he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived. 2 R. C. L., p. 339.

Appellant cites several other cases supporting the text, and again quotes from R. C. L. as follows:

"Where a defendant raised jurisdictional objections in the lower court, and takes an appeal for the sole purpose of having the rulings on such objection reviewed in the appellate court, his appearance in the latter court will not be considered as a waiver of such objection." Citing 4 C. J. 1347, and other authorities.

If the appellant had done no more than is mentioned in the above authorities, we would have a different question, but it is unnecessary to decide whether these acts would amount to a waiver of his objection. But it not only filed an answer, it filed a counterclaim or cross-complaint, asking for affirmative relief. In addition to this, it entered into an agreement that the suit should be tried at Blytheville, Arkansas, before W. W. Bandy, Judge, and fixing the date of the trial.

To be sure, in the last agreement referred to it is still insisted that it had not been properly served. But one cannot come into court, assert a claim, ask the court for affirmative relief, and then, when there is an adverse judgment, claim that the court had no jurisdiction over his person. If this could be done, the appellant would

have the opportunity and advantage of prosecuting its claim and, in case it recovered judgment, it could collect, and at the same time take no chances of a judgment against itself.

"Broadly stated, any action on the part of the defendant, except to object to the jurisdiction over his person, which recognized the case as in court, will constitute a general appearance." 4 C. J. 1333.

A court acquires jurisdiction over the person of a plaintiff whenever the plaintiff appears and invokes the power or action of the court in any manner, and when the defendant voluntarily appears in any case and, without objection, proceeds, the court thereby acquires jurisdiction over his person, whether any summons was issued or served or not.

This court has recently said: "While a suit upon the note and upon the contract of sale are entirely separate and distinct causes of action, the effect of defendant's answering the complaint and defending the action entered its appearance." *Purnell* v. *Nichol,* 173 Ark. 496, 292 S. W. 686.

In the same section in R. C. L. as that quoted and relied on by appellant is the following statement:

"On the other hand, there are numerous cases in which the defendant has been held to waive any question of jurisdiction over his person by taking some step to contest the cause upon the merits after his motion on special appearance has been overruled. One seeking to take advantage of want of jurisdiction in every such case must, according to these decisions, object on that ground alone. He must keep out of court for every other purpose. If he goes in for any purpose incompatible with the supposition that the court has no power or jurisdiction on account of defective service of process upon him, he goes in and submits for all the purposes of personal jurisdiction with respect to himself, and cannot afterwards be heard to make objection." 2 R. C. L., 340.

In this case the appellant not only pleaded to the merits and participated in the trial, but filed a counterclaim and asked for a judgment against the appellee. Its position now is that it is in court if it wins and not in court if it loses.

"A defendant appearing specially to object to the jurisdiction of the court must, as a general rule, keep out of court for all other purposes. In other words, he must limit his appearance to that particular question or he will be held to have appeared generally and to have waived his objection. If he takes any step consistent with the hypothesis that the court has jurisdiction of the cause and the person; such special appearance is converted into a general one, whether it is limited in its terms to a special purpose or not." 4 C. J. 1319.

"We are also of the opinion that, when the defendant Maitland made answer setting up various counterclaims, demanding judgment thereon, he thereby voluntarily submitted his person to the jurisdiction of the court for all intents and purposes as fully and completely and with the same force and effect as if the summons had been duly and personally served upon him within this State. * * * We are also of the opinion that the defendant, the Penobscot Mining Company, voluntarily submitted to the jurisdiction of the court by similar methods and acts as defendant Maitland, and that the court had jurisdiction over the persons of both appealing defendants for the purposes of rendering the judgment from which the appeal is taken." *Rogers* v. *Penobscot Mining Co.*, 28 S. D. 72, 132 N. W. 792, Ann. Cases 1914A, 1184.

In a note to the above case is the following:

"The test as to whether an appearance is special or general is, the court says, the relief asked. It is special if it is made for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant. It is general if the defendant invokes the judgment of the court, in any manner, on any question other than that of jurisdiction of the court, or in resistance to the cause of

action he is called on by the plaintiff and the rulings of the court involuntarily to defend."

Appellant recites and relies on the case of *Seelbinder* v. *Witherspoon,* 124 Ark. 331, 187 S. W. 325, and quotes extensively from that case. That suit was brought and service had in a county other than the one where the suit was pending, under a statute authorizing service in such cases. That provides simply where a single defendant lives in the county and service is had on him, the summons may be served on other defendants in other counties. But it expressly provides that the plaintiff shall not be entitled to judgment against any of them on service of summons in another county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them resided or were summoned in that county, the action is discontinued or dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him.

The law expressly authorized the defendant served in another county to make his defense, provided he objects to the service and states the reason for it. That was what was done in the *Seelbinder* v. *Witherspoon* case. He objected to being put on trial because he was not served in the county. The other defendant, Seelbinder, was personally served with summons, and filed an answer, denying liability. When the case was called for trial in the circuit court, all the parties announced ready for trial, whereupon, before any evidence was offered, appellee asked and obtained permission to take a nonsuit as to Hugo Seelbinder, and the cause was dismissed as to him. The defendant then immediately renewed his objections to the cause proceeding, and it proceeded over his objections. And, before judgment, defendant objected to judgment being entered against him. This is the procedure pointed out by the statute in cases of that

kind, and, no matter what his pleading had been up to that time, as soon as a nonsuit was taken as to the person served in the county, or if a verdict was rendered in favor of the person served in the county, then, in either event, the defendant served without the county would be entitled to a judgment in his favor.

And the court expressly states in the case relied on: "The authority for this suit against appellant as a resident of Crawford County, where he was served with process, in the courts of Sebastian County, is found in § 6074 of Kirby's Digest." That section is now § 1178 of Crawford & Moses' Digest. The court further said, quoting from a former decision *Wernimont* v. *State,* 101 Ark. 219, 142 S. W. 194, 198, Ann. Cas. 1913D, 1156:

"It is the policy and spirit of our law, enacted into statute by our Legislature, that every defendant shall be sued in the township or county of his residence. To this general principle there are statutory exceptions, chiefly in cases where there is a joint liability against two or more defendants residing in different counties. In such cases it is provided that suits may be brought in the county of the residence of any of the defendants, and service of summons can then be had upon the other defendants in any county, thereby giving jurisdiction over their persons to the court wherein the suit is thus instituted. But, before this jurisdiction can be acquired, by virtue of these statutes, over the person of such defendants, nonresident of the county wherein the suit is instituted, it is essential that the defendant resident of the county where the suit is brought shall be a *bona fide* defendant. By our statute it is further provided that, before judgment can be had against such nonresident defendants, a judgment must be obtained against the resident defendant."

It will therefore be seen that the case of *Seelbinder* v. *Witherspoon* has no application.

In the other case referred to, *Barry* v. *Armstrong,* 161 Ark. 314, 256 S. W. 65, the court simply said:

"It is first contended that the court erred in refusing to quash the service, but we must treat the motion to quash as having been waived by reason of the fact that appellants, without preserving their rights in that respect by an express reservation in their subsequent pleadings, filed an answer as well as a cross-complaint, thus voluntarily submitting to the jurisdiction of the court. This constituted a waiver, and it is too late now to raise the question of insufficiency of the service, or fraud in procuring the service."

The only point decided in the last case quoted from is that, when one files an answer or counterclaim without preserving his objections, he waives the defective service. But the point involved here was not considered in that case at all.

Another case to which attention is called is *Spratley* v. *Louisiana & Arkansas Ry. Co.*, 77 Ark. 412, 95 S. W. 776. In that case the court said:

"We held that, under the Code of Practice, a plea in abatement that the court has no jurisdiction of defendant's person for want of proper service is not waived by pleading in bar to the complaint, nor by appealing from an adverse judgment. There is no doubt but that, where a party who has not been served with summons, answers, consents to a continuance, goes to trial, takes an appeal, or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance."

It is true that the court said that, where a party objects, this does not apply. Where he preserves his protest he cannot be said to have waived his objection. But certainly he cannot go into court and ask affirmative relief and enter into the stipulations entered into in this case, without entering a general appearance. *Greer* v. *Vaugham,* 96 Ark. 524, 132 S. W. 456.

The case of *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467, has no application.

Appellant also calls attention to the case of *Automatic Weighing Co.* v. *Carter,* 95 Ark. 118, 128 S. W. 557. That case does not touch the question involved here.

The appellant in this case, by filing a counterclaim and asking for affirmative relief, asking the court to give it judgment, thereby enters its appearance and waives any defect there might be in the service, or any failure to get proper service, if there was such failure. In other words, the defendant, by filing a counterclaim and asking affirmative relief in the court, thereby subjected itself to the jurisdiction of the court, whether it had been served at all or not.

It is also contended by the appellant that the appellee is not entitled to any recovery above the amount stated in his account or bill presented.

The appellee was employed, first, under contract fixing the compensation for his services, but the evidence shows that he performed some services not included in the original contract, for which, of course, he was entitled to additional compensation. However, after the completion of the work, he presented a bill to appellant for $350 for his fee in both cases, and this, we think, fixed the amount of the fee at what he thought it should be.

There is some conflict in the testimony of other witnesses about the value of the services or the amount of a reasonable fee, but we think the testimony conclusively shows that the $350 fee is proper compensation for the services performed by appellee.

Holding as we do that the filing of the counterclaim and action of appellant entered its appearance, it becomes unnecessary to decide the other questions discussed by learned counsel.

The judgment of the circuit court will therefore be modified, and judgment entered here for appellee for $350. It is so ordered.

SULLIVAN v. ARKANSAS VALLEY BANK.

Opinion delivered February 13, 1928.

1. PARTIES—DEMURRER FOR DEFECT OF PARTIES.—A demurrer on the ground of defect of parties does not raise the question that there is a misjoinder of parties.
2. CORPORATIONS—APPLICATION OF DOCTRINE OF ULTRA VIRES.—The doctrine of *ultra vires*, meaning that the acts of a corporation in excess of its powers are void, does not apply to torts committed by a corporation, but only to its contracts or contractual relations.
3. BANKS AND BANKING—LIABILITY OF BANK FOR TORTS.—Where a bank falsely represented that a mortgage company had securities sufficient to pay its bonds, it is liable, notwithstanding an alleged want of authority of such bank to make such representations.
4. EQUITY—EFFECT OF WANT OF JURISDICTION.—Where a demurrer to the jurisdiction of the chancery court was well taken, the court should not dismiss the complaint, but should transfer the cause to the law court.
5. EQUITY—JURISDICTION TO COMPEL ACCOUNTING.—A complaint against a bank by purchasers of the bonds of a mortgage company to recover for the bank's false representations inducing the sale of such bonds, alleging that the mortgage company was bankrupt, and that the bank held a large number of securities in trust for plaintiffs and had been guilty of a breach of trust, *held* to give chancery jurisdiction to compel an accounting from the bank and for the appointment of a trustee to take charge of the securities held by the bank and to sell them for the bondholders' benefit.
6. EQUITY—SUIT FOR ACCOUNTING—WHEN NOT PREMATURE.—A suit by bondholders against a bank and others for misrepresentations in the sale of a mortgage company's bonds, and asking that securities held by the bank in trust be sold and that the bondholders recover from the bank and its officers such sum as might be found to represent plaintiff's losses, *held* not objectionable as premature, since a personal judgment was sought only as to the excess due after sale of the securities.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland*, Chancellor; reversed.

Dobbs & Young and *John D. Arbuckle*, for appellant.

Dailey & Woods, Hill, Fitzhugh & Brizzolara and *Warner, Hardin & Warner*, for appellee.

MEHAFFY, J. The appellants brought suit in the Sebastian Chancery Court against the Arkansas Valley

Bank, a State banking institution, and individuals, trustees of the John A. Guthrie Mortgage Company, bankrupt. Suit was brought for themselves and all other persons similarly situated. After suit was brought, numerous other bondholders intervened and made themselves parties plaintiff, and adopted the complaint and amended complaints of the original plaintiffs.

Plaintiffs alleged that the defendant, John A. Guthrie, was president, W. H. Johnson vice president, Hugh Branson treasurer, and Oran C. Yoes secretary of the John A. Guthrie Mortgage Company, and were also stockholders and members of the board of directors, and composed the executive committee of the said John A. Guthrie Mortgage Company, and, by the by-laws of the said company, said defendants were required to be actively engaged, and were actively engaged, in the management and financial condition of the John A. Guthrie Mortgage Company; that each and all of them held themselves out to the public as being actively engaged in the management, direction and control of the affairs of the mortgage company; that they caused to be printed advertisements, circulars, letters and other printed matter, and caused the same to be circulated throughout Arkansas, Oklahoma, Kansas, Vermont, and other states, representing themselves to be in charge of and directing the affairs of said company.

Plaintiffs alleged that the Arkansas Valley Bank was a banking institution under the laws of Arkansas, and doing business at Fort Smith, Arkansas, and that Hugh Branson was its president; that all of said defendants daily and continuously held out to the general public, and especially to these plaintiffs, that the mortgage company was a solvent concern of unquestioned financial soundness, and deserving of public confidence, and further, by word of mouth and by private letters, generally throughout the county, assured the general public, and especially these plaintiffs, that the said mortgage company was wholly solvent and reliable, and carried a large surplus, and that investors in its securities and

stock could stand no chance to lose their money, and that it had more money than it could loan on farms throughout the States of Arkansas and Oklahoma. That the officers and directors of the executive committee of the mortgage company authorized and caused to be issued bonds of said company, and advertised that said bonds were secured by first mortgages held by the defendant, Arkansas Valley Bank, as trustee for the purchasers; that the plaintiffs relied upon the said advertisements, and purchased part of the bonds. Many others purchased bonds in a like manner; that the Arkansas Valley Bank, through its president, Hugh Branson, accepted the trust, and that each of said bonds bore on its face a certificate which was set out in said complaint, setting out the securities and mortgages. That the advertisements, circulars and letters, etc., were false and wholly untrue; that the defendants knew the bonds were not secured by first mortgages, but many of the securities were unsecured promissory notes, and others were notes given where no money had ever been received by the borrower. That the mortgage company was, on July 14, 1926, declared bankrupt; that the Arkansas Valley Bank holds in trust for the plaintiffs a large number of notes, secured and unsecured, but that they are insufficient to liquidate the indebtedness; a large part of them are second and third mortgages. That the Arkansas Valley Bank had been guilty of gross breach of duty as trustee; that the Arkansas Valley Bank knowingly and negligently breached its trust agreement and dissipated or permitted to be dissipated trust property, and that it knowingly and fraudulently made and executed and put forth various false and fraudulent certificates in writing upon various bonds held by the plaintiffs, duly signed by the authorities of said bank officials, which false certificates were executed, made and put forth with the fraudulent intent that it would be relied upon, and it was relied upon, and was known by the officials and directors of the bank to be false, and was done with the intention of deceiving, and did deceive, plaintiffs. Plaintiffs further

alleged that the certificates issued by the bank were false and fraudulent, and known to be so, made with the intention to deceive, and did deceive, the parties.

The complaint is very lengthy, but it is unnecessary to set it out in full here.

Defendants filed a demurrer, because they alleged, first, that the complaint did not state sufficient facts to constitute a cause of action against the bank; second, because the court has no jurisdiction of the subject-matter; third, because there is a defect of parties.

There were other demurrers filed by other defendants, but they are all in the same language. That is, they demur on the ground that there is a defect of the parties; that the court has no jurisdiction, and that the complaint does not state facts sufficient to constitute a cause of action. The court sustained the demurrers on the ground of defect of parties defendant. Then, after plaintiffs had refused to elect or to amend, and having elected to stand upon the amended or supplemental complaint, the court then sustained the demurrer on each ground. Plaintiffs excepted, and have prosecuted an appeal to this court.

Appellant's first contention is that the holding of the court that there was a defect of parties and sustaining the demurrer because of defect of parties defendant, is error. We agree with counsel for appellant in this contention. There is no defect of parties defendant.

Defect of parties means too few, and not too many. The parties have discussed misjoinder of parties and misjoinder of causes of action, but have not discussed defect of parties.

"The first example in support of the demurrer is that there is a defect of parties plaintiff. But that, as a ground of demurrer, means too few and not too many. A demurrer alleging this particular objection can be interposed therefore only in case of a nonjoinder of necessary plaintiffs or defendants, and never in a case of misjoinder." *Tieman* v. *Sachs,* 52 Ore. 560, 98 Pac. 163.

It is doubtful whether misjoinder of parties could be raised on demurrer. Our statute provides:

"The defendant may demur to the complaint where it appears on its face either, first, that the court has no jurisdiction of the person of the defendant or the subject of the action; second, that the plaintiff has no legal capacity to sue; or, third, that there is another action pending between the same parties for the same cause; fourth, that there is a defect of parties plaintiff or defendant, or that the complaint does not state facts sufficient to constitute a cause of action."

But whether a demurrer would reach misjoinder of parties or not, that question is not before the court, because the demurrer is on the ground of defect of parties, and not misjoinder.

"It is urged that there is a misjoinder of parties defendant. As this does not come within the terms of defect of parties, it is doubtful whether the question may be raised on demurrer." *United States* v. *Comet Oil & Gas Co.* (C. C.), 187 Fed. 674.

Counsel in their brief and argument do not claim that others should be made parties or that the defendants are too few, and there is no defect of parties, and the demurrer based on this ground should be overruled. The appellants for the bank say in their brief that the court was clearly right in sustaining the demurrer because there was a defect of parties defendant. But they argue that the allegations with reference to the defendant, Johnson, were in no wise connected with the allegations with reference to the Arkansas Valley Bank. That might be true and still the court could not sustain a demurrer for defect of parties, because, if that was true, it would be merely a misjoinder of parties, and that question is not raised by the pleadings.

Attorneys for Johnson and Branson argue defect and misjoinder of parties and causes of action as if those questions were raised by the demurrer, which is based on the ground of defect of parties. The question of mis-

joinder of parties defendant or misjoinder of causes of action was not raised by the demurrer.

It is earnestly contended by the attorneys for the Arkansas Valley Bank that, even if the allegations of the complaint are true, it does not state a cause of action against the bank. It is argued that for a bank to attempt to do the things which it is alleged the bank did do in this instance is *ultra vires,* and that, for that reason, the bank is not liable, and learned counsel cite the case of *Grow* v. *Cockrill,* 63 Ark. 418, 39 S. W. 60, 36 L. R. A. 89.

The only question decided in that case, as we understand it, was that a national bank is not authorized to act as a broker in lending money to others, and the court said that the bank had no authority to transact business of that kind, and that the teller was not acting within the scope of his authority and business when he committed the torts complained of, and cites a Pennsylvania case as holding that.

The allegations of the complaint in this case against the bank are that it falsely represented that it had securities on hand sufficient to pay these bonds; that it made and published false statements about the condition of the mortgage company; that it induced these persons to invest their money in worthless bonds when it knew they were worthless, and the suit is based on tort, so far as the bank is concerned, and it has been many times held that the doctrine of *ultra vires* does not apply to a corporation's torts, but only to its contracts or contractural relations. Suits are maintained against corporations every day and recoveries had for negligence, willful wrong, and all kind of torts, and it has never been contended, so far as we know, that a corporation was not liable for these things because it was *ultra vires.*

"Is the doctrine of *ultra vires* applicable to this case? The doctrine of *ultra vires* has never been held to apply to a corporation's torts, but is limited to its contractural relations." *Greeley National Bank* v. *Wolf,* (C. C. A.) 4 Fed. Rep. (2d) series, 67.

The above is a rather recent case, decided in January, 1925, and it cites a number of cases holding that doctrine.

"Corporations are liable for every wrong they commit. And in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. * * * Recurring to the case in hand, it is now well settled that, if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by its directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter." *National Bank* v. *Graham,* 100 U. S. 699, 25 L. ed. 750.

The above case cites quite a number of authorities.

"In *Bissell* v. *Michigan So. & N. I. R. Co.,* 22 N. Y. 258, a leading case, the court held that corporations, like natural persons, have the power and capacity to do wrong. That corporations have no right to violate their charters, but they have the capacity to do so, and are to be bound by their acts, where a repudiation of such acts would result in manifest wrong to innocent parties; that the plea of *ultra vires,* according to its just meaning, imports, not that the corporation could not make the unauthorized contract, but, that it ought not to have made it; that such a defense is not to be entertained where its allowance will do great wrong to innocent third parties; that, although corporations cannot rightfully do any act not authorized by their charters, yet such acts, when done, are to be regarded as the corporation's acts; and if, in the course of their performance, others are injured by the negligence of the officers of the corporation, the corporation is responsible; such liability arising from the duty which every railway company owes to persons within its cars with its consent."

Citing a number of authorities, the court, continuing, says: "While they (corporations) have no right to violate their charters, yet they have the capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially when the offender alleges his own wrong to avoid a just responsibility." *Burke* v. *State,* 64 Misc. Rep. 558, 119 N. Y. Supp. 1089. The court in the above case also said: "It would seem that the action of the defendant in assuming to carry on the business of dentistry was illegal and *ultra vires.* But, though it was beyond the corporate powers of the defendant to engage in the business, this does not relieve it from the torts of its servants committed therein."

The Supreme Court of the United States, in a later decision than the 100 U. S., quoted with approval the case of *National Bank* v. *Graham,* and, after quoting from the Graham case, the court said:

"We are of opinion that the execution of the receipt or certificate in question and its transmission by mail direct by the defendant to the plaintiff created the relation of bailor and bailee between her and the defendant, and made it an act of gross negligence for the defendant to deliver or dispose of or appropriate the securities in question on the sole request of Juda, and without her direct authority."

The court further on said:

"Knowing, from what passed between Mass and Juda, that the bonds were to be used to raise money for the benefit of Walker Sons & Company, and knowing that such use was an improper disposition of the bonds unless the transaction was affirmatively and directly sanctioned by the plaintiff, the defendant became a party to the misappropriation of the bonds. It is immaterial, in this view, whether or not the defendant received any portion of the money loaned by the Bank of Commerce on the security of the bonds." *Manhattan Bank* v. *Walker,* 130 U. S. 267, 9 S. Ct. 519, 32 L. ed. 959.

The appellee is correct in the statement that a bank organized under the laws of the State of Arkansas has restricted powers, and this is true of any other corporation. But any corporation may have the capacity to do many things that it does not have the right to do. As we understand it, the bank would not be liable on any contract where the contract was beyond its power to make, but *ultra vires* has reference to contractual relations and not to tort. But, if the bank and its officers committed the acts alleged in the complaint, the bank could not defend itself when charged with the wrongful conduct by showing that it did not have authority to commit the acts.

We think the complaint states a cause of action, and that the demurrer based on the ground that the facts stated did not constitute a cause of action should have been overruled.

The next ground of demurrer is that the court had no jurisdiction of the subject-matter. The court dismissed the cause when, if it appeared to the court that the demurrer as to jurisdiction was well taken, it should not, on that ground, have dismissed the complaint, but should have transferred it to the law court.

The only thing that appellees say about the ground of demurrer last mentioned is: "That the matters involved as against them were not cognizable in equity, and was purely a common-law action for a tort."

"The complaint prayed for an accounting against the bank, that a trustee be appointed to take charge of all securities, funds and assets held by the bank, that they be ordered sold for their benefit, and that the plaintiffs have and recover of and from each defendant such a sum as may be found to be their losses sustained by the false representations and deceit of the directors," etc.

We think the allegations of the complaint are sufficient to justify the prayer, and that those allegations are sufficient to give the chancery court jurisdiction.

It is also contended by appellees that the suit was prematurely brought. Whether this question could be

raised by demurrer in this particular case need not be decided, because the complaint asks that this property first be sold—this is, the securities; and it could not be premature, certainly, in asking this relief, and if this relief is granted, then the other would, of course, not be premature, because they would only recover a judgment against the parties for any excess or any amount for which the defendants were liable in excess of the amount that the securities sold for.

The case will be reversed, and remanded with directions to overrule the demurrers. It is so ordered.

ROGERS v. AGRICOLA.

Opinion delivered February 13, 1928.

1. WILLS—CONSTRUCTION OF CODICIL.—A codicil is in legal effect a republication of the will, and the whole is to be construed together as if executed at the date of the codicil.
2. WILLS—EFFECT OF CODICIL.—A codicil, duly executed, will operate as a republication of an earlier will, although such earlier will was inoperative, or imperfectly executed or attested.
3. WILLS—EFFECT OF CODICIL.—Where a will was typewritten with but one witness and did not comply with the statute, and subsequently the testator wrote a codicil entirely in his own handwriting, referring to the previous will, the two instruments were to be regarded as one instrument, and the execution was sufficient.

Appeal from Clark Circuit Court; *J. H. McCollum*, Judge; reversed.

McMillan & McMillan, for appellant.

Joe Hardage and *Joseph Callaway*, for appellee.

McHANEY, J. In his lifetime, and on the 6th day of June, 1924, Carl Rogers executed the following typewritten instrument as and for his last will and testament:

"Missouri Pacific Railroad Company.

"I, Carl Rogers, of the city of Arkadelphia, county of Clark, State of Arkansas, being of sound mind, memory, and understanding, do make and declare the following as my last will and testament, that is to say:

"(1) I hereby revoke all wills, codicils, or testamentary instruments by me at any time heretofore made. (2) I direct that my funeral expenses and just debts be paid as soon after my death as may be practicable. (3) I give and bequeath to my brother, Tracy Rogers, all my earthly possessions at my death, he being made administrator. (4) My last will is there be no division or deviation from this testament.

"In witness whereof I have hereunto set my hand and seal at the Merchants' & Planters' Bank of Arkadelphia, Arkansas, this sixth day of June, in the year one thousand nine hundred and twenty-four.

(Signed) "Carl Rogers.

"Witness R. J. Dougan."

Thereafter, on September 15, 1926, he executed the following instrument as a supplement or codicil to the foregoing typewritten will, same being entirely in his own handwriting:

"Arkadelphia, Ark., 9-15-26.

"This document will serve as a supplement to my last will and testament.

"It is my will that Sam Rogers (brother) shall occupy building on Seventh Street, which he now occupies, as long as he lives, with the following provisions, if Tracy Rogers (brother), the lawful owner of the building, continues to make his home with Sam Rogers. (2) If any difference arises between my brothers above mentioned, said Sam Rogers shall pay Tracy Rogers $15 per month rent, after Tracy Rogers has removed from the home of Sam Rogers.

"It is further willed that Sam Rogers have my shotgun, and my sister, Mrs. Agricola, my diamond pin.

"I herewith will one dollar ($1) to each of my brothers, namely, W. V. Rogers, S. B. Rogers, J. D. Rogers, Ben Rogers, also one dollar ($1) to each of my sisters, Mrs. L. E. Agricola and Mrs. Ruth Yarbrough.

"All my debts and funeral expenses shall be paid before any final settlement made with benefactor.

(Signed) "Carl Rogers."

"9-15-26."

Carl Rogers, on the 27th day of November, 1926, died, and thereafter, on the 10th day of December, 1926, said two instruments above copied were filed in the probate court of Clark County for probate, and on the 19th of January, 1927, the probate court made an order admitting them to probate and declaring them to constitute the last will and testament of the said Carl Rogers. An appeal was prayed and prosecuted by the appellees, as contestants, to the circuit court, where the case was submitted to the court on the following agreed statement of facts:

"The two instruments filed for probate and the statement of facts below and in the four following sheets constituted the agreed statement of facts, on which the cause is submitted. Carl Rogers (deceased) was born and reared and lived all of his life at Arkadelphia, and died on the 27th day of November, 1926, at the age of thirty-eight years. Seven brothers and sisters and one niece (daughter of brother) survived him. They are W. V. Rogers, 54 years old; Sam B. Rogers, 47 years old; Mrs. Ruth Yarborough, 30 years old, and Tracy Rogers, his beneficiary, 35 years old; and the contestants, Mrs. Elmer Agricola, 42 years old; Jess Rogers, 45 years old; Ben Rogers, 33 years old, and Mrs. Jodie Cobb, 26 years old. All of these brothers and sisters are able-bodied, capable men and women, and all are in reasonably prosperous circumstances, except Tracy Rogers, the beneficiary. Tracy Rogers, at the age of three years, by accident, broke one of his legs; infection set up, and it became necessary to and it was amputated by physicians. Due to the injury and amputation of the one, the other leg became paralyzed, and from that time to the present he has been unable to walk. For a long number of years, after his affliction, he could only get about by crawling on his hands, and using the lower part of his body. After he reached the age of about fifteen years he was able to get about some by the use of crutches, and his condition in that respect has remained and is now the same. He owned no property, had no income, and has no employment.

"Carl Rogers (deceased) was from infancy strong, able-bodied and energetic. Until about a year before his death he was an unusually strong, healthy, robust man, over six feet in height, and of good personal appearance. He was three years older than his beneficiary, Tracy Rogers, and in the infancy of both he began caring for, helping, guarding and protecting his crippled brother, Tracy, and this care for Tracy continued until Carl died.

"His father died when Carl was about 17 years of age, and left his mother and Tracy and two younger children than he was. The other children, older, had married. Carl continued to live with his mother, and, at the age of seventeen, began and became the principal means of support for the mother and younger children. This continued until his mother died. On her deathbed she asked and Carl promised that he would always take care of and protect Tracy. The other children married and found homes elsewhere, and Carl continued unmarried in the care, support and protection of Tracy.

"For some time before his death Carl owned the brick building which Sam B. Rogers, his brother, occupies and in which he runs a barber shop. The agreed amount for rent on this shop between Carl and Sam was $15 per month, and in lieu of Sam's paying the rent to Carl, there was an agreement between Carl and Sam that Sam Rogers would furnish board and room to Tracy Rogers and would accept as pay therefor the $15 rental for the barber shop. This arrangement had been in force and had been followed for some time before Carl's death. This was the only business building that Carl owned.

"Carl Rogers was a good business man, a good trader, and saved money. For some years before his death he had been in the employ of the Missouri Pacific Railroad Company in various capacities, as clerk, assistant station agent, and, at the time of his death and for some three or four years prior thereto, he was cashier for the Missouri Pacific Railroad Company at its Arkadelphia station, and had an office in the freight depot,

and, in writing letters and statements, used a typewriter. He had continued all along through the years to support and care for and look after the welfare of his brother Tracy, and, for some time prior to the 6th day of June, 1924, repeatedly stated to Tracy and to his brothers, W. V. Rogers and Sam B. Rogers, and to close friends and others, that he intended to continue to take care of Tracy and that he intended to make a will so that, in the event of his death, Tracy would have his property.

"On the 6th day of June, 1924, Carl Rogers had in his possession the typewritten instrument which is in evidence here and offered for probate. Just after the typewritten instrument had been written he stated to friends and co-employees in the office with him, that he had made his will, and was giving all his property to his brother Tracy. He then went with the instrument to the office of his brother, W. V. Rogers, in Arkadelphia, showed it to him, and told this brother that he was going to execute it and place it in a safety box at the Merchants' & Planters' Bank, so that, in the event of his death, the will would be there, and Tracy would be taken care of.

"He went to the Merchants' & Planters' Bank with the instrument, and there signed his name to it, with a pen, and the then cashier of the Merchants' & Planters' Bank & Trust Company, R. J. Dougan, signed it with a pen as a witness. The signature to this typewritten instrument is in the handwriting of Carl Rogers (deceased), and the name R. J. Dougan is signed in the handwriting of R. J. Dougan.

"At that time and since that time, up to and after the time of his death, Carl Rogers and his brother Sam B. Rogers, together, used one of the safety lock-boxes in the vault of the Merchants' & Planters' Bank & Trust Company. Both kept their valuable papers in that box. Sam B. Rogers kept and carried the key to the box. Carl, after he had signed the instrument, and the witness Dougan had signed it, showed it to Sam B. Rogers, and stated to him that he wanted to put it in the lock-box there and to keep it there. This instrument was then

placed in that lock-box at the Merchants' & Planters' Bank & Trust Company, continued to remain there until a day or two after Carl's death, when Sam B. Rogers opened the box, and handed the instrument to the beneficiary, Tracy Rogers.

"In the spring of 1926 Carl Rogers became afflicted with some internal stomach or bowel trouble, and, while he continued at his work most of the time, it gave him a great deal of trouble and caused him a great deal of worry. This trouble continued until the latter part of the summer of 1926, when it became necessary for him to go to a hospital and have an operation. During this time he often expressed to his brothers and friends doubt as to his being able to overcome the affliction, and repeatedly, at such times, would add that he had made a will so that his brother Tracy would get his property.

"For some months prior to his death he had a room in the house of his sister, Mrs. Elmer Agricola, one of the contestants, and after his death the instrument which is in evidence here, and which has been probated in the Clark Probate Court, and which is entirely in the handwriting of Carl Rogers (that is, the entire body and all of the instrument, as well as the signature and the dates, are in his handwriting and the fact that it is entirely in the handwriting of Carl Rogers [deceased] has been established by the unimpeachable evidence of more than three disinterested witnesses), and which is dated '9-15-26,' was there in his room, and within a few days after his death was delivered by Mrs. Elmer Agricola to Sam B. Rogers.

"About the date of this instrument—that is, September 15, 1926, and just after, and repeatedly thereafter at various times, Carl told Tracy Rogers and his other brothers that he had written and signed this codicil, or supplement, to his will, which was in the lock-box at the bank, and this instrument was in his room.

"Just a short while before his death he realized that he was not going to recover, and again told his brothers, Sam B. and W. V. Rogers, and his beneficiary, Tracy

Rogers, of his having written and signed this supplement to his will and where it would be found.

"Ben W. Rogers, one of the contestants, is also a cripple, having had one of his hands cut off."

On a hearing the circuit court decided that these two instruments were not executed as required by law, so as to constitute a will, and should not have been admitted to probate as such by the probate court of Clark County, and entered a judgment rejecting them, and reversing the order of the probate court. From this judgment Tracy Rogers has appealed to this court.

It is admitted by appellant that the typewritten instrument purporting to be the last will and testament of Carl Rogers was ineffectual as a will, for the reason that it was not attested by two witnesses, and did not therefore meet the requirements of the statute. It is furthermore agreed that the second of the above instruments is wholly in the handwriting of the testator. If the first instrument, the typewritten will, had been properly attested, there could be no question about the second instrument, wholly in the handwriting of the testator, being a good holographic codicil to the will. See § 10494, C. & M. Digest, 5th subdivision.

The testator called the instrument in his handwriting a supplement to his will. "This document will serve as a supplement to my last will and testament." This instrument therefore can be nothing more than a codicil to his former will, and, while the former instrument, strictly speaking, cannot be called a will, lacking the necessary witnesses, yet it is an instrument testamentary in form, and if the codicil dated September 15, 1926, sufficiently identifies it by reference thereto, we must treat it as incorporated therein and republished as of the date of the codicil.

As stated by this court in *Gibbons* v. *Ward,* 115 Ark. 184, 171 S. W. 90: "A codicil is in legal effect a republication of the will, and the whole is to be construed together as if executed at the date of the codicil."

And in 40 Cyc. 1215, it is said:

"As a general rule, revival or republication brings the will down to the date of the republication, and makes it speak as of that time."

And on page 1216 of Cyc., with reference to invalid wills, it is said:

"By the weight of authority a codicil duly executed will operate as a republication of an earlier will, although the latter is inoperative or imperfectly executed or attested."

That is exactly the situation here. The original will being invalid on account of being imperfectly attested, but the codicil being a good holographic instrument, executed in accordance with the statute relating to holographic wills, operates as a republication of the original will, although imperfectly executed, and the two are to be regarded as being one instrument, speaking from the date of the codicil. This was the question before the Supreme Court of Missouri in *Harvey* v. *Choteau,* 14 Mo. 587, 55 Am. Dec. 120, where there was an invalid will for the reason that it did not comply with the requirements of the statute, and a codicil executed later that did meet the requirements thereof. The court said:

"Will the proof of this codicil establish the will? Can an unattested will be set up and republished by a codicil not physically annexed to the will, but which is attested by a sufficient number of witnesses required by law to prove a will? These are questions of weighty import, and have demanded our patient consideration."

The court, after citing eminent authority in support thereof, including Judge Story and Chancellor Kent, said:

"Here, then, is a very respectable authority, that 'reference' is sufficient. I confess I see no good reason why it should not be. In cases like the present, the question of identity may sometimes arise: Is this the will referred to? But this can always be settled by the facts in proof.

"I am therefore free to declare that I can see no legitimate reason why a properly attested codicil may not draw down to it a previously made, though unattested, will, to which the codicil refers, upon its face, though not annexed by wafers or any other mode physically."

The holding in *O'Leary* v. *Lane,* 149 Ark. 393, 232 S. W. 432, was to the effect that deeds referred to in the will were not sufficiently identified by the will itself to effect a conveyance of the real estate described in the deeds. This was all the court decided in that case. The language in the will, which referred to certain deeds purporting to convey certain property to his heirs, was, "which property I give and bequeath to each of said heirs as conveyed in said deeds." The court then said:

"This language refers to deeds in the testator's safety deposit box in the Farmers' & Merchants' Bank of Des Arc, Arkansas, at the time the will was executed, and, if the instrument referred to is sufficiently identified, the language quoted was sufficient to effect a conveyance of the real estate."

The court then goes on to hold that the deeds were not sufficiently identified by the will. The court further said in this case that "there could be no objection, however, in devises of real estate, if the language of the will itself is sufficient to effect a conveyance of the lands, to refer to an extraneous instrument for the description merely, if the will sufficiently designates the extraneous instrument so as to certainly identify it."

In the codicil of the will now under consideration the testator refers to his former will, and sufficiently identifies the real estate as the building on Seventh Street, which Sam Rogers then occupied, and of which Tracy Rogers was the then owner. It is not stated in the agreed statement of facts that he owned any other real estate, and the reference to the real estate in the valid codicil is sufficiently definite to determine its location. The former will, which was not properly attested, is sufficiently referred to as to identify it as a part of his whole will. It is not shown that he made any other will

at any time, and it is not questioned that he signed this former document, believing it to be his will. The whole thought of Carl Rogers seemed to be to take care of his totally helpless, crippled brother.

We are of the opinion therefore that the two instruments constituted the will of Carl Rogers, and that the circuit court erred in setting aside the judgment of the probate court admitting same to probate. The judgment is therefore reversed, and remanded with directions to enter a judgment sustaining the probate of said will. It is so ordered.

BERNSTEIN v. REID.

Opinion delivered February 20, 1928.

CARRIERS—LOSS OF SHIPMENT—LIMITATION.—Where a bill of lading for an interstate shipment of cotton authorized by U. S. Comp. St., § 8604a, was issued on July 15, 1919, and the cotton was delivered to the consignee in Louisiana on July 23, 1919, a suit for one bale lost in transit brought on November 29, 1921, was barred, since it was not brought within two years and a day as required by the bill of lading.

Appeal from Columbia Circuit Court; *L. S. Britt,* Judge; reversed.

Henry Stevens, for appellant.

Wade Kitchens, for appellee.

HART, C. J. Appellant prosecutes this appeal to reverse a judgment against it in favor of appellee for $296.40, the value of a bale of cotton alleged to have been lost in transit in an interstate shipment of cotton.

This was an action by a shipper of cotton under a transportation contract for a shipment of 92 bales of cotton from Magnolia, Arkansas, to New Orleans, Louisiana. Appellee had 92 bales of cotton stored in the warehouse of the Columbia Compress Company in Magnolia, Arkansas, and gave directions for his cotton to be shipped to New Orleans, Louisiana. The compress company loaded the cotton into a car of the railroad company

on one of its tracks near the warehouse. The car containing the cotton was sealed by the railroad company, and it signed the bill of lading presented to it by the compress company. The bill of lading was dated July 15, 1919, and contained a condition on the back of it which reads as follows:

"Except where the loss, damage, or injury complained of is due to delay or damage while being loaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within six months (or nine months, in case of export traffic), after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

The cotton was consigned to H. R. Gould Company, New Orleans, Louisiana, and was delivered to that company on the 23d day of July, 1919. The seals had not been broken on the car when the cotton was delivered to consignee, but, when the cotton was unloaded from the car, it was ascertained that there were only 91 bales in it. Notice that one bale was missing was given to the railroad company, but it refused to make payment for the cotton. Hence this lawsuit.

One of the defenses to the suit is that it was not brought within the time provided by the act of Congress regulating interstate shipments. The act of Congress in question provides for bills of lading to be issued by the carrier receiving the property for transportation from one State to another, and contains a proviso which reads as follows:

"Provided, further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any

remedy or right of action which he had under the existing law; provided, further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years; provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. (24 Stat. 386; 34 Stat. 595; 38 Stat. 1196; 39 Stat. 411)." See United States Compiled Statutes, Annotated, vol. 8, § 8604a, p. 9291.

The proviso also copied in the bill of lading was made pursuant to this act. The bill of lading for the cotton was issued by the railroad company on July 15, 1919, at Magnolia, Arkansas, and the cotton was delivered to consignee at New Orleans, Louisiana, on July 23, 1919. The present suit was not instituted until November 29, 1921.

In *A. J. Phillips Co.* v. *Grand Trunk Western Ry Co.*, 236 U. S. 666, 35 S. Ct. 444, 5 L. ed. 774, the fact was that all claims for the recovery of damages for overcharges were not brought within the time prescribed by the act of Congress. It was contended, however, that the case was to be governed by the Michigan rule, which did not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. The Supreme Court of the United States denied the contention, however, and in discussing the question said:

"But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *United States*, 123 U. S. 227, 232, 8 S. Ct. 82, 31 L. ed. 128), whether complaint is filed with the Com-

mission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity, which, in this as in so many instances, must be borne in mind in construing the commerce act."

To the same effect see *Missouri, Kansas & Texas Ry. Co.* v. *Harriman,* 227 U. S. 657, 33 S. Ct. 397, 57 L. ed. 690. This declaration of the law regulating interstate shipments, by the Supreme Court of the United States, is of controlling force, because it is the tribunal of ultimate authority for the settlement of the question.

This court, however, has announced the same rule in the case of *Farr* v. *St. Louis Southwestern Ry. Co.,* 154 Ark. 585, 243 S. W. 800. The second syllabus contains the gist of the holding of the court on the question, and reads as follows:

"In an action by a shipper against a connecting carrier for damages from delay and neglect as to a shipment which the shipper received from the initial carrier, a bill of lading providing that, 'except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness, or negligence, as condition precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after reasonable time for delivery has elapsed, and suit for loss, damage or delay shall be instituted within two years and a day after a reasonable time for delivery has elapsed, *held* that suit must be brought within two years and a day, as the exception relates only to the written notice of the claim."

It follows that the judgment of the circuit court must be reversed; and, inasmuch as the undisputed evidence shows that the right of action was barred because not brought within two years, the cause of action will be dismissed here. It is so ordered.

SUPERIOR LUMBER COMPANY v. NATIONAL BANK OF COMMERCE.

Opinion delivered February 20, 1928.

1. MORTGAGES—PRIORITY OF MATERIALMAN'S LIEN.—A mortgage to secure future advances, where it is optional with a mortgagee whether to make future advances or not, is inferior to a materialman's lien as to advances made after the mortgagee had notice that the materialman's lien had attached to the property.
2. MECHANICS' LIEN—STATUTORY PROVISIONS.—A lien for materials is purely a statutory lien.
3. MECHANICS' LIEN—WHEN MATERIALMAN'S LIEN ASSIGNABLE.—While a materialman's lien is assignable, the right to perfect such a lien is not assignable, and the lien must be perfected before it can be transferred or assigned.
4. MECHANICS' LIEN—RIGHT TO ASSIGNEE.—A bank which advanced money to pay off certain claims of materialmen *held* not to have acquired a superior lien against the lien of the mortgage, where it did not prove that the claim had been established as a lien in the manner required by statute.

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

STATEMENT OF FACTS.

Superior Lumber Company brought this suit in equity against W. B. McCall for the purpose of enforcing a lien for materials furnished and used in improving his home in El Dorado, Arkansas. Other lien claimants for materials and National Bank of Commerce, which had a mortgage on the premises, were made parties defendant. National Bank of Commerce defended the suit on the ground that its mortgage was superior to the lien of the plaintiff for materials. On the trial of the case it was shown that, between the 26th day of January, 1927, and the 6th day of April, 1927, Superior Lumber Company sold to the defendant, W. B. McCall, building materials of the value of $3,048.39, which were used in improving his home in El Dorado, Arkansas. It was also shown that on the first day of July, 1926, W. B. McCall executed a mortgage to the National Bank of Commerce to secure the sum of $2,000, which he owed said

bank. It is conceded that the mortgage to secure this sum is a prior lien on the land involved in this suit to those of the materialmen. The mortgage also contains a provision that it is given to secure any other indebtedness which may exist on the part of said W. B. McCall to the National Bank of Commerce up to the foreclosure of the mortgage, should it be foreclosed within five years from date. The date of the mortgage is July 1, 1926. Subsequent to the furnishing of the materials by the Superior Lumber Company, as above stated, National Bank of Commerce advanced to W. B. McCall $900, evidenced by note for said sum, dated April 9, 1927, and due May 3, 1927. Four hundred and fifty dollars of this amount was used by McCall in paying for materials which were used in improving his house. The National Bank of Commerce asked that its mortgage be foreclosed and that it should be declared a lien superior to that of the plaintiff for material furnished.

The court found the issues in favor of said bank, and it was declared that the bank had a superior lien on the house and lot of W. B. McCall to that of the materialman's lien of the Superior Lumber Company, and a decree of foreclosure was also entered of record in favor of said bank. To reverse that decree Superior Lumber Company has duly prosecuted an appeal to this court.

T. O. Abbott and *Graham Moore*, for appellant.

Marsh, McKay & Marlin, for appellee.

HART, C. J., (after stating the facts). The chancellor was wrong in holding that the bank had a superior lien to that of plaintiff as to the $900, evidenced by a note of April 9, 1927. This money was advanced by the bank after the lien of the plaintiff had accrued for the materials furnished by it and used in the improvement of the premises on which the bank had a mortgage. The mortgage did not contain a clause making it obligatory upon the bank to make this advance of $900, and it had notice of the lien of plaintiff at the time the $900 was furnished. It was entirely optional with the bank whether or not it should make it. Mortgages to secure future advances are

valid; but, where it is entirely optional with the mortgagee whether to make future advances or not, advances made after notice of a subsequent incumbrance, such as a lien for materials furnished, are inferior to the materialman's lien. In other words, the general rule is that, if the amount for which the mortgage shall stand is wholly optional with the mortgagee, he cannot, after notice that a subsequent lien has attached, deplete the value of the equity to the disparagement of its lienors by advances which, if refused, would not have been in force. *Heintze* v. *Bentley,* 34 N. J. Eq. 562; *Gray* v. *McClellan,* 214 Mass. 92, 100 N. E. 1093; *Finlayson* v. *Crooks,* 47 Minn. 74, 49 N. W. 398, 645; *Germania Building & Loan Assn.* v. *B. Fraenkell Realty Co.,* 82 N. J. Eq. 49, 88 Atl. 305; *W. P. Fuller & Co.* v. *McClue,* 48 Cal. App. 185, 191 Pac. 1027, and cases cited; *Savings & Loan Society* v. *Burnett,* 106 Cal. 514, 39 Pac. 922; 27 Cyc. 239, 240; 40 C. J., p. 302, § 393 (bb); 41 C. J., p. 527, par. 468 (4); and *Davis* v. *Carlisle* (Circuit Court of Appeals, Eighth Circuit), 142 Fed. 106, and cases cited. The record shows that the bank had notice of the materialman's lien of plaintiff at the time it furnished the $900 evidenced by the note of April 9, 1927.

It is insisted, however, that the bank should have a superior lien for $450, because that amount was furnished by it to McCall for the purpose of paying off materialmen's liens against the mortgaged property, and was used by him for that purpose. The lien for materials is purely a creature of the statute, and, while it is assignable under our statute, the right to prosecute a mechanic's lien is not assignable. Such liens must be perfected before they can be transferred or assigned. Before the bank could claim any right to the lien of the materialmen by advancing money to pay off their claims, it would have to prove that these liens had been established in the manner required by statute. *Young Men's Building Assn.* v. *Ware,* 158 Ark. 137, 249 S. W. 545.

The result of our views is that the decree of the chancery court was wrong, and will be reversed, with

directions to enter a decree in favor of the Superior Lumber Company, holding that it has a paramount lien on the house and lot in question to that of the mortgage lien of the bank for the $900 note of April 9, 1927, and for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

HUNT v. BOYCE.

Opinion delivered February 20, 1928.

1. EJECTMENT—PAPER TITLE.—In ejectment where plaintiff relied on a chain of title depending on title of a wife of a husband who had agreed to deed a lot to her, but had never performed his promise, plaintiff's paper title to such lot failed.
2. SPECIFIC PERFORMANCE—VOLUNTARY AGREEMENT.—Equity never enforces a voluntary agreement to convey land where no possession has been taken of the land, nor any valuable improvements made on it.
3. SPECIFIC PERFORMANCE—WHEN VOLUNTARY AGREEMENT ENFORCED.—In a suit for specific performance of the voluntary agreement to convey land, where the donee took possession and made valuable and substantial betterments on the land, relying on promise to convey, the possession and betterments constitute such part performance as takes the case out of the statute of frauds.
4. MORTGAGES—FORECLOSURE OF DEED OF TRUST.—A sale at foreclosure of a deed of trust without service of notice on the grantor in such deed was void under Crawford & Moses' Dig., § 6807, and rendered the paper title of one claiming thereunder defective.
5. ADVERSE POSSESSION—SEVEN YEARS' PAYMENT OF TAXES.—Evidence *held* not to sustain a finding of title in plaintiffs by reason of seven years' payment of taxes on unimproved lands.
6. ADVERSE POSSESSION—TAX DEED.—A tax deed regular in form gives color of title to a purchaser and the grantees claiming thereunder, and holding possession thereunder for two years prior to the bringing of ejectment vests title in them, regardless of defects in their chain of title prior to the tax sale.
7. TRIAL—TRANSFER OF CAUSE.—Where defendant in ejectment was entitled to have a deed to her reformed to describe the land correctly, transfer of the case to equity was proper, especially in view of a lack of dispute as to the facts.

8. APPEAL AND ERROR—HARMLESS ERROR.—A decree in equity will not be reversed because improperly transferred from the law court where, under the law and facts, the judgment rendered at law must be the same.

Appeal from Jackson Chancery Court; *A. S. Irby*, Chancellor; affirmed.

STATEMENT OF FACTS.

This was an action in ejectment brought by James H. Hunt against Fannie Boyce and Williams Biggers, in the circuit court, to recover lots Nos. 1 and 2, block 1, in Knight's Addition to the town of Tuckerman, Arkansas. The plaintiff filed his muniments of title with his complaint. The defendants filed exceptions to some of the muniments of title of the plaintiff, and claimed title in themselves by a tax deed and adverse possession thereunder for two years.

The record shows that Charles Parrott had title to lot 1 in said block 1, and that his wife, Martha Parrott, had title to lot 2 in said block 1. Charles Parrott promised to deed said lot 2 to his wife, but died without having done so. Subsequent to his death, on the 2d day of March, 1915, Martha Parrott executed a deed of trust to said lots to J. R. Loftin, Jr., as trustee, to secure an indebtedness to A. S. Lawrence. Having failed to pay the indebtedness, J. R. Loftin, Jr., foreclosed the deed of trust under the power of sale contained in it, and A. S. Lawrence became the purchaser at the sale. On the 4th day of January, 1917, J. R. Loftin, Jr., executed a deed to A. S. Lawrence to said land. The deed recites that notice of the time, place and terms of sale was given for twenty days before the date of sale by posting written notices thereof in five public places in Jackson County, and one notice upon the courthouse, and one upon the land. A. S. Lawrence bid $60 for said lots. The trustee's deed does not show that notice of the sale was served on Martha Parrott, as required by § 6807 of Crawford & Moses' Digest. Martha Parrott, on cross-examination, testified that no notice of sale was ever served on her. Said lots were sold on the 14th day of June, 1920, for

nonpayment of taxes for the year 1919, and William M. Biggers became the purchaser at the tax sale. The lots, not having been redeemed, the clerk of Jackson County executed a tax deed to said lots to said W. M. Biggers on the 6th day of July, 1922. Subsequently W. M. Biggers sold said lot 2 to Fannie Boyce, and she entered into possession of it and erected a house on it in 1923. Both lots were then inclosed with a fence, and have been in the possession of William Biggers and Fannie Boyce since that time. Prior to that time the lots were vacant, and were not inclosed with a fence. The deed from W. M. Biggers to Fannie Boyce did not properly describe said lot 2, but the evidence of both of these parties shows that that was the lot intended to be embraced in the deed and that Biggers at once put Fannie Boyce in possession of said lot 2, and that she has been in possession of it since that time. The remaining facts will be stated in the opinion.

The case was transferred and tried in the chancery court, over the objections of the plaintiff. The ground for the motion to transfer to equity was that Fannie Boyce was entitled to have the deed from William Biggers to her reformed so as to correctly describe the lot intended to be conveyed to her.

The chancellor found all the issues in favor of the defendants, and it was decreed that the plaintiff's complaint be dismissed for want of equity. To reverse that decree the plaintiff has duly prosecuted an appeal to this court.

E. F. Duncan and *J. Paul Ward*, for appellant.

John W. Stayton, for appellee.

HART, C. J., (after stating the facts). The paper title of the plaintiff failed as to lot 2 in block 1 of Knight's Addition to the town of Tuckerman, Arkansas. The plaintiff alleged that Charles Parrott had conveyed this lot to his wife, Martha Parrott, but that the deed had been lost. The record contains no proof that Charles Parrott executed a deed to said lot 2 to Martha Parrott. It does show that Charles Parrott orally agreed to con-

vey said lot to Martha Parrott, but died without having executed the deed. Martha Parrott never entered into possession of the lot.

Equity never enforces a voluntary agreement to convey land where no possession has been taken of the land or valuable improvements made on it. It is only when the donee takes possession and makes valuable and substantial betterments upon the land, in reliance on the donation, that specific performance will be enforced. In such a case the expenditures of the donee supply a valuable consideration, and the possession and betterments constitute such part performance as to take the case out of the statutes of frauds. *Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87; and *Murphy* v. *Graves,* 170 Ark. 180, 279 S. W. 359.

The paper title of the plaintiff also failed as to lot 1, in block 1. Martha Parrott had the record title to this lot, and made a deed of trust to John R. Loftin, Jr., trustee, to secure an indebtedness which she owed A. S. Lawrence. Default was made in the payment of the indebtedness, and a foreclosure of the deed of trust was had under the power of sale contained in it. The trustee executed a deed to A. S. Lawrence, who became the purchaser at the foreclosure sale under the power contained in the deed of trust. The amount secured by the deed of trust was $160, and the amount bid by Lawrence at the foreclosure sale under the power contained in the deed of trust was $60. Under § 6807 of Crawford & Moses' Digest, notices in conformity with any deed of trust as to amounts under $350 may be posted in five conspicuous places in the county, but the statute further provides that notice shall be served in all cases upon the debtor as summons is now served. No service was had upon Martha Parrott, as required by the statute, and for that reason the sale was invalid. *Gleason* v. *Boone,* 123 Ark. 523, 185 S. W. 1093, and *Wilkison* v. *Hudspeth,* 134 Ark. 132, 203 S. W. 263. In these and in other cases decided by this court it is

held that, where the statutory requirements as to making the sale are not complied with, the sale is void.

It is next contended by counsel for the plaintiff that he has acquired title by the payment of taxes for seven consecutive years, the lands being unimproved. Plaintiff cannot claim to be holding title under Martha Parrott, because, as we have already seen, her title to the lot owned by her was never legally divested, and she never acquird any title to the lot owned by her husband. Plaintiff must therefore claim under A. S. Lawrence, who claimed the land by virtue of the trustee's deed executed to him in 1917. There had been no payment of taxes for seven consecutive years up to that time by the plaintiff. The record shows that the lands were sold in 1920 for the nonpayment of taxes for the year 1919. William M. Biggers, the purchaser at the tax sale, received a tax deed on July 6, 1922. In 1923 he sold one of the lots to Fannie Boyce, and both lots were inclosed by a fence, and have been in the possession of said defendants ever since. Thus it will be seen that the record does not bear out plaintiff in his contention. On the other hand, the clerk's tax deed is in regular form, and gave color of title to William Biggers and Fannie Boyce. They held adverse possession under this tax deed for two years prior to the bringing of this action, and acquired title thereby. *Black* v. *Brown,* 129 Ark. 270, 195 S. W. 673; and *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681.

Finally it is insisted that the decree should be reversed because the court erred in transferring the case to equity. In the first place, it may be said that the facts in the case are undisputed, and this court has held that a decree in equity will not be reversed, although the case was improperly transferred from law, where, under the law and facts, the judgment, if rendered at law, must necessarily have been the same. *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, 1199. To the same effect see *Clark* v. *Spanley,* 122 Ark. 366, 183 S. W. 964; and *Shapard* v. *Lesser,* 127 Ark. 590, 193 S. W. 262, 3 L. R. A. 247. Moreover, Fannie Boyce asked for a reforma-

tion of the deed to her from William M. Biggers, and this gave a court of equity jurisdiction in the case.

The result of our views is that the decree of the chancellor is correct, and it will be affirmed.

TIPTON v. PHILLIPS.

Opinion delivered February 13, 1928.

1. PARTIES—WAIVER OF DEFECT.—Where objection to the incapacity of plaintiff to sue to set aside a judgment to which she was not a party was not raised until after the trial was concluded, the defect will be deemed to have been waived, since the incapacity of parties should be raised by answer or special plea at the beginning and not at the end of a lawsuit.
2. JUDGMENT—AMENDMENT.—A judgment will not be amended to reflect a judgment that was actually rendered by the court, unless the testimony is clear, decisive, and unequivocal.

Appeal from Johnson Circuit Court; *J. T. Bullock*, Judge; reversed.

Jesse Reynolds, for appellant.

Hugh Basham and *J. H. Brock*, for appellee.

KIRBY, J. This is an action begun by Belle Phillips against Marshall Tipton, Edra Davis and Rex Davis, in the probate court of Johnson County, for a *nunc pro tunc* order correcting the judgment of the probate court. The plaintiff alleged, in substance, that the record of the probate court showed that on the 18th day of March, 1922, a judgment of that court was entered through mistake, showing that certain minors, towit, Edra and Rex Davis, were adopted by Marshall Tipton and Euphemia Tipton, whereas the judgment that was actually rendered was for the adoption of said minors by Marshall Tipton alone, and not by Euphemia Tipton. The plaintiff alleged that she was the mother and only heir-at-law of Euphemia Tipton, who had since died, in December, 1925.

Tipton answered, denying the allegations of the complaint, and alleged that Euphemia Tipton was one of the parties to the adoption of the Davis children, and that

the judgment of the probate court was correctly entered showing that she was the wife of Marshall Tipton and a joint party to the adoption proceedings with Marshall Tipton, and that the children were adopted in her name as well as in his.

The judgment of the probate court entered on March 13, 1922, recites that the Hon. J. J. Montgomery was the presiding judge. In the matter of the adoption of Rex and Edra Davis the following is the record entry of the judgment:

"*In re* adoption of Rex M. and Edra Davis, No. 45. On this day is presented to the court the petition of Euphemia Tipton and M. T. Tipton, stating that he desires to adopt Rex Murphy Davis and Edra Davis, minors, of the age of ten and twelve years, respectively. And it appearing to the court that the said minors are residents of Johnson County, that their father and mother are dead, and that they have no property, that they have been living with petitioner for nine years, it is therefore ordered by the court that the said minors be adopted by the said Euphemia Tipton and M. T. Tipton, and their names shall henceforth be Tipton, and they shall hold the same relation to the said petitioner as if they were their own children."

Fred Russell testified, in substance, that he was the clerk of Johnson County in 1922. He identified petition by M. T. Tipton for adoption of Rex Murphy Davis and Edra Davis, minor children, sworn to on March 18, 1922. Witness did not know whether Mrs. Tipton was present at the time or not. The petition was signed by M. T. Tipton, and was the only paper that was filed on that day. Euphemia Tipton never swore to the petition before witness. Another petition was introduced and identified by the witness, which reads as follows:

"In the Probate Court of Johnson County.—Euphemia—M. T. Tipson—Petition for adoption of Rex Murphy Davis and Edra Davis, minor children.

"Comes your petitioner, M. T. Tipton, and states that he is desirous of adopting Rex Murphy Davis and Edra

Davis, two minor children, who are residents of Johnson County, Arkansas, and aged ten and twelve years, respectively; that said children have no father and mother and no property; that they have been living with the petitioner for nine years, and that he thought said children had been adopted at the time he took them. Wherefore your petitioner asks the court to grant his prayer and adopt the said children.

"M. T. Tipton, Petitioner.

"Subscribed and sworn to before me this the 18th day of March, 1922.

"Fred Russell, County Clerk."

(On back) "No. 45. Petition for adoption of Rex M. and Edra Davis.

"3/13/22. Examined, and prayer granted, and said children ordered adopted. J. J. Montgomery, Judge."

The witness stated that the changes that now appeared on the last petition above copied, he thought, were made before the petition was presented to the court. They were all made at the time Tipton made the affidavit, and were not made after the case was heard by the court. Witness further testified that he did not think Euphemia Tipton was present, and she did not make the affidavit to the petition. If she had, witness would have had her to sign it. Witness was asked what caused him to put her name at the top of that petition, and answered that he did not remember, but his opinion was that, when Judge Montgomery changed Marshall to Tipton, that brought it to witness' mind that if it was Tipton in the style of the case it would be Tipton in the body of the petition, and witness changed that on his own initiative. Witness did not remember that Mrs. Tipton was in his office. He did not remember seeing any of them, and did not remember Tipton being there, but knew that he was because he swore to the petition.

J. J. Montgomery testified that he was county judge of Johnson County on the 13th day of March, 1922. He drafted the original petition in his office for Mr. Tipton. "Euphemia" was put in there after he had drafted the

petition. Witness' recollection is that he drafted the indorsement on the back of the petition at his office. After he drafted the petition, he gave it to Mr. Tipton, and told him to take it over to the clerk's office. The word "Euphemia" in the caption to the last petition set out above was inserted after it left witness' office. The first time witness knew about the word Euphemia being inserted in the caption was when Mr. Brock brought it over to witness and called witness' attention to it, about the time this action was begun—some time last summer. In making the indorsement on the back of the petition, to-wit, "Examined, and prayer granted, and said children ordered adopted," signed by witness, it was witness' intention to make the order of adoption as it read at the time witness made the indorsement. The clerk prepared the form of the record entry. Mr. Russell was the clerk at that time. Euphemia Tipton was not present when witness made the order. Mr. Tipton came to witness' office one day, and said that he wanted to adopt these children, and to know if he could adopt them, and witness asked him some questions—where the children were living, and with whom, and he told witness that they were living with him, and had been for several years. Witness asked him about their parents, and thinks that he told witness that their parents were dead. Witness asked Tipton to bring the children down and let witness talk with them, and he said that he would. One day not long thereafter he came in and brought the children and said, "Here are these children. You can ask them whatever you want to, or talk to them about the adoption." Witness sat down in his office and talked to the children about the adoption, and Mr. Tipton was with them, but Mrs. Tipton was not. They told witness that they wanted Mr. Tipton to adopt them. Mrs. Tipton never made any request for the adoption, and no one for her made such request.

On cross-examination witness stated that it was his idea to do what Mr. Tipton wanted about it. He was trying to comply with his wishes. He was asked if he

told Marshall Tipton that it was necessary for his wife to join in the petition, and stated that he did not remember; that he might have done it. Witness was asked the following question: "Did you tell him that the petition of one was the petition of both of them—that it was not necessary for his wife to sign it? A. No, I didn't tell him that; if I told him that it wasn't necessary for his wife to sign it, it was because he wanted to adopt them, and his wife wasn't known in it; that would have been the only reason I would have told him that." Witness did not remember whether Tipton asked him if he hadn't better have his wife sign it too. Witness examined the petition, as it had been changed, and said that none of the changes were made in the petition at the time he approved it, except the word "Tipton" was written by him with an indelible pencil. He did not write the word "Tipton" in ink, and did not write the word "Euphemia" or the word "Tipton" as it is written at the other places in the petition. Witness changed the word "Marshall" as it appeared in the original petition to "Tipton" as soon as he took it out of the typewriter, so as to make it read "Marshall Tipton." Witness explained that the court convened on Monday, which was the 13th, and if the petition was dated on the 18th, as it appeared, and was indorsed on the 13th, as it also appears, witness dated it back so as to make it appear that it was allowed on Monday, the day the probate court was in session. Witness' purpose was to do what Marshall Tipton wanted done at that time, and he told witness that he wanted to adopt the children. If he had come in and asked to have the children adopted by himself and wife, witness would have done it that way. Witness remembered very distinctly talking to the children and about Tipton bringing the children to let witness talk to them. Witness erased the word "Marshall" and wrote the word "Tipton" in pencil in the heading of the petition. Witness would not have included Mrs. Tipton in the petition unless she had been there to sign it. When a man and his wife adopted children, witness had them both present, and would not have

entered an order of adoption for both of them without both being present. When only one wanted to adopt, then witness did not require the other party to be present. Witness signed the probate record approving the same, but never did read every word in a record—all witness did was to see that all the cases were on record, but did not read the body of the order. The clerk was recalled, and testified that he wrote the record of the orders, and tried to write the same to state the facts as recited in the petition and granted by the court. Witness did not remember whether the approval on the back of the petition was on the same when it was brought to witness.

Tipton testified that he signed the petition for the adoption of the two minor children. It was prepared in the clerk's office by Judge Montgomery. Witness and his wife and the judge and Mr. Russell were present. The witness asked the judge if it was necessary for his wife to sign it, and he replied that it was not necessary. Witness' wife was present there with witness at the time. The children were not with them that day. Witness had brought them in before that to have Judge Montgomery talk with them, and, about a week or ten days thereafter, witness and his wife had them adopted. Witness' wife was present when her name was written in the petition. They came to town for that purpose. Witness' wife told the judge at that time that she wanted the children adopted—that she had no children of her own, and what little property they had they wanted these children to have it. That was his wife's request on that occasion. Russell, the clerk, swore witness to the petition about the 13th of March, the day that Judge Montgomery wrote the petition for witness. It was done right there in the clerk's office. The judge told witness that it was not necessary for witness or witness' wife to sign it; that the court's order would be sufficient. Witness thought it would be best to sign it, as that was the way he always did business. Witness' wife took the judge at his word, and did not sign it. Witness' wife stood there and heard the whole conversation.

The defendant offered to prove that the names of the family were written in the family Bible by Jim Stoveall, at the request of Mrs. Tipton. These names were as follows: "M. T. Tipton, Euphemy Tipton, Edra Tipton and Rex Tipton, adopted children of M. T. and Euphemia Tipton, in December, 1925." The court would not admit this testimony, to which ruling of the court the defendant at the time duly excepted.

The probate court denied the petition, and refused to amend the record, and the cause was appealed to the circuit court, where the testimony as above set forth was adduced. The circuit court found that the entry of the judgment of the probate court showing that the minors were adopted by Euphemia Tipton and M. T. Tipton was erroneous, and that such record of the judgment entry "should be amended by *nunc pro tunc* order so as to show that said minors, Rex Murphy and Edra Davis, were adopted by M. T. Tipton alone," and entered a judgment in accordance with its finding, from which is this appeal.

1. The fourth ground of appellant's motion for a new trial was that "the court erred in finding Mrs. Belle Phillips is entitled to maintain this suit to correct the record in a proceeding in the probate court of Johnson County, Arkansas, to which she was not a party." The question of defect of parties was not raised by the appellant in its answer, nor by special plea for that purpose. A defense of defect of parties should be raised by answer or by special plea to that effect at the beginning and not at the end of a lawsuit. Since the appellant did not plead a defect of parties until after the trial was concluded, he must be deemed to have waived such defect. *Yarnley* v. *Thompson,* 30 Ark. 399; *Cartwright* v. *Dennis,* 163 Ark. 503, 260 S. W. 424; *Summers* v. *Heard,* 66 Ark. 550, 50 S. W. 78; 51 S. W. 1057; *Arkansas Road Construction Co.* v. *Evans,* 153 Ark. 142, 239 S. W. 726; see also *Flanagan* v. *Drainage District No. 17, ante,* p. 31.

2. The issue on the application to correct the judgment of the probate court by *nunc pro tunc* entry is purely

one of fact as to whether or not the judgment as entered was the judgment actually rendered. We have fully set out the evidence on this issue, and it speaks for itself. It would serve no useful purpose to comment at length upon it.

We have reached the conclusion that the testimony is not clear, decisive and unequivocal to the effect that the record of the judgment of the probate court as originally written does not reflect the judgment that was actually rendered by that court. The proof therefore adduced by the appellee does not meet the requirement of the law as announced in our former opinions. See *Midyett* v. *Kirby,* 129 Ark. 301, 195 S. W. 674; *Murphy* v. *Citizens' Bank of Junction City,* 84 Ark. 100-106, 104 S. W. 187, 934, and cases there cited; *Sloan* v. *Williams,* 118 Ark. 593, 597, 177 S. W. 427; see also *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52; *Goerke* v. *Rodgers,* 75 Ark. 72, 86 S. W. 737; *Foster* v. *Beidler,* 79 Ark. 418, 96 S. W. 175; *Davenport* v. *Hudspeth,* 81 Ark. 166, 98 S. W. 699.

The judgment of the trial court must therefore be reversed, and the cause remanded with directions to the circuit court to affirm the judgment of the probate court.

WOOD, J., dissents.

BLANTON v. JONESBORO BUILDING & LOAN ASSOCIATION.

Opinion delivered February 20, 1928.

1. DRAINS—SALE OF LAND FOR NONPAYMENT OF DRAINAGE TAXES.—Where land, subject to drainage taxes, was sold to the drainage district in a suit for delinquent taxes, the proceedings being in all respects valid, the district acquired title to the property under conveyance from the commissioner after the period for redemption had expired.
2. DRAINS—AUTHORITY OF DRAINAGE DISTRICT TO RESELL PROPERTY BOUGHT IN.—Where a drainage district bid in land at a public sale under foreclosure decree for nonpayment of drainage assessments, the district had power to resell the lands for the purpose of acquiring funds for the prosecution of the drainage work.

3. DRAINS—AGREEMENT AS TO REDEMPTION OF LAND.—Correspondence between the attorney of the mortgagee and the secretary of a drainage district, by which the secretary was requested to draw on the mortgagee for the amount of drainage assessments on particular property, which was described, and where the secretary promised to draw as requested and to execute a quitclaim deed, *held* to constitute a valid contract for conveyance of property bid in by the drainage district for unpaid assessments, and the contract was specifically enforceable between the parties.

4. DRAINS—AUTHORITY OF SECRETARY OF DRAINAGE DISTRICT.—Where the secretary of a drainage district organized under Acts 1917, p. 1053, customarily acted for the board in making contracts for redemption of land or for repurchase thereof, after foreclosure for unpaid drainage assessments, such secretary had implied authority to contract for conveyance of property bid in by the district to a mortgagee offering to pay the costs and charges against the land, although the secretary had no written authority to make such sale.

5. BROKERS—ORAL CONTRACT OF EMPLOYMENT.—It is not necessary that authority to sell and make a binding contract for the sale of land should be in writing, as a contract employing an agent to find a purchaser for land is not within the statute of frauds.

6. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY.—Where a mortgagee instructed his attorney to redeem a lot in question from a sale for drainage districts or to acquire a title of the drainage district, such attorney had authority to make a binding contract for the purchase of a lot from the district which had bid it in for unpaid drainage assessments, notwithstanding the attorney had no written authority.

7. DRAINS—PURCHASER WITH NOTICE OF OUTSTANDING CONTRACT.—One who purchased a lot from the drainage district with knowledge that the district had agreed to convey it to another, acquired no better title against the person holding such contract for conveyance than the drainage district had.

8. MORTGAGES—RIGHT TO FORECLOSE.—Where a mortgagee of land which had been sold to a drainage district for nonpayment of taxes contracted with the district to redeem the property, as against one who took a quitclaim deed from the district with knowledge of the mortgagee's rights under the contract, such mortgagee is entitled to foreclose its lien.

Appeal from Poinsett Chancery Court; *J. M. Futrell*, Chancellor; affirmed.

STATEMENT OF FACTS.

Jonesboro Building & Loan Association brought suit in equity against C. E. Causey to foreclose two mort-

gages on lot 1, block 3, of E. Ritter's Second Addition to the town of Marked Tree, Arkansas, to secure an indebtedness amounting in the aggregate to $1,127.30. A decree of foreclosure was entered of record on the 14th day of August, 1925, and the lot was ordered sold, in default of the payment of the indebtedness found due. Subsequently a supplemental complaint was filed, asking that Drainage District No. 7, Dick Ray and C. A. Blanton be made parties defendant.

It was alleged that Drainage District No. 7 had foreclosed its lien for unpaid drainage taxes, and that the lot in question had been sold to it; that said drainage district had first entered into a written contract to convey said lot to Dick Ray, and had subsequently executed a quitclaim deed to C. A. Blanton to said lot.

The record shows that Drainage District No. 7 brought suit in equity against C. E. Causey to foreclose its lien for unpaid drainage taxes. A decree of foreclosure was entered of record on the 3d of December, 1923, and the lot was ordered sold for the nonpayment of said drainage assessments at the time, on the terms and at the place of sale prescribed by the decree and the statute for the sale of land for unpaid drainage assessments. On the 10th day of April, 1924, the lot was offered for sale pursuant to the terms of the decree, and Drainage District No. 7 became the purchaser at the sale. The commissioner who made the sale executed a deed to said lot to said district, and this deed was approved by the chancery court.

Dick Ray had a second mortgage on said lot to secure the sum of $6,000 owed him by C. E. Causey. He became the purchaser of the mortgages of the Jonesboro Building & Loan Association, and had them transferred to him. Subsequently he applied to A. D. Shelton, secretary of said drainage district, to purchase said lot. On November 11, 1925, the attorney of Ray wrote the following letter:

"Mr. A. D. Shelton,
Lepanto, Arkansas.

"Dear sir: On October 27, 1925, we wrote you regarding lot 1, block 3, E. Ritter's Second Addition to Marked Tree, assessed against C. E. Causey, inquiring the amount of taxes due Drainage District No. 7 for 1923. This is of considerable importance to us, as we are anxious to secure a deed to this property and to pay all taxes and charges there are against it.

"In order to facilitate matters, won't you be good enough to draw at sight on Mr. Dick Ray, Memphis, Tenn., attaching to the draft deed to him, and cause the same to be sent to the East Memphis Bank & Trust Company, Memphis, Tennessee, for collection?

"This property is being foreclosed, and, as we hold a second mortgage thereon, it is necessary that we get the title cleared up just as soon as possible.

"Thanking you to attend to this as soon as you can, we are,

"Yours very truly."

Shelton replied to the letter as follow:

"Lepanto, Arkansas, November 13, 1925.

"Ewing, King & King, Attys.
Memphis, Tenn.

"Gentlemen: Replying to your letters of October 27 and November 11, with reference to lot 1, block 3, E. Ritter's Second Addition to Marked Tree, and the amount of taxes, etc., will say that at this particular time the books are being audited, and all of the records are in the hands of the auditor. Within a few days I will get the list of taxes, and, if the same has been sold to the district, I will have quitclaim deed properly executed and delivered to you.

"It may possibly be a week or ten days, but it will be duly attended to, and draft drawn as per your instructions.

"Very truly."

On October 22, 1925, Shelton had sent to the attorneys of Ray a letter giving an itemized statement of all the taxes and assessments due upon said lot, which amounted in the aggregate to $112.31. In reply to the letter of Shelton of November 13, the attorneys of Ray wrote the following:

"November 16, 1925.

"Mr. Allen D. Shelton,
Attorney at law,
Lepanto, Arkansas.

"Dear sir: We thank you very much for yours of the 13th inst. relative to lot 1, block 3, E. Ritter's Second Addition to Marked Tree. The writer saw Mr. Ray this morning, and, if you will simply draw on him at sight through the East Memphis Bank & Trust Company of this city, attaching to the draft proper quitclaim, the same will be taken up immediately.

"If there is anything you can do to facilitate the execution of this deed, the same will be very much appreciated.

"Yours very truly."

On November 19, 1925, said drainage district executed a quitclaim deed to said lot to C. A. Blanton in consideration of $17.38.

C. E. Causey has been in possession of said lot during the whole of these proceedings. A. D. Shelton has been secretary of Drainage District No. 7 since March, 1925. He admitted receiving the letters about the lot set out above and writing the replies thereto. The board of directors of the drainage district alone had authority to execute deeds to lands owned by it. It was the policy of the board to sell the land bought by it to former owners. It was customary to sell to them upon payment of the taxes and costs due to the district. Because C. E. Causey requested the deed to be made to C. A. Blanton, the board executed the quitclaim deed in question, and disregarded its promise to convey the lot to Ray. Witness said that he was the representative of the district with whom any taxpayer or landowner would conduct

negotiations or would see in connection with redeeming his land from sale for delinquent taxes. We copy from his testimony the following:

"Q. So far as handling the matter like the one in question was concerned, you had the authority to do that, and you were the one who handled those of that kind? A. I think I took that authority. After they have gone delinquent, I could really have a right to sell this land to anybody who wants it."

According to the testimony of C. E. Causey and C. A. Blanton, there was no collusion between them about the purchase of the land. Causey asked the secretary of the district to execute a deed to Blanton, because he owed Blanton and preferred to favor him to his other creditors. Blanton admitted that he had not collected any rent from Causey, who still occupied the house on the lot in question, but said that the reason he had not done so was because the matter became involved in litigation at once, and he thought he would wait until he saw whether or not his title was valid.

The chancellor found that Drainage District No. 7 had no authority to execute a quitclaim deed to C. A. Blanton, and that the contract between said drainage district and Dick Ray was valid. It was therefore decreed that Blanton hold the legal title as trustee for the benefit of C. E. Causey, and that the lot should be sold to secure the payment of the mortgage liens due the Jonesboro Building & Loan Association and Dick Ray. C. A. Blanton has duly prosecuted an appeal to this court.

C. T. Carpenter, for appellant.

Hawthorne, Hawthorne & Wheatley, Eugene Sloan and *Ewing, King & King,* for appellee.

HART, C. J., (after stating the facts). The title was acquired by the drainage district when the land was struck off to it in April, 1924, and the deed was made to the board of directors of the drainage district by the commissioner who made the sale. There was a valid decree of foreclosure for the nonpayment of drainage

taxes, and the statute was in all respects complied with by the commissioner who made the sale, and the conveyance in pursuance thereof to the board of directors was a valid one. The drainage district was organized under a special act passed by the Legislature of 1917. Acts 1917, vol. 1, page 1053. The suit was instituted by the district against Causey, as owner of the land, for the nonpayment of drainage taxes, in accordance with § 28 of the act. When the land was sold under the decree, the board of directors of the drainage district became the purchaser thereof. Section 28 provides that, where lands are offered for sale as provided by the act, and the amount of the taxes due, with interest, costs and penalty, is not bid at the sale, the commissioner shall bid the land in in the name of said board of directors of said drainage district for the whole amount due as aforesaid. The section further provides that the commissioner shall then execute his deed thereto as in other cases under this act, conveying such land to such drainage district, and that such deed, when duly executed in conformity to the provisions of the act, and recorded, shall be received as evidence in all cases, showing an indefeasible title in said purchaser, unassailable in law or in equity.

In *Douglass* v. *Lewis,* 131 U. S. 45, 9 S. Ct. 634, 33 L. ed. 53, it was said that a covenant that the grantee is seized of an indefeasible estate in fee simple is a covenant for a perfect title. Hence, under the provision of the statute just referred to, the drainage district acquired an absolute title to the land after the period of redemption provided by the statute had expired.

While there is no express provision authorizing the drainage district to sell lands acquired by it in this manner, we think the power to sell arises by necessary implication. It would seem that there would be no use in providing that the district should have an absolute title to lands purchased by it for the nonpayment of drainage assessments if they could not sell the lands in aid of the drainage work. The drainage board was an involuntary *quasi* corporation created to construct a public work, author-

ized to procure the means to accomplish the improvement by the imposition of assessments upon private property. It was a governmental agency existing for a public purpose, and, while it could hold no real estate in a proprietary sense, it was empowered to bid in the land at a public sale for the nonpayment of drainage assessments and to acquire an absolute title thereto, and this, we think, by necessary implication, gave power to resell the lands for the purpose of acquiring funds for the prosecution of the drainage work. This view receives support from the following cases: *Altheimer* v. *Board of Directors Plum Bayou Levee Dist.*, 79 Ark. 229, 95 S. W. 140; *Board of Directors St. Francis Levee District* v. *Fleming*, 93 Ark. 490, 125 S. W. 132, 659; and *Chicago Mill & Lumber Co.* v. *Drainage Dist. No. 17*, 172 Ark. 1059, 291 S. W. 810.

It is next contended that no valid contract was made with Ray by the district for the purchase of the land. We have copied the letters written by the attorneys of Ray and the replies of the secretary of the drainage district thereto. In these letters the terms of the contract are plainly set out. The names of the contracting parties are given, there is a proper description of the lot to be sold, and the price and method of payment are given. This constituted a valid contract which might be specifically enforced between private parties. *Moore* v. *Exelby*, 170 Ark. 908, 281 S. W. 671.

We can see no reason why the doctrine of specific performance should not apply to a drainage district. But it is contended that Shelton had no power to make the contract, and reliance is placed upon the case of *St. Francis Levee District* v. *Cottonwood Lumber Company*, 86 Ark. 221, 110 S. W. 805, and *Ritter* v. *Board of Directors of St. Francis Levee District*, 128 Ark. 324, 194 S. W. 13. We do not think these cases apply. In the first case it was held that the district was not bound by the unauthorized promise of the secretary of the board. The same holding was made in the latter case with regard to the unauthorized act of the president. The court held

that, while he had authority, under the statute, to make the deed, he had no power to enter into a covenant to refund the purchase price if the title failed, and that he could not execute a deed with covenants of warranty. Quite a different situation confronts us here. The secretary of the board testified that it was his custom to act for the board in making contracts for the redemption of the land or the repurchase of it by the owner or by those interested in it. He said that it was the custom to give a preferential right to the owner. It is fairly inferable from his testimony, which is not contradicted, that he had the power to enter into a contract on behalf of the board for lands which had been sold to it under foreclosure proceedings for the nonpayment of the drainage assessments. Of course, in all cases the deed would be executed by the board of directors of the drainage district in whom was the legal title. This court has held repeatedly, however, that it is not necessary that authority to sell and make a binding contract for the sale of land should be in writing. The reason is that a contract employing an agent to find a purchaser of land is not within the statute of frauds. *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671, and cases cited.

The rule announced in these cases would also govern the power of the attorneys of Ray to execute a contract for him. According to the testimony of Ray and of one of his attorneys, he had placed the matter in their hands for the purpose of redeeming the lot in question from the sale for drainage taxes, or in some way acquiring the title of the drainage district to it, in order that he might subject it to the payment of his mortgage. It was realized that the lot was worth more than the amount of the drainage district tax, interest and costs. Hence we think the record shows that the attorneys of Ray had a right to make a binding contract for the sale of said lot to Ray and that the secretary of the district had a right to make a binding contract for it.

The letters on their face purport to be a completed contract, and became enforceable as a written agreement

before the quitclaim deed to Blanton was executed. The record shows that Blanton purchased the lot with notice of the outstanding contract made by the secretary of the drainage district with Ray. Indeed, this is how came Blanton to purchase the lot. The secretary of the drainage district told him about the letters he had written to Ray, and Blanton persuaded Causey to ask the board of directors of the drainage district to execute a deed to Blanton, and the latter, having notice of the contract of Ray, acquired no better title to the lot than the drainage district in whose shoes he stands. *Vance* v. *Newman,* 72 Ark. 359, 80 S.W. 574, 105 Am. St. Rep. 42; and *Adams* v. *Rhodes,* 143 Ark. 172, 220 S. W. 29. In the latter case it was expressly held that, where a defendant had contracted to sell land to the plaintiff, a third person who purchased the land with notice of his rights is not an innocent purchaser, and plaintiff is entitled to specific performance as against him.

The result of our views is that the decree of the chancery court was correct, and it will be affirmed.

STATE EX REL. ATTORNEY GENERAL *v.* WILLIAMS-ECHOLS DRY GOODS COMPANY.

Opinion delivered February 20, 1928.

1. STATUTES—PARTIAL INVALIDITY.—When different clauses of an act are so dependent upon each other that it is evident that the Legislature would not have enacted one of them without another, the whole act will fall with the invalidity of a particular clause.
2. STATUTES—PARTIAL INVALIDITY OF STATUTE.—Crawford & Moses' Dig., §§ 9965, 9966, providing that all corporations doing business in the State, with certain exceptions, shall make and file a specified statement of intangible property for the purpose of assessment and taxation, being unconstitutional as applied to foreign corporations, is also unconstitutional as to domestic corporations, since the provisions of the act are not severable.
3. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—It is the duty of the court to interpret the statute as it is written, and not to limit or restrict the plain meaning of words so as to make it

constitutional, where its plain and ordinary meaning renders it unconstitutional.

4. STATUTES—EFFECT OF UNCONSTITUTIONAL STATUTE.—Where a statute is held to be unconstitutional, it is, in legal contemplation, as inoperative as though it had never been passed, and former statutes on the subject are left in force and unimpaired.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland*, Chancellor; affirmed.

STATEMENT OF FACTS.

The State of Arkansas, on the relation of the Attorney General, brought this suit in equity against Williams-Echols Dry Goods Company, a corporation duly organized under the laws of the State to sell dry goods at wholesale in Fort Smith, Arkansas, to recover back taxes. The chancery court sustained a demurrer to the complaint, and the State refused to plead further, and elected to stand on its demurrer. Whereupon the chancery court dismissed the complaint for want of equity. The State has appealed.

H. W. Applegate, Attorney General, *R. E. L. Johnson* and *John M. Rose,* for appellant.

Cravens & Cravens, for appellee.

HART, C. J., (after stating the facts). The suit was instituted under an act of the Legislature of 1917, providing for the assessment of insurance companies and assessing for taxation the intangible property of all corporations.

Section 1 of the act relates to the taxation of insurance companies, and is § 9964 of Crawford & Moses' Digest. Section 2 is § 9965 of the Digest, and provides that 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 definitely set forth certain matters, which are specifically stated, but which need not be set out here. Section 3 of the act

is § 9966 of the Digest, and provides that any person whose duty it is made by the act to prepare the returns required in the act, who shall fail to do so, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than $100 nor more than $1,000, and, in addition thereto, the charter of said corporation shall be forfeited.

This section was held invalid, in so far as it applied to foreign corporations, in *State ex rel.* v. *Lion Oil & Refining Co.,* 171 Ark. 209, 284 S. W. 33. The necessary effect of our opinion in that case was to hold the statute unconstitutional, so far as it applied to foreign corporations. Otherwise we would have held that its terms did not include foreign corporations, and this would have ended the case. The reason that we reserved the question whether the unconstitutional part was severable from the remainder was because we did not deem it wise or expedient to pass upon the question of its constitutionality in so far as it related to domestic corporations until that issue was squarely presented and fully argued, as has been done in the case at bar.

It is an elementary rule of constitutional construction that it is only when different clauses of an act are so dependent upon each other that it is evident that the Legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fail with the invalidity of one clause. *Huntington* v. *Worthen,* 120 U. S. 97, 7 S. Ct. 469, 30 L. ed. 588.

In the application of the rule in Cooley's Constitutional Limitations, 8th ed., vol. 1, pages 360 and 361, it is said that, where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. This rule has been adopted and applied with

varying facts by this court. *Ex parte Deeds,* 75 Ark. 542, 87 S. W. 1030; *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S. W. 77; *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45; and *Replogle* v. *Little Rock,* 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333.

In the first case cited it was held that an unconstitutional provision in a statute in favor of resident merchants could not be stricken out so as to leave the remainder of the act unimpaired, as to do so would leave the statute applicable to resident merchants, contrary to the express intention of the Legislature. In discussing the application of the same rule in *United States* v. *Reese,* 92 U. S. 214, 23 L. ed. 563, it was said:

"We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific when, as expressed, it is general only * * *. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

The rule was later approved and again applied in *Hill* v. *Wallace,* 259 U. S. 44, 42 S. Ct. 453, 66 L. ed. 822.

In the application of this well-settled rule to the case at bar, we are of the opinion that the statute is unconstitutional as to domestic corporations. It will be observed that the language of the act refers to all corporations. If it had contained separate sections concerning foreign corporations and domestic corporations, it might be said that the statute was separable, and the unconstitutional part as to foreign corporations might be stricken out and leave enforceable that part relating to domestic corpora-

tions. Such is not the case, however. The language is plain, and refers to all corporations. The act prescribed a severe penalty for the failure of the officer of the corporation to comply with its terms. To sustain the act as to domestic corporations would require us to strike out the words "all corporations," and to disregard their plain and ordinary meaning, and substitute therefor the words "domestic corporations." To limit the statute in this manner would require us to amend the statute, and, as has been said, this is no part of our duty. It is our duty to interpret the statute as it is written, and we cannot limit or restrict the plain meaning of the words used so as to make constitutional a statute which, when construed according to the plain and ordinary meaning of the language used, would be unconstitutional.

It follows that the decree of the chancery court was correct, and it must be affirmed.

JOHNSON v. SPANGLER.

Opinion delivered February 20, 1928.

1. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDING.—A finding by the circuit court sitting as a jury, based on conflicting evidence, is binding on the Supreme Court.
2. WITNESSES—ACTION AGAINST GUARDIAN OF INSANE PERSON.—In an action on a note brought against the guardian of an insane person, denial by plaintiff of the testimony of the maker's bookkeeper concerning the payment of the note does not offend against the prohibition of § 4144, Crawford & Moses' Dig., providing that in actions against guardians neither party shall testify against the other as to any transactions of the ward unless called to testify thereto by the opposite party.
3. APPEAL AND ERROR—PRESUMPTION THAT COURT CONSIDERED COMPETENT EVIDENCE.—In the trial of a case before the circuit court sitting without a jury, the presumption is that the court considered such evidence only as was competent.
4. LIMITATION OF ACTIONS—EVIDENCE OF PAYMENT.—Where payments were relied upon to stop the running of the statute of limitations, the burden of proof is on the party alleging it to show by other evidence, in addition to the indorsement on the note, that the payment was in fact made.

5. LIMITATION OF ACTIONS—EFFECT OF PART PAYMENT INDORSED ON NOTE.—Where a note sued on was barred by the statute of limitations at the time when the last payment thereon was made, such payment revived the deed, and it was not necessary that such payment be made in money where the satisfaction of demands of the maker against others was treated by all parties as payment of the amount indorsed on the note.

Appeal from Sebastian Circuit Court, Greenwood District; *J. Sam Wood,* Judge; affirmed.

Daily & Woods, for appellant.

Dobbs & Young, for appellee.

SMITH, J. Appellee brought this suit against Edgar P. Johnson, the guardian of W. E. Johnson, an insane person, to recover the sum alleged to be due upon a promissory note dated January 16, 1915, for $1,000, executed by W. E. Johnson to appellee's order. Indorsed on the back of the note were the following credits: "Received on within note $56.50, February 23, 1918." "Received on the within note $100, March 8, 1923." These credits were indorsed in the handwriting of appellee.

Appellee was called as a witness in his own behalf, and, over the guardian's objection, was permitted to testify that the maker of the note had made the payments indorsed on the note. There was no other testimony showing that the payment of $56.50 credited under date of February 23, 1918, had been made. A witness named M. T. Rhodes, a nephew of appellee, testified that, as a boy, he heard a conversation between appellee and W. E. Johnson in regard to a note, at which time a payment on the note was made, but the witness could not state in what year this conversation occurred nor could he identify the note sued on as the one upon which the payment had been made. The $100 payment was shown, however, by the testimony of two other witnesses—Rhodes and Davis—to have been made, and to have been made at a date earlier than the 20th of February, 1923, although the payment was not indorsed on the note until the 8th of March thereafter. These witnesses testified that they were indebted to Johnson, and that appellee was their surety,

and that their accounts to Johnson, amounting to $100, were settled by an agreement whereby appellee was to credit the amount of these accounts on the note. This was done, and their indebtedness to Johnson was discharged in this manner. Appellee testified, over the guardian's objection, that the $100 credit was not indorsed on the note at the time it was allowed, for the reason that the note was not at hand at that time, and that the credit was later indorsed, but that the payment was actually made about the middle of February.

There was testimony tending strongly to show that the note was paid; that it was Johnson's custom to borrow money from appellee and to make settlements about the first of the year, at which time the indebtedness would be ascertained and a note given to evidence it, and that Johnson never had outstanding more than one note at any one time to appellee. Appellee had another note executed by Johnson to appellee's order, which he presented to Johnson's guardian after Johnson became insane, and the guardian paid this note, and it is insisted that the note sued on had been paid, but had not been taken up when paid, because appellee stated, when the renewal note was made, that the note in suit had been lost. The testimony of Johnson's bookkeeper tends very strongly to support this defense, but appellee categorically denied the bookkeeper's testimony and the court, sitting as a jury, resolved this conflict in appellee's favor, and that finding is binding upon us.

Appellee had the right to deny the testimony of the bookkeeper, as such testimony did not offend against the prohibition of § 4144, C. & M. Digest, which provides that "in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party."

Objection was made to the testimony of appellee to the effect that payments on the note were made in 1918

and in 1923, but the court overruled the objection tentatively, upon the statement of appellee's counsel that, if the testimony was not finally shown to be competent, it could be excluded and not considered by the court. The case was tried by the court without a jury. Counsel for appellee asserts that it was his understanding, at the time this testimony was offered, that other testimony would show the payments had been sent to appellee by Johnson, but, when the testimony failed to establish that fact, it was conceded that appellee had given incompetent testimony, in that he had testified to transactions with the ward of the defendant guardian, and that thereafter the court was not asked to, and did not, consider this incompetent testimony, and that this testimony was not considered by the court in the findings of fact made, but that the findings which were made were based upon testimony which was competent, to-wit, the testimony of Davis and Rhodes.

At the conclusion of all the testimony the court made the following findings of fact:

"The court finds that the plaintiff, in his own handwriting, on February 23, 1918, placed the following indorsement on said note: 'Feb. 23, 1918, received on within note $56.50;' that said indorsement was written on said note by the plaintiff on February 23, 1918, within the five-year period of the statute of limitations. The court further finds that said note has an indorsement on the back thereof, in the handwriting of the plaintiff, dated March 8, 1923, as follows: 'March 8, 1923, received on within note $100.' The court finds that said indorsement was written by the plaintiff on March 8, 1923, but further finds, from the testimony of the witnesses Davis and Rhodes, that, on or about February 17, 1923, and before the 20th of February, 1923, said witnesses were indebted to W. E. Johnson on their several accounts, which accounts the plaintiff, Spangler, was surety for, and that the said W. E. Johnson, by agreement with Spangler, credited their accounts on his books with the amount due him, and directed the plaintiff to credit his note with the

amount; that there is no testimony in the record to refute the testimony of Davis and Rhodes that such credit was entered before the 20th of February, 1923, and that Spangler received a payment on said note within five years from the date of the former credit; and that the plaintiff, Spangler, received the credit on said note before the 20th of February, 1923, and before the bar attached, but wrote the indorsement showing the credit on March 8, 1923."

Upon these findings the court rendered judgment for the face of the note, less the credits, with the interest thereon, and the guardian has appealed.

The guardian requested the court to make findings that the note had been paid; that it was barred by the statute of limitations; and that there was not sufficient competent testimony to show that a payment had been made on the note within five years before the institution of this suit. These requests were refused, and error is assigned upon these refusals. It is also insisted that the court erred in admitting and in considering the erroneous testimony showing transactions between appellee, the plaintiff below, and the ward of the defendant guardian.

It is conceded that most of the testimony given by appellee was incompetent, as being in violation of the statute quoted above, but it is insisted that this testimony was not considered by the court, and that there was sufficient competent testimony to show a payment on the note by Johnson within five years of the date of the institution of this suit.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Berry,* 86 Ark. 309, 110 S. W. 1049, it was said that, "in a trial of a case before the court sitting without a jury, the presumption is that the court considered such testimony only as was competent." This presumption is reinforced by the findings of fact set out above, in which the court recites that the finding as to the payment made by Johnson on or about February 17, 1923, was based upon the testimony of Davis and Rhodes. See also *Pace v. Crand-*

all, 74 Ark. 417, 86 S. W. 812; *Covington* v. *St. Francis County,* 77 Ark. 258, 91 S. W. 186.

The competency of the testimony of the witnesses Davis and Rhodes is not questioned, and their testimony, if credited, as was done by the court, shows a payment on the note within five years of the date of the institution of the suit, and at a time when the maker of the note was sane.

Now, if the payment credited as having been made in 1918 could be said to have been shown to have been made by competent testimony, then the note was not barred by the statute of limitations when the last payment was made in 1923. It was evidently the opinion of the trial court, as reflected by the findings of fact, that the indorsement of the 1918 payment arrested the running of the statute of limitations and formed a new period from which the statute ran. It has been said, however, that "where payments are relied upon to stop the running of the statute of limitations, the burden of proof is on the party alleging it to show by other evidence, in addition to the indorsement, that the payment was in fact made." *Slagle* v. *Box,* 124 Ark. 43, 186 S. W. 299; *Simpson* v. *Brown-Desnoyers Shoe Co.,* 70 Ark. 598, 70 S. W. 305; *Brown* v. *Hutchings,* 14 Ark. 84. As there was no other testimony that the payment indorsed in 1918 had been made except the indorsement itself and the incompetent testimony of Spangler, it must be held that the note was, in fact, barred by the statute of limitations when the payment was made in 1923.

But, even though competent testimony does not show that the payment in 1918 was made, competent and undisputed testimony does show a payment in 1923, and it becomes necessary therefore to determine the effect of that payment, as it was made within less than five years of the date of the institution of this suit.

In the recent case of *Sanders* v. *McClintock,* 175 Ark. 633, 300 S. W. 408, it was held that a partial payment made on the note there sued on did not have the effect of reviving that note as a subsisting obligation as to the

unpaid balance, but it was so held because the circumstances attending the payment were of such a nature as to rebut the presumption of an acknowledgment of the debt with an implied promise to pay the balance due on it. It was there said:

"The reason is that part payment is treated as an admission of the continued existence of the debt and an implied promise to pay the balance. It is equally well settled, however, that such promise is not to be implied where the part payment is accompanied by circumstances or declarations of the debtor showing that it is not his intention to admit, by the payment, the continued existence of the debt and his obligation to pay the balance. *Burr* v. *Williams,* 20 Ark. 171; *Chase* v. *Carney,* 60 Ark. 491, 31 S. W. 43; and *Joy* v. *Phelps,* 65 Ark. 1, 45 S. W. 990."

In the case of *Gorman* v. *Pettus,* 72 Ark. 76, 77 S. W. 907, it was held that, in the absence of rebutting evidence, proof of part payment of a debt raises a presumption that the debtor recognizes the existence of the debt and promises to pay the residue; and in the case of *Less* v. *Arndt,* 68 Ark. 399, 59 S. W. 763, it was held that part payments credited on a note by the creditor, with the debtor's knowledge and consent, will stop the running of the statute of limitations, if there are no circumstances connected with the payment to indicate a contrary purpose.

In the case of *Cox* v. *Phelps,* 65 Ark. 1, 45 S. W. 990, the court quoted with approval the following statement of the law from the case of *Taylor* v. *Foster,* 132 Mass. 33: "The part payment must be under such circumstances as reasonably, and by fair implication, lead to the inference that the debtor intended to renew his promise of payment, and must have been made by the debtor in person, or by some one authorized by him to make a new promise in his behalf." See also *Alston* v. *State Bank,* 9 Ark. 455; *State Bank* v. *Wooddy,* 10 Ark. 643; and numerous cases cited in the note to § 625 of the chapter on Limitations of Actions, 37 C. J., pages 1142 *et seq.*

In Wood on Limitations (4th ed.) vol. 1, page 601, it is said:

"A part payment of a debt, though made after the bar of limitations has attached, removes the bar and revives the debt, but the revival cannot affect the rights of third persons attaching after the bar was complete and before the revival. Part payment on a debt operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of limitations, of any such lapse of time as may have occurred previous to the payment being made. A partial payment made on account of an existing debt takes the case out of the statute of limitations. A partial payment of a note takes the entire debt out of the running of the statute, and time is computed from the date of such payment. The voluntary part payment of a debt, made as such, is an acknowledgment of an existing obligation, and from such acknowledgment a promise to pay the balance may be implied. It is *prima facie* sufficient to revive the debt, although such *prima facie* case may be rebutted by attendant circumstances inconsistent with such revivor."

It is true the payment of the hundred dollars was not made in money, but it was not essential that it should be, as the satisfaction of the demands of Johnson against Davis and Rhodes was treated by all parties as a payment of the hundred dollars. Section 112, Wood on Limitations (4th ed.) vol. 1, page 558.

As an unconditional payment of a hundred dollars was shown by competent and undisputed evidence to have been made on the note, with no circumstances to rebut the presumption that the payment was intended as an admission of the debt evidenced by the note and an implied promise to pay the balance, and as the testimony supports the finding of the court below that the note has not been paid, the judgment must be affirmed, and it is so ordered.

SIEGEL, KING & COMPANY v. PENNY & BALDWIN.

Opinion delivered February 20, 1928.

1. SALES—BREACH OF CONTRACT—REMEDIES OF BUYER.—On breach of warranty that pipe purchased was in good serviceable condition, a buyer could either rescind on discovering the inferior quality of the pipe, or retain the pipe and sue on the warranty, or recoup damages when sued for the price.
2. SALES—RESCISSION—REASONABLE TIME.—Where pipe was purchased with express warranty that it was in good serviceable condition, and complaint was made within four weeks that it was unfit for the use intended, and suit was brought within three months after the purchase, a finding that the rescission was made within reasonable time is warranted.
3. SALES—TENDER ON RESCISSION.—Where pipe was purchased under express warranty of its fitness for use in the pipe line to be used in pumping water from a creek, the buyer could rescind for breach thereof without tendering the pipe at its place of purchase, where the tender would have been refused.
4. SALES—PLACE OF TENDER ON RESCISSION.—Where pipe was purchased in Little Rock to be used in Searcy for a pipe line for pumping water from a creek, and where the test of the pipe could only be made by attempt to use it in Searcy, the buyer's offer to return the pipe could be made where the test was made and breach of warranty discovered.
5. SALES—TESTIMONY AS TO WARRANTY.—Where the buyer, who purchased pipe on an express written warranty that it was in good serviceable condition with no leaks, sued the sellers to recover the price paid, it was not error to admit the buyer's testimony that he would not have purchased the pipe even after seeing it, if the sellers had not given him the express warranty.
6. SALES—EXCLUSION OF TESTIMONY.—In a buyer's action against sellers to recover the price paid for pipe on account of a breach of express warranty of serviceability, it was not error to exclude the sellers' testimony that they had sold pipe to other customers, who made no complaint.
7. SALES—EXCLUSION OF TESTIMONY.—In a buyer's action against sellers to recover the price paid for pipe on account of a breach of express warranty of serviceability of second-hand pipe, it was not error to exclude the sellers' testimony that they did not undertake to guarantee the pipe to be as good to all intents and purposes as new pipe.
8. SALES—BREACH OF WARRANTY—RETURN OF PRICE.—Where there was a breach of warranty that second-hand pipe purchased was in good condition, with no leaks, the buyer had a right to demand a return of the price.

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

E. G. Shoffner, for appellants.

Brundidge & Neelly, for appellees.

SMITH, J. On the 15th day of September, 1926, R. H. Baldwin, a member of a copartnership doing business as Penny & Baldwin, hereinafter referred to as the plaintiffs, came from Searcy, where they were engaged in the performance of a paving contract, to appellants' place of business in the city of Little Rock, in quest of second-hand pipe, to be used in running a water-line in connection with a paving project.

Baldwin testified that he saw Mr. Siegel, a member of appellant firm, which is a copartnership doing business as Siegel, King & Company, hereinafter referred to as the defendants, at the defendants' office in Little Rock. Baldwin advised Siegel that he wanted to buy enough pipe to furnish a pipe line a mile and a half or more in length, to be used in pumping water from a creek, and that sound pipe which did not leak would be required for the purpose. Siegel advised Baldwin that he could fill the order, and they went into defendants' storage yard, where they saw several piles of pipe. No test of the pipe was made at the time.

A contract was entered into, which was evidenced by the following writing:

"Little Rock, Arkansas, September 15, 1926.

"It is hereby understood that Penny & Baldwin of Searcy, Arkansas, have this day bought of Siegel, King & Company of Little Rock, 10,560 feet of two-inch second-hand pipe, as inspected by Mr. R. H. Baldwin, at the price of $.09 per foot f. o. b. cars Little Rock.

"This pipe is to be good serviceable condition, with no leaks from end to end.

"Terms: Sight draft bill of lading attached.

"Couplings are to be furnished.

"Prompt shipment."

The pipe was loaded for shipment to Searcy, and a draft with a bill of lading attached was drawn on Penny

& Baldwin, which was duly paid, and the pipe was delivered in Searcy about four days later.

When the pipe was received, Penny & Baldwin were engaged in laying brick, as called for by their paving contract, and it was three or four weeks before they required the use of the pipe line. When the construction of the pipe line was begun, it was found that fifty per cent. of the joints were worthless, and that the pipe leaked at and around the joints and between the joints so that the pipe was worthless for the purpose for which it was purchased. Such is the testimony on the part of the plaintiffs, but it was developed in the cross-examination of plaintiffs' witnesses that only about nine hundred feet of the pipe was connected up, and it is insisted that the bad results obtained were due to the lack of skill on the part of the laborers who made the connections of the pipe joints.

Plaintiffs brought suit, and alleged that the pipe was worthless, and prayed judgment for $950.40, the amount paid for the pipe, for $82.90 freight paid, and $50 for unloading and handling. The jury returned a verdict for $950.40, the amount of the purchase price, and from a judgment accordingly is this appeal.

Numerous errors are assigned for the reversal of the judgment, those requiring discussion being as follows: That there was no restitution or tender of the pipe within a reasonable time; that, when a tender was made, the pipe had deteriorated from exposure and could not be returned in the condition in which it was when sold; that error was committed in refusing certain instructions; and in admitting and in excluding certain testimony.

The first and most important question is, of course, whether there was a breach of the express warranty that the pipe was in good serviceable condition, with no leaks from end to end. The testimony summarized above supports the finding that there was a breach of the warranty, and the law applicable to that condition is restated in the case of *Keith* v. *Fowler,* 169 Ark. 176, 273 S. W. 706,

by quoting from the case of *Courtesy Flower Co.* v. *Westbrook,* 146 Ark. 17, 225 S. W. 3, as follows:

" 'The law on the subject is that, where chattels are purchased under express warranty as to quality, the purchaser may rescind on discovering the inferior quality of the article sold, but is not bound to do so, and, on the contrary, may retain the articles purchased and sue on the warranty, or recoup the damages when sued for the price. In case, however, the contract is to deliver goods of a particular description or quality, without express warranty, and the purchaser accepts them after inspection and discovery of the inferior quality, or after having had a fair opportunity to make such inspection, he waives the right to claim damages for defects or inferiority of the goods sold.' "

The instructions given by the court required the jury to find that the pipe was not serviceable and leaked before finding for the plaintiffs, but it is insisted that, even though the testimony supports the finding that the pipe was not serviceable and leaked, there was no sufficient tender to the appellants of the pipe, nor was the tender made within a reasonable time.

As we have said, three or four weeks elapsed before any test of the pipe was made by attempting to use it, and, when this test was made, it was found that the pipe did not hold water, and complaint was made of that fact to defendants, who advised plaintiffs to take the pipe to a blacksmith or a plumber. Later plaintiffs took up with defendants the resale of the pipe, and defendants offered them $15 per ton for the pipe f. o. b. delivered at Little Rock. Siegel testified that the pipe would weigh about twenty tons, and that the offer for the pipe amounted to about $300, less the reloading and freight charges. The negotiations for a settlement were fruitless, and on December 21, 1926, plaintiffs advised defendants that the entire contract would be rescinded and the pipe would be held in Searcy subject to the plaintiffs' order, and Baldwin testified that the pipe was in as good condition as when shipped.

It thus appears that three months elapsed between the date of the sale and the date of a definite announcement of an intent to rescind, and it is insisted that the court should have declared as a matter of law that this offer was not made within a reasonable time. The court told the jury that plaintiffs could not rescind unless that offer was made within a reasonable time, and, the jury having found as a matter of fact that the offer was made within a reasonable time under all the circumstances, we are unwilling to hold to the contrary as a matter of law.

It is insisted that a rescission could not be effected without a tender of the article sold in Little Rock, but all the testimony shows that such a tender would have been refused if made, as the defendants have at all times insisted, and now insist, that there was no breach of the warranty.

The test of the pipe which the warranty contemplated could only be made by an attempt to use the pipe in Searcy, and, to make this test, plaintiffs were required to pay both freight and unloading charges, which items were not included in the jury's verdict. The offer to return was made at the place where, in contemplation of the parties, the test was to be made, and where it was made, and where a breach of the warranty was discovered.

The instructions requested by defendants were to the effect that a tender of the pipe at Searcy, the place of the test, was not sufficient. But there would have been no expense of reloading and of return freight had there been no breach of the warranty; on the contrary, these items were the direct result of the breach of the warranty, and we think the court was correct in not requiring plaintiffs to incur these items of expense, especially so as the undisputed testimony shows no tender of any kind would have been accepted. 24 R. C. L., p. 326, chapter "Sales," § 511.

The court permitted Baldwin to testify that he would not have purchased the pipe, even after seeing it, if defendants "had not given that written agreement,"

and that the pipe was not suitable for the purpose for which he bought it, and that "he could not use it at all."

We think there was no error in admitting this testimony, as it amounted only to saying that plaintiffs relied upon the warranty, as they had the right to do, and that there was a breach of the warranty—an essential thing to prove to sustain any recovery.

The court excluded testimony offered by defendants to the effect that they had sold pipe to other customers, who made no complaint, and that Siegel "did not undertake to guarantee the pipe to be as good, to all intents and purposes, as new pipe."

There was no error in excluding the first mentioned testimony, as the pipe sold other customers may not have been of the same kind; there may have been no warranty, and those purchasers may have been damaged without complaining. As to the last-mentioned testimony, it may be said that it was not contended that the pipe should be as good, to all intents and purposes, as new pipe. The warranty sued on was that the pipe was in good serviceable condition, with no leaks from end to end, and the jury found, under proper instructions, that there was a breach of this warranty, and, this being true, the plaintiffs had the right to demand a return of the purchase money.

As no error appears, the judgment must be affirmed, and it is so ordered.

LOUISIANA & NORTHWEST RAILROAD COMPANY *v.* WILLIAM R. MOORE DRY GOODS COMPANY.

Opinion delivered February 20, 1928.

1. TRIAL—INSTRUCTION ASSUMING ADMITTED FACT.—An instruction which assumed an admitted fact is not erroneous.
2. CARRIERS—LIABILITY AS WAREHOUSEMAN.—An instruction in an action against a railroad as a warehouseman, which bases the right to recover on defendant's want of common and reasonable diligence whereby the goods were lost, *held* proper.

3. CARRIERS—FINDING AS TO LOSS OF GOODS.—Testimony that the consignee refused to receive a shipment, that it was redelivered to the railroad company and lost after it was shown to be in possession of the railroad company, makes a *prima facie* case of negligence which was sufficient, in the absence of explanation, to support the verdict of a jury against the carrier.

Appeal from Columbia Circuit Court; *L. S. Britt,* Judge; affirmed.

Henry Stevens, for appellant.

J. E. Hawkins, for appellee.

SMITH, J. On or about November 5, 1922, Tullis & McClurkin, merchants at Magnolia, Arkansas, ordered a bill of dry goods from the William R. Moore Dry Goods Company, a corporation having its place of business in Memphis, Tennessee. The order was filled by ordering the goods shipped from Winston-Salem, North Carolina. After placing the order, Tullis & McClurkin canceled it, and the cancellation was accepted by the Moore Company, which company made an unsuccessful effort to stop the goods in transit as they passed through Memphis, and the shipment, consisting of a box weighing 259 pounds, went through to Magnolia.

John Curry is a drayman in Magnolia, and he had an arrangement with Tullis & McClurkin whereby he received from the railroad company all freight intended for Tullis & McClurkin, and delivered the same to them.

The box of goods in question had been shipped by prepaid freight, but the payment was twenty-nine cents short of the correct freight, and Curry paid this difference, and hauled the box to the store of Tullis & McClurkin, who refused to receive it. Curry then returned the box to the railroad freight-room and delivered it to the person there in charge, and he testified that he later saw the box in the freight-room, but that he did not haul it a second time to the store of Tullis & McClurkin. The box was never reshipped to the Moore Company by the railroad company, but was lost. Testimony was offered by the railroad company tending to show that Curry hauled the box from the freight-room a

second time, and did not return it a second time. This was denied by Curry.

The complaint filed by the Moore Company against the railroad company, to recover the value of the box of goods, alleged an erroneous date as the date of the receipt of the box by the railroad company at its station in Magnolia, but it is not questioned that it was received by the railroad company at that station, and it is not claimed that the box was ever reshipped to the plaintiff.

An answer was filed by the railroad company, in which liability was denied upon the ground that it had fully discharged its contract of carriage by delivering the freight to the consignee named in the bill of lading.

There was a verdict and judgment for the plaintiff for the value of the goods, and the railroad company has appealed.

It is insisted by the appellant railroad company that this judgment should be reversed and the cause dismissed because it was not shown that the plaintiff was the owner of the freight, nor was it shown that the box was lost through its negligence.

The court instructed the jury that the plaintiff could not recover unless it was shown by the evidence, and the jury so found, that there was an understanding with Tullis & McClurkin whereby the goods were to be reshipped to the plaintiff, and it is insisted that instruction numbered 1, given at the request of the plaintiff, is in conflict with this instruction, in that it permitted a recovery by the plaintiff without imposing that requirement. It appears however that, even though the instructions are in conflict in this respect, the error was not prejudicial, for the reason that McClurkin, of the firm of Tullis & McClurkin, testified that his firm had canceled the order and had refused to accept the goods; that he saw the station agent, and obtained the copy of the freight-bill, which he marked "Refused," and he sent a copy so marked, to the plaintiff, Moore Company, and that the railroad agent wrote the word "Refused" on the original freight-bill. The goods belonged either to the

consignor or the consignee, and, as the consignee expressly disclaimed any interest in or title thereto, there was no error in assuming—as plaintiff's instruction numbered 1 did—that the goods belonged to the consignor, the plaintiff in the action. The title of the plaintiff was sufficiently proved, and was undisputed, and there was no error therefore in assuming this to be an undisputed fact, as plaintiff's instruction numbered 1 did.

Plaintiff's instruction numbered 1 further told the jury that, if the goods were delivered to and received by the railroad company, "then, while said goods were in possession of defendant in the depot at Magnolia, Arkansas, it was liable as a warehouseman for the care and custody of said goods, and, as such, was required to use common and reasonable diligence in caring for said goods, and if you further find that, from want of common and reasonable diligence, said goods were lost, then you should find for the plaintiff."

There was no error in this instruction. Appellant insists that it was erroneous because it permits a recovery without requiring a finding that the goods were lost through the negligence of the defendant. But the instruction does require a finding that, "from want of common and reasonable diligence, said goods were lost." The failure to exercise ordinary care and reasonable diligence would be negligence.

In the case of *Yazoo & M. V. R. R. Co.* v. *Altman,* 129 Ark. 358, 196 S. W. 122, it was held (to quote a syllabus): "The nondelivery by a warehouseman of goods held by him, upon demand, in the absence of any explanation of their loss by fire or theft, or in any other manner consistent with the exercise of ordinary care over the goods, makes a *prima facie* case against the warehouseman."

Appellant insists that it fully discharged its liability as a warehouseman by delivering the goods to the consignee's agent, but this question of fact was passed upon by the jury adversely to appellant's contention, and that finding is conclusive.

Upon this question the case is similar to and is controlled by the decision in the Altman case, *supra.*

The testimony is sufficient to support the finding that the consignee refused to receive the box, and that it was redelivered to the railroad company, and, although no bill of lading was ever issued for the reshipment of the box, it was lost after it was shown to be in the possession of the railroad company, and, as the only explanation of the loss was denied by Curry, a *prima facie* case of negligence was made when the jury found that the loss of the box was unexplained, which is sufficient to support the verdict of the jury, and the judgment is therefore affirmed.

MOSAIC TEMPLARS OF AMERICA *v.* MILLER.

Opinion delivered February 20, 1928.

INSURANCE—BENEFIT CERTIFICATE—RIGHT OF ASSIGNEE.—Crawford & Moses' Dig., § 6074, naming the classes of beneficiaries under a fraternal benefit certificate, has no application to benefit certificates issued before the statute was passed, so that one to whom a benefit certificate was assigned in 1926 under a certificate issued prior to the passage of such act was entitled to recover.

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

Scipio A. Jones, Thomas J. Price, for appellant.

A. J. Gilmer, for appellee.

SMITH, J. This case is similar to and is controlled by the opinion in the case of *Mosaic Templars of America* v. *Bean,* 147 Ark. 24, 226 S. W. 525.

In 1915 Lizzie Moore was initiated into and became a member of a subordinate lodge of the Mosaic Templars of America, a fraternal benefit life association, and a benefit certificate was issued to her in the sum of $300, payable at her death, if the certificate was then in force, to the beneficiaries there named. The certificate was kept in force by the payment of the monthly assessments against it until 1925, at which time the health of the

member failed, and she entered into a contract with Rena Miller, whereby she assigned a two-thirds interest in the certificate to the said Rena Miller upon condition that the said assignee would take care of her during the remainder of her life and pay the assessments upon the benefit certificate. The insurance society was advised of this assignment, and thereafter received from Rena Miller the monthly assessments until the date of the death of the insured, which occurred March 16, 1926.

When proof of the death of the insured was furnished, it appeared that Rena Miller was not related to the insured in any degree which permitted her to become a beneficiary under the provisions of § 6074, C. & M. Digest, which reads as follows:

"The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member, or his or her estate; provided that if, after the issuance of the original certificate, the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes."

The section quoted was enacted as § 6 of the act of March 28, 1917 (act 462, volume 2, Acts 1917, page 2087), entitled "An act pertaining to the regulation and incorporation of fraternal beneficiary associations, societies or orders, and other matters pertaining thereto * * *." The section quoted was amended by act 13 of the Acts

of 1927 (Acts 1927, page 37), but the eligibility of Rena Miller as a beneficiary was not affected by the amendatory act.

The ineligibility of Rena Miller being made to appear, the insurer paid the amount of the certificate to the beneficiaries named in the certificate, after declining to pay any portion thereof to the said Rena Miller, who thereupon brought this suit, and in the trial below, which occurred in the chancery court, she recovered a decree for the portion of the certificate which had been assigned to her.

It is insisted, for the reversal of the decree of the court below, that the fraternal association could not consent to an assignment of the certificate to a person ineligible to become a beneficiary under the statute quoted, and that the assignment thereof was therefore nugatory.

Legislation very similar and in many respects identical with the act of 1917 has been enacted in a number of the States, and the legislation has been uniformly upheld.

At § 214 of Bacon on Life & Accident Insurance (4th ed.), vol. 1, page 371, it is said:

"Benefit societies differ from other mutual insurance organizations in that their charters generally impose restrictions upon the issue of certificates by limiting the persons who may be beneficiaries of the members to those who are heirs, relatives or dependents of such members. Wherever these restrictions are imposed by statute, or contained in the charter of the society, it has no power to pass beyond them by issuing a certificate in which any one other than of the specified classes is beneficiary. The Court of Appeals of Kentucky early established this doctrine when it said: 'The charter prescribes who may become members of the company and their obligations, and who shall be the beneficiaries of the membership after the death of the member, and it is not in the power of the company or of the member, or of both, to alter the rights of those who by the charter are declared to be the

beneficiaries, except in the mode and to the extent therein indicated'."

It would appear therefore that the association properly refused to pay the portion of the certificate assigned to appellee, Rena Miller, but for the fact that the certificate here sued on was originally issued before the passage of the act of 1917, appearing as § 6074, C. & M. Digest, *supra.* The case of *Mosaic Templars of America* v. *Bean, supra,* and that of *Mosaic Templars of America* v. *Crook,* 170 Ark. 474, 280 S. W. 3, held that the statute was not retroactive, and did not apply to certificates issued before its passage. In the Bean case, *supra,* it was said:

"The record shows that the plaintiffs are not in any of the classes permitted by the statute to be made beneciaries. Therefore counsel for the defendant contend that the plaintiffs cannot recover on the benefit certificate sued on because the statute in question became a part of the contract of insurance, and there is no power to make a beneficiary one who is not within any of the classes designated by the statute. Counsel rely upon the rule laid down by the Supreme Court of Minnesota in *Logan* v. *Modern Woodmen of America,* 137 Minn. 221, 163 N. W. 292, and cases cited in the opinion. We need not decide upon the correctness of the rule announced in those cases, for we are of the opinion that the statute relied upon has no application under the facts of the present case. The benefit certificate sued on was issued prior to the passage of the act. So far as the record discloses, at the time the benefit certificate was issued the member had the right to change the beneficiary to the plaintiffs, and this right or privilege was recognized by the grand scribe of the order, in 1919, at the time the change of beneficiaries was made."

What was there said is equally applicable here, and, as a recovery by an assignee was sustained there, a similar recovery must be sustained here, and it is so ordered. The decree is therefore affirmed.

MASSACHUSETTS BONDING & INSURANCE COMPANY v. CHAPMAN.

Opinion delivered February 27, 1928.

1. INSURANCE—KNOWLEDGE OF SOLICITING AGENT.—Where an applicant for accident insurance stated to the insurer's soliciting agent that he was working part time as freight brakeman and part time as passenger brakeman, notice to such agent became notice to the insurer, though his occupation was classified in the application as a passenger brakeman.
2. INSURANCE—RECOVERY OF PAYMENT ON POLICY—EFFECT OF MISTAKE.—Where an applicant for accident insurance stated to the insurer's soliciting agent that he was working both as passenger and as freight brakeman, and where, under policy classifying him as a passenger brakeman, the insurance company paid the loss on the basis of proof showing that the insured was injured while working on a freight train, there being no fraud or misconduct on insured's part, the company was not entitled to recover payment on the ground of mutual mistake, or mistake on its part due to ignorance, by reason of the fact that the insured was at the time of the accident engaged as freight brakeman.

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

STATEMENT OF FACTS.

Massachusetts Bonding & Insurance Company instituted this action in the circuit court against C. G. Chapman to recover the sum of $690, alleged to have been paid the defendant by mistake upon an accident insurance policy. The defendant denied all the material allegations of the complaint.

According to the evidence adduced by the plaintiff, it issued an accident policy to C. G. Chapman in the sum of $1,000, on the 18th day of October, 1926. Chapman made a written application for the insurance, in which he stated his occupation to be that of passenger brakeman. On the 3d day of November, 1926, Chapman started to go out on a freight run, and was injured by falling under the freight train before he got on it and had reported to the conductor. He was injured so badly that his left leg had to be amputated just above the ankle. His sister made proof of loss for him, under the direction of E. L. Bloom,

a soliciting agent of the plaintiff, who had also taken the application for the insurance. In the proof of loss, it was stated that Chapman was injured while working as a brakeman on a freight train. On the 6th day of December, 1926, the plaintiff paid Chapman $989 in full settlement of all his present and future claims under the policy.

According to the testimony of R. H. Brusoe, superintendent of the claim department of the plaintiff company, this payment was made by mistake. E. L. Bloom was only a soliciting agent, and had no authority to change any qualification, classification, or an occupation, limit of risk, or rate of premium. He was not authorized to make a settlement with Chapman. He made the payment thinking that Chapman had been properly classified as a passenger brakeman, and did not know that his occupation had been changed to that of freight brakeman at the time he was injured.

C. G. Chapman was a witness for himself. According to his testimony, he explained to the agent of the plaintiff company that he was working as freight brakeman, passenger brakeman and train baggageman. E. L. Bloom, the soliciting agent, told him that he was entitled to be classified as a passenger brakeman, and, for that reason, his occupation was so written in the application. Bloom told him that, if he ever quit passenger work, he would have to change it to freight brakeman. Bloom also told him that, if he got hurt while on a freight train, he would get the full value of the policy just the same.

The policy contains a provision as follows:

"This policy includes the indorsements and attached papers, if any, and contains the entire contract of insurance, except as it may be modified by the company's classification of risk and premium rates in the event that the insured is injured or contracts sickness after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence, or while engaged in recreation, in which event the com-

pany will pay only such portion of the indemnities provided in the policy as the premium would have purchased at the rate but within the limits so fixed by the company for such more hazardous occupation."

Chapman was paid the amount under the policy which he should have received if he had lost his leg while working as a passenger brakeman.

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

Sam Robinson, for appellant.

Raymond Jones, for appellee.

HART, C. J., (after stating the facts). According to the evidence for the defendant, the soliciting agent of the insurance company had full knowledge of the fact that he was working part of the time as a freight brakeman and part of the time as a passenger brakeman at the time the policy was applied for by him and issued by the company. It was his duty to explain fully his occupation, and the notice to the soliciting agent became the knowledge of the company. *American National Ins. Co.* v. *Hale,* 172 Ark. 958, 291 S. W. 82, and cases cited; *Bankers' Reserve Life Co.* v. *Crowley,* 171 Ark. 135, 284 S. W. 4; and *Old Colony Life Ins. Co.* v. *Julian,* 175 Ark. 359, 299 S. W. 366.

Chapman testified that he told the soliciting agent of the plaintiff that he was working both as a passenger and as a freight brakeman at the time he applied for the insurance. He is corroborated in this testimony by another witness who was present, and no denial thereof is made by the soliciting agent. Chapman then had a right to assume that, when the company issued the policy and delivered it to him, he was properly classified as a passenger brakeman under its terms. It is true he was injured while starting out on a freight run, but this was only a temporary change, and he was still in the service of the railroad company as a passenger brakeman just as he was when the policy was issued. He stated in his proof of loss that he was injured while working on a freight train. This put the company upon notice of that fact, and, not-

withstanding this, it paid him under his classification as a passenger brakeman. Under these circumstances it cannot be said that the payment was made under a mutual mistake. Chapman thought that he was entitled to be paid as for an injury to a passenger brakeman, and that he had been properly classified as such when the policy was issued. Neither can it be said that the payment was made under mistake on the part of the company, coupled with fraudulent conduct on the part of Chapman. It is not claimed that he was guilty of any fraudulent conduct. At least there is no proof whatever tending to show such to be the fact. So far as the record discloses, Chapman acted in the utmost good faith throughout the whole transaction.

The contention of the plaintiff is that the payment was made because of a mistake on its part due to its ignorance of the facts, entitling it to avoid the policy. In discussing a question of this sort in *National Life Insurance Co.* v. *Minch,* 53 N. Y. 144, the court said:

"A policy of insurance is an executory contract. The time for insisting upon the breach of any warranty contained in the original application was when the claim was made for the execution of the contract. Mere ignorance of a fact which might have enabled the company to defend an action upon the policy on account of such breach is not such a mistake of fact as will enable it to recover back the money. It will be presumed that the company either knew the fact or intended to waive any such defense, and voluntarily paid the money. Otherwise there would be no end to controversy and litigation, and the party receiving the money would hold it subject to a lawsuit until the statute of limitations intervened."

This rule has been applied according to varying facts in other cases. *Smith* v. *Glen's Falls Ins. Co.*, 62 N. Y. 85; *Stache* v. *St. Paul Fire & Marine Ins. Co.*, 49 Wis. 89, 5 N. W. 36, 35 Am. Rep. 772; and *Kansas City Life Ins. Co.* v. *Blackstones* (Court of Civil Appeals of Texas), 143 S. W. 702.

The plaintiff was not induced to issue the policy because of any fraud practiced upon it, and it does not claim it was induced to make the payment to the defendant because of any misconduct on his part. It had notice of facts which, if pursued with ordinary diligence, would have led to a full discovery of everything connected with the issuance of the policy. Hence it cannot urge that it made the payment by mistake on account of lack of knowledge.

It follows that the judgment of the circuit court was correct, and it will therefore be affirmed.

ROOT REFINERS, INC., *v.* ROBERTSON.

Opinion delivered February 27, 1928.

1. WATERS AND WATERCOURSES—POLLUTION OF RUNNING STREAM.—A finding of the jury that an oil refining company was liable for polluting the water in a running stream by a flow of oil from its refineries was warranted, where the evidence showed that the oil escaped from the refineries into a stream used by plaintiff for watering cattle, and that defendant had previously run its oil in another direction and might easily have diverted the oil from the stream.
2. WATERS AND WATERCOURSES—POLLUTION OF STREAM.—Pollution of water in a running stream by oil from a refinery was a temporary and not a continuing nuisance, and entitled a tenant to recover the depreciation in rental value caused by such pollution.
3. WATERS AND WATERCOURSES—DAMAGES.—A verdict for $550 for polluting, with oil from a refinery, a running stream used by a tenant as a watering place for his cattle, *held* sufficiently supported by competent evidence.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

STATEMENT OF FACTS.

R. H. Robertson sought to recover damages from Root Refineries, Inc., on account of the alleged pollution of a running stream of water on his dairy farm by the defendant discharging large quantities of oil from its refineries in the stream.

According to the evidence of J. M. Sheppard, R. H. Robertson was a nephew of his wife, and he gave Robertson the use indefinitely of 40 acres of land, on which there was a branch running all the year 'round. Robertson used the branch to water his dairy cattle. The defendant allowed oil to escape from its refineries and to flow into the stream. This rendered the water unfit for cattle to drink. It was fit for them to drink before it was polluted.

According to the testimony of R. H. Robertson, he had from 50 to 75 head of cattle in his dairy, and owned the forty acres of land upon which his dairy was located. There was no branch or running stream from which to water his cattle on his land. Dr. Sheppard gave him permission to use the running stream of water on 40 acres of land belonging to him, for the purpose of watering his cattle, and he had used it for that purpose. There was an ample supply of the water, and it was sufficient for the purpose of watering his cattle before it was polluted by the defendant allowing its oil to flow into the running branch. After this was done, the water became polluted and was not fit to be used for watering the cattle. The defendant began polluting the stream about April 1, 1925, and continued to do so up to the time suit was commenced on the 15th day of June, 1926, and up to the time of the trial on the 25th day of May, 1927. The rental value of the 40 acres on which the running stream was located was worth about $50 per month. For watering purposes alone it was worth $35 per month.

According to the evidence of the defendant the stream in question did not contain running water and never had been fit to use for watering cattle. The soil was boggy, and the water was slimy. Very little oil escaped from the refineries of the defendant onto the land in question.

The jury returned a verdict for the plaintiff in the sum of $550, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Marsh, McKay & Marlin, for appellant.
Ragsdale & Matheney, for appellee.

HART, C. J., (after stating the facts). According to the evidence adduced by the plaintiff, oil was allowed to escape from the refineries of the defendant and to flow into a running stream on 40 acres of land used by the plaintiff for watering the cattle on his dairy farm. The evidence for the plaintiff also shows that formerly the oil from the defendant's refineries had flowed in another direction, and that it might easily be diverted from flowing into the stream used by the plaintiff for watering his dairy cattle. Under these circumstances the jury was warranted in finding that the defendant was liable for the pollution of the water in the running stream. *Standard Oil Co. of Louisiana* v. *Goodwin,* 174 Ark. 603, 299 S. W. 2.

It is next insisted that the evidence showed that the pollution of the stream was a permanent injury to the property rather than a continuing nuisance, and that the court erred in instructing the jury that the measure of damages would be the depreciation in the rental value caused by the pollution of the stream by the defendant allowing the oil from its refineries to flow into it. We do not think the court erred in instructing the jury on the measure of damages. According to the evidence for the plaintiff, the defendant had previously allowed the oil from its refineries to flow in another direction, and could easily have changed the flow of the oil from its refineries so as not to allow it to escape and flow into the running stream on the 40 acres of land used by the plaintiff in watering his dairy cattle. The plaintiff did not own the land, but had a lease on it during the will of the owner. He used the stream in watering his dairy cattle, and it was suitable for that purpose before it was polluted by the defendant allowing the oil from its refineries to flow into it. Under these circumstances there was only a temporary nuisance to the land, and the measure of damages in such cases is the diminished rental or usable value of the land. *St. Louis S. W. Ry.*

Co. v. *Mackey,* 95 Ark. 297, 129 S. W. 78, and *Standard Oil Company of Louisiana* v. *Goodwin, supra.*

It is next insisted that there is no legal evidence to establish the rental value of the land. According to the testimony of the plaintiff, he had between 50 and 75 head of cattle in his dairy. The running stream was amply sufficient to water these cattle before it was polluted by the defendant. The plaintiff had no other place to water them. The land belonged to the husband of his aunt, and he was given permission to use it as long as he wished to. He testified that the rental value of the land for the purpose of watering the cattle alone was $35 per month. The defendant polluted the stream by allowing the oil from its refineries to flow into it on April 1, 1925, and continued to do so until the time of the trial in May, 1927. In stating the rental value of the land on which the running stream was located, the plaintiff was not speculating upon the value existing under conditions which he had never observed, but was basing his opinion upon a state of facts known to him. Hence it cannot be said that the evidence is not legally sufficient to support the verdict, or that there is no competent testimony of the usable value of the land for the purpose of watering the cattle.

The judgment therefore will be affirmed.

FULBRIGHT v. PHIPPS.

Opinion delivered February 27, 1928.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The Supreme Court will not reverse a judgment for $5,000 based on substantial testimony, though the testimony would have justified a verdict of $10,000.
2. NEW TRIAL—VERDICT CONTRARY TO EVIDENCE.—The trial court should grant a motion for a new trial, if convinced that a verdict is contrary to the preponderance of the evidence.
3. JUDGMENT—AUTHORITY TO RENDER JUDGMENT NOTWITHSTANDING VERDICT.—Where the jury returned a verdict for $5,000, and a preponderance of the evidence would have justified a verdict for

$10,000, the court was without authority to enter judgment for $10,000.

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; reversed.

J. W. Nance and *J. W. Grabiel,* for appellant.

H. L. Pearson and *J. Wythe Walker,* for appellee.

SMITH, J. Appellee brought suit against the administratrix of the estate of Jay Fulbright, deceased, upon a demand for alleged unpaid salary amounting to $10,000, and offered testimony tending to show that the demand was just, and that he was entitled to receive the amount sued for.

Testimony was offered by the defendant administratrix to the effect that nothing was due appellee, and that the demand upon which he sued had been compromised and settled. Had the verdict been for the defendant we would be required to hold that the testimony was ample to sustain the finding.

After the jury had had the case under consideration for some time, a report was made to the court that the jury was unable to agree. The court required the jury to further consider the case, and a verdict was finally returned for the plaintiff for the sum of $5,000, one-half the amount sued for, thus indicating that a compromise verdict had been reached, as the verdict should consistently have been for $10,000 or for nothing.

Both parties filed motions for a new trial, and both motions were overruled. Appellee filed a supplementary motion praying the court to render judgment for $10,000 notwithstanding the verdict, and that motion was sustained, and judgment was rendered for that amount, and this appeal has been duly prosecuted from that judgment.

We do not review the testimony, for, as has been said, it was sharply conflicting, and is legally sufficient to support a verdict for $10,000 in favor of the plaintiff or one in favor of the defendant. There appears to be no assignment of error requiring discussion except the action of the court in rendering judgment for $10,000 notwithstanding the jury had returned a verdict in favor of the plaintiff for only $5,000.

The case of *Jackson* v. *Carter,* 169 Ark. 1154, 278 S. W. 32, was a suit upon three notes which had been executed in payment of the purchase price of an automobile. The defendant denied liability upon the notes on the ground that the automobile had been stolen, and there was a verdict and judgment in his favor. Upon the appeal to this court it was held that the defendant had failed to prove that the automobile had been stolen, and that the proof was insufficient to show that the consideration for the notes had failed. It was therefore held that, as the undisputed testimony showed that plaintiff was entitled to a judgment for the amount of the notes, judgment should be rendered here for the plaintiff, notwithstanding a verdict had been returned in favor of the defendant, and this was done. It was there said, however:

"But § 6271 of Crawford & Moses' Digest provides: 'When a trial by a jury has been had, judgment must be entered by the clerk in conformity with the verdict, unless it is special, or the court orders the case to be reserved for future argument or consideration.' And § 6273 provides: 'Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so entered by the court, though a verdict has been found against such party.' The facts of this record do not bring the case within either of the above sections of our statute. The verdict was not special, the case was not reserved by the court for future judgment or consideration, and there was no statement in the pleadings to justify the court in entering a judgment in favor of the appellant. Therefore the appellant was not entitled to a judgment *non obstante veredicto.* 'The motion in arrest of judgment in civil causes is unknown to our system of practice, and, where it does obtain, can be maintained only for a defect upon the face of the record, of which the evidence constitutes no part' (Citing cases)."

It is apparent that neither section of the statute quoted in the case cited above is applicable to the facts in this case. Here the answer denied any liability, and the testimony on behalf of the defendant would have sustained that finding. The plaintiff was therefore not entitled to a judgment under the pleadings nor under the undisputed proof. *Ryan* v. *Fielder,* 99 Ark. 374, 138 S. W. 973; *Collier* v. *Newport Water Co.,* 100 Ark. 47, 139 S. W. 635, Ann. Cas. 1913D, 45; *Sharff Distilling Co.* v. *Dennis,* 113 Ark. 221, 168 S. W. 141; *Coleman* v. *Utley,* 153 Ark. 233, 240 S. W. 10; *Trippe* v. *Duval,* 33 Ark. 811.

We have held that where a jury found, under conflicting testimony, that a plaintiff was entitled to recover damages, and the undisputed testimony showed the damages were substantial, the judgment for nominal damages only was an error, to correct which this court would reverse the judgment. This is true, however, because a judgment for nominal damages is, in effect, a refusal to assess damages. *Krummen Motor Bus & Taxi Co.* v. *Mechanics' Lumber Co.,* 175 Ark. 750, 300 S. W. 389; *Martin* v. *Kraemer,* 172 Ark. 397, 288 S. W. 903; *Dunbar* v. *Cowger,* 68 Ark. 444, 59 S. W. 951; *Carroll* v. *Texarkana Gas Co.,* 102 Ark. 137, 143 S. W. 586; *Bothe* v. *Morris,* 103 Ark. 370, 146 S. W. 1184.

Here the verdict and judgment was not for a nominal sum, but was for a very substantial amount, to-wit, the sum of $5,000. There was therefore no refusal to render judgment for more than a nominal amount.

It is true that the verdict is not consistent, but this is not ground for us to reverse the judgment, as it is supported by very substantial and sufficient testimony.

A very similar question was presented in the case of *Washa* v. *Harris,* 167 Ark. 186, 266 S. W. 944, and it was there said:

"It must be conceded that the verdict does not appear to be consistent with either theory of the case, but we cannot say that it is unsupported by the testimony. The testimony in Harris' behalf would have supported a

verdict for the entire amount in controversy, except the price of the pulley, which was only $42.50, which would, of course, have included the $3,000 paid in cash, yet the verdict of the jury included only so much of the $3,000 as was necessary to extinguish the note and the price of the pulley, and we will not therefore disturb the verdict, because the jury's finding on the facts against appellant sustains the verdict, and would support a larger recovery against him than the mere extinguishment of the note."

The trial court might have granted the motion of either party for a new trial, and should have done so if convinced that the verdict was contrary to the preponderance of the evidence. *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851. But the jury having returned a verdict for a substantial amount, and the plaintiff not being entitled, under the pleadings or the undisputed proof, to recover a larger amount, the court was without authority to render judgment for a larger sum than that fixed by the verdict.

The trial court should properly have granted the appellee's motion for a new trial if convinced that the verdict was contrary to the preponderance of the evidence, or have overruled both motions for a new trial if not so convinced. But the action of the court does very clearly indicate a finding on the part of the trial court that the verdict for $5,000 was not contrary to the preponderance of the evidence, because the court has actually increased the recovery. There can therefore be no error in affirming the judgment for $5,000, if appellee elects to have that done. But, unless this election is made, the judgment must be reversed, and it will be so ordered unless appellee shall, within fifteen days, remit $5,000 of the judgment, thus leaving the verdict of the jury undisturbed.

OLD COLONY LIFE INSURANCE COMPANY v. FETZER.

Opinion delivered February 27, 1928.

1. INSURANCE—MISREPRESENTATION IN APPLICATION.—Misrepresentations, willfully and knowingly made with intent to deceive, in an application for life insurance will avoid the policy.
2. INSURANCE—FINDING AS TO MISREPRESENTATIONS.—In a suit to cancel a life insurance policy on the ground of misrepresentations made in the application, a finding that insured did not willfully and knowingly misrepresent that she had not been treated for chronic stomach trouble or cancerous condition of the stomach within 10 years next before applying for the policy, *held* not contrary to the preponderance of the evidence.
3. INSURANCE—CONDITION OF INSURED.—In a suit to cancel a life insurance policy, on the ground of misrepresentations as to insured's health, evidence *held* to show that insured was in good health when the policy was delivered to her.
4. INSURANCE—ALLOWANCE OF ATTORNEY'S FEE.—In a suit to cancel a life insurance policy for $1,000, in which defendant filed a cross-complaint praying for recovery on the policy and a reasonable attorney's fee, an allowance of $200 as attorney's fee was not excessive where defendant recovered judgment in the lower court and on appeal and her attorney filed a brief on appeal.

Appeal from Jackson Chancery Court; *A. S. Irby*, Chancellor; affirmed.

Boyce & Stayton, for appellant.

Gustave Jones, for appellee.

HUMPHREYS, J. On March 18, 1926, appellant instituted suit against appellee in the chancery court of Jackson County to cancel a life insurance policy for $1,000 issued by it on the 24th day of May, 1924, to Lora Fetzer, insuring her life in favor of her husband, the appellee herein, in consideration of an annual premium of $24.46, upon the ground that the policy was induced and procured through misrepresentations as to the condition of her health, willfully or knowingly made, with intent to deceive.

One of the alleged false, fraudulent and untrue statements was her answer to the effect that she had never been afflicted with any disease contained in the list of sixty-odd ailments set out in her application for insurance, embracing, among other ailments, disease of can-

cer and stomach trouble, whereas she had been afflicted with chronic stomach trouble and cancer of the stomach prior to the date of her application for insurance.

The other alleged false, fraudulent and untrue statement was to the effect that she had been afflicted with acute indigestion in 1922, and was attended by Dr. Ivy of Tuckerman, in answer to the following question asked by appellant's medical examiner when she applied for insurance, to-wit:

"Name all ailments, physical injuries and surgical operations said person has had in the last ten years, giving the names of all persons who attended said person in connection therewith, together with date and address." Whereas she had been treated for chronic stomach trouble in the years 1921, 1922 and 1923, by another physician.

Lora Fetzer died on the fourth day of February, 1926, after having paid two annual premiums on the policy, which amount appellant tendered to appellee, with an offer to rescind the contract, which was declined and refused by him. The policy provided that it would be incontestable after two years from its date, except for nonpayment of premiums. This suit was brought after appellee refused to accept the tender and before the expiration of the two-year limitation.

Appellee filed an answer and cross-complaint, in which he denied the material allegations of the complaint, and prayed for a recovery on the policy for $1,000, with interest from April 4, 1926, with a 12 per cent. penalty, and a reasonable attorney's fee.

The cause was submitted to the court on the pleadings and testimony introduced by the respective parties, and which resulted in a decree dismissing appellant's complaint for the want of equity, and in a recovery by appellee against appellant for $1,000, the amount of the policy sued on, with interest at 6 per cent. per annum from April 4, 1926, and $120 as penalty and $200 as attorney's fee, from which is this appeal.

In part II of the application for insurance, made a part of the policy, sixty or more ailments are listed, with the following question adjoined: "Of all the ailments mentioned, said person has had only the following: (if none, so state) "None." The list contained diseases of stomach and cancer.

The following question and answer also appears in part II:

"Q. Name all ailments, physical injuries and surgical operations said person has had in the last ten years, giving the names of all persons who attended said person in connection therewith, together with date and address? A. Acute indigestion, 1922, Dr. Ivy, Tuckerman."

In addition to the list of ailments embraced in the first question set out above, which was question 20, there were thirty-eight other questions relating, in one way or the other, to the health and history of the applicant, which the medical examiner, Dr. R. O. Norris, was instructed to propound to the insured. In addition to these questions the examiner was directed to make an extensive examination of the applicant, especially covering pulse rate, blood pressure, heart action, and specific gravity of the urine. Dr. Norris was a witness in the case, and testified that he made a physical examination of the applicant at her home. When he called at her home to make the examination he found the applicant, her husband and daughter, picking strawberries. His examination revealed that she was a strong, healthy-looking woman, normal in every respect. He testified that the examination was made in the house, and that no one was present except the applicant and himself, and that he propounded all of the questions contained in the application to her, and recorded her answers correctly. Dr. Norris testified further that he treated the insured in her last illness, and that she died from cancer of the stomach; that it could be possible, but not probable, that she had incipient cancer of the stomach when he examined her for insurance; that it is a disease of slow duration; that she would

not and could not have known of the existence of an incipient cancer, because it would have required an X-ray or gastric examination to have discovered it at the time she applied for insurance, and he made neither.

Agnes Batten, a daughter of appellee and the insured, testified that, when Dr. Norris came to their home to make the medical examination of her mother for insurance, her father, mother and herself were picking strawberries close to the house, and that she remained in the room with Dr. Norris and her mother during the entire time the examination was being made.

Appellee testified that the examination of Dr. Norris was short, and that he remained in the room with them the entire time; that Dr. Norris had some blanks containing questions; that he wrote the answers to some of the questions without reading them to his wife; that he asked her only a few questions; that he did not ask her to give him the names of all the doctors who had treated her in the last ten years; that he spoke of having called to see her himself on one occasion, and asked who was treating her at that time, and she said Dr. Ivy.

Dr. L. S. Slayton testified that he treated the applicant about thirty-seven times in 1921, 1922 and 1923; that about thirty of the treatments were for chronic stomach trouble. In answer to a hypothetical question based upon the result of the physical examination made by Dr. Norris when he examined her for insurance, Dr. Slayton testified that her condition indicated that she had recovered from the stomach trouble for which he had treated her in those years.

The sole question arising out of the pleadings and testimony on this appeal is whether the insured willfully and knowingly misrepresented that she had been treated for chronic stomach trouble or a cancerous condition of the stomach within ten years next before applying for the policy, in order to procure same. This court is committed to the doctrine that misrepresentations willfully and knowingly made, with intent to deceive, in an application for life insurance, will void the policy. *Metro-*

politan Life Ins. Co. v. *Johnson,* 105 Ark. 101, 150 S. W. 393; *Bankers' Reserve Life Co.* v. *Crowley,* 171 Ark. 135, 284 S. W. 4.

It cannot be said that the finding of the chancery court, to the effect that the alleged misrepresentations were not made, are contrary to a clear preponderance of the evidence. There is a direct conflict between the testimony of Dr. Norris and appellee as to whether the questions which were asked the insured elicited the answers claimed to be untrue. Dr. Norris testified that he asked every question and recorded the answers correctly. To have done so, and to have made the physical examination he said he made, would have required a long time. Dr. Norris said that no one was present when he made the examination, except the insured; appellee testified that he was present all the time; that the examination was short, and that the questions referred to were never propounded to the insured. Appellee's daughter corroborated the statement of her father to the effect that he was present during the examination.

Appellant contends that appellee was not entitled to recover on the policy without showing by the weight of the testimony that the insured was in good health when the policy was delivered to her. Its contention is based upon the following provision in the policy:

"3. That there shall be no contract of insurance unless the premium is paid and the policy delivered to and accepted by the applicant during the lifetime and good health of the person proposed for insurance, and that then the policy shall relate back to and take effect as of such date as may be fixed by the company in the policy."

Dr. Norris testified that the insured was thirty-seven years of age when he examined her; that her pulse beat was 78, her blood pressure systolic was 118 and her diastolic 84; that the heart action was correct; that the condition of the mouth, gums, teeth and tonsils was good; that he could find no evidence of disease of the liver, gall bladder, stomach or pancreas. The result of

Dr. Norris' examination was incorporated in detail in a hypothetical question propounded to Dr. Slayton relative to her state of health, and his reply thereto was that the result indicated that she had recovered from her chronic stomach trouble for which he had treated her in 1921, 1922 and 1923.

The ability of the insured to do hard labor like picking strawberries in the heat of the day indicated that she was in good health when the policy was delivered to her.

Appellant also assails the amount allowed the attorney on the ground that it was excessive. We do not think a $200 fee is incommensurate with the services rendered, considering extensive litigation, together with the amount involved. The case has been brought to this court on appeal for trial *de novo,* and the attorney for appellee has filed a brief in the case.

No error appearing, the decree is affirmed.

BLAND v. JONES.

Opinion delivered February 27, 1928.

1. PRINCIPAL AND SURETY—RIGHT OF SURETY TO CONTRIBUTION.—In a suit by a surety against principals on a note and plaintiff's co-sureties, plaintiff having paid the note, the co-sureties were not entitled to a reduction from their *pro rata* liability to plaintiff because of a set-off which the court allowed to the principals against plaintiff, in which the co-sureties were not interested.
2. PRINCIPAL AND SURETY—JUDGMENT FOR CONTRIBUTION.—In an action by sureties to recover from co-sureties their *pro rata* of a note which had been paid by plaintiff, a joint and several judgment against the co-sureties was erroneous, since the judgment should have been for the *pro rata* share due by each co-surety, there being no showing that any of the co-sureties were insolvent.

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

Appellant pro se.

HUMPHREYS, J. Appellee brought suit for $721.69, in the circuit court of Dallas County, against H. E. Jones,

Cecil Futch and appellants, upon a note which all of them executed to the Bank of Fordyce, and which appellee paid at maturity, alleging that he was surety for the other signers of the note.

H. E. Jones and Cecil Futch filed a separate answer, admitting that they owed the note, but claimed that they were entitled to a credit thereon for $125.35 for repair work done by them on automobiles belonging to appellee.

Appellants filed a separate answer, admitting the execution of the note, and alleging that, instead of appellee being surety for all the signers thereof, they, together with appellee, were sureties for H. E. Jones and Cecil Futch. They further allege that, as co-sureties, each was liable for one-fifth of the amount paid to the bank by appellee, less the amount owed H. E. Jones and Cecil Futch for repairs on his automobiles.

The cause was submitted to the court sitting as a jury, upon the pleadings and testimony adduced by the respective parties, which resulted in a judgment against H. E. Jones and Cecil Futch for the full amount of the note, less $125.35 allowed Jones and Futch as a set-off for repair work on appellee's automobiles, and a joint and several judgment against the appellants for $577.24, being four-fifths of the amount paid by appellee to the bank in discharge of the note, from which judgment against them appellants have duly prosecuted an appeal to this court.

The facts are practically undisputed, and, in substance, are as follows:

On August 13, 1926, appellants and appellee became sureties for H. E. Jones and Cecil Futch on a note which they all executed to the Bank of Fordyce for $700, bearing interest at the rate of ten per cent. per annum from date until paid. After maturity of the note appellee paid the bank the face of the note and the unpaid interest, amounting to $713.77, and took an assignment of the note to himself. H. E. Jones and Cecil Futch did repair work on automobiles belonging to appellee amounting to $125.35.

Appellants contend for a reversal of the judgment upon two grounds, the first being that the court should have deducted the claim of H. E. Jones and Cecil Futch for the amount paid by appellee in discharge of the note, and then have apportioned the remainder among the sureties; and the second being that the court should have entered a several judgment against each for one-fifth of the remainder instead of a joint and several judgment for the total amount of the remainder against them.

(1). Appellants are in error in their first contention. Their co-surety paid $721.69 to the bank in discharge of their mutual obligation as sureties, and he was entitled by way of contribution to a judgment against each for one-fifth of the total amount he paid the bank. They had no interest whatever in the claim of H. E. Jones and Cecil Futch against appellee for repair work. This was a matter between appellee and H. E. Jones and Cecil Futch. H. E. Jones and Cecil Futch were entitled to offset their claim against appellee's claim against them, but appellants, having no interest in the Jones-Futch claim, could not use it as an offset against appellee's claim against them. The court did not err in disallowing them a credit for the Jones-Futch account before ordering contribution on their part.

(2) The court did err, however, in rendering a joint and several judgment against appellants, co-sureties with appellee, for their contribution. He should have rendered a judgment against each for one-fifth of the amount as his contribution, it not appearing that any of them were insolvent. Appellee was entitled to a judgment against each for the amount he had paid for him, but was not entitled to a judgment by way of contribution against them all for the amount he had paid for each.

On account of the error indicated the judgment is reversed, and judgment is ordered to be entered here against each appellant for one-fifth of $721.69, or $144.34, together with interest thereon from the date of the rendition of the original judgment by the trial court.

WRIGHT v. SKELTON.

Opinion delivered February 27, 1928.

1. PLEADING—AMENDMENT OF COMPLAINT—WAIVER OF OBJECTION.—In a suit in ejectment, where the plaintiff filed an amended complaint changing the nature of the action from one in ejectment to one of unlawful detainer, and defendant made no objection thereto, but consented to proceed to the trial of the cause, he waived the objection to change of issues in the action.
2. PLEADING—AMENDMENT OF COMPLAINT—EVIDENCE.—In a suit in an action of ejectment, where plaintiff amended his complaint by asking relief in unlawful detainer and the cause was submitted on the issue whether a contract of sale had been superseded by an oral agreement establishing the relation of landlord and tenant, *held* that the admission of testimony showing the relationship of landlord and tenant under an oral agreement was not error.

Appeal from Crawford Circuit Court; *J. O. Kincannon,* Judge; affirmed.

Chastain & Taylor, for appellant.

D. H. Howell, for appellee.

HUMPHREYS, J. Appellee instituted suit in ejectment in the circuit court of Crawford County against appellant to recover lands which he had contracted in writing to sell him for $880, payable as follows: $280 payable November 1, 1925; $300 payable November 1, 1926; $300 payable November 1, 1927. It was alleged in the complaint that appellant failed to pay the notes in 1925 and 1926, but made default, thereby forfeiting his right to possession of the lands.

Appellant filed an answer, admitting the execution of the contract and a failure to pay the notes, except a small amount thereon, due to crop failure the first year and overflow the second, and interposing as a defense against the alleged forfeiture of his right to the possession of the land the following paragraph in the contract:

"The party of the first part (appellee) agrees to let the party of the second part (appellant) have more time on notes which he can not meet."

On the day of the trial appellee was permitted to file an amended complaint, alleging that, in the spring of

1926, the contract of sale and purchase was abrogated by an oral agreement to the effect that, if appellant failed to pay the notes in 1925 and 1926, with interest, he would pay rent for the use of the lands and surrender possession thereof to appellee. Appellant filed no pleading to the amended complaint.

The cause was submitted upon the pleadings and testimony adduced by the respective parties, resulting in a verdict and consequent judgment in favor of appellee for the possession of the lands, from which is this appeal.

In the course of the trial appellant objected and saved an exception to the introduction of testimony establishing the relationship of landlord and tenant between the parties. Appellee testified, and his testimony was not contradicted, that, in the spring of 1926, he went to see appellant, and told him that he would not permit him to retain possession of the land, as he had failed to pay the note due in 1925, and if appellant was not able to pay any more he would have to turn the land back, as it was not right for him to keep the place and not pay the first note, as he had agreed to. Whereupon appellee agreed to take the land back, with the understanding that appellant might cultivate the land in 1926, and that, if he could not pay all of the notes due in the fall of 1926, he would pay crop rent and deliver up the possession of the premises at the expiration of the year to appellee. Appellee further testified that appellant failed to pay the notes or rent.

The testimony tended to show that appellant had cleared up several acres of the land, and had planted some strawberries on a part of it.

Appellant contends for a reversal of the judgment because the court permitted appellee to file an amended complaint changing the nature of the action from one in ejectment on account of an alleged forfeiture of his right to possession under the contract, to one of unlawful detainer, and in allowing appellee to introduce proof of an oral agreement in support of the allegations of his amended complaint.

The cause was submitted to the jury upon the issue tendered in the amended complaint of whether the contract for sale and purchase of the lands had been superseded by the oral agreement establishing the relationship of landlord and tenant between the parties.

When appellee failed to demur or move to strike out the amended complaint, and consented to proceed with the trial of the cause, he waived the right to object to a change of the issues in the action and to object to the introduction of testimony responsive to the issues tendered by the amended complaint.

The court did not err in admitting the testimony showing the relationship of landlord and tenant, and in sending the case to the jury upon the issue tendered by the amended complaint.

The judgment is affirmed.

FIRST BAPTIST CHURCH OF BALD KNOB *v.* CENTRAL BAPTIST CHURCH OF BALD KNOB.

Opinion delivered February 27, 1928.

1. RELIGIOUS SOCIETIES—TITLE TO BUILDING.—Where two church congregations consolidated on agreement that one would worship in the house of the other, and that each would retain title to its building until a new joint edifice was erected, *held,* upon dissolution of the consolidated organization into its component parts, that the building used for worship had not become the property of the congregation which had left its old building, since no new structure had been erected at the time of its dissolution.
2. RELIGIOUS SOCIETIES—EFFECT OF CONSOLIDATION AGREEMENT.—Where two churches consolidated under an agreement that, while they worshiped in one building, each would retain ownership of its own building until such time as a new edifice would be erected, *held,* on dissolution of the consolidation, that the organization which had remodeled and mortgaged its church for a residence was alone responsible for debts thereby incurred, no new edifice having been erected.

Appeal from White Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

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

Brundidge & Neelly, for appellee.

McHANEY, J. Prior to January 29, 1922, there were two Baptist churches in the town of Bald Knob, one, the First Baptist Church, being the Landmark Church, and the other, the Central Baptist Church, being the Missionary or Conventional Baptist Church. On that date they were consolidated into one Landmark Baptist Church, one of the resolutions adopted on that date by the Central Baptist Church being as follows:

"That we, as a body, agree to go to Landmark, under the condition that you come and worship in the building of the Central Baptist Church, until such time as the united bodies agree and erect a new church. We feel that we have gone more than half way in this offer, and that you should be willing to do this much for the uplifting of the Baptist cause in Bald Knob.

"Be it further resolved, that each church or body reserves the right to dispose of its church property until same is placed in a new church.

"J. T. Reed, moderator.

"Mrs. T. W. Leggett, church clerk."

After the consolidation, the consolidated body held its church services and meetings in the church-house of the Central Baptist Church. Some time after the consolidation the church-house of appellant was remodeled and converted into a residence, and, in order to obtain the money to make such improvements, they placed a mortgage upon this property in the sum of $1,350 to secure a note for borrowed money in such sum. The consolidated body continued to work together until the first Sunday in January, 1927, but with considerable discord for some months prior thereto, at which time the pastor announced that there would be a church meeting that afternoon, and that no one but Landmark Baptists would be permitted to vote at such meeting. This meeting was held and a resolution adopted withdrawing fellowship from the appellees, the former members of the Central Baptist Church, the effect of which was to turn them out

of church. Thereafter appellees took charge of the Central Baptist Church property, excluded the Landmark Baptists from using same, and brought a suit to enjoin them from using the property or from interfering with their possession of said property. A temporary restraining order was granted, and, on a final hearing, the chancellor found that the Central Baptist Church and the trustees thereof were the owners of its church property, including the grounds and the building, and had the right to occupy, control and manage the same, free from any interference on the part of the appellants, and the temporary injunction theretofore granted was made perpetual. The chancellor further decreed a lien in favor of appellants against the piano belonging to the appellees in the sum of $63, which the appellants had paid on the purchase price thereof, and ordered the $270 then on hand and in bank to be divided equally between the parties. From this decree this appeal is prosecuted.

It is first contended by appellants that, by the act of consolidation on January 29, 1922, the property of the Central Baptist Church became the property of the consolidated bodies, under the name of the First Baptist Church, and that therefore the Central Baptist Church lost title to its property. But for the agreement between the bodies, as exemplified by the resolution adopted by the Central Baptist Church heretofore set out, that each body would retain title to its property until such time as same should be sold and put into a new church, appellants' contention would undoubtedly be true. We think the chancellor put the correct construction upon the act of consolidation and the resolution adopted in connection therewith, that is, that each body would retain the ownership and title to its separate property until such time as they separately might sell or dispose of same and invest it in a new church to be the property of the consolidated body. The resolution heretofore quoted specifically so says, and this resolution was accepted by the appellant church. No sale having been made by either body of its church property, it cannot be said that the church property of the Central Baptist Church became the property

of the consolidated church, known as the First Baptist Church. We therefore hold that the title to the church-house and lot belonging to the Central Baptist Church never did become the property of the consolidated body known as the First Baptist Church, or the Landmark Baptist Church.

It is next insisted that, if the court should hold that the title to the property of the Central Baptist Church did not pass by the consolidation, since the consolidated church remodeled its property, converting it into a residence for rental purposes, upon which a mortgage of $1,350 was placed, the membership of the Central Baptist Church should be chargeable with one-half the cost of such improvements. We cannot agree with this contention. That property belongs to the First Baptist Church, and it and its membership alone are responsible for such debts incurred against it, even though made and incurred with the knowledge, acquiescence, consent or active participation of some of the present members of the Central Baptist Church. The improved property is still its property, and the membership of the Central Baptist Church have no rights or interest therein. This mortgage was placed thereon by authority of the then membership of the First Baptist Church, and the membership still existing therein are the beneficial owners thereof. Being the owners of this property, the organization as it now stands is responsible alone for this debt. The action of the Landmark members in excluding the other part of their membership was tantamount to an assumption of this indebtedness. The First Baptist Church, being the owner of the property, entitled to receive all the rents and profits therefrom, is likewise liable for its debts. We do not understand just how a court of equity could hold the members who had been expelled from the church by the voluntary action of that church liable for the church's debts.

It is finally contended that the court erred in finding that the First Baptist Church had paid only $63 on a piano now in use at the Central Baptist Church, for

which a lien was fixed on said piano, and that the joint organizations have on deposit in the banks at Bald Knob the sum of $270 contributed by the congregations of both bodies, which it ordered divided equally between them, because, appellant says, there is no evidence to support such findings. There is evidence to show that a piano owned by the appellants was sold and the proceeds used to pay a balance due on the piano of appellees, and there is evidence in the record to show that, at the time of the separation, the joint body had money on deposit in the banks. Just how the court arrived at the exact amount of each item we are unable to tell, but, since appellant has not questioned the correctness of the amount, only that it is without evidence to support it, we overrule this contention. Appellants did not offer to show that these amounts were other and different from that found by the court.

We find no error, and the decree is affirmed.

CHALFANT v. HARALSON.

Opinion delivered February 27, 1928.

1. TRIAL—PROVINCE OF JURY.—Questions as to the credibility of witnesses and the weight of testimony are within the province of the jury.
2. NEW TRIAL—VERDICT CONTRARY TO EVIDENCE.—The trial court should set aside a verdict and grant a new trial where it is of the opinion that the verdict is contrary to the evidence.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The Supreme Court will uphold a verdict sustained by substantial testimony where the circuit court has approved the verdict by refusing to grant a new trial on the ground that the verdict is contrary to the evidence.
4. FRAUDS, STATUTE OF—PURCHASE OF AUTOMOBILE.—Evidence *held* to sustain a verdict in favor of the buyer of an automobile who denied making an oral agreement to buy and denied that he had received it within the meaning of the statute of frauds.
5. FRAUDS, STATUTE OF—VERBAL PURCHASE OF AUTOMOBILE.—An instruction that, if there was an agreed price and the alleged buyer or his agent received the automobile, the jury should find for the

seller for the purchase price, was properly modified by inserting the word "actually" before the word "received" where the buyer relied on the statute of frauds.

6. FRAUDS, STATUTE OF—RECEIPT OF GOODS.—Crawford & Moses' Dig., § 4864, providing that certain contracts for the sale of goods shall not be binding unless a note or memorandum is signed by the party to be charged, or the buyer accepts part of the goods so sold and "actually" receives same or gives something in earnest or part payment, the word "actually" used in the statute means that the buyer shall, in fact, receive the goods alleged to be bought by him.

7. TRIAL—REPETITION OF INSTRUCTIONS.—It was not error to refuse to multiply instructions on the same point or to give instructions on the same subject in varying form.

Appeal from Woodruff Circuit Court, Northern District; *W. D. Davenport,* Judge; affirmed.

STATEMENT OF FACTS.

E. J. Chalfant sued John Penn Haralson to recover the sum of $1,200 alleged to be due him for the purchase price of a Buick automobile. The defendant denied that the plaintiff sold and delivered to him a Buick automobile, and also pleaded the statute of frauds.

According to the testimony of E. J. Chalfant, on May 2, 1925, he sold and delivered to the defendant, John Penn Haralson, a Buick automobile for the sum of $1,200. On the night before there had been a collision between a Buick automobile belonging to E. J. Chalfant, and driven by his nineteen-year-old son, and a car driven by the defendant, John Penn Haralson. On the next morning after the collision the plaintiff met the defendant on the street, and the defendant referred to the collision between the cars, and told the plaintiff that he did not want to blame his boy, but wanted to assume the fault. The car of the plaintiff was wrecked in the collision, and the defendant told him that he wanted to buy him another car. The plaintiff replied that he had had six months' service out of the car, and that, if the defendant thought the car was worth it, he would sell it to him for $1,200. The defendant agreed to this, and told the plaintiff that he would bring him a check for $1,200 at twelve o'clock on

that day. This was $257.45 less than the original price of the car. The defendant said that he would send Robert Buchanan, an owner of a garage, out to the scene of the accident, and get the car for him. Other witnesses for the plaintiff tended to corroborate his testimony, and to show that the defendant took possession of the car, through Robert Buchanan, under the sale, and left it in his garage.

According to the testimony of the defendant, John Penn Haralson, he did not agree to buy the car from the plaintiff, and the car was never delivered to him. He admitted talking to the plaintiff about the accident, and that the plaintiff had told him that, if he would give him $1,200 for the car, he might have it. The defendant told him that he would go home and think the matter over. After doing so, he decided not to accept the proposition of the plaintiff, and did not do so. The car was never delivered to the defendant nor to any one for him.

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.

J. F. Summers, for appellant.

Elmo CarlLee, for appellee.

HART, C. J., (after stating the facts). The principal ground relied upon for a reversal of the judgment is that the verdict is so clearly against the weight of the evidence as to shock the sense of justice of a reasonable person, and that the case is controlled by the rule of law announced in *Oliver* v. *State,* 34 Ark. 632, and *Singer Manufacturing Co.* v. *Rogers,* 70 Ark. 385, 67 S. W. 75, 68 S. W. 153. In so far as it might be said that these cases sustain a holding that this court will set aside the verdict of a jury where there is any substantial evidence to sustain it, they are against the current of decisions in this State and are contrary to the long-settled rule of this court on the subject.

The subject has been discussed at length by this court, and no useful purpose could be accomplished by again going over the same ground. Our Constitution provides that judges shall not charge juries with regard to matters of fact, but that they shall declare the law.

Hence it is within the peculiar province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony. It has been held repeatedly to be the duty of the trial court to set aside a verdict and grant a new trial where it is of the opinion that the verdict of the jury is contrary to the weight of the evidence. On the other hand, after the jury has weighed the evidence and the circuit court has given its approval to the judgment by refusing to grant a new trial on the ground that the verdict is contrary to the evidence, it is the duty of this court to uphold the verdict where there is any testimony of a substantial character to support it.

The testimony of the defendant was of a matter about which he claimed to have personal knowledge. He testified in definite terms that he did not agree to buy the automobile in question from the plaintiff, and that the same was not delivered to him or to any one for him. His testimony related to matters which might or might not have occurred, according to the truth or falsity of his testimony. His testimony therefore was evidence of a substantial character, and, if believed by the jury, was sufficient to warrant a verdict in his favor. *Catlett* v. *Railway Co.,* 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; *St. Louis Southwestern Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768; *Chaney* v. *Mo. Pac. Rd. Co.,* 167 Ark. 172, 267 S. W. 564; *St. Louis-San Francisco Rd. Co.* v. *Pearson,* 170 Ark. 842, 281 S. W. 910; *Mo. Pac. Rd. Co.* v. *Barry,* 172 Ark. 729, 290 S. W. 942. Numerous other decisions might be cited in support of this view of the law, but this court has so long and so uniformly adhered to the rule that we do not deem further citations necessary.

It is next insisted that the court erred in modifying and giving as modified instruction No. 1, which reads as follows:

"The question submitted for your consideration is whether there was a sale of the car in question by plaintiff, E. J. Chalfant, to the defendant, John P. Haralson. To constitute a sale there must have been an agreed price

between the plaintiff and the defendant, and, if you find there was an agreed price, and the defendant or his agent or agents, if you find there was an agency, actually received the car, you should find for the plaintiff."

The particular objection to the instruction is the use of the words "actually received the car." There was no error in modifying the instruction to insert the word "actually" before the words "received the car." The defendant had pleaded the statute of frauds contained in § 4864 of Crawford & Moses' Digest, which reads as follows:

"No contract for sale of goods, wares and merchandise, for the price of thirty dollars or upward, shall be binding on the parties, unless, first, there be some note or memorandum signed by the party to be charged (a); or second, the purchaser shall accept a part of the goods so sold and actually receive same (b); or third, shall give something in earnest to bind the bargain, or in part payment thereof (c)."

That part of the section applicable to this case was whether the defendant actually received the automobile, and the court was evidently applying the language of the statute so as to present a concrete case to the jury. No objection was made to the action of the court in reading the section of the Digest in question to the jury. The word "actually" as used in the statute simply means that the purchaser shall in fact receive the goods alleged to have been purchased by him. Hence we do not think the objection to the instruction is well taken, and are of the opinion that it is a correct declaration of law as applied to the facts in the case at bar.

It is next insisted that the court erred in refusing to give instructions Nos. 2 and 3, which read as follows:

"No. 2. To constitute a delivery it is not necessary that any particular thing be done by either of the parties, but any act on the part of the plaintiff by which he relinquished control over the car in question, coupled with an acceptance of control by defendant, would amount to a delivery.

"No. 3. On the question of delivery, you are instructed that delivery is a question of intention of the parties, the one to deliver and the other to accept, as manifested by overt acts, and a sale would be complete, if you find there was a sale, or rather an agreed price between the parties, where any act was done which was intended by the parties as a delivery by the one and an acceptance by the other."

In addition to instruction No. 1, the court gave instruction No. 4, which reads as follows:

"You are instructed that the defendant could receive the car by agent as well as in person, and, if the defendant actually received the car, you should find for the plaintiff."

The court, on its own motion, also instructed the jury as follows:

"You are instructed that, before the plaintiff can recover in this case, he must show that a delivery was made on the part of the plaintiff and that an actual acceptance was made on the part of the defendant, and you are to consider any and all facts and circumstances proved in this case in arriving at the intentions of the parties to this suit."

It will be observed that the respective theories of the parties to this suit were fully and fairly submitted to the jury in the instructions given by the court, and, under the settled rules of this court, the trial court is not required to multiply instructions on the same point or to give instructions on the same subject in varying form. The issues of fact in this case were simple, and the evidence was in direct and irreconcilable conflict. The case was submitted to the jury under instructions fully giving the respective theories of the parties, and, under our settled rules of practice, we cannot disturb the verdict of the jury.

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

FEDERAL LAND BANK OF ST. LOUIS v. CRAIG.

Opinion delivered February 27, 1928.

1. MORTGAGES—EFFECT OF PAYMENT TO MORTGAGEE'S AGENT.—In a suit to foreclose a prior mortgage, payment by the tenant, renting the premises, of the rent money to mortgagee's agent to be applied on the mortgage, in accordance with an agreement between the tenant and the landlord, who held the premises as purchaser at foreclosure sale under a subsequent deed of trust, *held* an absolute payment, and the owner of the premises and the subsequent incumbrancer were entitled to receive credit for the amount paid on the indebtedness, notwithstanding the fact that the mortgagee's agent had never transmitted the money to mortgagee, but had subsequently paid it over for private purposes of the tenant under the tenant's order.
2. MORTGAGES—APPLICATION OF CREDIT.—A mortgagee in a foreclosure suit is not required to credit on the mortgage indebtedness money paid over to his agent by the tenant on the premises, to be applied to his mortgage indebtedness, where the money was in addition to the rent which the tenant had agreed to pay the landlord holding under a subsequent trust deed, and where the mortgagee's agent, instead of applying the money to payment of the mortgage indebtedness, used it for a private purpose of the tenant in accordance with the tenant's request.
3. MORTGAGES—PROVISION FOR ATTORNEY'S FEE IN FORECLOSURE.—A provision in a mortgage that, in case of default, the mortgagor should pay such reasonable attorney's fees as might be allowed by law, is void and unenforceable in a foreclosure suit as constituting an agreement for a penalty.
4. BANKS AND BANKING—REFUSAL TO TAX ATTORNEY'S FEE IN FORECLOSURE SUIT.—In a foreclosure suit by a Federal Land Bank, a refusal to allow an attorney's fee to be taxed as costs was not an abuse of discretion, where the rights of subsequent mortgagees were involved and plaintiff claimed an additional amount, even if Acts 1924, p. 72, permitting allowance of reasonable attorney's fee in suits to foreclose deeds of trust given Federal loan banks, was applicable.

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

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellees to foreclose a mortgage on a tract of land in Union County, Arkansas, containing 200 acres, more or less, to secure an indebtedness of $1,000 in the form of a prom-

issory note. The complaint alleges that the sum of $959.19 was due and unpaid on said note, and that, under the terms of the mortgage, it was entitled to recover judgment against the mortgagor and have a foreclosure of the mortgage for taxes and the amount paid for a supplemental abstract of title to the land.

The mortgage was executed on the 17th day of December, 1917, by Jesse J. Craig and Corinne Craig, his wife. On May 6, 1920, Jesse J. Craig and Corinne Craig, by warranty deed, conveyed said lands to appellee, Robert Scott. On October 13, 1921, Robert Scott and his wife conveyed said land by deed of trust to W. E. Patterson to secure an indebtedness to the Citizens' National Bank of El Dorado. On March 1, 1922, Robert Scott and his wife conveyed said land by deed of trust to B. A. Hancock to secure an indebtedness to J. L. Kinard. The deed of trust executed to W. E. Patterson, trustee, was foreclosed by the trustee under the power of sale, and the land was sold under it on April 8, 1924, to J. L. Kinard. J. L. Kinard rented the land to Robert Scott for the year 1925 for $150. It was agreed between Kinard and Scott that the rent should be paid by Scott to W. B. Brown, secretary of the El Dorado National Farm Loan Association, to be applied on the mortgage indebtedness to appellant. Scott paid to Brown the $150 rent for the purpose of being applied towards the mortgage executed by the Craigs to appellant. In addition, Scott borrowed $278.53 from a third person and paid it to Brown, to be also applied towards the satisfaction of the mortgage to appellant. This made a total of $428.53 paid by Scott to Brown to be applied to the satisfaction of appellant's mortgage. Brown never sent the money to appellant at St. Louis; and on March 11, 1926, Scott gave Brown an order to pay said money to Stewart & Oliver, attorneys, at El Dorado, Arkansas, who had been employed by him to defend his son in a murder case. Brown paid the $428.53 to Stewart & Oliver on the order of Robert Scott. The record shows that Brown, as secretary of the El Dorado National Farm Loan Association,

had the authority to receive payments to be applied towards the satisfaction of the mortgage of appellant.

The chancellor found that W. B. Brown was, on December 31, 1925, the agent of appellant, and that payment to him by Scott of the $428.53 was payment upon the note and mortgage of appellant, and that the same should be allowed as a credit thereon. A judgment of foreclosure was entered of record for the balance due appellant, in accordance with findings of the chancellor. The case is here on appeal.

Stewart & Oliver and *J. R. Crocker,* for appellant.

Mahony, Yocum & Saye, for appellee.

HART, C. J., (after stating the facts). The record shows that appellant, Federal Land Bank of St. Louis, Missouri, and the El Dorado National Farm Loan Association of El Dorado, Arkansas, are both incorporated under an act of Congress of the United States, but that they are separate and distinct corporations. The loan by appellant to Craig was obtained by Brown, as secretary of the El Dorado National Farm Loan Association; and, without reciting the evidence in detail, we are of the opinion that the chancellor was justified in holding that Brown, as secretary of said association, was authorized to receive payment on the mortgage indebtedness of the Craigs to appellant. Brown acted for appellant throughout in securing the loan and in paying over the amount of it to the Craigs and in applying the amount borrowed to the satisfaction of their debts.

The evidence also shows that, under the circumstances, Brown, as secretary of said association, was authorized to receive payments on the mortgage indebtedness for the purpose of transmitting the same to appellant. After giving the mortgage to appellant, the Craigs conveyed the land to Robert Scott, and he, in turn, executed a deed of trust on it to secure an indebtedness of his own. The deed of trust was foreclosed, and J. L. Kinard became the purchaser under it, and took possession of the land. He rented it to Robert Scott, whose mortgage had been foreclosed, for the year 1925, for

the sum of $150. Kinard and Scott recognized that appellant had a prior mortgage on the land, and it was agreed between them that, instead of paying the $150 rent to Kinard, Scott should pay it to Brown, to be applied in satisfaction of the mortgage of the Craigs to appellant. Scott also borrowed $278.53, which he paid to Brown to be so applied to the payment of the mortgage of appellant. This made a total of $428.53 which was paid by Scott to Brown for that purpose.

The chancellor held that Brown, as agent of appellant, had the right to receive the $428.53 to be applied towards the satisfaction of appellant's mortgage, and that, after Scott had paid that sum to Brown, the payment became absolute, and that the order subsequently given by Scott to Brown to pay the money to Stewart & Oliver was of no avail.

The chancellor was right in so holding as to the $150. Scott owed Kinard this amount as rent, and it was agreed between Kinard and Scott that Scott, instead of paying Kinard, should pay the rent to Brown, to be applied towards the satisfaction of the Craig mortgage to appellant. When Scott paid this sum to Brown, as agent for appellant, it constituted an absolute payment, which could not be returned. To illustrate, suppose Kinard had wished to recall the transaction and have Scott pay the rent to him. Brown, as agent of appellant, could have refused to do this, and, inasmuch as Kinard, under his contract with Scott, had a vested interest in the matter, Brown, after receiving the payment from Scott, could not, to the detriment of Kinard, return the money to Scott to be used by him for his own private purpose.

The case as to the $278.53, however, is entirely different. Scott borrowed the money from a third person, and Kinard had no interest whatever in the transaction. So long as the money had not been actually applied to the payment of the mortgage indebtedness, Scott had a right, by agreement with Brown, to receive the money back and use it for his own private purpose. Until the money had been actually applied to the payment of the mortgage indebtedness, the parties could rescind the

transaction, and the money could be paid back to Scott without in any manner interfering with the rights of Kinard. If Scott had sent the money in a letter direct to appellant, and, before appellant had received the money and applied it to the payment of the mortgage indebtedness, had asked that the money be returned to be used by him in employing attorneys to defend his son for murder, and appellant had done so, this would have constituted a new agreement between appellant and Scott, and would have in no wise affected the mortgage, because no payment had been actually received and applied towards the satisfaction of the mortgage by appellant. Scott could not complain, because appellant had done exactly what he asked it to do in the matter. Kinard could not complain, because he had no interest in the matter whatever. It was no concern of his whether Scott ever made a payment on the mortgage of appellant or not. He could only claim any right or interest in the matter when such payment had been actually received by appellant and applied by it towards the satisfaction of the mortgage.

The result of our views is that the chancellor should have held that the $150 owed by Scott to Kinard and paid by Scott to Brown constituted an absolute payment on the mortgage, but that the chancellor erred in so holding as to the $278.53 which Scott had borrowed and paid to Brown as agent of appellant.

It is next contended that the decree should be reversed because the chancery court refused to allow appellant a reasonable attorney fee. In the first place, it is contended that the allowance should have been made because the mortgage contained a clause providing that, if default be made in its payment, in addition to his payment of the indebtedness, the mortgagor should also pay such reasonable attorney fee as might be allowed by law. This court has held that the insertion in a note of the stipulation of an attorney fee and costs for the collection of the note does not destroy the negotiable character of the instrument, but such stipulation is void and not

enforceable, because it is an agreement for a penalty, even though it would be enforceable in the State in which it was executed. *Bank of Holly Grove* v. *Sudburry,* 121 Ark. 59, 180 S. W. 470, Ann. Cas. 1917D, 373; *Arden Lumber Co.* v. *Henderson Iron Works & Supply Co.,* 83 Ark. 240, 103 S. W. 185; *White-Wilson-Drew Co.* v. *Egelhoff,* 96 Ark. 105, 131 S. W. 208; and *Boozer* v. *Anderson,* 42 Ark. 167.

Again, it is insisted that the attorney's fee should have been allowed under the provisions of an act regulating the foreclosure of deeds of trust given to Federal Farm Loan banks. Acts of 1924, special session, page 72. The act provides that, where the amount involved is $200 or more and the interest is 7 per cent. or less, the court trying the case may, at its option, allow a reasonable attorney's fee to be taxed as costs in the case. The act has a proviso which says that it should apply only to loans made under the Federal Loan Act. Without deciding the question, we are of the opinion that, even if the act be held valid, the chancery court did not abuse its discretion in refusing to allow an attorney fee to be taxed as costs in the case. As we have already seen, the rights of subsequent mortgagees were involved in the action, and the contest was really between them and the appellant as the holder of the first mortgage. Appellant was claiming, among other things, to have a right to enforce its lien for $224 abstract fees. The court held against it, and it is not now claimed that the holding of the court was erroneous. As we have already seen, appellant was contending that it had a right to enforce its mortgage against the $150 rent which had been paid its agent to be applied on the mortgage, and which it had not so applied. Under these circumstances it was a matter of discretion, in any event, whether or not the chancellor should allow an attorney's fee under the act, even if valid.

It follows that the decree must be reversed, and the cause will be remanded with directions for further proceedings in accordance with the principles of equity and not inconsistent with this opinion. The costs of the appeal will be taxed against appellees.

ARKANSAS VALLEY BANK *v.* KELLEY.

Opinion delivered February 27, 1928.

1. BANKS AND BANKING—EFFECT OF ACCEPTING CHECK.—Where a bank receives a check, not for collection, but as so much money, and places the amount to the credit of a customer, it assumes liability for such amount to all persons to whom the customer may give checks.
2. PRINCIPAL AND AGENT — RATIFICATION. — Ratification of the unauthorized acts of an agent, in order to render them binding on the principal, must have been made with the knowledge of all material facts, and ignorance of such facts will render an alleged ratification ineffectual.
3. PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR AGENT'S OVERDRAFT.—Where a bank permitted an unauthorized agent to overdraw his account, it cannot recover the amount of the overdraft from the agent's principal upon a mere showing that the principal received the proceeds of the overdraft, without knowledge of all the circumstances, as, when demand for restitution is made, the principal cannot be placed *in statu quo.*
4. PRINCIPAL AND AGENT—LIABILITY FOR AGENT'S OVERDRAFT.—A bank crediting a check to an agent's account as a cash deposit, and not for collection, could not, after such check proved to be worthless, recover from the undisclosed principal who had innocently received the proceeds thereof by the agent's check, where the principal could not be placed *in statu quo.*

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; affirmed.

Warner, Hardin & Warner, for appellant.

Daily & Woods, for appellee.

SMITH, J. At the trial from which this appeal comes the court made a finding of fact which presents the issues in the case. Without reciting the testimony, it may be said that the finding of fact is largely in accord with the undisputed testimony, and, as to any matters about which there was a conflict, is supported by substantial testimony. We therefore assume the facts to be as found by the court. This finding is as follows:

"During the season of 1925 H. J. Payne acted as agent for Leigh Kelley for the sale of the latter's potatoes, under a verbal contract, by the terms of which Payne was required to find purchasers, deliver to them

the potatoes, collect the purchase price, and remit the proceeds, less his commission, to the defendant Kelley. That, pursuant to such contract, Payne sold, among others, three cars of potatoes belonging to Kelley, Patty and Rogers to one H. W. Burrough, and took the latter's check for the sum of $1,664.68 to cover the purchase price, said check being drawn on the Bank of Lavaca and payable to 'H. J. Payne & Sons'; that said sale was made on the sole judgment of Payne, and the identity of the purchaser was not known to Kelley and associates. That said check was indorsed by Payne, the name of Kelley and his associates not appearing thereon, and deposited in his (Payne's) checking account with plaintiff bank in the name of H. J. Payne, Agent. That Payne was acting as agent for some fifteen or twenty other growers of potatoes under similar contract, and deposited the proceeds of all sales made by him for all growers in this same checking account; that he remitted to all such growers by check drawn on said account; that Kelley and his associates had no knowledge of the fact that collection from Burrough had been made by check payable to Payne; that, in accepting such check from Payne and in crediting the amount thereof to Payne's checking account, plaintiff had no knowledge of Payne's agency for Kelley and associates in the matter of the sale of potatoes, nor of his agency for various other potato growers; that, in so crediting such check to the account of Payne, plaintiff relied solely on the indorsement and credit of Payne; that, subsequently to the indorsement, deposit and crediting of the Burrough check, as aforesaid, Payne remitted to Kelley by checks drawn on said account for seven or eight cars of potatoes which he had sold for Kelley, such remittances including, among other cars, the three cars sold to Burrough; that said checks so drawn by Payne to Kelley on the plaintiff bank were presented by Kelley to plaintiff for payment and were by plaintiff paid; that thereafter the Burrough check was returned to plaintiff unpaid, resulting in an overdraft in the said account of Payne with plaintiff; that plaintiff made demand on

Payne to make good the overdraft, but made no demand on Kelley for nearly two months after the overdraft was created. That plaintiff did not notify Kelley or his associates that it would look to them for payment of the overdraft for said period of nearly two months; that, after demand was made on Kelley, plaintiff accepted a payment of $100 from Burrough on said overdraft account. That the checks given by Payne to Kelley were accepted by Kelley in good faith in payment of amounts which he was entitled to receive from Pane; that said checks were presented by Kelley in good faith to plaintiff for payment, and were deliberately paid by plaintiff."

Upon this finding of fact the court declared the law as follows:

"That, in the transaction between plaintiff and Payne, Payne was acting for himself, and not for Kelley and associates; that Kelley and associates are not liable to plaintiff as undisclosed principals of Payne; that, in accepting Burrough's check and crediting it to Payne's checking account, and in paying the checks of Payne drawn against it, plaintiff elected to rely solely on the credit of Payne; that the return of the Burrough check unpaid merely resulted in an overdraft of Payne's account with plaintiff, for which overdraft plaintiff's recourse is against Payne and Burrough alone."

Upon this finding of fact and declaration of law, judgment was rendered in favor of Kelley and his tenants, all of whom were sued by the bank for the amount of the check drawn by Burrough in payment of the three cars of potatoes sold by Payne to Burrough belonging to Kelley and his tenants, for which check the bank had given Payne credit, who remitted the proceeds to Kelley by check drawn upon the account of Payne, as agent, with the plaintiff bank, and this appeal is from that judgment.

Appellant insists, for the reversal of the judgment of the court below, that the declaration of law is not supported by the finding of fact made by the court, as it appears from the facts found by the court that Kelley and

his tenants were the undisclosed principals of Payne, their agent, and received the benefits of the transaction by which Payne procured the money from the plaintiff bank. It is insisted that, as Payne was the agent for an undisclosed principal who received the proceeds of the worthless check deposited by him, the principal should be held liable for the amount of this check as for money had and received to the account of the principal. The plaintiff bank asked findings to this effect, which the court refused to make, and the plaintiff duly excepted to this refusal.

Payne and Burrough were made defendants to this suit, and judgment was recovered against them for the want of an answer.

It appears that, before the institution of this suit, Burrough had agreed with the plaintiff bank to repay the amount of his worthless check at the rate of $100 per week, and that, pursuant to this agreement, a payment of $100 was actually made, but, as Burrough defaulted in the subsequent payments, the bank brought this suit, and has recovered judgment against both Payne and Burrough for the amount of the overdraft, less the hundred-dollar credit.

Appellees insist that, the bank having elected to sue Burrough and Payne, cannot also pursue the inconsistent remedy of suing them. As we have concluded that the declaration of law above quoted is correct, we do not consider or decide whether the bank is barred from suing Kelley, having sued Kelley's agent and Burrough.

It will be borne in mind that Payne employed his own method of making collections for the potatoes sold for the account of Kelley and his tenants and other potato growers, and all money so received by Payne was placed to the credit of his account as agent. But Kelley was not Payne's only principal, as all growers for whom Payne sold potatoes were also his principals, and there was no disclosure to the bank that Kelley was one of these. It was within the discretion of the bank to have accepted Burrough's check for collection for Payne's account, or to accept it as a cash deposit for that amount,

and it elected to take the latter action. It was not induced to do so upon the faith of Kelley's credit or Payne's agency for Kelley, as Kelley was not known in the transaction.

In the case of *J. M. Robinson & Co.* v. *Bank of Pikeville,* 146 Ky. 538, 142 S. W. 1065, it was held by the Court of Appeals of Kentucky (to quote a syllabus) that, "where a bank receives, not for collection, but as so much money, a check, and places the amount to the credit of a customer, it assumes liability for such amount to all persons to whom the customer may give checks." The opinion in that case quoted from the case of *First Nat. Bank of Cincinnati* v. *Burkhardt,* 100 U. S. 686, 25 L. ed. 766, as follows:

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned."

No question is made here about the good faith of the bank, or of that of Payne or Kelley. A loss has been sustained, which some innocent person must suffer, and the question is, Where must that loss fall?

In the case of *First Nat. Bank of Detroit* v. *Burkham,* 32 Mich. 328, the facts were that the drawees of a bill, the genuineness of which was not disputed, sought to recover from the payees the amount of the bill, which they had accepted and paid. The ground upon which the drawees sought to recover was that they had paid under a mistake of fact, which mistake consisted in their security from the drawer of the bill being fictitious, when they

supposed it to be genuine and reliable. Upon these facts Judge Cooley, speaking for the Supreme Court of Michigan, there said:

"It is not claimed in this case that, if the drawees had relied upon the responsibility of the drawer, and that had failed them, they would have had any ground of recovery against the payees. But we think it would be an exceedingly unsafe doctrine in commercial law, that one who has discounted a bill in good faith, and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterwards hold the moneys subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper consist in their perfect certainty and reliability; they would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motives which influenced the latter to honor the paper.

"The best view that can be taken of this case for the plaintiffs below is that there was a mutual mistake of fact under which the bank discounted and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank? Usually, when one of two parties equally innocent must suffer, the law leaves the loss where it has chanced to fall; but, in a case like this, if the law should assist either party on the ground of mutual mistake, it certainly should not be the drawees. This suit seeks to reverse the rule of commercial law, and transfer from the acceptor to the payee the responsibility which the former assumes by acceptance, and which the law leaves there.

"So far we have assumed that the bank discounted the bill in good faith and for value. We think this not open to question on the facts. The amount was put to the credit of the drawer, and drawn against. The previous transactions cannot affect this unquestionable fact."

Appellant concedes that the transaction would be a closed incident, and that the loss would be upon the bank,

where it fell, but for the fact that Payne was the agent of Kelley and his tenants in selling the potatoes, and it is insisted that, inasmuch as Kelley and his tenants received the benefits of the transaction, they are liable as for money had and received.

It does not appear, however, that the law supports this contention under the facts as found by the court.

In 2 C. J., chapter "Agency," after stating the proposition that the principal must ratify the whole of the agent's unauthorized act or not at all, and cannot accept its beneficial results and at the same time avoid its burdens, and that if the principal, with full knowledge of all the material facts, takes and retains the benefits of the unauthorized act of the agent, he thereby ratifies such act, it is said, at § 115 of this chapter:

"Nor does the general rule apply where the principal is legally entitled to what he has received without assenting to the act of the agent, and he does not otherwise give his approval to such act, or where the benefit received by the principal is merely incidental and arises out of a credit extended by a third person to the agent individually, or where the other party to the transaction did not deal with the agent as such, but in his individual capacity." And further: "The mere fact that the principal has received or enjoyed the benefits of the unauthorized act will not amount to a ratification if he did so in ignorance of the facts. * * * A principal also has a right to receive money from an agent in payment of a debt due from the latter, without inquiry as to the source from which it came, and, if it is in good faith so received and applied by the principal, its subsequent retention, after he learns that it was procured through an unauthorized transaction entered into by the agent in his name, will not amount to a ratification of such transaction."

Among the cases cited in the note to the text quoted is that of *Martin* v. *Hickman,* 64 Ark. 217, 41 S. W. 852. In that case Hickman sued Martin upon an alleged contract made by Clary as agent of Martin, whereby Hickman conveyed a town lot to Martin, it being alleged that

Clary agreed that Martin would assume the payment of a certain note for $147 which Hickman owed. On conflicting testimony the jury found that Clary had made the agreement, and that finding was not disturbed on the appeal. It was denied by Martin that he had authorized that action, or had ratified it, but the jury also found against Martin on that contention. In holding that the last finding was not sustained by the testimony, although Martin had accepted the benefits of Clary's trade, the court there said:

"It is well settled that ratification of the unauthorized acts of one who assumes to be an agent, in order to render them binding on the principal, must have been made with the knowledge of all material facts, and that ignorance of such facts will render an alleged ratification ineffectual and invalid. *Lyons* v. *Tams,* 11 Ark. 189; *Combs* v. *Scott,* 12 Allen (Mass.) 493; 1 Am. & Eng. Enc. Law (2 ed.), 1189, and cases cited.

"A principal will not be considered as having ratified an unauthorized act of his agent merely because he receives property and avails himself of the advantages derived from such act, when he did not learn that such agent had exceeded his authority until after he had sold the property, and after the circumstances were such as to put it beyond his power to return or restore the property. *Bryant* v. *Moore,* 26 Maine 84, 45 Am. Dec. 96; *Thacher* v. *Pray,* 113 Mass. 291, Am. Rep. 480; *Brown* v. *Wright,* 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467. In this case the evidence is uncontradicted, not only that Martin had never authorized Clary to agree for him that he would assume and pay the $147 sued for, but also that he had no notice of such a claim on the part of Hickman until long after he had sold the property received from Hickman."

In *Case* v. *Hammond Packing Co.,* 105 Mo. App. 168, 79 S. W. 732, the facts were that King was the agent of the packing company, with authority to sell meats and to collect and remit the sales price to the packing company. The plaintiff, Case, was engaged in the banking business, and

King opened an account with him in the name of "The Hammond Packing Company—W. A. King," to the credit of which King deposited his individual funds and his collections for the packing company, and against which he checked in his individual business. From time to time King drew checks on this account in his individual name, which he sent to the packing company as proceeds of meats sold by him. This mode of business continued for several months, until King finally drew two checks, aggregating $1,581, which overdrew the account that amount. The bank demanded that the packing company make the overdraft good, upon the theory that it had received the benefit thereof from its agent. In other words, the suit was for money had and received, as in the instant case. The packing company refused to pay, upon the ground that it had never authorized the opening of the account, and did not know that it had been opened until the bank demanded payment of the overdraft. The testimony showed that the agent King did not have any authority to represent the packing company, except to sell its meats and collect and remit the proceeds of such sales.

So here, there was the same limitation upon Payne's authority, and the cases are therefore identical, except that, in the packing company case, the bank knew who the agent's principal was, a fact unknown to the appellant bank in the instant case, and except also that Payne did not have an account with appellant bank in his principal's name, as did the agent King in the packing company case.

In holding that the packing company was not liable for this overdraft, although it had received the proceeds of the checks which produced it, the court said: "Such agency (as King had) did not authorize him to open a bank account for defendant (the packing company), nor to borrow money for it. Nor did such agency confer an apparent authority on King, justifying plaintiff (the bank) in believing real authority existed." It was there further said:

"But it is said that defendant received King's checks on the plaintiff bank, and must have known of the account. The checks were notice to defendant that King had an account with plaintiff, but not that it had. Indeed, King's individual checks could not lead one to suppose they were drawn on his principal's account, for such checks would not authorize payment out of the principal's money. *Ihl* v. *Bank,* 26 Mo. App. 129. There was nothing shown from which it can be inferred that defendant ratified King's act in overdrawing. As has been already stated, the defendant did not know that King had opened an account in its name. It did not know that the money which it received was an overdraft on such account. It received and accepted the money as money due from King, which he had collected from customers. Money is a current fund, which any one, without notice, has a right to receive in good faith in payment of a debt, without inquiry into the source from which it comes; and the person so receiving it cannot be compelled to restore it to him who was the true owner. *Stephens* v. *Board of Education,* 79 N. Y. 183, 35 Am. Rep. 511; *Hatch* v. *Bank,* 147 N. Y. 184, 41 N. E. 403; *Justh* v. *Bank,* 56 N. Y. 478; *Smith* v. *Bank,* 107 Iowa 620, 78 N. W. 238. But it is said by plaintiff that defendant received and kept the money represented by the overdraft. That fact does not create a liability against defendant. If money due a principal from his agent is obtained by such agent by the unauthorized use of the principal's name, and paid over to the principal, who receives it in good faith, without notice, he is not liable to the party from whom the agent got the money. The fact that he keeps the money after being informed of how the agent obtained it is not a ratification. *Thacher* v. *Pray,* 113 Mass. 291, 18 Am. Rep. 480; *Baldwin* v. *Burrows,* 47 N. Y. 212; *Gulick* v. *Grover,* 33 N. J. Law 463, 97 Am. Dec. 728; *Bohart* v. *Oberne,* 36 Kan. 284, 13 Pac. 388; *Pennsylvania Co.* v. *Dandridge,* 8 Gill & J. 323, 29 Am. Dec. 543; *Lime Rock Bank* v. *Plimpton,* 17 Pick. 159, 28 Am. Dec. 286."

We are not required to approve all that was there said to find authority in that case for denying appellant bank the right to recover from Kelley.

Another case very similar in principle to the instant case is that of *First Nat. Bank of Owenton* v. *Sidebottom,* 147 Ky. 690, 145 S. W. 404. We do not review the decision of the Court of Appeals of Kentucky in that case, as it would unduly lengthen this opinion to do so, but we quote a syllabus which reads as follows:

"A deputy sheriff, having an account with a bank, drew his checks on other banks payable to it, and gave to the sheriff two checks equal in amount to the checks so drawn, and, on presentation by the sheriff's bank, they were paid before one of the checks drawn by the deputy was returned not paid for want of funds. *Held,* in the absence of any agreement on the part of the sheriff, that, if the checks drawn by his deputy were not paid he would refund to the bank the money paid to him, the bank could not recover; the fact that the drawer of the checks was a deputy of the defendant not conferring any greater rights on the bank."

As bearing upon this question and supporting the view that a bank, which permits an unauthorized agent to overdraw his account, cannot recover the amount of the overdraft from the principal, upon a mere showing that the principal received the proceeds of the overdraft, where, when demand for restitution is made, the principal cannot be placed *in statu quo,* see the following cases: *Merchants' Nat. Bank of Peoria* v. *Nichols & Shepard Co.,* 223 Ill. 41, 7. L. R. A. (N. S.) 752, 79 N. E. 38; *Guaranty Bank & Trust Co.* v. *Beaumont, etc.* (Tex. Civ. App.), 218 S. W. 638; *Sanborn* v. *First Nat. Bank,* 115 Mo. App. 50, 90 S. W. 1033.

Here Payne employed his own means of collecting and remitting the proceeds of potatoes sold by him. Kelley had no control over Payne's account with the bank, and could only credit Payne's account with the checks drawn in his favor against it. Kelley was not advised of the overdraft until two months thereafter, during which time

the potatoes had, no doubt, been eaten or planted or otherwise consumed, and the *status quo* could not be restored.

Some innocent person must suffer, and, as the bank's election to treat as a cash deposit the check from Payne by Burrough, instead of receiving it for collection, as it might have done, caused the loss to fall upon it, the loss must remain there. This was the judgment of the court below, and it will therefore be affirmed.

LINDSEY v. STATE.

Opinion delivered February 27, 1928.

1. LARCENY—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to sustain a conviction of grand larceny.
2. CRIMINAL LAW—HEARSAY TESTIMONY.—Though it is competent for defendant to introduce proof tending to show that the crime was committed by another, a statement or even an extrajudicial confession of the latter was inadmissible, being merely hearsay.
3. CRIMINAL LAW—ERROR NOT ASSIGNED IN MOTION FOR NEW TRIAL.—Alleged error in rendering a judgment on a verdict, as being indefinite and uncertain as to the offense charged, will not be considered, where it was not assigned as error in the motion for new trial.
4. CRIMINAL LAW—SUFFICIENCY OF VERDICT.—Under an indictment charging grand larceny and knowingly receiving stolen property, a verdict of guilty as charged in the indictment was not so indefinite and uncertain as to render a judgment thereon erroneous, where the State's testimony was directed, and the court's instructions related, to the charge of grand larceny.

Appeal from Pulaski Circuit Court, First Division; *Abner McGehee,* Judge; affirmed.

John D. Shackleford, for appellant.

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

KIRBY, J. This appeal comes from a judgment of conviction for the crime of grand larceny. It is assigned as error that the evidence is insufficient to support the

verdict, and that the court erred in excluding certain testimony.

The testimony discloses that a Ford touring car, of the value of $400, was stolen from P. N. Wilkenson, in the city of Little Rock, about 10 o'clock on the night of March 5, 1927. The car was later found in July in possession of one Mun Hunter, near Toltec, Arkansas, who testified that he purchased it from appellant, agreeing to pay him $125 therefor, and did pay him $12 of the purchase money and kept the car from March to July. Stated that Henry Howard was present when he purchased the car, and also that he knew Son Hunter, who lived in North Little Rock, and was present at the dance the night he purchased the car.

Henry Howard testified that he was present when Mun Hunter purchased the car from appellant, and saw him make the payment and take charge of the car.

Lindsey testified that he did not steal the car, and denied that he had sold it to Mun Hunter, and that he had anything to do with it at all. Said that the statement made by Mun Hunter and Henry Howard was untrue; that he knew nothing about the taking of the car, and the first time he ever saw it Mun Hunter and Son Hunter were riding in it in town, and denied that Mun Hunter had ever paid him a cent on the car. Stated that Son Hunter had the car at his girl's house, in North Little Rock, and hung around there for nearly a year. Parked the car in front of her house, and sometimes in the back yard. Said that Son and Mun Hunter were supposed to be brothers; that he never talked to Mun Hunter about the car, but did ask Son Hunter where he got it, while the car was kept at the girl's house, and he replied that he bought it. Said also that Son Hunter told him, during the conversation, that he, appellant, knew nothing about the car. Denied that he saw Mun Hunter at a dance in March. Admitted that he knew the car Son Hunter had at the girl's house was the car that was taken from Mun Hunter, and which was claimed to have been stolen.

Another witness testified that he knew the Hunters and the girl, and that Son Hunter lived with her, and that he had seen this car at her place, kept there by Son Hunter, as much as two or three weeks at a time. That he had seen Son and Mun Hunter in the car together at the girl's house several times. That he first saw Son Hunter with the car at the girl's house before it ever went to Toltec, and that, after it was taken down there, he saw both Son and Mun Hunter riding in it.

The evidence is not disputed that the car was stolen recently before it was found in the possession of Hunter, who, with other witnesses, testified he had purchased it from appellant, who admitted that he knew the car taken from Mun Hunter was claimed to have been stolen.

The jury evidently believed Hunter's story about having purchased it from appellant, and found accordingly, and the evidence is legally sufficient to warrant the conviction. *Daniels* v. *State,* 168 Ark. 1083, 272 S. W. 833; *Mays* v. *State,* 163 Ark. 232, 259 S. W. 338; *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029.

The second assignment, that the court erred in excluding from the jury appellant's statement that Son Hunter had said to him, while he was in jail, "I know you don't know anything about it yourself," referring to the taking of the automobile. This was a self-serving declaration, and, although it was competent for the defendant, in order to show his innocence, to introduce proof tending to show the crime was committed by another person, the statement of such third person, or an extrajudicial confession even, would merely have been hearsay, and was not admissible. *Tillman* v. *State,* 112 Ark. 236, 166 S. W. 582; *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376.

It is argued that the court erred in rendering a judgment upon the jury's verdict, which, it is claimed, is not definite and certain as to the offense of which appellant was found guilty. It is true appellant was charged with grand larceny and knowingly receiving stolen property, and the jury rendered a verdict finding him "guilty as

charged in the indictment," but this was not assigned as error in the motion for a new trial, and need not be considered. The State's testimony, however, was directed to the charge of grand larceny, and the court's instructions related thereto, and virtually amounted to an election to prosecute upon that charge.

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

BRISCOL v. AMERICAN SOUTHERN TRUST COMPANY.

Opinion delivered April 2, 1928.

1. BILLS AND NOTES—TRANSFER OF NOTE AFTER MATURITY.—The fact that a note is transferred after maturity is of no importance except as to equities between the prior parties, the rule being that an indorsee or transferee after maturity takes subject to defenses between the original parties.
2. BILLS AND NOTES—TRANSFER AFTER DEATH OF MAKER.—The death of the maker of a note does not in any way affect its negotiability.
3. PLEDGES—TRANSFER OF COLLATERAL SECURITY.—Where a bank had a right to sell a note secured by a certificate of deposit, it was authorized to transfer the collateral security as an incident of the sale.
4. SUBROGATION—RIGHTS OF ONE SECONDARILY LIABLE ON NOTE.—One who is compelled to pay a note on which he is secondarily liable is subrogated to all the rights of the payee.
5. SUBROGATION—PAYMENT OF NOTE.—The right of subrogation to the payee's right on payment of a note extends, not only to indorsers, but also to sureties and guarantors.
6. SUBROGATION—RIGHTS OF PARTY SUBROGATED.—Where one who is secondarily liable is required to pay a note, secured by collateral, he acquires title to the note, and becomes owner of attached collateral.
7. PLEDGES—SALE OF NOTE SECURED BY COLLATERAL.—In a sale of a note secured by collateral, the collateral passes as a mere incident of the sale of the note.
8. PLEDGES—TRANSFER OF COLLATERAL.—Where a bank held a note secured by collateral, the note being past due and the maker dead, *held* that it had a right to deliver the note with attached collateral when paid by any one whose liability thereon was fixed, either as surety, guarantor, or indorser.

9. BILLS AND NOTES—EFFECT OF SIGNING NOTE AFTER MATURITY.—Where a bank had a note of a dead maker which was past due, and the brother of the maker and the administrator of the maker's estate signed their names on the note, *held* that the brother so signing was not an indorser, within the Negotiable Instruments Law (Crawford & Moses' Dig., § 7830), defining the liability of an irregular indorser, and § 7832, fixing the liability of general indorsers.

10. CONTRACTS—COLLATERAL CONTRACT.—Where a brother and administrator of decedent's estate signed a note of decedent after maturity, and executed another note in their name in consideration of the bank's foregoing foreclosure of collateral given by decedent to secure his note, *held* that the undertaking was a distinct contract collateral to the original undertaking of the decedent and supported by sufficient consideration.

11. SUBROGATION—RIGHT TO COLLATERAL.—Where the brother of a deceased maker of a note indorsed the note, which was secured by collateral, after its maturity, *held* that, on being compelled to pay the note, whether as guarantor or surety, he would be subrogated to the rights of the payee and to receive the collateral.

12. BILLS AND NOTES—GUARANTY.—Where a brother of the deceased maker of a matured note signed it after maturity, in consideration that the bank holding the note should agree to forego foreclosure of collateral security, he was a guarantor.

13. SUBROGATION—RIGHTS OF GUARANTOR.—One who becomes guarantor of another's note without the knowledge or consent of such other and who by reason of his guaranty pays the note becomes by operation of law the purchaser of the debt, stands in the shoes of the principal creditor, and as such is entitled to all collateral.

14. PRINCIPAL AND SURETY—LIABILITY OF GUARANTOR.—Under Crawford & Moses' Dig., § 7762, designating those primarily liable on a note, the liability of a guarantor as distinguished from that of surety is secondary.

15. SUBROGATION—RIGHT OF GUARANTOR.—The right of a guarantor to subrogation by reason of payment of the principal's debt does not exist unless the payment was made by one who was at the time required to pay it; and, if he paid it prior to the maturity of the debt, he will be regarded as a stranger to the debt.

16. PLEADING—MOTION TO MAKE COMPLAINT MORE DEFINITE.—In an action against a bank for conversion of collateral, if the complaint failed to show that, at the time of delivery of the collateral to the guarantor, he was legally obligated to pay the debt, *held* that the bank should have, by motion in lower court, requested that plaintiff be required to allege facts with more definiteness.

17. BILLS AND NOTES—RIGHTS OF STRANGER PURCHASING NEGOTIABLE PAPER.—A stranger may purchase negotiable paper, either before or after maturity, in which event the paper is not discharged, and he becomes the holder of the same with all the rights of the assignor, including the right to receive such collateral as his assignor may have had.

18. BILLS AND NOTES—PURCHASE OF NOTE BY STRANGER.—Where a stranger pays another's note, he is presumed to have purchased the same, and the note is not discharged.

19. BILLS AND NOTES—PRESUMPTION AS TO PURCHASE OF NOTE BY STRANGER.—While the payment of another's note by a stranger is presumed to have been a purchase, such presumption is not one of law, but of fact, and may be rebutted.

20. PLEDGES—EFFECT OF PAYMENT OF ANOTHER'S NOTE.—In an action against a bank for conversion by delivery of collateral to the brother of deceased maker of a matured note, where the complaint was silent as to whether the note was delivered to the brother, and it did not appear from the complaint whether the note was marked "Paid," or whether it was delivered with intention that it was not being discharged, but that title thereto was merely being transferred together with collateral, *held* that as a matter of law the court could not say that such payment was made by a purchaser.

21. BILLS AND NOTES—PAYMENT OF NOTE BY STRANGER.—Under Crawford & Moses' Dig., § 7885, providing that payment by or on behalf of the maker of a note will discharge it, payment of a note by a stranger, if made for and on behalf of the maker, will discharge the debt.

22. BILLS AND NOTES—PAYMENT OF NOTE BY STRANGER.—Under Crawford & Moses' Dig., § 7885, providing that payment of a note by or on behalf of a maker will discharge it, payment by a stranger on behalf of himself with intention of acquiring title to note and collateral attached does not discharge the note and debt, justifying delivery of the collateral to him.

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

Kirby & Hays, for appellant.

Trieber & Lasley, for appellee.

W. H. RECTOR, Special Judge. Appellant sued appellee in trover, charging it with the conversion of certain collateral which had been deposited with it to secure a note executed by his intestate. A gen-

eral demurrer to the complaint was sustained, and, the plaintiff refusing to plead further, the action was dismissed. This appeal therefore involves the sufficiency of the complaint as tested by the demurrer.

Briefly stated, the allegations in the complaint were as follows: The appellee, a bank at Little Rock, held a negotiable promissory note of appellant's intestate, M. C. Pappas, in the principal sum of $700. This note was secured by a certificate of deposit in the Banque Nationale de Greece of the alleged value of $5,000. When this note matured, its maker had died, and the appellant, as administrator, was without funds with which to pay the note and redeem the collateral. At this time the appellant and H. C. Pappas, a brother of the deceased, entered into an agreement with the bank whereby they indorsed their names upon the past-due note of the deceased, and at the same time gave a new note executed by them individually, to serve as a renewal or a continuance of the old note.

The allegations with respect to the new note were as follows: "Plaintiff states that, after the death of the said M. C. Pappas, he, together with the said H. C. Pappas, a brother of deceased, put their indorsement upon said note past due, and also executed a new note individually to cover said loan and to serve as a renewal or continuance of said original note."

The complaint further alleges that the bank did not present its claim for allowance by the administrator and did not have it probated.

After the extension agreement above referred to, but before the expiration of the time for probating claims against the estate, the complaint alleges that the appellee "accepted payment of its note from H. C. Pappas, the brother of the deceased, and wrongfully delivered at the time to H. C. Pappas the said security held by it, which was of the value of $5,000, against his directions and over his protest, and refused to deliver same to this plaintiff, upon proper demand made therefor, thus converting said

securities unlawfully to its own use." It is further alleged that the estate of the deceased was insolvent.

Appellant contends for a reversal of the judgment upon the ground that, after the maturity of the note and the death of the maker, it ceased to be negotiable, and that the delivery of the note, with the collateral attached, amounted to a conversion, for which the appellee was liable. He cites the case of *Union & Mercantile Trust Co.* v. *Harnwell,* 158 Ark. 295, 250 S. W. 321, as controlling the judgment in this case. The appellant also contends that H. C. Pappas was not an indorser of the old note within the meaning of the law relating to the rights and liabilities of an indorser of commercial paper.

Whether or not an instrument is negotiable or non-negotiable depends upon our statute (§ 7767, C. & M. Dig.). An instrument once negotiable continues to be negotiable until it is discharged in the manner prescribed by the law (§ 7885-7886), or until it is restrictively indorsed. The note of the deceased at the time it was negotiated was without question a negotiable instrument, and, there being no contention that there was ever at any time a restrictive indorsement thereon, it continued to be negotiable, unless it had been discharged. Whether the act of H. C. Pappas, the brother of the deceased, in paying the note, operated as a discharge thereof, will be considered in a later portion of the opinion. We are now concerned with the effect, if any, upon the negotiability of the note of the fact that it had matured and its maker had died at the time of the execution of the so-called renewal note.

A majority of the court is of the opinion that the death of the maker and the maturity of the note did not destroy its negotiability. "The fact that a bill or note is transferred after maturity is of no importance except as to equities between prior parties, the rule being that an indorsee or a transferee after maturity takes subject to defenses between the original parties." 8 C. J., Bills and Notes, paragraph 58.

To hold that a note, once negotiable, becomes non-negotiable after maturity or after the death of the maker, would entirely destroy that security which heretofore has attended the making and negotiation of commercial paper. The channels of commerce are daily flooded with millions of such instruments, and it is indispensable to the transaction of business that one who acquires such an instrument shall be protected in his ownership and shall not be required to ascertain what in the greater majority of cases would be an impossible thing, to-wit, whether the maker or drawer had died. One who makes and negotiates a promissory note obligates himself to pay the amount named therein upon its maturity, or at any time thereafter, until the paper is discharged in one of the ways recognized by the statute. The death of a maker of a note does not in any way affect its negotiability. *Clark* v. *Thayer,* 105 Mass. 216, 7 Am. Rep. 511. We therefore hold that the fact that the maker of the note was dead and the note was past due did not in any wise affect the rights of the bank with respect to its transfer, and that it had a right to sell this note, although its maker was dead and it was past due; and, having a right to sell the note, it also had the right to transfer the collateral as an incident of the sale.

A majority of the court is also of the opinion that any one who was secondarily liable on the note would, when compelled to pay the same, be subrogated to all the rights of the payee. It is conceded by the appellant that this is true with respect to indorsers, but it is contended that H. C. Pappas was not, in contemplation of law, an indorser. The right of subrogation extends not only to indorsers but also to sureties and guarantors. 37 Cyc. 402; *Talbot* v. *Wilkins,* 31 Ark. 411, 12 R. C. L., p. 1098.

It is thoroughly settled that, when one who is secondarily liable is required to pay a note secured by collateral, he acquires title to the note, which is not discharged by his payment, and becomes the owner of the

attached collateral. In *Goss* v. *Emmerson,* 23 N. H. 38, a note was paid by an indorser who was secondarily liable thereon, and it was delivered to him, together with the attached collateral, and he had thereafter wrongfully converted such collateral to his own use. The court held that the indorser, being required by law to pay the note, was entitled to all of the rights against the principal creditor which had previously been held by the holder of the note, including the collateral, and that the fact that the indorser wrongfully converted this collateral to his own use would not render the holder of the note liable as for conversion. In *Waddle* v. *Owen,* 43 Neb. 489, 61 N. W. 731, the note, secured by collateral, was paid by an indorser, and was by the holder transferred to the indorser, together with the attached collateral. The court held that the holder of a negotiable instrument secured by collateral had a right to negotiate it and to transfer the securities with it at any time before payment or tender of payment. The court said:

"The bill being negotiable, Waddle had a right to transfer it by indorsement to Hainer, and to transfer with it the accompanying securities. There is a vast difference between the position of a pledgee who retains the principal debt and wrongfully parts with the securities pledged thereto, and that of one who, in the regular course of business, transfers the debt, and with it the securities, without diverting the latter from the purpose for which they were pledged. The first act constitutes a conversion, the latter does not." See also *Chapman* v. *Brooks,* 31 N. Y. 75; Jones on Collateral Securities (3d ed.) §§ 418, 421, 425.

It is equally well settled that the holder of negotiable paper secured by collateral may sell the paper with the collateral attached, and his purchaser takes title to the paper and such rights as he had in the pledged collateral. That was in effect the holding of this court in *Whitney* v. *Peay,* 24 Ark. 22.

In *Bank of Forsyth* v. *Davis,* 113 Ga. 341, 38 S. E. 836, 84 Am. St. Rep. 248, the holder of negotiable paper secured by collateral sold the paper and transferred the collateral to a third person. The court held that this was not a conversion of the collateral, but that the purchaser of the note took title thereto and that the collateral passed to him as an incident of the transfer. "As the security (collateral) is a mere incident of the original debt, just as a mortgage is a mere incident of the debt secured, an assignment of the debt passes either a legal or an equitable interest in the pledge, unless it is otherwise agreed between the parties." Jones on Collateral Securities (3d ed.), § 418. And the same author, at § 425, says: "A payee of a negotiable note, holding other notes as collateral security, may lawfully transfer the collateral notes to an indorsee of the principal note, * * * and if the indorsee to whom the securities are transferred converts them to his own use, the original payee is not liable in trover for such conversion." See also on the general proposition: 31 Cyc. 849; *Hawkins* v. *Fourth National Bank,* 150 Ind. 117, 49 N. E. 957.

When the maker of a note negotiates the same, with collateral attached, he is presumed to know that, under the law, the original payee has the legal right to sell the note and transfer the collateral, and this right exists in the original payee by virtue of his contract with the maker. "One who makes a negotiable promissory note and delivers it to another is charged by the law with notice that the payee of such note has the right to transfer it, by sale or otherwise, to whomsoever he may see proper." *Bank of Forsyth* v. *Davis, supra.* And, as stated above, the purchaser takes such collateral as may be attached as security to the note as a mere incident of the sale and transfer.

From what we have said above it is obvious that the appellee had the legal right to deliver the note, with attached collateral, upon its payment by any one whose liability thereon had been fixed either as surety, guar-

antor or indorser, and that it equally had the right to sell the note to a stranger and to transfer the collateral to the purchaser of the note. It is therefore now necessary to determine whether H. C. Pappas was liable as surety, guarantor or indorser, and, *by reason of such liability, was required to pay the note,* or whether H. C. Pappas was a stranger to the note, and, if so, whether, as such stranger, he paid the note in such a manner as would discharge it, or whether he purchased the same.

We are of the opinion that H. C. Pappas was not an indorser within the meaning of the Negotiable Instrument Law. Before the adoption of that law in this State, one who indorsed commercial paper after it had been put in circulation was not an indorser, but a guarantor. *Killiam* v. *Ashley,* 24 Ark. 511, 91 Am. Dec. 519; *Scanlan* v. *Porter,* 64 Ark. 470, 42 S. W. 897. The adoption of the Negotiable Instrument Law does not, in our opinion, change that rule. Section 7830, C. & M. Digest, prescribes the liability of an irregular indorser; that is, one who, not otherwise a party, places his name upon an instrument, and this indorsement must be before delivery of the paper. The liability of a general indorser is fixed by § 7832, C. & M. Digest, and, under this section, such indorser "engages that, on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor," etc. The note being past due at the time H. C. Pappas placed his name upon it, he could not have engaged that, upon due presentment, it would be paid according to its tenor. At that time there could be no due presentment and the note could not be paid "according to its tenor." But, because H. C. Pappas was not an indorser, it does not necessarily follow that he was a stranger to the note. He could, and did, make himself liable thereon to the bank by signing his name thereon and by executing the so-called renewal note. That, in our opinion, under the allegations of the complaint, was a separate and distinct contract, collateral to the original undertaking of the deceased, and sup-

ported by a sufficient consideration—the agreement of the bank temporarily to forego its undoubted right to foreclose its collateral.

It is sometimes hard to say whether a given contract is one of surety or guaranty. The terms are frequently loosely employed by the courts and in the textbooks. There are, however, certain well recognized distinctions between the two relations. The subject was considered by this court in *Hall* v. *Equitable Ins. Co.,* 126 Ark. 535, 191 S. W. 32; *Shores-Mueller Co.* v. *Palmer,* 141 Ark. 64, 216 S. W. 295; *Broomer Lbr. Co.* v. *Hickman,* 71 Ark. 549, 76 S. W. 559; *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913. See 28 C. J. 889-894.

But, whether H. C. Pappas was a guarantor or a surety, his right, upon being compelled to pay the note, to be subrogated to the rights of the payee and to receive the collateral, was the same. 37 Cyc. 402.

It is sufficient here for us to say that we believe the contract between the bank and H. C. Pappas, which was undoubtedly made for the benefit of the estate of the deceased, was a contract of guaranty.

We find it unnecessary to pass upon the question as to whether the administrator could consent to H. C. Pappas becoming a guarantor. One who becomes the guarantor of another's contract without the knowledge or consent of such person, and who, by reason of his guaranty, pays the principal creditor, becomes by operation of law the purchaser of the debt, stands in the shoes of the principal creditor, and, as such, is entitled to all collateral. *Leslie* v. *Compton,* 103 Kan. 92, 72 Pac. 1015, L. R. A. (N. S.) 1918F, 706; *Teberg* v. *Swinson,* 32 Kan. 24, 4 Pac. 83; *Carter* v. *Jones,* 40 N. C. (5 Ired. Eq.) 196, 49 Am. Dec. 125; *Wright* v. *Garlinhouse,* 27 Barb. (N. Y.) 474; *Marsh* v. *Hayford,* 80 Me. 97, 13 A. 271; *Hecker* v. *Mahler,* 64 Ohio St. 176, 60 N. E. 555; *Snell* v. *Warner,* 63 Ill. 176; *Peak* v. *Dorwin,* 25 Vt. 28.

It therefore becomes immaterial whether the administrator consented to the contract of guaranty or whether in law he could consent thereto.

The liability of a guarantor is secondary. C. & M. Dig., § 7762; *Crawford* v. *Turnbaugh,* 80 Ohio St. 43, 98 N. E. 858; 2 Daniel, Negotiable Instruments, §§ 1753-1754. It is otherwise with a surety. *Hall* v. *Equitable Ins. Co., supra; Shores-Mueller Co.* v. *Palmer, supra.* As said in the last cited case: "The contract of a surety starts with the agreement, and the liability of a guarantor is established for the first time with the default of the principal debtor."

In this case the act of the appellee bank in taking a new note executed by the appellant personally and by H. C. Pappas, the brother of the deceased, amounted to an extension of the debt. Until this extension note, which was in itself the contract of guaranty, matured, the appellee bank had no right to proceed against the estate of the deceased, nor had it any right to proceed against H. C. Pappas. His guaranty was that the estate of the deceased would pay the note on or before the maturity of his note. There was no liability upon his part to pay until his note matured. If he paid the note prior to that time, his act was tantamount to the act of a stranger, against whom there was no liability. In order that the guarantor may be subrogated to the rights of the creditor, upon paying the debt, the payment must be made at a time when he was legally required to make it. 37 Cyc. 375 *et seq.*; 37 Cyc. 407. The right to subrogation does not exist unless the payment was made by one who at the time was required by law to pay. 5 Pomeroy's Equity Juris., § 2345 *et seq.*; 2 Story's Eq. Juris. (14 ed.), § 717 *et seq.* Of course, if Pappas was not subrogated to the rights of the bank, it was not justified in delivering him the collateral. He was not legally required to pay the note of the deceased until the renewal note which he had executed matured, and if he paid it prior to that time, he will be regarded as a stranger to the debt. *Martin* v. *Monger,* 112 Ark. 394, 166 S. W. 566.

From this view of the law it becomes important to ascertain whether the complaint shows upon its face that,

at the time H. C. Pappas paid the note of the deceased, he was legally required to pay the same—that is to say, that *his* note had matured. If this appears from the complaint, we unhesitatingly say that no cause of action was alleged against the appellee.

We are, however, from a careful examination of the complaint, unable to find any allegations from which a reasonable inference can be drawn that H. C. Pappas paid the note *at a time when he was required to pay it under his contract with the bank.* Indeed, the necessary inferences from the complaint are to the contrary. The complaint does not allege that H. C. Pappas *was required* by the bank to pay the note. On the other hand, it alleges that the appellee "*accepted payment* of its note from H. C. Pappas, the brother of the deceased, and wrongfully delivered at the time to H. C. Pappas the said security," etc. The inference is that the payment by H. C. Pappas was the result of a voluntary act upon his part, one *not* required by his legal obligation. The complaint alleges that the bank "*accepted*" *payment,* from which we are led to infer that the payment of the note by H. C. Pappas was not the result of his obligation, which might not yet have matured. The allegations as to the estate's insolvency, being referable to the date the complaint was filed (January, 1926) cannot aid us in reaching a conclusion contrary to the one expressed. We are therefore unable to say, from the facts alleged, giving them every possible intendment in favor of the correctness of the lower court's ruling on the demurrer, that it appears with certainty that at the time he paid the note he was legally bound to do so.

If the appellee bank desired to justify its act in delivering the collateral to a guarantor, and the complaint failed to show, as we hold, that at the time of the payment of the note and the delivery of the collateral the guarantor was legally bound and obligated to pay the debt, it should have, by motion in the lower court,

requested that the plaintiff be required to allege the facts with more particularity.

It is earnesly insisted by the appellee that, if Pappas be considered a stranger to the transaction, his payment of the note and the assignment to him thereof, together with the attached collateral, would make him a purchaser of the debt and entitle him to receive the collateral.

It is undoubtedly true, as shown above, that a stranger may purchase negotiable paper either before or after maturity, in which event the paper is not discharged, and he becomes the holder of the same with all the rights of his assignor, including the right to receive such collateral as his assignor may have had. It is also undoubtedly true that, where a stranger pays another's note, he is presumed to have purchased the same, and the note is not discharged. *Chappell* v. *McKeough,* 21 Colo. 275, 40 P. 769; *Bank* v. *Friend,* 80 Mo. App. 657; *Van Standt* v. *Hobbs,* 84 Mo. App. 628; *Ketchum* v. *Duncan,* 96 U. S. 659, 24 L. ed. 868; *Wood* v. *Guaranty Trust Co.,* 128 U. S. 416, 9 S. Ct. 131, 32 L. ed. 472; *Barney* v. *Clark,* 46 N. H. 514; *Dent* v. *Matthews,* 202 Mo. App. 451, 213 S. W. 141; *People's State Bank* v. *Dryden,* 91 Kan. 216, 137 Pac. 928; *McDonald* v. *Burns,* 83 Fed. 866. The last cited case is an opinion by the Circuit Court of Appeals for the Eighth Circuit (judgment was rendered by Sanborn and Thayer, Circuit Judges). See also on this point, 3 Randolph on Commercial Paper, §§ 1438-1440.

An examination of the authorities just cited will disclose the fact that, while the presumption is, as stated above, that the payment of a note by a stranger is a purchase thereof and not a discharge, yet, in the final analysis, it is a question of the intent of the parties, which is to be gathered from all the facts and circumstances. This presumption is not one of law, it is a presumption of fact, and may be rebutted.

In construing the allegations of the complaint with respect to whether or not the act of H. C. Pappas in pay-

ing the note (assuming that he was a stranger in so doing) amounted to a purchase thereof and not a discharge of the paper, we find that the complaint is silent on the question as to whether the original note, or any note, for that matter, was delivered to H. C. Pappas. It does not appear from the complaint whether the note was marked paid by the bank or whether it was delivered to Pappas with the intention and understanding that the note was not being discharged but that the title thereto was merely being transferred to Pappas as a purchaser, together with the collateral, which he was to hold as security for the payment of the note. We cannot say, as a matter of law, and in the teeth of allegations apparently to the contrary, that the payment of the note by H. C. Pappas made him a purchaser thereof, although, when the facts and circumstances are fully shown, such may be the legal effect thereof.

Our statute provides that payment of a note by or on behalf of the maker will discharge it. C. & M. Dig., § 7885. Hence payment of such note by a stranger, if made for and on behalf of the maker, would discharge the debt. If H. C. Pappas paid this note for and on behalf of his brother, the note was discharged, and he was not entitled to the collateral. If, on the other hand, he paid it for and on behalf of himself, with the intention thereby of acquiring title to the note and its attached collateral, the note was not discharged, and the bank was justified in delivering him the collateral.

The complaint might have been fuller on this point, and a motion to make more definite and certain would lie. We cannot say, however, that it was bad upon demurrer, whether H. C. Pappas be treated as a party secondarily liable or as a stranger.

We may add that if H. C. Pappas was a purchaser of the note, or if he paid the same at a time when he was legally required to do so, the case of *Union & Mercantile Trust Co.* v. *Harnwell, supra,* has no application.

From what has been said it follows that the judgment of the lower court is reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings in accordance with law and not inconsistent with this opinion.

Mr. Justice SMITH, Mr. Justice HUMPHREYS and Mr. Justice McHANEY dissent.

Mr. Justice KIRBY did not participate.

DISSENTING OPINION.

HUMPHREYS, J. This is an appeal from a judgment dismissing appellant's complaint against appellee upon a failure to amend same, after a demurrer had been sustained thereto upon the ground that it did not state a cause of action. The complaint, omitting caption, is as follows:

"Comes the plaintiff, Andrew Briscol, and states that M. C. Pappas departed this life on the —— day of ———, 1922, intestate, and that he was appointed administrator of the estate of the said M. C. Pappas on the 7th day of June, 1922, by the probate court of Pulaski County, Arkansas, and duly qualified as such administrator; that at the time the Bank of Commerce & Trust Company was a corporation organized under the laws of the State of Arkansas, and doing a general banking business; that, subsequent to said time, the American Southern Trust Company has become the owner and successor of the American Bank of Commerce & Trust Company, and is and has been, since its succession to the ownership of said American Bank of Commerce & Trust Company, engaged in the banking business in the city of Little Rock, Arkansas. Plaintiff states that, at the time of the death of said M. C. Pappas, the said American Bank of Commerce & Trust Company held a promissory note of said Pappas for the sum of $700, and to secure said note he, the said Pappas, had placed as collateral a certificate of deposit, executed by the Banque Nationale de Greece, which certificate of deposit cost the said M. C. Pappas the sum of $5,000 of American money, and was of that value; said certificate matur-

ing about April, 1924. Plaintiff states that, after the death of the said M. C. Pappas, he, together with the said H. C. Pappas, a brother of deceased, put their indorsement upon said note past due, and also executed a new note individually to cover said loan and to serve as a renewal or continuance of said original note. Plaintiff states that the said American Bank of Commerce & Trust Company failed and refused to present its debt for allowance by the administrator and to have same probated as the law directs, and that said claim of $700 has never been probated against said estate. Plaintiff states that, some time about the first day of April, 1923, the defendant, or the American Bank of Commerce & Trust Company, of which the defendant is successor, accepted payment of its note from H. C. Pappas, the brother of the deceased, and wrongfully delivered at the time to H. C. Pappas the said security held by it, which was of the value of $5,000, against his directions and over his protest, and refused to deliver same to this plaintiff, upon proper demand made therefor, thus converting said securities unlawfully to its own use. Plaintiff states that there is a large amount of indebtedness against said estate, and that the other property belonging to same is wholly insufficient to pay same indebtedness, and that the said American Bank of Commerce & Trust Company is indebted to him, as administrator, in the sum of $5,000, the value of the said security held and wrongfully converted by the defendant, for his cost, and all proper and general relief."

Appellant contends for a reversal of the judgment upon the ground that, after maturity of the note and the death of the maker, it ceased to be negotiable, and that the delivery thereof, with collateral attached, to an indorser who paid the note, amounted to a conversion of the collateral, and that appellee is responsible for the value thereof, less the amount of the note and interest.

The death of the maker and maturity of the note did not render it non-negotiable. The death of a maker

does not affect the negotiability of paper, so far as transferring it is concerned, the only effect being that the assignee takes it after maturity subject to all defects and defenses the maker or prior holders might have. The indorsement of the note by appellant and H. C. Pappas and the execution of a new note by them for the purpose of renewing or continuing the original loan note with collateral attached had no other effect than obtaining an extension of the original note by giving additional security. The complaint does not allege that the new note was given in settlement of the old and that the collateral was released, but, on the contrary, alleges that it was given in continuation or renewal of the old note. The payment of the note by one of the indorsers, and the delivery of the old note with collateral attached, amounted to a transfer of negotiable paper which carried the collateral as an incident, and did not amount to a conversion of the collateral by appellee. The administrator still had and has the right to follow the collateral in the hands of H. C. Pappas, and recover any equity there might be after paying the note. The rule announced is sustained by the following cases: *Bank of Forsyth* v. *Davis*, 113 Ga. 341, 38 S. E. 836, 84 Am. St. Rep. 248; *Goss* v. *Emmerson,* 23 N. H. 38; *Waddle* v. *Owen,* 43 Neb. 489, 61 N. W. 731.

The case of *Union & Mercantile Trust Co.* v. *Harnwell,* 158 Ark. 295, 250 S. W. 321, cited by appellant in support of his contention, is not in point. In that case the collateral was sold contrary to the pledged agreement, and the court ruled that it was an unlawful conversion of the collateral, while in the instant case there was no sale of the collateral at all. The note was assigned to H. C. Pappas by the bank when he paid the debt, and the collateral attached to the note passed to H. C. Pappas as an incident.

Mr. Justice KIRBY not participating.

PELT v. DOCKERY.

Opinion delivered February 27, 1928.

1. DEEDS—CONSTRUCTION TO GIVE EFFECT TO EVERY PART.—In construing a deed, every part of the instrument should be given effect, if the same can be done consistently with the rules of law.
2. DEEDS—CONSTRUCTION.—The fundamental rule in construction of deeds is to give effect to the intention of the party executing the instrument to be arrived at through the language used in the entire writing, and in some cases aided by extrinsic evidence of the maker's intention, subject, however, to the general rule that an intention plainly expressed by the face of the instrument cannot be contradicted by parol.
3. DEEDS—CONSTRUCTION TO GIVE EFFECT.—A construction of an instrument which will deprive it of any effect will not be adopted, if it can be reasonably avoided, and the practical construction given the instrument by the parties may also be considered.
4. DEEDS — CONSTRUCTION OF INSTRUMENT.—Where a husband "granted, bargained, sold, and conveyed" certain real estate to his wife, with a statement that it was understood and agreed that the deed was to take effect and be enforced after his death, but that the title should remain in him as long as he lived, which instrument was not only executed and delivered, but was recorded, it was *held* to be a deed, and not a will.

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

R. T. Boulware, for appellant.

Searcy & Searcy, for appellee.

MEHAFFY, J. Appellants, plaintiffs below, filed suit in Lafayette Chancery Court against the appellees, defendants below, alleging, in substance, that A. B. Dockery and Minnie Dockery, his wife, being indebted to said John D. Pelt in the sum of $2,276, did on January 6, 1921, execute their promissory note for said sum, due in one year and two years after date thereof, bearing interest at the rate of 10 per cent. per annum from date until paid, and that, to secure the payment of said indebtedness, defendants executed and delivered to plaintiff a deed of trust whereby they conveyed to Louie Pelt, as trustee, the northeast quarter of section 20, township 15 south, range 22 west, in Lafayette County, Arkansas.

At the time suit was begun there was a balance due on said indebtedness of $1,948.87 and interest. Deed of trust was recorded. Minnie Dockery joined with her husband in said conveyance, and waived her rights of dower and homestead. A. B. Dockery died in 1923, leaving as his only heirs Ester Dockery, Lester Dockery, Jim Dockery, Berry Dockery, Dary Dockery, Daniel Dockery, Goodley Dockery and Odessa Wesley, the appellees, and others who were made parties and summoned, but who did not appear or make any defense.

The appellees claimed title to one-half of the above described land under the following instrument:

"Know all men by these presents: That I, A. B. Dockery, of Lafayette County, Arkansas, for and in consideration of the sum of one dollar to me in hand paid by Julia Dockery, receipt of which is hereby acknowledged, and for the further consideration of the love and affection I have and bear for my said wife, Julia Dockery, do hereby grant, bargain, sell and convey unto the said Julia Dockery and unto her heirs and assigns forever, the following lands lying in the county of Lafayette, and State of Arkansas, to-wit: East half of the northeast quarter of section twenty, in township fifteen south, range twenty-two west, containing 80 acres of land, more or less. It being understood and agreed that this deed is to take effect and be in force after my death, and that the title to said land is to remain in me so long as I may live. To have and to hold the same unto the said Julia Dockery and unto her heirs and assigns forever, with all appurtenances thereunto belonging. And I hereby covenant with said Julia Dockery that I will forever warrant and defend the title to the said lands against all lawful claims whatever.

"Witness my hand and seal on this 22d day of September, 1906. (Seal) A. B. Dockery."

Said deed was properly acknowledged and recorded on the same day.

Appellees were the only heirs of Julia Dockery. Julia Dockery died in 1910. Appellees asked that said

deed of trust to Louie Pelt be canceled in so far as it concerned the land described in deed of A. B. Dockery of September 22, 1906. Plaintiff J. D. Pelt died while the suit was pending, and J. H. Landes was appointed administrator *ad litem,* and suit was revived in the name of the administrator *ad litem.*

Plaintiffs filed a general demurrer to defendants' answer. Court overruled the demurrer, and rendered judgment in favor of defendants. Plaintiffs excepted, prayed appeal to the Supreme Court, which was granted.

The only question for the consideration of this court is whether the instrument above set out is a valid deed, or whether it is of a testamentary nature, and void. The appellant contends that the following clause in the instrument, "it being understood and agreed that this deed is to take effect and be in force after my death, and that the title to said land is to remain in me as long as I live," makes it void because it is contended that it conveys nothing *in praesenti.* Appellant states that it does not appear that the precise question involved here has ever been before this court, but attention is called to the case of *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244. In that case the court said:

"The form is that of a deed, the words, 'grant, bargain, sell and convey' used, being appropriate to the office of the deed and inappropriate in a will. * * * The only words in them that can be said to be evidence of intention to make a will are, 'and the deed shall go into full force and effect at my death,' but we are to construe these words in connection with the whole deed. Every part must have its effect, if the same can be done consistent with the rules of law."

The deed in the instant case has the clause, "it being understood and agreed that this deed is to take effect and be in force after my death, and that the title to said land is to remain in me so long as I live." There is practically no difference between this clause and the clause in the case above referred to, but in the instrument we are considering it is in the form of a deed, and uses the words,

"grant, bargain, sell and convey"; in fact all of the words necessary to make a valid deed. It was executed by Dockery on September 22, 1906, acknowledged the same day, and filed for record and recorded on the same day. It must be kept in mind that every part of the instrument must have its effect, if the same can be done consistent with the rules of law. Construed in this way, it was evidently the intention of Dockery to give the land to his wife.

The appellant cites and relies on *Murphy* v. *Gabbert*, 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733. The court held in that case that it was not the intention of the grantor to pass any present interest in the property.

There is a conflict in authorities on this question, but the decisions of this court are controlling, and settle the question in accordance with the decision in the case of *Cribbs* v. *Walker, supra.*

When the whole deed is considered, it seems clear that it was the intention of the grantor to deed the property to his wife. The rule of construction is that effect must be given to the intention of the party. "The fundamental rule in the construction of both wills and deeds is to give effect to the intention of the party executing the instrument, to be arrived at through the language used as found in the entire writing, construed in the light of all the attending circumstances, and in some cases aided by extrinsic evidence of the maker's real intention; or, where the language of the instrument is doubtful, as to how he regarded the transaction, such aider, however, being subject to the general rule that intention plainly expressed by the face of the instrument cannot be contradicted by parol." 8 R. C. L., p. 931.

"There is more or less conflict of authority as to the effect of recitals attempting to postpone the operation of a deed until the grantor's death. Many cases are to be found in which instruments containing such words have been construed as being testamentary, while others treat the words that the instrument is not to take effect until the death of the grantor, as a clumsy way of express-

ing that the deed is not to take effect in possession or in the enjoyment of the property until the grantor's death. If it is necessary to hold that the instrument is a deed in order to uphold it, the general rule applies, of course, that the court will, if possible, so construe the instrument as to give it effect, and that a construction of an instrument which would deprive it of any effect will not be adopted if it can reasonably be avoided; and the practical construction given the instrument by the parties may also be considered, as where the grantor allows it to be recorded and permits the grantee to sell the land, or where, in a partition suit brought by the grantor, both parties to the instrument treat it as a deed." 8 R. C. L., p. 932-3.

When we consider the whole instrument, and keep in mind the fact that it was not only executed and delivered but recorded, and that there was no power of revocation, and the further fact that we should give the instrument such a construction as will uphold it if possible, it seems to us that the instrument must be construed as a deed. In the case of *Bunch* v. *Nicks,* 50 Ark. 367, 7 S. W. 563, in construing a deed which provided, among other things, that it should not go into full force and effect until the grantor's death, the court said:

"We think the instruments in question were valid deeds, and conveyed a present title to the donees, with the postponement of the right of the use and possession until the donor's death. It is obvious that the intention of the donor was to give his property to the children mentioned in the deeds, reserving the right to use and hold the same and to enjoy the profits thereof during his life. The evidence of this intention, afforded by the instruments themselves, are: (1) The form is that of a deed, the words, 'grant, bargain, sell and convey,' used, being appropriate to the office of the deed, and inappropriate to a will. (2) They contain a covenant of warranty, whereby the donor agrees to forever warrant and defend the title to the land to the donees and their heirs and assigns, against all lawful claims whatsoever. (3)

The donor himself calls them deeds of conveyance; and it is unreasonable to suppose he would call what he intended as a will deeds of conveyance. (4) They were executed, delivered and acknowledged as deeds. The only words used in them that can be said to be evidence of an intention to make a will are, 'and the deed shall go into full force and effect at my death.' But we are to construe these words in connection with the whole deed. Every part must have effect, if the same can be done consistently with the rules of law. Construed in this way, it is evident that the intention of Nicks was to give the land and sell the personal property he had at the time they were executed, to the grantees, and to reserve the use and enjoyment thereof for and during his life."

Numerous authorities are cited in the above case, and it has since been followed by this court. See also, *Seals* v. *Pierce,* 83 Ga. 787, 10 S. E. 589, 20 Am. St. Rep. 344; *Love* v. *Blauw,* 59 Pac. 1059, 61 Kan. 496, 48 L. R. A. 257, 78 Am. St. Rep. 334; *Pentico* v. *Hays,* 88 Pac. 738, 75 Kan. 76, 9 L. R. A. (N. S.) 224.

The court below was correct in overruling the demurrer and in rendering the decree for appellees, and the decree is therefore affirmed.

SECURITY MORTGAGE COMPANY v. HARRISON.

Opinion delivered February 27, 1928.

1. MORTGAGES—PURCHASE OF LAND BY SECOND MORTGAGEE.—Where, after mortgaged lands had been sold at tax sale, the second mortgagee purchased them at a foreclosure sale, subject to the first mortgage, and thereafter purchased the lands from the tax purchaser, he gained a title clear of the first mortgage, where, not being in possession of the land, he was under no obligation to pay taxes or redeem from the tax sale.
2. MORTGAGES—DUTY OF SECOND MORTGAGEE TO PAY TAXES.—A second mortgagee in possession, receiving the rents and profits from the mortgaged property, has the duty to pay the taxes and prevent a forfeiture of the land through a tax sale.

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

DuLaney & Steel, for appellant.

Steel & Edwards, for appellee.

MEHAFFY, J. In March, 1919, T. A. Harrison and his wife, Bessie Harrison, being indebted to the Security Mortgage Company, a domestic corporation, in the sum of $1,000, executed and delivered to said Security Mortgage Company a note bearing interest at the rate of 6 per cent. per annum, with coupon notes for interest, and to secure the payment of said notes, T. A. Harrison and Bessie Harrison executed and delivered to the Security Mortgage Company their real estate mortgage upon the south half of the northwest quarter of the northeast quarter of the southwest quarter and the west half of the southeast quarter and the east half of the southwest quarter, in section 35, township 8 south, range 30 west, containing 220 acres. The said Bessie Harrison, wife of the said T. A. Harrison, joined with her husband, and relinquished dower and homestead. The right of appraisement and redemption was waived.

After the execution of said mortgage, in September, 1919, T. A. Harrison and Bessie Harrison, his wife, executed and delivered to M. A. Janes a warranty deed to the land described in the mortgage, and the said Janes assumed the mortgage debt as a part of the price of said land, and also executed his note for the sum of $550 for the balance of the purchase money, the grantors retaining a vendor's lien for the unpaid purchase price. The mortgage company brought suit to foreclose its lien, alleging that its mortgage lien was superior and paramount to that of Janes.

Janes and wife, in January, 1921, executed and delivered a mortgage to C. E. Kitchens for $889.35. The Bank of Lockesburg became owner of the notes, and brought suit and foreclosed the vendor's lien, and a sale was ordered, subject to the lien of the mortgage of the Security Mortgage Company. The bank became the purchaser at the sale. The mortgage company asked that its lien be

declared superior to the other liens mentioned. The Bank of Lockesburg answered, and filed a cross-complaint, alleging that the land was in Road Improvement District No. 2 of Sevier County, and that the benefit assessments were not paid, and the road improvement district brought suit to collect the assessments and a decree was rendered in the Sevier Chancery Court adjudging the amount of taxes, penalties and costs against the lands above described, and ordering them to be sold in satisfaction thereof. A commissioner was appointed, the lands were sold by said commissioner and purchased by the road improvement district. Thereafter the commissioner executed a deed conveying said lands to said improvement district, and this deed was acknowledged and approved in open court. Thereafter, on the 21st day of April, 1925, the commissioners of said district sold and conveyed the land to the said Bank of Lockesburg. A deed was executed and delivered by the road improvement district to the Bank of Lockesburg. The chancery court rendered a decree to the effect that the Bank of Lockesburg was the owner of the land involved, free and clear of any right, title, claim, interest or equity of the plaintiff; dismissed the plaintiff's complaint for want of equity, and decreed the title to the land to be in the Bank of Lockesburg. The case was tried on an agreed statement of facts.

It is not necessary to copy the agreed statement of facts or to set out the facts in this opinion. The only question involved in the case is whether the bank, by purchasing the land from the road improvement district, acquired a title which was superior to the mortgage of the plaintiff. The bank had foreclosed a lien on the land, procured its sale, and purchased it subject to the mortgage of the Security Mortgage Company. The testimony shows that the bank paid the interest to the mortgage company for September, 1923, and March and September, 1924, and March, 1925. In April, 1925, the road improvement district made a deed to the bank. The bank had purchased under foreclosure sale. Appellant's con-

tention is that, the bank being in possession of the land, and it being its duty to pay the taxes in order to protect its own interest, its purchase from the road improvement district operates as a redemption, and that the lien of appellant is superior to any claim of the bank.

Road Improvement District No. 2 of Sevier County was a road improvement district formed under the general laws, and the taxes became delinquent for the year 1921, a decree was rendered in November, 1922, against the delinquent lands, and a sale was made in December, 1922. On April 5, 1923, the Bank of Lockesburg purchased at foreclosure sale, subject to the plaintiff's mortgage, and on that day a commissioner's deed was executed and delivered to the Bank of Lockesburg to said land. The bank of Lockesburg thereby became the owner of said land on April 5, 1923. The deed from the commissioner to Road Improvement District No. 2 was on December 2, 1924, and in April, 1925, the road improvement district conveyed to the Bank of Lockesburg.

Appellee in its brief states: "The only question for this court to determine is whether or not the appellee owed any duty to appellant to pay the taxes and special assessments charged against said lands for the year 1921. If it was under obligation to pay the taxes, then its purchase from the road improvement district should be treated as a redemption, but, on the other hand, if it owed no such duty to pay said taxes, its title, so acquired from the improvement district, is superior to the title of appellant."

At the time the lands became delinquent, in 1921, the appellee was not the owner of the land, but he became the owner on April 5, 1923, after the lands had been sold for the payment of taxes and purchased by the district. If the Bank of Lockesburg had been the owner at the time of the sale to the district, it would have been its duty to pay the taxes, but its interest at that time was the same as a mortgagee. It held a note given for the purchase price of the land, it brought suit and foreclosed

on this note and became the purchaser, but it did not become the purchaser until after the road improvement district had purchased the property, and it was therefore under no obligation to the mortgagee, Security Mortgage Company, to pay the taxes.

This court has recently said:

"The holder of the second mortgage was under no obligation to the holder of the first mortgage to redeem the lands in possession of the mortgagor from their sale for delinquent taxes, notwithstanding the owner was bound to the payment of such taxes by the terms of the first mortgage. The appellant, under its mortgage, could have paid the taxes before the lands were sold as delinquent and charged them against the mortgagor, and it could have redeemed the lands in the manner provided by the act from the tax sale within the time allowed therefor for such sale. Appellant makes no showing of having been prevented from either paying the taxes or redeeming the lands by any conduct of the holder of the second mortgage calculated to lull him into security in the belief that such taxes would be paid or redemption would be made for his benefit." *Security Mortgage Co.* v. *Herron,* 174 Ark. 698, 296 S. W. 363.

At the time the taxes became delinquent and at the time the lands were purchased by the district, the Bank of Lockesburg was not the owner, and therefore under no duty to pay the taxes.

"A bidder to whom property has been struck off at a judicial sale may assign his bid before the deed has been delivered, and the deed will be made directly to the assignee and pass title to him." 24 Cyc. 31; Wiltsie on Mortgage Foreclosure Sales (3 ed. vol. 1, § 678). "In the case of *Wells* v. *Rice,* 34 Ark. 346, the court said that a sale made under a decree of the chancery court is not completed until confirmed by the court, and a deed to the purchaser confers on him no right to the property." *Purcell* v. *Gann,* 113 Ark. 332, 168 S. W. 1102.

Appellant calls attention to the case of *McFaddin* v. *Bell,* 168 Ark. 826, 272 S. W. 62. This case holds that,

when one purchases subject to a mortgage, this amounts to a recognition by the purchaser or second mortgagee that such mortgages as were on record were prior valid liens on the lands, so, when the Bank of Lockesburg purchased the land, it purchased with the knowledge of the existence of the mortgage of appellant; but this does not mean that he owed any duty to the prior mortgagee to either pay the taxes or redeem from tax sales. Appellant argues that, since the Bank of Lockesburg was in possession of the land under its foreclosure of its second lien, receiving all rents and profits of the land, it became and was the duty of the bank to pay the taxes, but we do not find any evidence supporting the position or contention that the bank was in possession, receiving the rents and profits. Of course, where one is in possession, receiving rents and profits from mortgaged property, he has money received from property itself with which to pay the taxes, and it has been held that, under such circumstances, he owes the duty to pay the taxes, but the evidence in this case does not show that the bank was in possession and does not show that it received any rents or profits from the property. *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116.

It is contended also by the appellant that the letters introduced show that the bank intended to pay the first lien. E. K. Edwards, who is said to have been the attorney for the bank at the time, advised the mortgage company of the time of the sale, and stated that, if the bank became the purchaser at the sale, as it probably would, then the bank would pay the accrued interest on the loan and meet the other payments. This was a recognition of the prior lien of the mortgage company, but, even if competent evidence, it would not bind the bank to pay the taxes or redeem the land from tax sale. This letter was written in 1923, and the taxes became delinquent for the year 1921. Moreover, there is not any testimony that the bank authorized the letter or authorized any statement to be made justifying the conclusion that the bank had made a promise to pay appellant's

debt or to redeem the land from tax sale. Besides, nothing in the letter indicates that the bank intended to pay the taxes or that the mortgage company could construe as a promise to pay the taxes or to redeem from the tax sales.

As said in the case of *Security Mortgage Co.* v. *Herron, supra,* "appellant makes no showing of having been prevented from either paying the taxes or redeeming the lands by any conduct of the holder of the second mortgage calculated to lull him into security in the belief that such taxes would be paid or redemption would be made for his benefit."

The appellant could have paid the taxes, it could have prevented any delinquency, it could have paid the taxes before the lands were sold as delinquent and charged them against the mortgagor, or it could have redeemed the lands in the manner provided by law, but it did not undertake to do either. It suffered the lands to become delinquent, permitted them to be sold, the sale to be confirmed, a deed executed to the road improvement district, and apparently took no steps whatever to protect its interests.

We agree with contention of appellant that, if the bank was bound to pay the taxes to protect the prior mortgagee and permitted the same to forfeit, it would be treated as a redemption. It is also true that, if the proof showed that the bank was in possession, receiving the rents and profits, receiving the money with which to pay the taxes, or if the bank had been the owner when the taxes became delinquent and the land sold, it would have been its duty to pay.

We do not deem it necessary to call attention to other authorities, because we think the rule announced in *Security Mortgage Company* v. *Herron, supra,* is controlling in this case. We find no error in the decree of the chancery court, and it is therefore affirmed.

STEWART-MCGEHEE CONSTRUCTION COMPANY v. BREWSTER.

Opinion delivered February 27, 1928.

1. APPEAL AND ERROR—AMENDMENT OF COMPLAINT ON REMAND OF CASE.—Where, on former appeal, it was held that the complaints did not state a cause of action against the bonding company because not filed within the statutory period, and the cause was remanded for a new trial, it was not error to permit the complaints to be amended so as to charge defendant in an action of debt, where defendant was permitted to amend his answer and to file a cross-complaint.
2. PRINCIPAL AND AGENT—AUTHORITY OF CONTRACTOR'S FOREMAN.—The foreman of a building contractor in charge of the construction of a building had implied power to bind the contractor by placing orders for materials.
3. EVIDENCE—STATEMENT OF AGENT.—In an action by a materialman against a building contractor for materials furnished but charged in the name of a subcontractor, it was proper to admit evidence of a conversation with defendant's foreman in charge of the construction of the building in which the foreman told plaintiffs that the subcontractor had abandoned his contract and requested that material furnished be charged in the name of a subcontractor, but that defendant would pay for same.
4. PRINCIPAL AND AGENT—APPARENT AUTHORITY OF CONTRACTOR'S FOREMAN.—Defendant contractor's foreman in charge of construction of a building had apparent authority to direct materialmen to charge material furnished in the name of a subcontractor who had defaulted in his contract, for the convenience of the contractor in keeping an account separate, so that the contractor could hold the subcontractor's bondsmen liable for the amount thereof.
5. TRIAL—DISPUTED QUESTION OF FACT.—Where there is a disputed question of fact on the material issue, it is improper for the court to direct a verdict for either party.

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

S. L. White, for appellant.

Rowell & Alexander and *Harry T. Wooldridge*, for appellee.

MCHANEY, J. This is the second appeal of this case, the first being reported in 171 Ark. 197, 284 S. W. 53. The former case was first affirmed, and petition for rehearing overruled. A short time thereafter appellant

paid the judgments of the two lien claimants, who are the appellees herein. Some months after the first decision the court, on its own motion, recalled the judgment, amended its opinion, set aside the original judgment of affirmance, and reversed and dismissed the causes on the ground that, at the time the actions were instituted, the appellees did not have claims which might be the basis of liens, following its former decision in the case of *Acme Brick Co.* v. *Swim,* 168 Ark. 185, 269 S. W. 369. Thereafter the appellees filed a petition for rehearing, which was granted, and the former order of the court dismissing the case was set aside, and the cause was reversed, and remanded for a new trial. Thereupon appellant demanded of appellees that they refund it the money it had erroneously paid them, and, upon their refusal to return same, it filed an answer and cross-complaint in each case in the court below, alleging the facts heretofore set out, and prayed judgment against appellees for the amounts paid them. The facts in the original action are stated in the opinion on the former appeal.

The appellees answered, admitting that these payments had been made, but, by way of offset against any claim of appellant, they stated that it was indebted to them, as set out in the original complaint, which they pleaded in bar of any right of appellant on its cross-complaint. They also filed amendments to their original complaints, that the material sold to Shepherd, a subcontractor of appellant, was in fact contracted for by appellant, but was, at its request, and for its convenience in keeping separate the amount delivered to Shepherd, charged to Shepherd's account; that Shepherd had been doing the plastering work on the building, and that a controversy had arisen because of which Shepherd had abandoned his contract with appellant, and it was carrying out Shepherd's contract, and for this reason, in order to fix liability on Shepherd's bond to it, it desired the material charged to Shepherd, but that appellant agreed to pay for it; that the material was ordered out by appellant's superintendent in charge of the building, and that

all of the items were in fact delivered to appellant, who agreed to be primarily liable therefor, but desired the account carried in the name of Shepherd for its convenience; that, upon the completion of the contract, appellant, through its superintendent, requested a final statement, which was furnished and ok'd by its superintendent, and that the appellees were requested by appellant to bring action against it, Shepherd and the Fidelity & Deposit Company of Maryland, for the purpose of establishing their claims, so that appellant could realize on the bond of Shepherd.

Appellant answered, denying all these allegations, demurred to the amendment to the complaint, and moved to strike the same from the records, on the ground that it stated a new cause of action different from that alleged in its original complaint. The court overruled the demurrer and motion to strike, as also the plea of the statute of frauds, on the ground that said agreement was not in writing. The case was submitted to a jury, and, on a finding in favor of appellees, judgment was rendered for them, from which is this appeal.

We cannot agree with appellant that the court erred in overruling its demurrer and motion to strike. Appellant had been made a party defendant in the original suit because it was the original contractor, having given a bond to the State of Arkansas for the use and benefit of all persons who might have liens, in which it was set up that Shepherd, the contractor, had purchased the material. This was done at appellant's request in order to fix the liability of Shepherd so that appellant might collect from him on his bond given to the principal contractor. In that suit appellant was sought to be held as secondarily liable, that is, liable on its bond to all persons who might have liens. The effect of the decision in the former case was, as finally determined by this court, that the complaints in that case did not state a cause of action against the bonding company, because not filed within the ninety-day period fixed by the statute from the date of the last item of material that had been

furnished, and therefore did not fall within the statute giving materialmen a right of action against the bonding company, one of the defendants, as construed in the case of *Acme Brick Co.* v. *Swim, supra.* It did not preclude appellees, on a remand of the case, from amending their complaints in any manner which the facts justified to show appellant primarily liable for their claims. We do not think the cases cited by appellant support his contention in this regard. On a remand of the case the court permitted both sides to amend, appellant to amend its answer and file a cross-complaint, and the appellees to amend their complaints. By permitting the amendment to the complaint, the cause of action was changed from one on the bond to one of debt. Under our liberal system of pleading and amendments to pleadings, we do not think there was any error in permitting this to be done. Indeed, appellees could have filed an original suit against appellant, alleging that it purchased this material, had not paid for it, and praying for judgment for the amount thereof. Certainly, if this could be done, the court did not abuse its discretion in permitting appellees to amend their complaints and try out this matter in the suit pending.

The next assignment of error is that the court erred in overruling its objections to certain testimony of Brewster and McMillan. This testimony related to conversations had with one Ingram, who was the foreman of appellant in charge of the construction of the building. It is admitted by appellant that Ingram was its foreman in charge of the work, and had authority to order out material for the building as the work progressed. These conversations were to the effect that Ingram had told them that Shepherd had abandoned his contract for the plastering of the building, and that appellant had taken same over to be completed by it, and that, for its convenience, so that the plastering account and the general construction account would not get confused, it desired that the material furnished for plastering be charged in the name of Shepherd, but that it would be paid for

by appellant. Ingram had authority to order out material as the work progressed, and in fact did order same out from time to time as it was needed, and he had the implied power to bind appellant by placing orders for this material, as it was in the apparent scope of his authority. This, too, regardless of the fact that the president of appellant stated that he had no authority to make a contract for the purchase of material, but only to order same out after he had made the contract of purchase. By putting him in charge of the work, with authority to order out the material, he had the implied power to order any necessary material for the building, whether previously purchased by appellant's president or not. And we think the conversations above referred to were competent testimony, and that there was no error in the court's overruling the objections thereto. Being the foreman of construction, and being on the job all of the time, with authority to order out material, it was certainly within the apparent scope of his authority to direct appellees to charge the material in the name of Shepherd, who, it is alleged, defaulted in his contract to plaster the building, for the convenience of appellant in keeping the accounts separate, so that appellant could hold Shepherd's bondsmen liable for the amount thereof.

There was no error in the refusal of the court to instruct a verdict in appellant's favor, at the conclusion of appellee's testimony, and at the conclusion of all of the testimony. Appellees had testified to facts and circumstances which, if believed by the jury, made appellant primarily liable for the debts due appellees as having been ordered out by it directly, with a request to charge it to Shepherd. This was the state of the testimony when appellees rested. Appellant denied this evidence given by appellees, which made a disputed question of fact at the conclusion of all the evidence, making it a case for the jury. Where there is a disputed question of fact on a material issue, it is not proper for the court to instruct a verdict for either party.

Complaint is made to the giving of instructions requested by appellees and in modifying and giving one instruction requested by appellant. We have examined these assignments of error carefully, and find no error in them. We do not set them out, as it would unduly extend this opinion. Suffice it to say that the case was submitted to the jury under correct instructions which fairly submitted the contentions of both sides, and, it having found against appellant, the judgment will be affirmed.

CANNON v. HOPE FERTILIZER COMPANY.

Opinion delivered February 20, 1928.

1. CORPORATIONS—FAILURE TO FILE ANNUAL REPORT—LIABILITY OF OFFICERS.—In a suit against the administratrix of the secretary of a corporation to enforce the statutory liability for failure to file the annual report required by Crawford & Moses' Dig., §§ 1715, 1726, a recovery against the estate was warranted, where it was shown that the company was a corporation, that its officers failed to file an annual report, and that during the period of such default the indebtedness was incurred, and that intestate was at the time the secretary of the corporation.
2. CORPORATIONS—PROOF OF OFFICIAL CAPACITY.—In a suit by the creditors of a corporation to enforce the statutory liability of the president and secretary for failure to file the annual report required by Crawford & Moses' Dig., §§ 1715, 1726, checks drawn by defendant as president, to which she signed the name of her husband as secretary, which checks were charged to the account of the corporation, *held* admissible as tending to show that defendant was president of the corporation during the period it defaulted in making its report.
3. EVIDENCE—COPIES OF FRANCHISE TAX RETURNS OF CORPORATION.—Authenticated copies of the franchise tax returns by defendant's deceased husband as secretary of the corporation and by defendant as president, *held* admissible to show their official capacity in a suit to enforce the statutory liability for failure to file the annual report required by Crawford & Moses' Dig., §§ 1715, 1726; such copies being made competent evidence by Acts 1921, c. 238, § 1.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by substantial evidence is conclusive on appeal.

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

Collins & Collins, for appellant.

E. F. McFaddin, for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Sevier County by appellee, a creditor of the J. L. Cannon Company, a corporation, in the sum of $1,156.74, to enforce the statutory liability of the president and secretary of said corporation for failure to file the annual report required by §§ 1715 and 1726 of Crawford & Moses' Digest. All necessary allegations were made in the complaint to fix liability for said amount upon Mrs. E. I. Cannon, as administratrix of the estate of J. L. Cannon, who was the secretary of said corporation, and against her individually as president of the corporation.

Mrs. E. I. Cannon, as administratrix of the estate of J. L. Cannon, filed an answer admitting that she was administratrix of the estate and that J. L. Cannon was secretary of the corporation, J. L. Cannon Company, but denied that the J. L. Cannon Company was indebted to appellee in the sum alleged or that the officers of the corporation had failed to make the report required by said sections of the statutes; and for herself individually denied all the allegations of the complaint, particularly denying that she was ever president of the J. L. Cannon Company.

In the course of the trial it was admitted by appellants that the J. L. Cannon Company was a corporation; that J. L. Cannon was secretary thereof; that J. L. Cannon Company was indebted to appellee in the sum of $1,156.74; that Mrs. E. I. Cannon was the duly appointed and acting administratrix of the estate of J. L. Cannon, deceased; that J. L. Cannon Company was adjudged a bankrupt in the United States District Court on September 13, 1926. The records in the county clerk's office of said county disclosed that the officers of the J. L. Cannon Company failed to file the annual report of the

J. L. Cannon Company required by said sections of the statute.

At the conclusion of the testimony the trial court peremptorily instructed the jury to return a verdict in favor of appellee against Mrs. E. I. Cannon, as administratrix of the estate of J. L. Cannon, for the amount of the alleged indebtedness, but submitted to the jury the question of the liability of Mrs. E. I. Cannon individually. The jury returned a verdict for the full amount of the alleged indebtedness in favor of appellee against Mrs. E. I. Cannon individually.

An appeal has been duly prosecuted to this court from both judgments.

In order to recover the statutory penalty against the estate of J. L. Cannon, deceased, it was necessary to prove that J. L. Cannon Company was a corporation; that the officers of the corporation failed to file an annual report in the office of the county clerk of Sevier County during the years 1925 and 1926, and that during the period of such default the indebtedness was incurred, and that during the period of neglect to file said report J. L. Cannon was secretary of said corporation. All the facts, except the failure or neglect of the officers to file the report, were either admitted in the pleadings or in the course of the trial. The records of the clerk's office disclosed that the report was not filed by the officers of the said corporation during the years 1925 and 1926, the latter year being the year the account sued upon was incurred. This being true, the court correctly instructed the verdict against Mrs. E. I. Cannon, as administratrix of the estate of J. L. Cannon, deceased.

The only additional fact necessary to establish individual liability for the indebtedness against Mrs. E. I. Cannon was to show that she was president of the corporation during the year 1926, which was the period the debt was incurred, and that the officers of the corporation failed or neglected to file the report in the county clerk's office, required by § 1715 of Crawford & Moses' Digest. This issue was submitted to the jury, but appellant con-

tends that it was done without any competent evidence to warrant its submission. During the progress of the trial testimony was introduced showing that the stock owned by D. C. Goff in said corporation was sold and reissued to Mrs. E. I. Cannon on October 6, 1924. Five checks were also introduced in evidence, drawn by Mrs. E. I. Cannon, to which she signed the name of her husband, and these checks were charged to the account of J. L. Cannon Company. Objection was made to the introduction of the checks, but we think they were admissible as a circumstance tending to show that she exercised authority in the operation of the corporate business in an official capacity.

The franchise tax returns of 1925 and 1926, made to the Railroad Commission of Arkansas by J. L. Cannon, as secretary of the J. L. Cannon Company, showed that Mrs. E. I. Cannon was president of said corporation. Appellant objected to the introduction of the authenticated copies of these returns on the ground that they were merely *ex parte* affidavits. Certified copies of these returns are made competent evidence in any court of this State with like effect as the originals thereof, by act 238 of the Acts of the General Assembly of the State of Arkansas of 1921. Section 1 of said act is as follows:

"Copies of any record, book, report, paper or other document on file with, or of record in, the office of any public officer or commission of the State, or of any county officer, or any excerpts from such record, book, report, paper or other document, when duly certified by the officer or the secretary of the commission in whose control such record, book, paper or other document is found, shall be received in evidence in any court of this State with like effect as the originals thereof."

Although Mrs. E. I. Cannon denied that she was president of the corporation or that she had ever had anything to do with it or its affairs, this certificate was some substantial evidence tending to show that she was president of the corporation during the period it defaulted, through its officers, in making its report to

the county clerk, and during the period the indebtedness sought to be recovered in this suit was incurred. We think it, together with the checks issued by her and cashed out of the corporate funds, was sufficient evidence to send the issue of whether she was president to the jury. The jury found that she was president of the corporation, and, since the verdict is supported by some substantial evidence, appellant is bound by the verdict.

No error appearing, the judgment is affirmed.

UNITED FRIENDS OF AMERICA v. WALKER.

Opinion delivered February 20, 1928.

ACCORD AND SATISFACTION—ACCEPTANCE OF CHECK.—Acceptance by the beneficiaries of part payment in full settlement of a benefit certificate constituted an accord and satisfaction, precluding further recovery under the policy.

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

Troy W. Lewis and *Clayton Freeman,* for appellant.

Frank Pittard, for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered in the circuit court of Pulaski County for $100 in favor of appellees against appellant on a graded insurance benefit certificate issued by appellant upon the life of Oliver Facen, in which appellees were the beneficiaries. The beneficiaries were the wife and three daughters of the insured. They were ignorant negroes, in the sense that none of them could read and write.

In addition to denying any liability under the certificate, appellant interposed the defense of accord and satisfaction, and, at the conclusion of the testimony in the trial court, moved for a peremptory instruction, which the trial court refused to give, over the objection and exception of appellant.

The record reflects that, at the time the certificate was issued to Oliver Facen, he was a member of Beth-

lehem Council No. 88, a subordinate lodge of appellant's, located at Scott, Arkansas. The certificate provided that, if Oliver Facen should die after the second year of his membership in the lodge, appellant would pay his wife and three daughters $150 if he was "financial" or "clear on the books" of appellant. At the time of the insured's death he had not paid his dues for September, 1925. According to the contract he had until September 20 to pay his dues, but he died on September 21 without having paid. A dispute arose between appellant and the beneficiaries as to whether appellant was liable for anything under the benefit certificate. Mattie Brewer, formerly Mattie Facen, with friends, went to see C. B. Pettaway, supreme commander of appellant, and demanded payment of the policy. Pettaway denied all liability, but finally agreed to pay $50 on surrender of the benefit certificate for cancellation to the grand lodge. She procured the certificate from her stepmother, and surrendered it in exchange for a check in the following words and figures:

"UNITED FRIENDS OF AMERICA
A 6740
"Little Rock, Arkansas, October 7, 1925.

"Indorsement of this check will be considered as full payment in settlement of policy of Oliver Facen $50.00.

"Pay to the order of Hannah, Mattie, Luella, and Ara Facen $50 fifty and no/100 dollars.

"To W. B. Worthen Company, Bankers, of Little Rock, Ark.

"M. R. Perry, Supreme Secretary.
"J. R. Currie, Supreme Treasurer.

"Countersigned: C. B. Pettaway, Supreme Commander."

Mattie received the check on the day of its date, and took it immediately to her sister, Ara Walker, and left it with her. That night Ara Walker's husband read the check to her, and advised her to cash the check, then sue appellant for the balance of the face of the certificate. The face of the certificate was for $250, but it was

a graded certificate, and if the insured had been clear on the books of appellant only $150 could have been recovered under the clause in the policy which allowed that amount in case of the death of the insured after the policy was two years old.

Ara Walker kept the check until October 26, 1925, at which time she cashed it at her grocer's, and kept $12.50 for herself, and gave $12.50 to each of the other beneficiaries. The following indorsement appears on the check: "Hannah Facen, Mattie Facen, Ella Facen, Ara Facen," together with the name of F. M. Daley, who cashed the check. The check was then presented to and paid by the drawee, W. B. Worthen Company, and charged to the account of appellant.

The beneficiaries each testified that the check for $50 was a gift under a clause in the policy providing for a $50 burial payment in case the insured was clear on the books of appellant. There is no testimony in the record, however, tending to show that they were induced to accept the check as full payment in settlement of the policy through deception or fraud practiced upon them by any of appellant's agents. As appellees were not induced to accept the check through fraud, the acceptance and collection thereof with the following words on its face, "Indorsement of this check will be considered full payment in settlement of policy of Oliver Facen," was an accord and satisfaction.

On these undisputed facts it was the duty of the trial court to instruct a verdict for appellant, and, on account of his refusal to do so, the judgment is reversed, and cause is dismissed.

BRUCE v. BRUCE.

Opinion delivered February 20, 1928.

1. HOMESTEAD—RIGHT OF WIDOW.—In a suit by a widow to recover possession of lands occupied by her husband as homestead, her right to a homestead, if it accrued at all, accrued on the death of the husband.
2. HOMESTEAD — WIFE LIVING SEPARATE FROM HUSBAND.—Under Const., art. 9, § 6, providing for the vesting of a homestead, "if widow has no separate homestead in her own right," a widow who, at the time of her husband's death, was living separate from him on lands owned in her own right, was entitled to claim the homestead in his property on his death.
3. DOMICILE—WIFE LIVING APART FROM HUSBAND.—The domicile of a wife follows that of her husband, though she is living separate and apart from him, and her legal status is governed by that of her husband.
4. HOMESTEAD—ABANDONMENT BY WIDOW.—Const., art. 9, § 6, providing for the vesting of the homestead in the husband's land, "if the widow has no separate homestead in her own right," the fact that a widow lived apart from her husband, whether because of her fault or his, *held* not to amount to an abandonment of the homestead, where proof showed that the husband, prior to his death, told her that she had a home there whenever she wanted to return as long as she lived, and she recognized the property as her homestead to which she could return.

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

J. I. Alley, for appellant.

Minor Pipkin, for appellee.

MEHAFFY, J. A. M. Bruce and Mrs. L. B. Bruce were married several years before the beginning of this suit, and lived together about five years. Prior to the marriage Mrs. Bruce owned in her own right a small tract of land on which she lived as her homestead before their marriage, and, after she and Mr. Bruce disagreed, she moved back to this place, and lived there until the death of A. M. Bruce, which occurred in October, 1926. Both parties had been married previously and had grown children, but there were no minor children, and no children as the result of this marriage.

Prior to the death of A. M. Bruce he had arranged with his grandson, J. A. Bruce, to move in with him and take care of the place and take care of him. This grandson moved in about a year before Mr. Bruce died.

Soon after the death of A. M. Bruce his widow administered on the estate, took charge of the personal property, and demanded possession of the lands. And when the possession of the lands was denied her, she brought this suit. She also sued for damages for the use of the land.

There is no evidence tending to show who was at fault or who caused the separation. Mrs. Bruce herself testified that they could not agree, but that she visited him after she had left him, and he had told her that she had a home there whenever she wanted to come back, but that she did not go back there to live until after his death.

The case was tried before the court sitting as a jury, and a judgment was rendered for plaintiff, L. B. Bruce, for the recovery and possession of the lands, describing them, and for $40.25 as damages for the unlawful detention of said lands up to the date of the judgment, and at the rate of $116 a year from date of judgment until defendant yielded possession of said lands. The defendant objected and saved his exceptions, and filed motion for a new trial, which was overruled, and the case is here on appeal.

There is practically no dispute about the facts, and, as stated by counsel for appellant, "The first question in this case that presents itself is, what is meant by the constitutional provision to the effect that said widow has no separate homestead in her own right?"

Article 9, § 6, of the Constitution of Arkansas reads as follows:

"If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life. Provided, if the owner leaves children, one

or more, said child or children shall share with said widow, and be entitled to half the rents and profits till each of them arrives at twenty-one years of age; each child's rights to cease at twenty-one years of age, and the shares to go to the younger children, and then all to go to the widow; and provided, said widow or children may reside on the homestead or not. And, in case of the death of the widow, all of said homestead shall be vested in the minor children of the testator or intestate."

Appellant argues that the widow is not entitled to claim homestead out of the lands, because it is alleged she abandoned her husband and lived apart from him on a homestead belonging to her; that she owns and occupies a separate homestead in her own right, and that therefore she cannot claim one from her deceased husband. This is the only question in the case; the question whether she is entitled to a homestead in the lands of her deceased husband.

This is not claimed as the homestead of a wife or the head of a family, but is claimed as the widow's homestead, and, of course, her right to a widow's homestead, if it accrued at all, accrued upon the death of her husband.

This court said, in a case where a woman owned a separate homestead and lived on it several years before the death of her husband: "The only question addressed to us for determination is whether the ownership of the lands in her own right, and upon which she and her husband lived for some years in their early married life, bars her claim of homestead in his lands, which they had occupied as a homestead for many years next preceding and up to his death."

The difference between that case and this, of course, is that, in the present case, the wife was living on her own place at the time of the death of her husband, and in the case quoted from they had lived on her place but had moved back to his. But in each case she owned it in her own right, and we do not think that the facts in this case would preclude her from claiming a homestead in the lands of her deceased husband.

In the same case above quoted from, the court said:

"In construing the language of this section, this court, in *Thompson* v. *King,* 54 Ark. 11, 14 S. W. 926, said: 'The object of this section is to protect the home of the married and the family against seizure or sale, and no reason can be advanced why the land of the wife occupied as the home of the husband and his family should not be protected as well as the land of the husband should be when it is the homestead.' * * * The separate homestead referred to in the section of the Constitution just quoted is not the separate homestead of the wife, but of the widow, that is, the separate homestead of the widow, selected by her on her own lands after the death of her husband (for she is not the widow until then). * * * In other words, the section was construed to have reference to a separate homestead of the widow, established by her as a widow; that is, after, and not before, the death of her husband." *Wilmoth* v. *Gossett,* 71 Ark. 594, 76 S. W. 1073.

It will, of course, be conceded that, if Mrs. Bruce had lived with her husband on his homestead until he died, she would have been entitled to the homestead, notwithstanding she owned a tract on which she had formerly lived. To hold that the conduct of a man is such that his wife may live with him agreeably until he dies and be entitled to the homestead, and to contend that she would disentitle herself by leaving him, no matter what the treatment may have been, would be unreasonable. She becomes entitled to the widow's homestead upon his death, and not before. And the fact that they could not agree, and that this failure to agree made it necessary for her to live apart from him, should not and does not deprive her of her homestead rights under the Constitution.

This court said: "There is some testimony tending to show that plaintiff did not remain at home with that constancy due from a wife, but it is not sufficient to establish an abandonment of her husband's bed and board. Even if there had been such desertion, it did not amount

to a forfeiture of the widow's homestead right." *Brown* v. *Brown,* 104 Ark. 313, 149 S. W. 330.

The question in this case, of course, is that she owned and occupied another homestead, and in the above case it is not contended that she owned another homestead. But the owning of the other property is immaterial. As we have said, her right to a widow's homestead accrued when he died, and she had a right to select then. And if her abandonment or desertion did not deprive her of this right, certainly the fact that she lived on property belonging to her would not affect it.

In construing the section of the Constitution with reference to a widow's homestead, this court has said:

"It would seem that the language of this section of the Constitution settles the question involved in this suit. The appellee had never been divorced from her husband, and she was unquestionably his widow. How then can she be debarred of her homestead right, without reading into the Constitution an exception or provision it does not contain, to the effect that, if the wife abandon her husband, and is guilty of immoral and unwifely conduct, she shall forfeit her right thereby to the homestead? We think such a construction unwarranted and untenable. * * * In this State it is held that the domicile of the wife follows that of the husband, and we understand this to be the rule, and that the fact that she abandons her husband, and lives apart from him in another State, will not form an exception, nor cause her to forfeit her right to the homestead. She is not a nonresident while her husband is a resident. Her legal status, as to this, is governed by that of the husband." *Duffy* v. *Harris,* 65 Ark. 251, 45 S. W. 545, 40 L. R. A. 750, 67 Am. St. Rep. 925.

If the domicile of the wife follows that of the husband, and there can be no dispute about this, then the domicile of Mrs. Bruce, although living separate and apart from him, was the domicile of her husband. And her legal status is governed by that of her husband, and immediately on his death she becomes entitled to her

homestead as a widow. If, after his death, she had remained on her own property, claiming that as her homestead, it might have been an abandonment of her homestead in his estate. But she did not do this. She administered on his estate and claimed a homestead as his widow. And what the Constitution means in speaking of a separate homestead in her own right is that, as a widow, and not as a wife, she occupies and claims this homestead, because it says "the said widow has no homestead in her own right." She was not entitled to any widow's homestead until his death, and if she immediately claimed homestead in her husband's property, she did not, as widow or after she was his widow, claim a homestead elsewhere.

There is no dispute about the facts in this case. Our Constitution provides: "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall shall vest in her during her natural life," etc.

The only controversy at all is about the following portion of the section: "Has no separate homestead of her own right." Our court has construed this to mean a homestead of the widow, and not the homestead of the wife. She becomes entitled to it on his death, and unless, after his death, the widow selects some other homestead, she is entitled to this, and the fact that she had to live apart from the husband, whether it was her fault or his, does not amount to an abandonment of the homestead.

It has been said: "The law is not concerned about the precise locality of the family at any time, but it is concerned that, wherever they may be carried by convenience or chance or misfortune, there shall be a place to which they may return to find the shelter and security of a home. The homestead therefore is not to be likened to prison bounds, within which the family must always remain, but to a sanctuary to which they may always return. And an abandonment is accomplished, not by

going away without any intention of returning at any particular time in the future, but by going away with the definite intention never to return at all." *Foreman* v. *Meroney*, 62 Texas 723.

The undisputed proof is that the husband, prior to his death, told her that she had a home there whenever she wanted to return as long as she lived, and she recognized that as her right, as her homestead to which she could return.

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

GALION IRON WORKS & MANUFACTURING COMPANY *v.* OTTO V. MARTIN CONSTRUCTION COMPANY.

Opinion delivered February 20, 1928.

1. EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.—In an action by a buyer of a steam roller to recover the amount paid on its purchase price and damages, on account of misrepresentations as to its condition, a letter written by the seller to the buyer prior to the execution of the contract, stating that the roller was 60 per cent. as good as new and describing the boiler as being in good condition, *held* admissible to show false representations and fraud on the basis of which the sale was entered into, such evidence not being objectionable as varying the terms of the written contract subsequently executed.
2. EVIDENCE—FRAUDULENT REPRESENTATIONS.—Parol evidence of representations made by the seller's agent that a steam roller was ready to start operation, *held* admissible in a buyer's suit for damages on account of fraud under claim that the roller was worthless, where a contract of sale was subsequently entered into on the strength of such representations, and contained a guaranty that the goods were thoroughly serviceable and practical for the purposes for which they are designed.
3. FRAUD—REMEDY OF BUYER.—Where the seller of a steam roller, through its representatives, made false representations as to the condition of the roller for the purpose of inducing the sale, and the buyer, in reliance on such false statements, signed the contract of purchase, the buyer was not bound by the terms of the contract, but had a right to refuse to accept the property and to sue for resulting damages.

4. FRAUD—FALSE REPRESENTATIONS AS BASIS OF SUIT.—A suit by the buyer of a steam roller to recover payment made and damages on account of the worthless condition of the roller, in which the complaint alleged that, as a result of the seller's failure to furnish parts in accordance with the contract, the buyer was damaged, was based on false representations, in view of the allegation that the steam roller was wholly worthless for the purposes for which intended, and in view of the representations and guaranty that the goods were serviceable for such purposes.

5. SALES—RIGHT TO RECOVER PRICE.—Where a seller falsely represented that a steam roller was in condition for operation, in a suit by the buyer for false representations, it was not entitled to recover on notes given for the purchase price merely because it had supplied missing parts.

6. FRAUD—JURY QUESTION.—The issue whether the purchase of a steam roller was induced by the seller's false representations concerning its condition, precluding a recovery of the purchase price, *held* for the jury under the evidence in the buyer's action to recover damages for fraud.

7. SALES—FRAUDULENT REPRESENTATIONS—RECOVERY OF PRICE.—Where the purchase of a steam roller was induced by the seller's alleged false representations as to its condition, the seller was precluded from recovering the amount of the purchase price in the buyer's action for fraud.

8. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by substantial evidence will not be disturbed on appeal.

9. FRAUD—EVIDENCE.—In a buyer's action against the seller for false representations in the sale of a steam roller, recovery on account of the worthless condition of the roller at the time of its delivery by the carrier to the buyer was not precluded by the absence of evidence as to its condition at the time of its delivery by the seller to the carrier.

10. FRAUD—NOTICE OF DEFECTS.—Where a suit for false representations in the sale of a steam roller was based on a claim that the roller was completely worn out and worthless, no notice of the defects was required.

11. FRAUD—SALE OF MACHINERY—NOTICE OF INTENDED USE.—The fact that no notice had been served on a seller as to the uses to which a steam roller was intended, did not prevent a recovery for false representations in its sale, where it appeared from the evidence that the seller knew the purpose for which the roller was to be used, and sold it for that purpose.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; affirmed.

James B. McDonough, for appellant.

W. L. Curtis, for appellee.

MEHAFFY, J. The Otto V. Martin Construction Company filed in the Sebastian Circuit Court the following complaint:

"Comes now the Otto V. Martin Construction Company and, for its cause of action against the defendant, states:

"1. That the plaintiff is a corporation duly organized and existing under the laws of the State of Oklahoma, and has been domesticated and secured authority for the purpose of transacting business within the State of Arkansas, and that the defendant is a corporation organized and existing under the laws of the State of Ohio, and has a branch office for the purpose of transacting business within this State.

"2. That on the 8th day of September, 1923, the plaintiff purchased a certain steam roller from the defendant, for which he was to pay the sum of $700 f. o. b. cars at Memphis, Tennessee; that at the time of making said purchase he paid the sum of $350 to apply thereon, and was to pay the remaining $350 on October 1 and November 1, 1923, in equal installments; that the defendant, through its agents and representatives, represented that said steam roller was in first-class operating condition and as good as new, with the exception of certain parts, which had been stolen, and which said defendant was to replace; that said roller was bought with the distinct understanding between plaintiff and defendant that it was for immediate use upon certain highway construction work in which plaintiff was at that time engaged.

"3. That, when said steam roller reached Fort Smith, Arkansas, it was found to be old, dilapidated, and wholly worthless for the purposes for which the plaintiff intended to use it, and for the purposes which the defendant, through its agents, knew the plaintiff intended to use it, and that, after notice of its condition to the defendant, it failed, neglected and refused to furnish the parts

which it had agreed to furnish to recondition the roller, or to refund to plaintiff the advanced payments made by it to the defendant on the purchase price of said roller, and for freight and other expenses incurred by it in connection therewith, which resulted in its damages and injury in the following sums, to wit:

1.	Amount paid to apply on the purchase price	$350.00
2.	To Breslin Boiler Works	259.61
3.	For freight on same	270.00
	Making a total of	$879.61

"That, as a result of the failure of said defendant to furnish said parts in accordance with the terms of their contract and agreement, said plaintiff was unable to have the use of said steam roller at the time and for the purposes for which it was purchased, and was therefore required to and did rent a steam roller for the months of November and December, 1923, and January and February, 1924, for which he was required to pay rental of $200 per month, or an aggregate amount of $800, and that, by reason of the matters and things hereinabove referred to, said plaintiff was further damaged by the actions and breaches of the defendant in said sum."

Plaintiff asked judgment against the defendant for the sum of $1,679.61, and costs.

The appellants owned a second-hand 10-ton steam roller, which was near Pontotoc, in the State of Mississippi. Appellee desired to purchase a steam roller, and, after some negotiations, E. W. Clark, agent of appellee, was sent to examine the roller, but did not go to Pontotoc, but went to Memphis, and did not examine the roller, but entered into a written contract of purchase with one Berryhill, the sales agent of appellant, at Memphis. Said contract was signed, subject to the approval of Martin. Martin was called by telephone, and approved the contract, and a few days thereafter it was approved

by appellant's executive officer, F. W. Faber, secretary and treasurer. The roller was shipped from Pontotoc, Mississippi, to Fort Smith, Arkansas. The contract referred to is as follows:

"The following described goods, subject to the guaranty and conditions on the back of this order:

"1 Erie steam 10-ton tandem roller (used) just as it stands at Pontotoc, Miss., with exception of parts that have been stolen. We are to repair these. At $700.

"We hereby agree to receive the goods above specified and to settle for same with the Galion Iron Works and Manufacturing Company, Galion, Ohio, by the payment of seven hundred and no/100 dollars as follows: $350 in cash, and balance in warrants, notes or orders, drawn and executed according to law, and bearing 6 per cent. interest from date until paid.

"One note or order for $175, due October 1, 1923.

"One note or order for $175, due November 1, 1923.

"It is understood and agreed that all notes, orders, warrants, checks, drafts, money orders, or other evidences of payment shall be drawn to the order of the Galion Iron Works & Manufacturing Company.

"It is further mutually stipulated and agreed that the title and ownership of all property covered by this contract is to be and remain in said the Galion Iron Works & Manufacturing Company, its successors and assigns, until the purchase price thereof, with interest as above provided for, has been paid in full. In case any notes or warrants are given in settlement, the title and ownership of all of said property is to be and remain in the Galion Iron Works & Manufacturing Company, its successors or assigns, until each and all of such notes or warrants, or extensions or renewals thereof, or any part thereof, including all protest fees and expenses, have been paid.

"We hereby acknowledge an exact carbon copy of this order, which is not affected by any verbal agree-

ment, but which embodies the entire understanding, and is not subject to countermand.

"Otto V. Martin Const. Co.
"E. W. Clark.

"Accepted by the Galion Iron Works & Mfg. Co., Galion Ohio. F. W. Faber, Secretary-Treasurer."

Following pencil notation: "Paid Ck. for $350 as cash payment. Galion Iron Works & Mfg. Co. By Fred Berryhill."

On the back:

"Conditions. All agreements are subject to strikes, accidents, or other causes for delay over which we have no control. All claims for defective or broken goods must be made in writing within thirty days after receipt of same. All claims for goods broken or damaged in transit, or shortage in shipment, must be reported promptly, and said report must be accompanied by the freight receipt, properly noted by local freight agent at point of destination, showing shortage or damage, or both.

"Guaranty. The goods specified on the reverse side of this order are guaranteed to be thoroughly serviceable and practical for the purpose for which they are designed.

"If found defective in either material or workmanship, we agree to replace such defective parts free of charge, f. o. b. factory. Claims for defective parts must be made within one year from date of sale.

"The Galion Iron Works & Mfg. Co.
"Galion, Ohio."

The plaintiff's testimony tended to show that the roller was being used at the time; that a new one like it would cost from $3,600 to $4,000, and that appellant, in its statements to appellee, estimated this roller to be 60 per cent. as good as new. That it needed some parts, but that it was in good condition. There were no leaks, and it carried from 100 to 110 pounds of steam. The price of the roller was $700, $350 of which was paid in cash and two notes given for the balance. It was

reported to Martin that the condition of the roller had been fully described to him, that it was a good buy, and Martin did not see the roller until it was delivered in Fort Smith, on board the cars; that the roller was ready to start operation, and that neither Clark, the representative sent by appellee to examine the engine, nor Berryhill, the representative of appellant, ever saw the roller. Clark was a foreman of appellee, and Martin himself confirmed the contract. Martin did not see the roller for three months. It was sent to a machine shop, and Martin saw it in the shop in January. He testified that it was then a mass of junk. He did not get the parts referred to in the contract. He tried to get them, but the roller was out of date, and they did not make the parts any more. Appellee never did get the parts necessary to put the machine in a condition necessary for operation. Could not get the parts. Paid $259.61 to put the boiler in condition, but could not get the rest of it. Took the matter up with defendant, and defendant sent a representative to Fort Smith in February, 1924. Representative went with Martin to the machine shop and looked over the roller, and said he did not want Martin to think that the Galion Iron Works does things that way. That Mr. Berryhill had never seen the roller; one of his agents has taken it in, and that he would see that it is fixed up right away, and get the parts. Appellee never did get the parts, however. They do not make them any more. The roller was not made by the Galion Iron Works, but made by another person.

Numbers of letters and telegrams were introduced, and appellee wrote appellant that it was their intention to purchase necessary parts unless they heard from the appellant immediately. That he had been at the expense of something like $200, and yet the matter was unadjusted.

On February 22, 1923, there was a letter from appellee to appellant in which it was stated that they had been "expecting to receive a shipment of parts for the second-hand Erie roller bought from your Memphis

branch the latter part of 1923, this arrangement being made by your Mr. McDonald on his recent inspection here. Will you help us to get this roller in working condition at the earliest possible moment?"

Witness testified that he got no reply to this letter; tried to get the parts himself; incurred an expense of $270 in freight and expense of $259.61 in repairing the boiler. He refused to pay this, and told Breslin to sell the boiler for junk; it could not be used; the frame was broken. Witness then testified, over the objection of appellant, that he had to rent a roller at $200 a month. The roller reached Fort Smith probably the latter part of October, 1923. Witness himself did not examine it. He saw the roller the first time when he went with McDonald, February, 1924.

Clark was not present, and witness testified that he did not know where he was. He was with plaintiff about a year ago.

The proof on the part of appellant tended to show that Faber was an executive officer, and had everything to do with making contracts and notes, and he had to approve or disapprove orders, notes or other collateral. When he approved an order it became an obligation. He received written order in evidence in this case, and this order contained the following: "We hereby acknowledge an exact carbon copy of this order, which is not affected by any verbal agreement, but which embodies the entire understanding, and is not subject to countermand."

Appellant received the notes; still holds them; had correspondence with plaintiff; received a letter on December 28 concerning the notes; appellant was urging the payment of the notes. That the roller was sold to appellee as a used roller, and just as it stood at Pontotoc. Agreed to replace all stolen parts, and did replace them.

He testified that there was no report by anybody having authority that the roller was in first-class condition and as good as new. The contract as set forth in the general order embodies all the terms and conditions,

and was approved by the executive officer, and no salesman has any authority to make any verbal statement. Had no knowledge as to the uses to which plaintiff desired to apply the roller. After the order was received, appellant proceeded to replace all parts that were stolen. Had no business relations whatever with the Breslin Iron Works Company. The notes have never been paid. Berryhill took charge of the Memphis office from September 1, 1923, as appellant's sales representative.

We do not think it necessary to set out the testimony any further, except as attention may be called to it hereafter when necessary in the discussion of the questions raised.

The first contention of appellant is that the court erred in admitting letters, telegrams and oral evidence varying and contradicting and adding to the written agreement, and urges that the objection refers especially to a letter dated the 9th of June, 1923. It is contended that that letter, being written three months before the contract was made, is nothing more nor less than a part of the negotiations which ultimately resulted in the making of a contract, and that there is no ambiguity or doubt about the contract, and that appellee did not rely on the letter, because he sent his agent, Clark, to Mississippi and Tennessee to see the roller. It is argued that, since Clark was sent to Memphis to see the roller in operation, this was sufficient to prove that plaintiff did not rely on the letter of June 9.

Appellant cites and relies on *Goodwin* v. *Baker,* 129 Ark. 513, 197 S. W. 10. While the court held in that case that prior negotiations leading up to the written contract are merged, and that evidence of a contemporaneous parol agreement is not competent to vary the terms of the written agreement, yet it was said in that case:

"While the terms of the contract cannot be extended by parol evidence, such evidence may be admitted to show the circumstances under which the contract was executed, in order to construe the language thereof. * * * Courts may acquaint themselves with the per-

sons and circumstances that are the subject of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described."

The letter referred to stated where the boiler was situated, what the appellant gave for it, and also stated the price of a new boiler to be $3,600 to $4,000, and that they estimated this roller to be 60 per cent. as good as new, and further described the boiler as being in good condition, with no leaks, and that it carried from 100 to 110 pounds of steam.

This evidence did not contradict or vary the terms of the written contract. Moreover, another telegram dated July 25, 1923, was not objected to, and it read as follows:

"We assure you that condition of tandem roller has been fully described to you. It is a good buy, and upon receipt of your check for $350 and $350 with six per cent. interest, to be paid within ninety days, will ship roller per instructions your telegrams. Your inspector would be welcomed."

This telegram was admitted, as we have said, without objection. Or rather, objection was made and withdrawn. This said that the condition of the tandem roller has been fully described, evidently referring to the description in the letter of July 9.

The next case cited and relied on by appellant is *Graves* v. *Bodcaw Lumber Co.*, 129 Ark. 354, 196 S. W. 800. In that case the court reiterates the doctrine that negotiations leading up to the written contract are merged therein, and parol agreements are not competent to vary the terms of the written agreement. In the first place, this letter did not vary the terms of the written agreement. This court has said:

"It follows that, where the parties have by bill of sale, as in this case, or any other instrument, reduced

the contract of sale to writing, and have not provided for any warranty, or have incorporated express warranties, no parol evidence can be heard to show in the first case that there was a warranty, or in the second, that there were other or wider warranties than those expressed. The written instruments are held to contain everything of a contractual character which the parties finally intended should be binding, regardless of all previous negotiations. * * * Deceits, and false representations, intentionally made, regarding material matters, for the purpose of misleading another to his injury, are not contracts in any direct sense. Every one may be presumed, indeed, to agree that he will regulate his conduct by the laws of his country and the rules of fair dealing, and will abide the consequences of failure and detection. But in no other sense are they contracts. They are torts, for which heretofore lay actions on the case for deceit. * * * They differ from warranties in two very material points. The latter cannot, when the contract of sale has been reduced to writing, be supplied by parol proof. The former can be shown by parol, for they are torts outside the contract. Warranties bind, if untrue, without any regard to the good faith of the warrantor. This arises from their contractual character. He takes the risk of their truth, and means to bind himself to make a recompense if they are not. But false representations must not only mislead, but must have been made fraudulently and with that intent. * * * He will not be excused for want of candor and good faith with regard to such matters, and will be held responsible for false representations, not made in good faith, believing them to be true. He is bound only to a fair exercise of his own judgment in behalf of the other party, and not for an honest mistake."

The court, in speaking of instructions, continued: "The eighth instruction remedies the defect, and is, in effect, what the former would have been with the addition above suggested. It might well have been given." *Hanger* v. *Evins & Shinn,* 38 Ark. 337.

This letter was competent, not to vary the terms of the written contract, but to show false representations, deceit and fraud, and this, as held in the case to which we have referred, is not a contract, but a tort. And this evidence did not vary the terms of the contract, but was introduced for the purpose of showing the circumstances under which the sale was made and under which the contract was made, and to show fraud.

Appellant refers to *Harrower* v. *Insurance Co.*, 144 Ark. 279, 222 S. W. 39. This case reaffirms the doctrine, about which there is no dispute, that prior oral agreements and antecedent writings forming part of the negotiations for a contract become merged in the subsequent written contract, and are incompetent as evidence for the purpose of enlarging the scope of such written contract.

The letters introduced in this case were not for the purpose of enlarging the scope of the written contract, but for the purpose of showing false representations and deceit.

It is contended by the appellant that there is no evidence of any misrepresentations made by the defendant's agent, Berryhill. Berryhill made the contract with Clark, made the agreement, and on the agreement made was a guaranty that the goods were thoroughly serviceable and practical for the purpose for which they are designed. And Martin testified that Berryhill told him, in a conversation, that the roller was ready to start operation.

"Parol evidence is always admissible to show that an instrument was obtained by fraud or duress, and so to avoid it. In the absence of misrepresentation, fraud, or deceit, a party to a transaction is bound by the writing evidencing the agreement, though he was in fact ignorant of its contents. * * * So, where one has been induced by false representations to indorse a note, parol evidence is admissible to prove that fact. Similarly, parol evidence is admissible to show that a person

was induced to enter a written contract to purchase goods by false and fraudulent representations as to their quality. * * * Likewise, the rule that parol representations are not admissible to vary the terms of a written agreement has no application to representations which amount to a fraud practiced in procuring subscriptions to corporate stock. * * * It is a plain fraud to secure the execution of an instrument by representations differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would never have been signed at all." 10 R. C. L. 1058.

"As a general rule, a person whose rights or liabilities are affected by a written contract may introduce parol evidence to show accident, mistake or fraud, whereby the writing fails to express the actual agreement, and to prove the modification necessary to be made, whether such variation consists in limiting the scope of the contract, or in enlarging and extending it so as to embrace land or other subject-matter which has been omitted through the fraud or mistake. The extrinsic evidence rule should not be invoked as a shield for fraud, or be applied so as to work injustice." 10 R. C. L. 1056.

The appellant's next contention is that the court erred in giving, at plaintiff's request, number 1-a. The instruction reads as follows:

"You are instructed that, if you find from a preponderance of the testimony that defendant, through its representatives, as an inducement, made false or fraudulent statements to plaintiff as to the condition of the roller in question, and that the plaintiff believed said false or fraudulent statements, and would not have signed the contract of purchase but for same, then and in that event he would not be bound by the terms of said contract or order, but would have the right to refuse to accept the property and sue for whatever damages, if any, is shown that it incurred on account of same."

This is an action for fraud and false representations inducing the contract, and the instruction above quoted is correct.

The appellant argues that the statement in plaintiff's complaint, "that, as a result of the failure of said defendant to furnish said parts in accordance with the terms of their contract and agreement, and that he was thereby damaged," shows conclusively that the complaint was based solely on the written contract. Appellant, however, overlooks that part of the complaint which states: "That, when said steam roller reached Fort Smith, it was found to be old, dilapidated and wholly worthless for the purposes for which plaintiff intended to use the same, and for the purposes which the defendant, through its agents, knew the plaintiff intended to use it," etc.

When you consider this allegation in the complaint, together with the representations made, not only by letters but by the contract itself, it shows very clearly that the suit was brought on the false representations. The guaranty on the contract said that the goods were guaranteed to be thoroughly serviceable and practical for the purpose for which they are designed. But the complaint alleges that appellant knew the purposes for which they were designed, and that they were wholly unfit for that. The appellant's argument made and authorities cited under this claim of error are all based on the theory that the suit was on the contract, and that a party would not be allowed to repudiate or rescind it and sue on it at the same time.

Appellant's next contention is that the court erred in giving instruction number two. This instruction, however, could not have operated to the prejudice of appellant, because the jury returned a verdict only for $350 that plaintiff had paid and the freight that he had paid.

It is appellant's next contention that its instruction number five should have been given. The complaint is that the court erred in adding to the instruction "unless

defendant is precluded from so doing by other instructions."

The instruction requested was properly refused, because it told the jury that, if the defendant supplied the stolen parts, it was entitled to recover on the two notes.

As we have already stated, the suit is based on deceit or false statements, and not on the contract. If the contract was induced by false and fraudulent representations, or deceit, then the appellant would not be entitled to recover simply by supplying the stolen parts. And we think the court therefore did not err in refusing to give this instruction.

It is earnestly contended by appellant that the court should have directed a verdict in favor of the defendant for the amount claimed in the two notes. We do not agree with the appellant in this contention. The plaintiff based his action on and directed his proof to the proposition that false representations had been made by the defendant, which induced the purchase of the property. There is sufficient proof on this issue to go to the jury. It is not a question here as to whether we should find for one party or the other under the proof, and not a question of the preponderance of the evidence, but the rule is, if there is any substantial evidence to support the verdict, it will not be disturbed by this court, and there is some substantial evidence to support the verdict.

Appellant argues that the plaintiff furnished no evidence to show the condition of the roller at the time it was delivered to the plaintiff by delivery to the carrier at Pontotoc, Mississippi. There is no direct evidence that the roller was worthless at that time. That is, nobody examined it and then testified as to its condition, but the testimony or evidence as to the condition of it after it reached Fort Smith, if true, shows that its condition must have been the same when shipped from Pontotoc. In other words, it could not have been in good condition, or the condition which appellant said it was in at the time it was shipped from Pontotoc, and

then have been in the condition which the evidence shows it was in when it reached Fort Smith. No notice of defects was required, because the suit is based on the claim that the roller was completely worn out and worthless.

As to the proposition that no notice was served on appellant as to the uses for which the roller was intended, we think the proof is ample that appellant knew the purpose for which it was to be used, and sold it for that purpose. In fact, it was alleged by the appellant that it was, at the time of the contract, being used in Mississippi for the same purpose. The letter of June 9 states that it is on a road being used in road construction in Mississippi; and we think the testimony in the case, while not very convincing, is sufficient to sustain the verdict, and that the court properly instructed the jury, and the judgment is therefore affirmed.

McKINNEY v. NEW ROCKY GROCERY COMPANY.

Opinion delivered February 20, 1928.

1. MORTGAGES—JURISDICTION TO ENFORCE LIEN.—Where a complaint alleged that plaintiff had bills of sale of lumber which was being removed by defendants, which bills of sale gave him a lien, alleging the insolvency of one of the defendants and the nonresidence of the other, and asking that a receiver be appointed to take charge of the property, and where it appeared that the parties treated the bills of sale, not as an absolute sale, but as mortgages, and that plaintiff did not seek to take the lumber as belonging to him, by the enforced lien created by the bill of sale, chancery had jurisdiction to enforce the lien.
2. APPEARANCE—FILING ANSWER.—Where a nonresident defendant filed an answer without reserving objection to the court's jurisdiction of his person, the court acquired jurisdiction over his person.
3. APPEARANCE—OBJECTION TO JURISDICTION.—A defendant appearing specifically to object to the jurisdiction of the court must, as a general rule, keep out of the court for all other purposes, and if he takes any steps consistent with the hypothesis that the court

has jurisdiction of the cause and his person, he will be *held* to have appeared generally.

4. FRAUDS, STATUTE OF—VALIDITY OF CONTRACT.—A contract between partners and the company whereby the company was to receive a share of the profits of the manufacture and sale of lumber in consideration of advances to one of the partners, *held* not within the statute of frauds.

5. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—An agent with authority to purchase timber and make contracts for manufacture, hauling and shipment of lumber, had apparent authority to enter into a contract on behalf of the principal, whereby a part of the profits from the manufacture of lumber was promised to secure advances to further a shipment of lumber.

6. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Findings of fact by a chancellor will not be disturbed on appeal unless against the preponderance of the evidence.

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

T. B. Vance, for appellant.

Shaver, Shaver & Williams and *Otis Gilleylen,* for appellee.

MEHAFFY, J. The New Rocky Grocery Company brought suit in the Little River Chancery Court against P. D. Whatley and J. A. McKinney, doing business under the name of the Twin City Lumber Company. It alleged that P. D. Whatley was indebted to the grocery company in the sum of $1,231.18, and that, to secure the payment of said indebtedness, Whatley executed and delivered a bill of sale to certain lumber. Thereafter other bills of sale of lumber were executed and delivered by Whatley to the appellee, and it is alleged that McKinney is a nonresident, living in Brooklyn, New York, and that P. D. Whatley and McKinney entered into an agreement with the plaintiff by which plaintiff was to make certain advances to Whatley to enable him to manufacture and ship lumber to McKinney, and that appellee was to share in the profits from the manufacture and sale of the said lumber. That, while operating under this agreement, the defendant, Whatley, manufactured and shipped to McKinney large quantities of lumber, on which the appellee was entitled to one-half

the profits. That Whatley and McKinney agreed and undertook to ship and sell the lumber and to account to plaintiff for the value thereof, and that they had shipped large quantities, and failed and refused to account for same, and that they had appropriated the same to their own use.

It was further alleged that there was 75,000 feet of said lumber at Foreman, Arkansas, and that plaintiff had a lien on this lumber, and that the defendants are selling it and removing it from the State, with the intent to defraud plaintiff. That Whatley was wholly insolvent, and defendant McKinney a nonresident. That the accounts between the parties were long, intricate and complicated, and prayed for judgment against Whatley, and asked that the judgment be declared a lien against the lumber. Asked for judgment against McKinney for his part of the profits, and for the appointment of a receiver.

The bills of sale from Whatley to the appellee were filed, affidavit and bond for attachment, and a forthcoming bond was filed by J. A. McKinney.

McKinney filed a motion to dismiss the attachment on the 6th day of March. The complaint was filed on February 15, and on February 19 the forthcoming bond was filed. On March 6 defendant filed a motion to make complaint more definite and certain, and thereafter filed a separate answer, stating that he did not waive his demurrer.

The court found for the appellee, sustained the attachment, and gave judgment against McKinney and the sureties on the forthcoming bond, and found the indebtedness due the appellee from Whatley. The court also required the plaintiff to make his complaint more specific in certain particulars, as requested by defendant, McKinney, in his motion.

Appellant contends that the chancery court had no jurisdiction, and also that the attachment was not properly issued.

Plaintiff alleged that he had bills of sale for lumber which was being removed by the defendants, and that this bill of sale of the specific lumber, describing it, gave him a lien, which of course, if true, he could enforce in the chancery court. In addition to this, plaintiff alleged the insolvency of Whatley and the nonresidence of McKinney, and asked that a receiver be appointed to take charge of the property.

Certainly the chancery court had jurisdiction of this suit. It was the proper court in which to enforce the lien. All of the parties treated the bills of sale not as absolute sales but as mortgages, and plaintiff did not seek to take the lumber as belonging to him by the enforcement of the lien created by the bill of sale. All of the bills of sale given by Whatley were treated as mortgages, treated as creating liens, and not as conveying the absolute title to the property. We therefore conclude that the chancery court had jurisdiction of the subject-matter.

But it is contended that the attachment was not issued in the manner provided by the statute. Since the court had the right to take charge of the property under the allegations in the complaint, without any regard to the attachment, it appears that it would be immaterial whether the attachment was properly issued or not, since, if the court had a right to take charge of the property and did take charge of it, it would be immaterial whether it did it under the attachment or by appointing a receiver, and it is therefore unimportant to decide whether the attachment originally issued was properly issued or not. Moreover, the court permitted an amendment, which it had a right to do.

The main contention of appellant, however, is that the court retained jurisdiction over the appellant by reason of the attachment branch of the suit. The record shows that the court had jurisdiction of the person of McKinney without any regard to the attachment. It is true McKinney gave a forthcoming bond and thereby entered his appearance, but he not only did that, he filed

a motion to make the complaint more specific, and did this without reserving any objection to the jurisdiction of the court. Not only this, but he afterwards filed an answer, entering a general appearance and asking for relief from the court.

This court held, on February 13, 1928, in the case of *Federal Land Bank* v. *Gladish, ante,* p. 267, that, where one asked affirmative relief of a court, or appeared and pleaded, without reserving his objections to the jurisdiction or to the service, he was in court for all purposes.

"A defendant appearing specially to object to the jurisdiction of the court must, as a general rule, keep out of court for all other purposes. In other words, he must limit his appearance to that particular question, or he will be held to have appeared generally and to have waived the objection. If he takes any step consistent with the hypothesis that the court has jurisdiction of the cause and the person, such special appearance is converted into a general one, whether it is limited in its terms to a special purpose or not." 4 C. J. 1319.

Again: "One seeking to take advantage of want of jurisdiction in every such case must, according to these decisions, object on that ground alone. He must keep out of court for every other purpose. If he goes in for any purpose incompatible with the supposition that the court has no power of jurisdiction on account of defective service of process upon him, he goes in and submits for all the purposes of personal jurisdiction with respect to himself, and cannot afterwards be heard to make objection." 2 R. C. L. 339.

We therefore conclude that the court had jurisdiction, not only of the subject-matter but of the person of the defendant.

It appeared from the evidence that Whatley and McKinney had a lumber contract, and that McKinney, doing business as the Twin City Lumber Company, had a representative in Little River County, and that, subsequent to the making of the contract between McKinney and Whatley, McKinney, Whatley and the New Rocky

Grocery Company entered into a contract with reference to the profits, or providing that appellee should have a portion of the profits.

It is contended by appellant that this was for the purpose of collecting an old debt due from Whatley to the appellee. But it makes no difference what appellee's purpose was, or, rather, it is immaterial whether it was to collect an old debt or not, the allegation and proof are to the effect that he was to make advances and assist in the manufacture of lumber, and was to have one-half of the net profits. This was a contract that the parties had a legal right to make, and it is a question of evidence as to whether they did make it.

It is next contended by appellant that the judgment is based, or in part based, on a contract within the statute of frauds. We do not think the statute of frauds is involved, and appellant does not point out in just what way the statute of frauds affects the case. But it is contended that that part of the judgment giving appellee a lien for part of the profits is within the statute of frauds. This is what we understand the appellant to argue. We do not think that the contract between the parties was either within the statute of frauds or was without consideration, and this is a question of fact which was determined by the chancellor.

Stackhouse was the representative of appellant, superintended or supervised the purchasing, manufacture and shipment of lumber. About this there does not seem to be any dispute in the testimony, and if he had authority to purchase timber, make contracts for the manufacture, hauling and shipment of lumber, the contract alleged to have been made in this case was within the apparent scope of his authority, and would bind his principal.

We deem it unnecessary to set out the testimony at length. This court has many times held that the findings of fact by a chancellor, unless against the preponderance of the evidence, will not be disturbed. It would serve no

purpose to set out the testimony at length or to call attention to authorities supporting this rule.

We think the chancellor's finding was sustained by a preponderance of the evidence, and the decree is therefore affirmed.

STUBBS v. WRIGHT.

Opinion delivered February 20, 1928.

1. CORPORATIONS—AUTHORITY OF RECEIVER OF INSOLVENT CORPORATION.—It was error to direct the receiver of an insolvent corporation to take possession of property which did not appear to belong to the corporation for which he was appointed.
2. CORPORATIONS—INSOLVENCY—DECREE FOR OUTSTANDING RECEIVER'S CHECKS.—In insolvency proceedings in which a receiver was appointed for a domestic corporation, it was error to render a judgment for undetermined amount of outstanding receiver's checks and declare the amount thereof a lien against property in the hands of the receiver.
3. CORPORATIONS—FOREIGN CORPORATION DOING BUSINESS IN STATE.—A foreign corporation was not doing business within the State, in violation of the State's law, where the transactions in which it became a mortgagee of property were interstate, and at a time when it was a partnership, and where, before intervening in a suit as claimant under a chattel mortgage of property within the State, it had complied with the State laws.

Appeal from Pulaski Chancery Court; *Frank H. Dodge*, Chancellor; reversed.

Sam T. & Tom Poe, Floyd Sharp and *McDonald Poe*, for appellant.

Horace Chamberlin, for appellee.

McHANEY, J. Appellant, Stubbs, is the trustee in a chattel mortgage executed by one J. A. Coleman to the Triple XXX Company, a Texas corporation, to secure an indebtedness due it by Coleman of approximately $18,000. The appellee, A. L. Wright, brought this suit against one W. C. Dunn, said Coleman, and the Arkansas Triple XXX Company, an Arkansas corporation, on a promissory note for $800 executed by the Arkansas Triple XXX Company and indorsed by Dunn and Cole-

man to M. B. Morgan, which he had acquired in due course, alleging the insolvency of the Arkansas Triple XXX Company, and praying the appointment of a receiver therefor, and W. E. Greene, clerk of the court, was appointed receiver for said company. He was directed to and did take charge of the business of the Arkansas Triple XXX Company. He also took charge of the property belonging to said Coleman, which had been mortgaged by him to appellant corporation, and which was being used in the business of the Arkansas Triple XXX Company. The Texas Company was organized as a corporation on January 3, 1927. Prior to that time it was a partnership, doing business at Galveston, Texas, under the trade name of Southern Beverage Company. It was licensed to do business in Arkansas on July 21, 1927. It is the owner of a formula and trade-mark for the manufacture, sale and distribution of root beer, which it has advertised extensively under the trade name of Triple XXX, and it is the owner of various articles of equipment suitable for use in dispensing its brand of root beer. It grants, by contract with sundry people throughout the country, the right or license to make and sell this brand of root beer, and also leases its equipment to be used in dispensing its product, retaining title to the equipment and permitting the use thereof by others, subject to the terms of the license agreement. In March, 1926, prior to its incorporation, Southern Beverage Company, the partnership, leased three lots at the southeast corner of Fourteenth and Main Streets, Little Rock, Arkansas, and erected thereon a small brick building, which is known as a "thirst station," and equipped same for the sale of Triple XXX root beer. It thereafter on July 26, 1926, leased said property to said Dunn, who contracted to buy the improvements at Fourteenth and Main streets, and entered into a lease agreement for the use of the equipment. Dunn paid a portion of the purchase price in cash, and executed his notes and the deed of trust on the improvements on the leased property at Fourteenth and Main, and a chattel mortgage on the

personal property, to secure his indebtedness to the Southern Beverage Company. Dunn failed to pay the purchase price in accordance with the terms of the agreement, and in May, 1927, he conveyed all of said property to the appellant, Triple XXX Company, in full settlement of his indebtedness to it, and on May 5, 1927, the same property was resold to said Coleman for $19,360, of which $1,000 was paid in cash, and for the balance Coleman executed his notes, and on June 6, 1927, he executed to appellant, Charles J. Stubbs, as trustee for the Triple XXX Company, a deed of trust covering all of the property he had theretofore purchased from the Triple XXX Company. At the time the receiver was appointed and the property involved in this action was taken over by him, Coleman was delinquent in the payment of his notes to appellant. It further appears that, although Coleman and Dunn had organized the Arkansas Triple XXX Company, the title to this property had never been conveyed to it.

On July 26, 1927, appellants intervened in this action for the appointment of a receiver, set up its claim to the property held by Greene as receiver, and asked for the delivery of the property to it, and for damages for the wrongful detention of the property.

The appellees answered the intervention, denying its rights, for the reason that it was a foreign corporation, not having complied with the laws of this State, and that it was engaged in business in this State contrary to the laws of this State applying to foreign corporations.

On July 30, 1927, the court entered an order, finding that appellants were entitled to possession of the property involved in the action, directing the immediate delivery thereof by the receiver, but required appellants to execute a bond in the sum of $2,000 conditioned to pay any sums which might finally be adjudged as liens against the property prior to appellant's claims. Appellants filed the bond conditioned as aforesaid, and took possession of the property. The court also directed the receiver to pay all expenses of operation of the business incurred

by him, and to file his final report. On August 6 the receiver made an oral report to the court, stating that he had issued checks in connection with the receivership in excess of the funds in his hands, and asked the instructions of the court as to the method of procedure to raise the necessary funds to pay the outstanding checks. The amount thereof, nor to whom payable, nor for what purpose, is stated in the record. The court entered a decree declaring the undetermined amount of the unpaid checks of the receiver a lien against the property which he had ordered returned to appellants on the execution of the bond, prior and paramount to the title of appellants and all other parties to the action, and directed the receiver to take charge thereof and operate the property until a sufficient amount of money was obtained to pay the unpaid checks, unless a sufficient sum of money was paid to the receiver, on or before August 15, to cover the amount of such checks. The receiver was also ordered to prepare and file a written statement, showing the exact amount of each check outstanding which remained unpaid, the dates thereof, the name of the payee, and the purpose for which same was issued. From this latter order or decree this appeal is prosecuted.

We think this order was erroneous. In the first place, it is not shown that the Arkansas Triple XXX Company had any interest in the property which the receiver was ordered and directed to surrender to appellants. The receiver was appointed for the Arkansas Triple XXX Company, and for no one else. If the property was not the property of the Arkansas Triple XXX Company, but was the property of J. A. Coleman and appellants, or either or both of them, certainly the receiver of the Arkansas Triple XXX Company had no right or authority to take possession or control of any property that did not belong to it. The receiver was not appointed to take charge of the property of Coleman. If in fact Coleman had conveyed his equity in the property to the Arkansas Triple XXX Company, then the receiver was justified in taking charge thereof, and in operating

it as the property of the Arkansas Triple XXX Company, subject to the rights of appellants therein. And the equity therein of the Arkansas Triple XXX Company, if any, could have been sold by order of the court to satisfy the claims of creditors of the Arkansas Triple XXX Company. In the second place, in the order of July 30, the court directed the immediate delivery by the receiver of the property to appellants, and required them to give a bond in the sum of $2,000 to pay all sums which might be adjudged to be liens against the property prior to the lien of appellants. In the order of August 6 it adjudged an undetermined amount of outstanding checks to be liens superior to the claims of appellants, but did not attempt to enforce them by a proceeding against the bond. Instead, the court ordered the receiver to retake the property and operate it to pay these sums. The court could not render a judgment for an undetermined amount and declare it to be a lien against the property, as the judgment would have to be for a definite and certain sum, and, if a lien at all, the bond should have been subjected to the payment thereof, instead of the repossession of the property.

We do not think there is any merit in the contention that appellant, Triple XXX Company, being a foreign corporation, was doing business in this State in violation of the laws of this State relating to foreign corporations. All of the transactions heretofore set out with Dunn were had before the incorporation of appellant, at a time when it was a partnership, doing business as the Southern Beverage Company. The transactions between Coleman and it were had and done in the State of Texas, and were interstate in character. It complied with the laws of this State on July 21, 1927, and thereafter filed its intervention. *L. D. Powell Co.* v. *Rountree*, 157 Ark. 121, 247 S. W. 389, 30 A. L. R. 414; *Linograph Co.* v. *Logan*, 175 Ark. 194, 299 S. W. 609.

For the error indicated the judgment will be reversed, and the cause remanded with directions to ascertain the amount of the outstanding checks issued

by the receiver in payment of the expenses of the receivership, the nature and purpose thereof, and to determine whether such amounts are superior to the lien of appellants, and, if so, to enforce collection thereof out of the bond so given by appellants to obtain possession of the property; but, if not, then to collect same out of the bond of petitioner, Wright, given to obtain the appointment of a receiver, in the event there be no assets in the hands of the receiver belonging to the Arkansas Triple XXX Company. It is so ordered.

DRAINAGE DISTRICT NO. 9 OF MILLER COUNTY *v.* MERCHANTS' & PLANTERS' BANK.

Opinion delivered February 20, 1928.

1. DRAINS—REQUIREMENT OF NOTICE OF ESTABLISHMENT OF DISTRICT AND ASSESSMENT OF BENEFITS.—The requirements of Crawford & Moses' Dig., §§ 3607, 3615, relating to notice of formation of drainage districts and of the assessment of benefits, are jurisdictional, as publication of notice is in the nature of constructive service, and compliance with the statute is necessary.
2. DRAINS—PUBLICATION OF NOTICE.—Under Crawford & Moses' Dig., §§ 3607, 3615, requiring publication of notices in some newspaper published and having a general circulation in the county and issued within the county, *held* that notices of the organization of a drainage district and of the assessment of benefits therein, which were printed on presses located across the State line, but brought into a town within the county and bearing the name of such town and county and distributed therefrom in the first instance, was a sufficient compliance with such statutes.

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

B. E. Carter and *J. D. Head,* for appellant.

Henry Moore, Jr., for appellee.

McHANEY, J. Appellant, Drainage District No. 9, Miller County, Arkansas, was organized under the provisions of §§ 3607 *et seq.* of C. & M. Digest, and was begun by petition filed in Miller County Court on August 16,

1927. The procedure provided by statute having been complied with, the court, on August 17, 1927, made an order fixing September 3 thereafter as the day on which the court would hear said petition, and directed the clerk to give notice, calling upon the property owners to appear at such hearing and show cause for or against the establishment of the district. The clerk complied with the order of the court by publishing such a notice in the Texarkana Evening News, a newspaper actually printed in the State of Texas, about one-half block across the State line from the Arkansas side, but which carried a Texarkana, Arkansas, headline and dating, and the whole issue of such newspaper, after being so printed in Texas, was actually carted to the office of the Texarkana Evening News on the Arkansas side of the State line, and about one-half block therefrom, and there, for the first time, released and distributed to the public, both by newsboys and by mail.

On the day so appointed for the hearing a majority petition was filed, and the court made an order establishing the district and appointing commissioners, in which it found that the clerk "has given due notice by publication for more than two weeks in the Texarkana Evening News, a newspaper published and having a general circulation in Miller County, Arkansas," etc. Thereafter the commissioners appointed by the court filed their assessment of benefits, and the court fixed October 3, 1927, for a hearing thereon, and the clerk was again directed to publish a notice of this hearing. The notice thereof was published in the same newspaper. On October 1 the appellee, being a property owner in the district, filed its protest against the assessment, on the ground that the assessment of benefits was void, for the reason, as alleged, that no notice had been given by the clerk to property owners of the date fixed by the court to show cause for or against the establishment of the district "by any publication in a newspaper published in and having a general circulation in Miller County, and no notice has been given as required by law of the assess-

ment of benefits by publication for two weeks in any weekly newspaper published and issued and having a general circulation in Miller County, Arkansas."

On October 3, the date set for the hearing, the court entered an order finding "that the Texarkana Evening News is run through the presses and printed in Texarkana, Texas, and is thereafter brought in bulk to the office of said paper at 217 Vine Street, in Texarkana, Miller County, Arkansas, and is there distributed to newspaper boys for sale on the street and to carriers for delivery to subscribers. The court finds that said newspaper is not published in Miller County, Arkansas, that no other notice of said hearing was given, and that said order establishing said district is void."

From that order appellant took an appeal to the circuit court, where, on December 15, 1927, it made a finding substantially in the same language as the finding of the county court, and in addition that "said paper has a *bona fide* circulation in Miller County, and there is no other paper which purports to be published or issued in said county." And entered an order confirming the judgment of the county court, from which the drainage district has appealed to this court.

The only question we find it necessary to decide in this case is whether the above notices were published in compliance with the statute. If so, then the district was legally organized, and notice of the assessment of benefits was properly given, otherwise the judgment of the circuit court is correct.

That part of § 3607, C. & M. Digest, relating to the publication of a notice to the property owners in the establishment of the district, reads as follows: "The county clerk shall thereupon give notice by publication for two weeks in some newspaper published and having a general circulation in the county, calling upon all persons owning property within said district to appear before the court on some day to be fixed by the court, to show cause in favor of or against the establishment of said district."

And that part of § 3615 relating to the notice to be given by the clerk on the filing of the assessment of benefits reads as follows: "Upon the filing of said assessment the county clerk shall give notice of the fact by publication two weeks in some weekly newspaper issued in each of the counties in which the lands of the district may lie."

The act of May 8, 1899, brought forward in the Digest as § 6807 under the head of "Legal Notices and Advertisements," reads as follows:

"All advertisements and orders of publication required by law or order of any court, or in conformity with any deed of trust, or real estate mortgage, or chattel mortgage, where the amount therein received exceeds the sum of $350, or power of attorney or administrators' notices to be made, shall be published in some newspaper published and having a *bona fide* circulation in the county in which the proceedings are had, to which such advertisement or order of publication shall pertain; if there be no newspaper published in such county, then by posting five written or printed notices in five of the most public places in such county; provided, the provisions of this act shall not apply to sales under executions issued by justices of the peace; and provided further, that, as to amounts under $350, notices, written or printed, may be posted in five conspicuous places in the county, and notice shall be served in all cases upon the debtor as summons are now served."

It will be noted in none of the statutes above quoted that the word "printed" is anywhere used therein so as to require such notices to be "printed" and "published" in the county. In the first statute quoted, § 3607, the notice is required to be given by publication "in some newspaper published and having a general circulation in the county." The next section quoted, § 3615, is that the publication shall be in some newspaper "issued" in the county, and that the general statute pertaining to legal notices and advertisements is that they "shall be

published in some newspaper published and having a *bona fide* circulation in the county."

Under the statute existing prior to 1899 relating to legal notices and advertisements, which provided that the publication shall be "in some daily or weekly newspaper printed in the county where the suit or proceeding is pending, or where the * * * subject of the proceeding or publication is situated, provided there be any newspaper printed in the county having a *bona fide* circulation therein, which shall have been regularly published in said county for the period of one month next before the date of the publication of said advertisement," this court held, in *Jackson* v. *Beatty,* 68 Ark. 269, 57 S. W. 799, that the word "published" as used in that statute was synonymous with the word "printed." The court there said: "Nor will we, in this special statutory and summary proceeding, indulge in any astute refinements of construction in order to show that the statute in regard to jurisdiction has been complied with."

The substance of the opinion in this case is stated in the syllabus as follows:

"An order calling in county warrants for cancellation and reissue is void where neither the proof of publication, nor the sheriff's return, nor the record of the court, shows that the newspapers in which such order was advertised were regularly published in the county for the period of one month next before the date of the first publication of said advertisement, as required by Mansfield's Digest, § 4356."

The decision in this case, being under a different statute, cannot be controlling here. Since, as we have seen, the Legislature has removed the requirement that the notice of publication be made in a newspaper printed in the county, the question for our determination is, whether the Texarkana Evening News was published in Texarkana, Miller County, Arkansas, although printed in Texarkana, Texas. Nor do we think that the decisions of this court in *Wolf* v. *Phillips,* 107 Ark. 376, 155 S. W. 924, where it was held that a paper printed in one judicial

district and having a circulation in the other did not comply with the law requiring publication in a newspaper in the district where the land is located, and *Gibson* v. *Incorporated Town of Hoxie,* 110 Ark. 547, 162 S. W. 568, where it was held that the statute requiring certain city ordinances relating to improvement districts to be published in some newspaper published in said city or town for one insertion, were mandatory, and required such notices to be published in a paper actually published in the city or town where the ordinance is passed, and the publication of the ordinance in a newspaper published in the adjoining town of Walnut Ridge was not in compliance with the statute, although there was no paper published in Hoxie at that time, are controlling here.

The whole object of the statute relating to notice in the formation of drainage districts and the assessment of benefits therein is to give notice to that part of the public affected thereby, and is jurisdictional. The publication of the notice must be made in accordance with the statute, as it is in the nature of constructive service and takes the place of actual service on those interested. As was said by this court in *Winn* v. *Campbell,* 94 Ark. 341, 126 S. W. 1060: "That publication required by the statute was intended as a substitute for personal service, and, in order to give the court jurisdiction, compliance with the terms of the statute was imperative."

The best definition of the word "publish" that has been brought to our attention, and the one that apparently has been adopted and accepted generally by the courts of last resort throughout the country, was that of Mr. Justice Field in *Leroy* v. *Jamison,* Fed. Cases 8271, where he said:

"In one sense, a paper is published in every place where it is circulated, or its contents are made known. But it is not in that general sense that the language, 'place of publication' in the statute is used. That language refers to the particular place where the paper is first issued, that is, given to the public for circulation."

This definition was followed by the New York Court in the case of *In re Gainsway,* 66 Misc. Rep. 521, 123 N. Y. Supp. 966, where the court said:

"The proof is satisfactory that the notice appeared in a printed newspaper known as the Remsen News, which was circulated in the town of Remsen, at least five days before the election. But the claim is that the Remsen News is not a newspaper published in the town of Remsen. The proof shows that the Remsen News is a weekly newspaper, printed in some place other than the town of Remsen, but entered as second-class matter in the town of Remsen, and mailed to a large number of subscribers in the postoffice at the village of Remsen, and itself shows that it is intended for the town of Remsen and to be uttered and distributed in the first instance in said town. In my opinion, at the time of the alleged publication, it was a newspaper published in the town of Remsen, and the notice was legally published."

That decision was under a statute that provided that the notices "shall * * * be published at least five times before the vote is to be taken, once in one newspaper published in the county in which such town is situated, which shall be a newspaper published in the town, if there be one."

The Illinois Supreme Court, in *Polzin* v. *Rand-McNally & Co.,* 250 Ill. 561, 95 N. E. 623, Ann. Cas. 1912B, 471, defined the word "published" as follows: "By the word 'published' is clearly meant the place where the newspaper is first issued or printed, to be sent out by mail, or otherwise."

See also *People* v. *Read,* 256 Ill. 408, 100 N. E. 230, Ann. Cas. 1913E, 293; *Nebraska Land etc. Co.* v. *McKinley-Lanning Loan & Trust Co.,* 52 Neb. 210, 72 N. W. 357; *Amos Brown's Estate* v. *City of West Seattle,* 43 Wash. 26, 85 Pac. 854; *LeFavor* v. *Ludolph,* 35 Cal. App. 145, 169 Pac. 412. And in 29 Cyc., under the head of "Notices," it said: "The place of publication of a newspaper is that indicated on its face, and such paper is printed in the place so designated, within the meaning of

a statute requiring the publication of a certain advertisement, and it matters not that part or even all of its issue is printed elsewhere, or that part of its issue is mailed elsewhere. The whole city, village or township in which a newspaper is published is its place of publication within the meaning of a statute requiring an advertisement to be published in a newspaper."

Since, as we have already seen that the Texarkana Evening News, although printed in Texarkana, Texas, is brought across the line into Texarkana, Miller County, Arkansas, showing on its face that it is a Texarkana, Miller County, Arkansas, publication, with such a headline and dating, and for distribution to the public in the first instance, it necessarily follows that such newspaper was published in Texarkana, Miller County, Arkansas, within the meaning of the statutes relating to notices in the organization of drainage districts and the assessment of benefits therein, as heretofore quoted.

The judgment of the circuit court will therefore be reversed, and remanded with direction to enter a judgment overruling the order of the county court and sustaining the legality of the organization of the district and the assessment of benefits therein, in so far as affected by the legality of the notice published in the Texarkana Evening News, and for further proceedings according to law.

ARKANSAS RAILROAD COMMISSION v. GALUTZA.

Opinion delivered February 20, 1928.

PUBLIC SERVICE COMMISSIONS—NECESSITY OF MOTION FOR APPEAL.—Where the Railroad Commission failed to file a motion in writing in the circuit court, praying an appeal from the circuit court's order setting aside the Commission's action, as required by Acts 1921, c. 124, § 21, the appeal of the Commission will be dismissed.

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

H. W. Applegate, Attorney General, *John L. Carter,* Assistant, and *Robinson, House & Moses,* for appellant.

Charles Stan Harley and *Louis Tarlowski,* for appellee.

MEHAFFY, J. The Messina Bus Line was granted a license certificate on May 31, 1927, authorizing it to operate a bus line on certain highways in the State of Arkansas, particularly from Helena to Ferguson, in Phillips County. On June 15, 1927, the Railroad Commission granted a permit to operate a taxi service to Joe Galutza, G. Centenio and Mike Messina, and the permit for taxi service provided, among other things:

"It is further ordered that said Joe Galutza shall not operate upon a fixed schedule between fixed *termini* and over the route of a bus line heretofore granted or hereafter to be granted a license certificate, the intent of the Commission in issuing this permit being that applicant herein shall not interfere with the operation of a regular bus line."

The Messina Bus Line filed a petition before the Railroad Commission, alleging that it had a license and permit to operate a bus line from Helena to Ferguson and other places, and that, on the 15th day of June, 1927, the defendants were granted a permit to operate a taxi service, and it alleged that they operated their cars ahead of the Messina Bus Line schedule; they took on and discharged passengers at all points between Helena and Ferguson and return, and that the service as conducted by them seriously interferes with the operating of the Messina Bus Line Company; that the defendants have no fixed schedule, no fixed *termini,* and the method by which they are operating results in great damage and unfair and unauthorized competition to the plaintiffs. The prayer was for a hearing and cancellation of permits granted to the defendant.

The defendants filed response, denying the material allegations of the complaint.

The Railroad Commission gave notice, and granted a hearing, and, after hearing the testimony, the Commis-

sion found that the defendants had violated the terms of their permits, and made an order canceling the permit to the defendants. An appeal was taken to the Pulaski Circuit Court, where a trial was had, and the circuit court found that the order of the Railroad Commission was unreasonable, and should be set aside, and made an order setting it aside.

The Arkansas Railroad Commission filed its transcript in court, and prayed an appeal, which was granted by the clerk of this court on November 14, 1927. The Arkansas Railroad Commission did not file any motion for a new trial in the circuit court.

Appellee's first contention is that the appeal should be dismissed because no motion for new trial was filed in the lower court.

Section 21 of act 124 of the General Assembly of 1921 provides the manner in which appeals must be taken to the Supreme Court. That part of it necessary to be considered here reads as follows:

"Appeal to the Supreme Court.—Within thirty days after rendition of any order of any circuit court under the terms of this act, whether such order be rendered on appeal of municipal council or city commission action, or Arkansas Railroad Commission action, any party aggrieved may file a motion in writing in said circuit court, or in the office of the clerk thereof, praying an appeal from such order to the Supreme Court of Arkansas, which motion, when so filed, shall be granted as a matter of right by the said circuit court or by the clerk thereof; and in such case the appeal to the Supreme Court shall be governed by the procedure, and reviewed in the manner applicable to other appeals from such circuit court, except that any finding of fact by the circuit court shall not be binding on the Supreme Court, but the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable. The record shall be lodged in the office of the clerk of the Supreme Court within sixty days from the rendition of the order in the circuit court, and

all such cases shall be regarded and treated in the Supreme Court as cases involving public interest, and shall be advanced and given preference on the docket of said court on motion of either party."

It will be observed from the reading of this act that the party aggrieved, or the party desiring to take an appeal, takes the appeal by filing a motion in writing in the circuit court, or in the office of the clerk of the circuit court, praying an appeal. It is necessary that this motion in writing be filed. This was not done by the appellant in this case.

It therefore appears that the appellant did not take an appeal in the manner provided by law by filing his motion in writing in the circuit court or with the circuit clerk, and the appeal is therefore dismissed.

WILLIAMS v. KAGY.

Opinion delivered February 27, 1928.

1. GAMING—BETTING ON ELECTIONS—Betting on the result of elections, including primary elections, is illegal and void, under Crawford & Moses' Dig., § 3890, making it a misdemeanor to bet on the result of any general, special or primary election in this State.
2. GAMING—RECOVERY OF BET.—The provision in Crawford & Moses' Dig., § 4899, that a bettor may recover money or property from the winner by a suit within 90 days after payment of the money or delivery of the property, does not apply to a stakeholder nor affect his liability to a bettor who requests return of the wager while the contract is executory, but applies only to the bettor after execution of the contract.
3. GAMING—RIGHT TO RECOVER BET.—One making a bet as to the result of primary election to nominate a candidate for the office of sheriff is entitled to recover amount of the wager deposited with the stakeholder, under Crawford & Moses' Dig., § 3890, where he requested its return before the stockholder had paid it over to the winner.

Appeal from Sebastian Circuit Court; *J. Sam Wood*, Judge; reversed.

W. L. Curtis, for appellant.

James B. McDonough, Jr., and *James B. McDonough,* for appellee.

HUMPHREYS, J. This suit was brought in the Fort Smith District of Sebastian County by appellant against appellees to recover $1,000 posted by him as a bet or wager with J. D. Kuykendall that John B. Williams would receive more votes for sheriff than Pink Shaw in the Democratic nominating primary election held on the 10th day of August, 1926. It was alleged that, a few days before the election, appellant and J. L. Kuykendall made a bet, and each posted a wager of $1,000 with R. H. Kagy, cashier of the City National Bank, as stakeholder, with instructions to deliver the entire amount, or $2,000, to appellant if John B. Williams won, but to J. L. Kuykendall if Pink Shaw won; after the primary, and while a controversy was pending with reference to which candidate received the greater number of votes, and while the wager was still in the hands of the stakeholder, appellant notified R. H. Kagy to return to each one of the bettors the amount he had deposited as a wager, and that Kagy returned the $1,000 to J. L. Kuykendall but refused to return the $1,000 to him, and, instead, deposited said amount to the credit of J. L. Kuykendall in a special fund or deposit in the City National Bank, under agreement that it should not be subject to check.

Summons was issued and served upon R. H. Kagy on December 13, 1926, and upon J. L. Kuykendall and the City National Bank on January 13, 1927. On March 5, 1927, R. H. Kagy and the City National Bank filed an answer, denying the material allegations of the complaint, and alleging that the wager was placed in the hands of R. H. Kagy as stakeholder under agreement that the total amount should be delivered to J. L. Kuykendall if Pink Shaw was elected next sheriff in the Democratic primary election of Sebastian County, but, if not, to appellant. They further denied any liability either to appellant or J. L. Kuykendall, or that they had any interest in the litigation, or had ever asserted any right

to the money, or that it was incumbent upon them to decide which was entitled to the wager. They admitted that, after receiving notice from appellant to return each his money, they returned $1,000 to Kuykendall, but placed the other $1,000 deposited by appellant in a special fund with the understanding that it should abide decision of a court.

J. L. Kuykendall filed a separate answer, specifically denying that he made a wager with appellant or posted any money with R. H. Kagy for that purpose.

The cause was submitted upon the pleadings and testimony, at the conclusion of which each asked for a peremptory instruction in his favor, and asked no other instructions. The court instructed a verdict in favor of appellees, which the jury returned, and upon which judgment was rendered dismissing appellant's complaint at his cost, from which is this appeal.

The bill of exceptions reflects, according to the undisputed testimony, that appellant and J. D. Kuykendall bet $1,000 on the result of the race for sheriff between John B. Williams and Pink Shaw in the Democratic primary election held in Sebastian County on the 10th day of August, 1926, and posted $1,000 each with R. H. Kagy, cashier of the City National Bank of Fort Smith, as stakeholder, under agreement that the entire amount should be delivered to appellant if John B. Williams should win and to J. D. Kuykendall in case Pink Shaw should win the nomination. A controversy arose between the two candidates as to which was nominated, resulting in a contest in court, which was decided in favor of Pink Shaw. While the money was still in the hands of the stakeholder, appellant notified him to return each the amount he had posted or deposited with him. After receiving the notice, R. H. Kagy returned $1,000 to J. D. Kuykendall, but refused to return appellant the $1,000 he had posted with him, but placed it in a special fund or deposit in the City National Bank in the name of J. D. Kuykendall, with the understanding that it was not subject to check and to remain intact and abide the decision

of a court as to whom it belonged. It was discovered in the course of the trial that J. L. Kuykendall had nothing to do with the bet. J. L. was the father of J. D. Kuykendall, who made the wager. J. D. Kuykendall was not made a party to the suit.

Appellant contends for a reversal of the judgment upon the theory that the common-law rule prevails in Arkansas with reference to the recovery of money from a stakeholder on illegal wagers. Betting on the result of elections, including primary elections, is contrary to statute, and void in this State. Section 3890 of Crawford & Moses' Digest makes it a misdemeanor to bet on elections. It reads as follows:

"Every person who shall make any bet or wager upon the result of any general, special or primary election in this State, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined any sum not less than $50."

Even before the passage of the statute quoted, this court ruled, in the case of *Jeffrey* v. *Ficklin and Bennett,* 3 Ark. 227, 36 Am. Dec. 456, that wagers upon elections then pending are calculated to endanger the peace and harmony of society and have a corrupting influence upon the morals, and are contrary to sound policy. In that case the court quoted with approval the doctrine announced by Comyn on Contracts, as follows:

"It is a general rule that, if the contract be executed and both parties *in pari delicto,* neither of them can recover from the other the moneys bet; but if the contract continues, and the party is desirous of rescinding it, he may do so, and recover back the deposit. And this distinction is taken in the books, viz.: Where the action is an affirmance of an illegal contract, for the performance of an engagement *malum in se,* it can in no case be maintained. But, where the action is in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an

unlawful act, then it is consonant to the spirit and policy of the law that he should recover."

In the case of *Perkins* v. *Clems,* 23 Ark. 221, this court said:

"It is held by the great current of authorities that the loser of money upon an illegal wager may recover it of a stakeholder at any time before he pays it over to the winner, and that it does not lie in his mouth to say that the wager is illegal, and keep the money."

In 12 R. C. L. page 765, paragraph 67, the rule is stated as follows:

"While there is some authority to the effect that the courts will not entertain an action by the loser on a bet against the stakeholder after the event by which the bet is determined, almost all the authorities hold that, if money or property is placed in the hands of a stakeholder, to abide the result of a bet, or as a forfeit to bind parties to an illegal contract, it may, while it remains in his hands, be arrested by the bailor before or after the happening of the event on which the money is to be paid or the forfeiture depends."

The Arkansas case of *Jeffrey* v. *Ficklin and Bennett, supra,* is cited in support of the rule.

The Legislature of our State has enlarged the general rule by statute so that the loser of money or property may recover same from the winner if suit is brought for it in ninety days after payment of the money or delivery of the property so lost. Section 4899, Crawford & Moses' Digest. This statute has no application to a stakeholder nor in any way affects his liability to a bettor who repents and requests the return of his wager while the unlawful contract is executory. It only applies to bettors after the execution of the unlawful contract.

Appellee insists that the bettors as well as the stakeholders are *in pari delicto* and that courts will not interfere in favor of either. This was the case under the common law rule with reference to executed unlawful wagers, or in suits to enforce such unlawful wagers, but not in suits for rescission of executory unlawful wagers.

The trial court should have instructed a verdict for appellant, under the undisputed facts in the record.

The judgment is therefore reversed, and judgment is directed to be entered here against appellees and their bondsmen for $1,000, with interest at six per cent. per annum from December 13, 1926.

BOULLIOUN v. LITTLE ROCK.

Opinion delivered February 27, 1928.

1. MUNICIPAL CORPORATIONS—REMOVAL OF IMPROVEMENT DISTRICT COMMISSIONERS—SUFFICIENCY OF PETITION.—A petition to remove the commissioners of a street improvement district, which charges them with incompetency, gross negligence, willful disregard of duties, waste of funds and failure to file an annual settlement with vouchers, as required by Crawford & Moses' Dig., § 5718, *held* to state a cause for removal.
2. MUNICIPAL CORPORATIONS—REMOVAL OF IMPROVEMENT DISTRICT COMMISSIONERS.—A city council has authority to remove from office commissioners of a street improvement district.
3. MUNICIPAL CORPORATIONS—REMOVAL OF IMPROVEMENT DISTRICT COMMISSIONERS.—In a proceeding to remove the commissioners of a street improvement district, it was not necessary that the city council should vote or make finding upon each separate charge, but it could decide upon proof of the sufficiency of the proof as a whole.
4. MUNICIPAL CORPORATIONS—REMOVAL OF IMPROVEMENT DISTRICT COMMISSIONERS.—Although certain members of the city council before the hearing in a proceeding for removal of improvement district commissioners had already reported on the district's affairs with findings adverse to the commissioners, such fact did not disqualify them from participating in the hearing and decision.
5. MUNICIPAL CORPORATIONS—REMOVAL OF IMPROVEMENT DISTRICT COMMISSIONERS.—Commissioners of a street improvement district, removed from office by the city council after hearings, *held* not entitled to a trial by all the members of the council, and hence their removal was legal, although certain members were absent from some of the hearings.
6. MUNICIPAL CORPORATIONS—REMOVAL OF IMPROVEMENT DISTRICT COMMISSIONERS.—Although certain members of the city council, in

a proceeding to remove the commissioners of a street improvement district from office were not present at all of the hearings, that did not disqualify them from voting on the final decisions.

7. MUNICIPAL CORPORATIONS—HEARING OF PETITION FOR REMOVAL OF IMPROVEMENT DISTRICT COMMISSIONERS.—In hearing on petitions for removal of the commissioners of a street improvement district, the city council does not constitute a court, but acts in a *quasi*-judicial capacity only.

8. MUNICIPAL CORPORATIONS—REVIEW OF ACTION OF CITY COUNCIL.—The action of the city council in removing commissioners of the street improvement district from office is reviewable by the courts on certiorari.

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

STATEMENT BY THE COURT.

This appeal is prosecuted from the order and judgment of the circuit court of Pulaski County refusing to quash, on certiorari, the order of the city council removing appellants as commissioners of Street Improvement District No. 349 and its annexes in the city of Little Rock.

It appears that four petitions, preferring charges against the commissioners and asking their removal from office, were filed with the city clerk between the dates of July 20 and September 12, 1927; that the commissioners were duly notified of the charges pending against them on the 14th day September, 1927, and summoned to appear before the council and answer said charges on the night of the 26th of September, 1927, twelve days after the summons.

They appeared in person and by counsel on September 26, 1927, and, after a hearing for several hours, the council adjourned until the night of October 3, 1927, at which time the commissioners were present with their counsel at the hearing, which was adjourned until the night of October 5, 1927, when the commissioners were again present, and the hearing was finally concluded. Sixteen of the eighteen members of the council found the commissioners guilty of the charges preferred, and adopted a resolution and made an order removing them from office.

Herman Heiden, an owner of property in Street Improvement District No. 349 and the Marshall Street Annex thereto, filed a supplementary petition, requesting the removal of the commissioners of the improvement district, adopting and making part of his petition the petitions for removal of the commissioners already filed with the council by S. M. Alley, Joe Ferguson, and others; also the report and petition filed with the council by the committee of which J. A. Craft was chairman, and the report filed with the council by its committee on streets, of which Alderman Gay was chairman, relating to the district and its annexes, with the resolution and petition attached thereto; and, for further cause for removal of the commissioners, stated that they had refused to furnish the accountants selected by the city of Little Rock with information that would enable them to make an audit of the district's affairs. The petition was verified and filed on September 27, 1927.

The sixteen members present, of the whole number of eighteen alderman elected to the council, at the conclusion of the hearing passed a resolution finding the charges sustained, and made an order removing the commissioners. The circuit court, on petition for certiorari, examined the order of the council, and affirmed it, and the appeal here comes from that order.

Melbourne M. Martin, for appellant.
Pat L. Robinson, for appellee.

KIRBY, J. There is no merit in the contention that the charges or petitions for removal of the board of improvement of the district and its annexes were not sworn to, or the complaint that the members were not duly notified of the filing thereof. The undisputed testimony shows the filing of a verified petition or complaint by Herman Heiden, and the attachment thereto as exhibits of the other petitions and requests of committees, also verified, all specifying charges against the members of the board for incompetency, gross negligence, and willful disregard of their duties, mismanage-

ment, and waste of the funds, and failure to file the annual settlements with vouchers as the law requires.

The testimony also shows that they had more than ten days' notice of the time set for hearing of these petitions by the city council, and that they attended in person and by attorney the meetings of the council throughout the entire hearing, and filed no answer denying any of the charges made and produced no testimony in explanation or in justification of their conduct.

The law requires the boards of improvement in municipal improvement districts to file annual statements or settlements with the clerk of the city or town in which such improvements have been ordered made, showing all collections and money received and paid out, with proper vouchers for all such payments (See § 5718, C. & M. Digest). The undisputed testimony shows that they failed to file such vouchers showing the payments of the money with their settlements, and also that they refused to furnish the auditor, appointed by the city council to examine and audit the accounts of the district, with such vouchers, their attorney saying that they did not have them, and would not produce them for his examination if they could.

The auditor testified that there was a discrepancy or difference in the amount of the expenditures as shown by the annual settlement of the board, and such vouchers and information as he could get from others, and the books and accounts of the contractor, engineer and the bank, and that it was impossible to tell what went with this money, in the state of the accounts, and that he had no assistance from the commissioners in trying to make a correct audit of the affairs of the district and its annexes.

Certainly the cause or grounds alleged for the removal of the members of the board of improvement related specially to and affected the administration of the office, and were all substantial matters directly affecting the rights and interest of the public, and constituted cause for removal within the provisions of the statute,

and the council was acting within its authority in removing them. *Carswell* v. *Hammock,* 127 Ark. 110, 191 S. W. 935.

It was not necessary that the council should vote or make a finding upon each specification or charge made as cause for removal of the commissioners, as contended by appellants. It had the right to consider the proof as a whole and to decide upon its sufficiency as a whole, and was not required to vote upon each or any separate charge without reference to the evidence or proof upon the other charges or specifications, as held in *Carswell* v. *Hammock, supra.* There is nothing shown in this case to warrant the request for overruling that case as a correct statement of the law.

Whatever the reason for the action of these commissioners in the conduct of the affairs of the district and their failure to keep proper accounts of the money collected and paid out by the district, and make annual report or settlements thereof, with the vouchers showing the payments as required by law, the record here justifies the wisdom of such requirement of the law.

Neither do we think there is any merit in appellants' contentions that they were entitled to a trial before all the members of the council, or that they can complain that some of its members who sat in the trial had already made a report to the council upon the affairs of the district, showing they had a fixed opinion about the action of the commissioners upon trial on the charges, amounting to preventing their having a fair trial before an impartial tribunal, and that any member of the council who was not present at each and all the meetings of the council during the hearing of the matter was disqualified to vote upon the final decision.

The council was not a court, and was acting in a *quasi*-judicial capacity only in the hearing of the petition for removal, and its members were not disqualified to act because some of them had already, in an official capacity as members of the committee, investigated the condi-

tions and reported their findings to the council, indicating an opinion adverse to the innocence of the commissioners.

The council is given jurisdiction to remove any member of the board of improvement of an improvement district by a two-thirds vote of the whole number of aldermen elected to the council, and in the hearing it could doubtless have followed its own rules of procedure, and, by a committee of its members appointed, made an investigation of the charges preferred, and recommended a decision or determination of the matter, which, of course, must have been concurred in by a two-thirds vote of the whole number of the aldermen elected.

The fact that one of the sixteen members of the council voting for the removal was absent from the hearing one night, and that another missed two of the meetings, could make no difference nor affect the result, since sixteen of the eighteen aldermen elected to the council concurred in voting for the resolution, the decision, or order for the removal of the commissioners.

The fact that some of the councilmen had already made an adverse finding to the innocence of the commissioners, in an official report to the council made after an investigation of the affairs of the district, out of which the charges grew, did not disqualify them from participating in the hearing and decision of the question, in any event. The law makes no provision for any such condition, and the council's action can be reviewed by the courts on certiorari. *Hale* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041; *Carswell* v. *Hammock, supra.*

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

WESTERN UNION TELEGRAPH COMPANY v. FORT SMITH BODY COMPANY.

Opinion delivered February 27, 1928.

1. TELEGRAPHS AND TELEPHONES—CONTRIBUTORY NEGLIGENCE.—In an action for damages caused by error in the transmission of a telegram to plaintiff's agent, whether the latter was negligent in attempting to interpret an unintelligible message, without asking the sender for confirmation, *held* for the jury.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The jury's finding on a question of fact, properly submitted to them, cannot be disturbed by the Supreme Court.
3. TELEGRAPHS AND TELEPHONES — CONTRIBUTORY NEGLIGENCE. — Whether the plaintiff was justified in acting on a telegram to an agent as interpreted by the latter in answer to plaintiff's inquiry, *held* for the jury in an action against the telegraph company for damages by error in the transmission of such message.
4. TELEGRAPHS AND TELEPHONES — CONTRIBUTORY NEGLIGENCE. — Whether plaintiff, acting on a telegram as interpreted by its agent, was guilty of contributory negligence, depends on whether the plaintiff acted as a person of ordinary prudence would have acted under the same circumstances.
5. TELEGRAPHS AND TELEPHONES—INSTRUCTION AS TO CONTRIBUTORY NEGLIGENCE.—In a seller's action against a telegraph company for damages by error in the transmission of the buyer's telegram to the seller's agent, an instruction that plaintiff cannot recover if the jury believe that plaintiff's agent was negligent in not asking the buyer to confirm the message on receiving plaintiff's message asking for information, because the agent's first message to plaintiff was not clear, correctly submitted the question of the agent's negligence.
6. TELEGRAPHS AND TELEPHONES—SUFFICIENCY OF EVIDENCE—DAMAGES.—Evidence *held* sufficient to sustain a verdict of the seller, suing a telegraph company for damages resulting from the former's shipment of more than the number of automobile bodies ordered by the buyer in consequence of defendant's error in transmitting a telegram directing shipment.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; affirmed.

Francis R. Stark, Rose, Hemingway, Cantrell & Loughborough and *Pryor, Miles & Pryor,* for appellant.

James B. McDonough, for appellee.

MEHAFFY, J. The appellee, Fort Smith Body Company, engaged in the manufacture and sale of bodies for automobiles and trucks, etc., in the city of Fort Smith, Arkansas, brought suit in the Sebastian Circuit Court against the appellant, Western Union Telegraph Company, alleging that the Knapp Motor Company of Donna, Texas, sent a wire to appellee's agent, George F. Hall, at San Antonio, Texas. The following is a copy of the telegram sent:

"Ship rush freight twelve special wide express with stock rack open cab and windshield and six open cabs and windshields only at same price terms and so forth as stipulated in our order dated May nineteen your number ten five one. Stop. Wire acceptance. Signed, Knapp Motor Company."

The message was addressed to George F. Hall, San Antonio, Texas. The appellant, in transmitting the message from Donna, Texas, to San Antonio, changed the letter "y" to the letter "f" in the eighth word from the end, making it read "four" instead of "your," so that, when George F. Hall received it at San Antonio, Texas, it read as follows: "Ship rush freight twelve special wide express with stock rack open cab and windshield and six open cabs and windshields only at same price terms and so forth as stipulated in our order dated May nineteen four number ten five one. Stop. Wire acceptance. Signed, Knapp Motor Company."

Hall sent the massage from San Antonio, Texas, to Fort Smith, Arkansas, addressed to the Fort Smith Body Company, as it was received by him, but not the message that was sent by the Knapp Motor Company. In other words, the Western Union Telegraph Company, in transmitting the message to Hall, changed the letter "y" to the letter "f," and made it read "four" instead of "your," and it was received by Hall and transmitted to the Fort Smith Body Company just as the Western Union Telegraph Company had transmitted to Hall from the Knapp Motor Company.

The Fort Smith Body Company, on receipt of the telegram, telegraphed Hall as follows: "We do not understand the last sixteen words of your telegram of the twenty-seventh. Please explain more fully."

Hall then wired the Fort Smith Body Company as follows: "Wants twelve three in one jobs complete six extra cabs also four number ten and five number one at former prices terms."

The Fort Smith Body Company thereupon began the manufacture of the articles and shipped them to the Knapp Motor Company on August 8. On July 28 Hall wrote the Knapp Motor Company at Donna, Texas, telling them what he had done and what he had ordered. The Knapp Motor Company, on July 30, wrote the following letter to Hall at San Antonio, Texas:

"Our telegram calls for 13 of the '3 in 1' and 6 extra cabs at same price, terms and guaranteed freight rate, as previous carload we bought from you. We do not want the other bodies you mention in your letter dated July 28.

"Kindly acknowledge acceptance of this order and when shipment will go forward by wire at once.

"Yours very truly,

"Knapp Motor Company."

Hall denied receiving the letter above set out.

The plaintiff asked for freight in transmission on the articles eroneously sent, because of defendant's errors, $143.06; return freight on same articles $151.04; telegrams caused by the error of the defendant relating to said shipments, $16.71; demurrage on the shipment due to defendant's negligence, $13.00. It also asked damages in the following sums:

"Loss of use of the articles shipped during the time they were detained away from the plaintiff $50.00

"Loss of profits in loss of opportunity to sell said articles during the time that they were out of the possession of the plaintiff by reason of defendant's negligence 50.00

"Damage to the articles which were shipped by reason of the transportation to and from the point of destination 40.00

"Making a total damage claimed by the plaintiff of $463.81

The defendant answered, denying liability, and alleging the proximate cause of the damage was Hall's negligence in attempting to construe the telegram which he received from the Knapp Motor Company, when the appellee was unable to determine what it meant, and then permitting the goods to be shipped without confirmation.

Second, it contended that it was not liable to the Fort Smith Body Company on a mistake in the original message from the Knapp Motor Company, because the Fort Smith Body Company is the undisclosed principal of the sendee of that message, and no action can be maintained by the undisclosed principal of a sendee of a telegram.

Third, that the messages were interstate messages, and no claim was presented in writing within 60 days after the messages were filed with the company for transmission.

The jury returned a verdict for $310.81. The verdict was made up of the following items:

Freight transmitting bodies not ordered $143.06
Return freight 151.04
Cost of telegrams caused by defendant's negligence 16.71

And found against the plaintiffs on the other items in the complaint.

F. E. Knapp, manager of the Knapp Motor Company of Donna, Texas, testified that he desired to buy certain bodies and parts for automobile trucks on July 27, 1923; that he delivered to the appellant, Western Union Telegraph Company, at Donna, Texas, a telegram addressed to George F. Hall, and reading as follows: "Ship rush freight twelve special wide express with stock rack open cab and windshield and six open cabs

and windshields only at same price terms and so forth, as stipulated in our order dated May nineteenth your number ten five one. Stop. Wire acceptance."

The message was signed "Knapp Motor Company"; that the bodies which he desired were extra wide, with high side-racks, and that the cabs were open; that the message was sent collect; that, later on, he received the articles ordered in the telegram along with other articles which he did not order; that there were other automobile bodies in the car than those ordered, and that he declined to receive the other bodies, but did accept the goods ordered, and shipped back the other goods; that the matter had been settled between him and the Fort Smith Body Company. He testified that George F. Hall wrote the Knapp Motor Company a letter, dated July 28, 1923, about this order, and that he answered Hall's letter on July 30, explained in detail what the telegraphic order called for, and that the Fort Smith Body Company did not call upon the Knapp Motor Company for a confirmation of the order and that Hall did not wire them for confirmation of the order. He testified that his records showed that this shipment was made from Fort Smith on August 8, 1923, and that on July 30, 1923, he had written Hall.

Hall testified that he was a traveling salesman, and was agent of the Fort Smith Body Company in the year 1923; that on July 27, 1923, he received in San Antonio a message from the Knapp Motor Company at Donna, and that he immediately transmitted it in the same language to the Fort Smith Body Company at Fort Smith, Arkansas, by telegram. The telegram has already been set out above. That he immediately received a telegram from the Fort Smith Body Company as follows:

"We do not understand the last sixteen words of your telegram of the twenty-seventh. Please explain more fully."

And that he then sent the following message to the Fort Smith Body Company:

"Wants twelve three in one jobs complete extra cabs also four number ten and five number one at former price terms."

He testified that in sending the last message he relied upon the message which he had received through the Western Union Telegraph Company from Donna, and that all messages were sent over the lines of the Western Union Telegraph Company; that he, at the time, was the sales agent of the Fort Smith Body Company in San Antonio, Texas, selling the products of the Fort Smith Body Company generally in Texas; that he did not change the word "your" to the word "four," but that the message from Donna, Texas, came to him with the word "four" used; that he naturally had no knowledge that the original message read "your" instead of "four"; that he did not know that the agent of the Western Union Telegraph Company at San Antonio knew the kind of business that he was transacting, and that it was not generally known in San Antonio that he was representing the Fort Smith Body Company; that he transmitted over the Western Union Telegraph Company to the Fort Smith Body Company at Fort Smith the exact language of the message which he received from Donna. He had been appointed agent of the Fort Smith Body Company in writing, but that he was unable to locate the writing; that he received a 10 per cent. commission on all sales made; that, at the time of receiving the telegram from the Knapp Motor Company, he was not engaged in business for himself, buying and selling automobile bodies, and that he did not act as a broker in receiving the order from the Knapp Motor Company, but that he was the agent of the Fort Smith Body Company. When he received the message from the Fort Smith Body Company, that they did not understand the last sixteen words of his telegram, he sent his answer to the Fort Smith Body Company, giving the definite number of bodies and cabs that the Knapp Motor Company wanted, without asking the Knapp Motor Company for a confirmation by wire, but undertook to interpret their mes-

sage himself; that he could not give the name of any agent that handled any of the messages; that the population of San Antonio was more than 168,000 people.

Ben B. Johnston testified that he was president and general manager of the Fort Smith Body Company; had quite a business, extending from the Mississippi River to the Pacific Coast, and that the sales manager received and wrote up the orders; that when the message came from Hall on July 27, Mr. Walker, the sales manager, brought it in to witness, and stated that he did not understand the message; that they read it over together, and neither of them understood it, but that it was not a collect message, and they received it, and he advised Mr. Walker that the thing he had better do was to wire Hall to clarify the message; so they sent a message to Hall, and Hall wired back. The original message has been introduced and marked Exhibit A. The message was not exactly clear to him. The Fort Smith Body Company had previously shipped to the Knapp Motor Company their assemblies No. 10 and assemblies No. 1 in carload lots, and had naturally assumed that they wanted four No. 10 and five No. 1. He testified to the message sent to Hall and as to the receiving of the message from Hall. Upon getting Hall's last telegram, they shipped the goods mentioned therein. The day following the shipment they received their first notification that there was anything wrong with the shipment. The railroad company had received the car, and it was gone, and there wasn't anything else to do but to wait; that the shipment was made on August 8, 1923; that between the date of the telegram, July 28, and the 8th of August, there was no knowledge on his part that there was any error in the telegram; that they relied on the telegram given them by the Western Union Telegraph Company from Hall as stating the goods that the Knapp Motor Company wanted; that they acted on that message and made the shipment; that on August 9 they received a wire from Hall as follows: "Knapp wires ordered only sixteens and extra cabs, and will not accept balance. Evidently original order misunderstood by me. Geo. F. Hall."

At the time of receiving this, the shipment was already on its way; the goods got to Donna, Texas, and they received a notice that the Knapp Motor Company had refused to receive them, for the reason that there were more bodies in the car than ordered; that they ordered the extra bodies shipped back to Fort Smith; that the extra freight by reason of the error was $143.06 going and $151.04 returning; that they were out $16.71 in telegrams, $13 demurrage; that they were shipped on August 8, and they did not get them back until September 11. Hall was the agent of the Fort Smith Body Company; that the date of his first written communication to the Western Union Telegraph Company about this claim was on October 13; no written claim had been filed within 60 days, but he wrote the Western Union Telegraph Company a letter with reference to the claim on October 13, 1923.

A. W. Avery testified that he was shipping clerk for the Fort Smith Body Company, and that these bodies were shipped to Donna, Texas, on August 8.

Plaintiff introduced, over the objection and exception of the defendant, an assignment from the Knapp Motor Company of any interest it might have in the litigation, and also an assignment of George F. Hall of any interest he might have in the litigation. The assignment was in the usual form, assigning to the Fort Smith Body Company the right to bring and maintain a suit, if need be, for any claim that George F. Hall might have against the Western Union Telegraph Company. The same is true of the Knapp assignment.

Hettie M. Salisbury testified for the appellant that she was the manager and operator of the Western Union Telegraph Company at Donna, Texas; that the original message from the Knapp Motor Company to George F. Hall was transmitted from the Donna office on July 27; that it was a day letter, and sent collect; that it was not a repeated message, and that she personally transmitted the message; that the message was exactly as Knapp testified, with the word "your" instead of the word

"four" in it; that the message was relayed at Brownsville, Texas, to San Antonio.

Fred Ward testified that he was manager of the Western Union Telegraph Company at Fort Smith; that the first time that Mr. Johnston of the Fort Smith Body Company called on him with reference to these telegrams was on October 8; that the first letter written was October 22.

Appellant then introduced the rules, as approved by the Interstate Commerce Commission, with reference to the acceptance and transmission of messages by telegraph. Among other rules is the following: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The court thereupon, at the request of the plaintiff, instructed the jury as follows:

"1. If the jury find from the evidence that the plaintiff received from its agent, George F. Hall, the telegram set up in the complaint, and if that telegram was based upon a telegram from the Knapp Motor Company to George F. Hall, and if the latter telegram was sent by the defendant, and if said latter telegram was erroneously sent, and if the said telegram transmitted by the defendant from the Knapp Motor Company to George F. Hall called for different articles from the telegram actually written and delivered to the defendant by the Knapp Motor Company, and if George F. Hall, in sending the telegram to the plaintiff, relied upon the telegram received by him from the Knapp Motor Company as a true telegram, and if George F. Hall sent the telegram to the plaintiff, and if the plaintiff, relying upon the information received in the telegram, shipped different articles other than those ordered by the Knapp Motor Company, then, and in that event, the plaintiff is entitled to recover whatever reasonable damages, if any, it suffered by reason of the error or mistake of the defendant, if there was one, in sending the erroneous telegram from the Knapp Motor Company to George F. Hall.

"2. If you find for the plaintiff, the plaintiff will be entitled to recover all direct damage resulting from the mistake, or error, or negligence of the defendant, if there was such mistake, error or negligence, including freight on the articles erroneously sent, because of defendant's errors, if any, and the return freight on said articles, if any, and the extra telegrams caused by the defendant's error, if any, and the demurrage, if any, due to the defendant's negligence."

To the giving of each of said instructions the defendant at the time objected and saved its exceptions.

The court gave the following instructions at the request of the defendant:

"2. You are instructed that, if you believe that the purchaser of these bodies notified George F. Hall, the agent of the Fort Smith Body Company, by letter, that they did not want the extra bodies, in ample time for the bodies not to have been shipped, your verdict must be for the defendant.

"5. If you believe that, when Hall received the message from the plaintiff asking information because Hall's first message was not clear, and that Hall was negligent in not asking the Knapp Motor Company to confirm its message on July 27, to him, then the plaintiff cannot recover."

The court refused to give the following instructions requested by defendants:

"1. You are instructed that, under the law and the evidence, the plaintiff is not entitled to recover, and your verdict must be for the defendant.

"3. You are instructed that, unless you believe that written claim was filed within sixty days from the time the message was filed with the defendant, your verdict must be for the defendant.

"4. You are instructed that, unless the plaintiff proves that the defendant actually knew that George F. Hall was the agent of the plaintiff, there can be no recovery in an error in any message sent by the Knapp Motor Company to George F. Hall."

The court, on its own motion, gave the following instructions:

"The burden of proof. The court instructs the jury that the burden of proof is on the plaintiff to establish his case by a preponderance of the testimony, and on the * * * to prove his case by a preponderance of testimony.

"Preponderance of evidence. A preponderance of the evidence means a greater weight of evidence; but this is not to be determined solely by the greater number of witnesses testifying in relation to any particular fact or state of facts. It means that the testimony on the part of the party on whom the burden rests must have greater weight, in your estimation; have a more convincing effect than that opposed to it. If, in your opinion, the testimony on any essential point is evenly balanced, then the party on whom the burden rests to prove the same by a preponderance of the evidence must be deemed to have failed in regard thereto."

After the verdict, the defendant filed a motion for a new trial, which was overruled. Defendant saved its exceptions, and has appealed to this court.

Appellant's first contention is that the court erred in refusing to direct a verdict in its favor at the conclusion of all the evidence, first, because the proximate cause of the damage to appellee was the negligence of Hall, its agent, in attempting to interpret an unintelligible message without asking the Knapp Motor Company for confirmation.

Appellant first calls attention to the *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816, 31 L. R. A. (N. S.). 1020. That was an action instituted for the recovery of damages for personal injuries sustained by a child twelve years old, and it was caused by the negligent acts of the defendants. The question in that case was whether the minor, twelve years of age, was guilty of contributory negligence. The court, however, did not hold that that was a question of law, but it held that it was error for the lower court

to give instructions A and B. Instruction number A given told the jury that, if a person left fire, or other instrumentality attractive to children, unguarded at a place where children are accustomed to go and play, and a child does go to or near such fire or other dangerous instrumentality attractive to children, and is injured, such child can recover damages from all those concerned in leaving unguarded such fire or other dangerous instrumentality attractive to children. And the court held that the leaving upon the premises of a dangerous object attractive to children does not alone constitute the act of negligence; the act of negligence consists in leaving such object under such circumstances that one of ordinary prudence might reasonably expect that a child too young to appreciate the danger would be allured to and attracted thereby.

This instruction did not submit to the jury the question of the contributory negligence of the child, and the court said:

"What might be an act of negligence in leaving such an object or element resulting in attracting thereto a child of a few years of age and too young to appreciate the danger therefrom might not be an act of negligence if it should be reasonably expected that only a child of the age and maturity to fully understand and appreciate the danger from such an object or element should go near thereto, because it would not be reasonably anticipated that a child of sufficient maturity and intelligence to appreciate the danger from fire would go to and play with this dangerous element."

In other words, it was a question of fact that should have been submitted to the jury, whether the negligence of the defendant was the proximate cause of the injury. That is, if it set out fire at a place where children would be attracted, and a child too young to know or appreciate the danger should be burned, the wrongdoer would be liable; whereas a person old enough to know and appreciate the danger would be guilty of negligence himself which would disentitle him to recover, notwithstanding the negligence of the person who set out the fire.

The court also held that instruction B was erroneous and should not have been given, and that told the jury if the evidence showed that the proximate cause of the injury to plaintiff was some voluntary act of hers, and not caused by the defendant's negligence, they should find for the defendant.

Here the court said that, under the circumstances, it became a question of fact for the jury to determine, after taking into consideration the age, intelligence and capacity of the child, as to whether or not she was guilty of contributory negligence. If she was not, then the defendant was liable if it directed her to watch and guard the fire, without giving her proper warning.

In the instant case the question of negligence of Hall was properly submitted to the jury, and the jury's finding on a question of fact properly submitted to them cannot be disturbed by this court.

Appellant next calls attention to the case of *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647, 18 L. R. A. (N. S.) 905. In that case the Pittsburg Reduction Company was engaged in mining at Bauxite, and it owned lands, houses, machinery, spur-tracks from the railroad, etc., which were near a schoolhouse, and a schoolboy about ten years of age, in going along a path near the spur-track, a place habitually used by the children of the neighborhood in going to and from school, picked up some dynamite caps on his way home from school, and carried them home with him. His father was a employee of the company, and he kept the caps at home for about a week, placing them on the floor, in the presence of his parents. When he would leave the caps on the floor his mother would pick them up. About a week after he found the caps he traded them to Jack Horton, a boy about thirteen years of age, and this boy was picking the dirt out of one with a match, when it exploded and tore up his hand. The court said in that case that the carrying of the caps home and playing with them in the presence of his mother there for a week, her course of conduct broke the causal connection between the negli-

gent act of the appellant and the subsequent injury of the plaintiff. That it established a new agency.

We do not think the same principle is involved here. Hall received the message from Knapp Motor Company, but the telegraph company had not sent it as it was given to it, and Hall immediately sent the message received by him to the Fort Smith Body Company. It is said that the appellee, with the exact message before it, refused to act, and was therefore not damaged by the original negligence of appellant.

It is true that appellee did not undertake to fill the order without communicating with Hall, but Hall thought that he understood it, and, after receiving a message from him, the Fort Smith Body Company thought that it understood it. Whether it was justified in acting under the circumstances as it did act is a question of fact properly submitted to the jury. In other words, if the Fort Smith Body Company acted in filling the order as a person of ordinary prudence would have acted under the circumstances it was not guilty of negligence, and was entitled to recover. If it did something that a person of ordinary prudence would not have done under the circumstances, it could not recover. The negligence charged is the negligence of Hall, and, of course, his negligence, if he was negligent, would be the negligence of the Fort Smith Body Company.

Appellant next calls attention to *Manley Manufacturing Co.* v. *Western Union Telegraph Co.*, 105 Ga. 235, 31 S. E. 156. Appellant states that there is no Arkansas case in point, but that this case is in point. But the court in the Manley Manufacturing Company case submitted the question to the jury, telling them, in substance, that if they believed from the evidence that the message received by Manley was unintelligible and ambiguous, and that a reasonably prudent man would not have acted upon it without having it repeated or telegraphing to the sender, plaintiff could not recover, but that if, on the other hand, they believed that a reasonably prudent man would have

acted upon it without having it repeated, plaintiff could recover.

The court, in discussing the case, states that it thinks any sort of diligence would have prevented the damage in that case. The court frequently decides cases upholding the verdicts of juries, when, if the question were submitted to the court, it might find the other way. The question in the Manley case was submitted to the jury, and the court did not hold that it should not have been submitted to the jury.

Appellant next calls attention to the case of *Western Union Telegraph Company* v. *Neill,* 57 Tex. 283, 44 Am. Rep. 589. The question in that case was whether the company could charge half rate and limit its liability. While the court held that the company could limit its liability under the circumstances in that case, it said:

"Whether or not telegraph companies should be held as common carriers, with all their common law liabilities, has been the subject of much discussion and conflicting decisions * * *. If the testimony, however, should show that the failure to properly transmit or deliver a message arose from such misconduct, fraud or want of due care, then it might be very seriously questioned, indeed, whether the same reasons of public policy which prohibit exemption from liability on these grounds would not also prohibit a limitation upon the true amount of damages which should be recovered—telegraphic communication having now become almost a social as well as a commercial necessity, and the want of competing lines giving to the companies greatly the vantage ground over the public."

In *Nusbaum* v. *Western Union Telegraph Co.,* 42 Leg. Int. (Pa.) 16, the message involved was insensible, substituting the word "ober" for "obey." As transmitted, it was meaningless.

The message involved in the case of *Hart* v. *Cable Company,* 86 N. Y. 633, was held by the court to be unintelligible jargon. It did not mean anything.

Appellant calls attention to the rule announced in 37 Cyc. 720, and states that, while the rule is that an undisclosed principal of the sender of a message may recover, and since the undisclosed principal of the sender may sue, a person may, of course, sue where he is the undisclosed principal of both the sender and the sendee, but it is argued that the action cannot be maintained by one who is the undisclosed principal of the addressee alone. Appellant states that this seems to be the almost universal holding of the various courts of the United States.

In the volume of Cyc. referred to by appellant it is stated: "Since the undisclosed principal of the sender may sue, a person may of course sue where he is the undisclosed principal of both the sender and addressee, but it has been held that the action cannot be maintained by one who is the undisclosed principal of the addressee alone." 37 Cyc. 1722. From the cases cited to the above section in Cyc. it appears that the authorities are in conflict.

The learned counsel for both the appellant and appellee have cited and discussed many authorities, but it would serve no useful purpose to review them or cite them here. The authorities are in hopeless conflict on most of the questions involved in this case. The proof clearly shows that the appellant was guilty of negligence in changing the word "your" to "four," and if this change, resulting from the negligence of appellant, caused injury to the appellee, then the appellee was entitled to recover, unless barred by its own contributory negligence. The negligence of the appellant and negligence of appellee were questions of fact to be decided by the jury, and the appellant requested and the court gave the following instruction on the question of the negligence of the agent of appellee: "If you believe that, when Hall received the message from the plaintiff asking for information because Hall's first message was not clear, and that Hall was negligent in not asking the Knapp Motor Company to confirm its message on July 27 to him, then the plaintiff cannot recover." This instruction correctly submitted to

the jury the question of Hall's negligence. If the message had been meaningless, or, as one court said, "unintelligible jargon," appellee could not have recovered, but if the appellee, acting with reasonable care, understood the message with the word "four" instead of "your," and if a person of ordinary prudence would have acted on it, then the appellee was not guilty of negligence. It is simply a question of negligence, and, as we have said, properly submitted to the jury, and the finding of the jury is binding upon this court on questions of fact. The evidence on the questions of negligence and contributory negligence, as well as on the question of damages, were questions of fact, and there was ample evidence to sustain the verdict of the jury.

Finding no error, the judgment is affirmed.

PIERCE v. SICARD.

Opinion delivered March 5, 1928.

1. VENUE—DISCRETION OF COURT.—A trial court has the discretion to refuse a petition for a change of venue where the plaintiff alleges that he could not obtain a fair and impartial trial in the county, but does not allege any fact upon which his opinion was based.
2. JURY—CHALLENGE OF JURORS FOR BIAS.—In an action against a bank and its officers for breach of a contract, it was not error to overrule plaintiff's challenge to certain jurors because they did business with defendant bank.
3. JURY—BURDEN OF PROVING DISQUALIFICATION OF JUROR.—One selected and returned as a juror is presumed competent and qualified to serve, and the burden is on the challenging party to establish a *prima facie* disqualification.
4. JURY—DISCRETION OF JUDGE IN PASSING ON QUALIFICATIONS.—The judge, who presides at the trial and observes the appearance and manner of jurors, must necessarily exercise judicial discretion in passing on their qualification.
5. JURY—EXAMINATION OF JURORS.—In an action against a bank for breach of a contract, it was not an abuse of discretion to refuse to allow jurors to answer whether they did business with the bank,

which would cause them to believe an officer of the bank in preference to a stranger.

6. FRAUD—PROMISES TO ACT.—The general rule is that fraud must relate to a present or pre-existing fact and cannot ordinarily be predicated on promises or statements as to what will be done in the future.

7. FRAUD—FALSE PROMISE.—Though ordinarily a statement on which fraud may be predicated must be of an existing fact, yet, if a promise is accompanied with an intention not to perform it, and is made for the purpose of deceiving the person to whom it is made and induces him to act in the premises, the same constitutes fraud.

8. EVIDENCE—DECLARATIONS OF AGENT.—In an action against a bank for false promises that it would furnish money to another bank to carry on its business, declarations of defendant's assistant cashier that defendant would see such other bank through a certain year are not competent evidence against the defendant, where they were not authorized and did not relate to any act done by the officer in the course of agency.

9. BANKS AND BANKING—EVIDENCE AS TO BANK OFFICER'S LIABILITY.—In an action by numerous plaintiffs against a bank and its officers for false promises to furnish money to another bank to carry on its business, the evidence *held* insufficient to go to the jury on the question of liability of the assistant cashier of the defendant bank as to plaintiffs, to whom no statement had been made by such officer or any one for him relative to the transaction in question.

10. APPEAL AND ERROR—ASSIGNMENT OF ERROR.—No assignment of error may be based on the action of the court in directing a verdict where such action is not one of the grounds for a motion for new trial.

11. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict on conflicting evidence will not be disturbed.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; affirmed.

STATEMENT OF FACTS.

L. A. Pierce and some sixty odd separate plaintiffs instituted an action in the circuit court against the First National Bank of Fort Smith, Arkansas, and A. N. Sicard and Neil Sims, respectively vice president and assistant cashier of said bank, to recover certain sums alleged to have been lost by the plaintiffs on account of the false promises of the defendants that said First National Bank

would furnish money to the Bank of Cameron, Oklahoma, to carry on its business during the year 1922.

R. C. Strozier, cashier of the Bank of Cameron, was the principal witness for the plaintiffs. According to his testimony, he came to Fort Smith in December, 1921, to make arrangements with the First National Bank of that city to furnish the Bank of Cameron, at Cameron, Oklahoma, with money with which to carry on its business during the year 1922. A. N. Sicard, vice president of the First National Bank, had some stock in the Bank of Cameron. One of the directors of the First National Bank asked Strozier if he would turn over his entire note-case if they would furnish him money to operate on in the year 1922. Strozier told him that he would, and they agreed on that. The directors of the First National Bank sent Neil Sims, assistant cashier, to Cameron to get the notes. Sims went with Strozier to Cameron and brought back all the notes the bank had, for the purpose of being used as collateral for money which the First National Bank would furnish to the Bank of Cameron. The notes amounted to something like $33,000. The First National Bank of Fort Smith loaned the Bank of Cameron $10,000 at that time. The First National Bank furnished the Bank of Cameron with $22,000 in the next thirty days. Subsequently the Bank of Cameron secured a loan of $10,000 through the War Finance Corporation, and reduced its loan to the First National Bank to the sum of $12,500. Collateral notes were released by the First National Bank to the Bank of Cameron to enable it to secure said loan. Sims made several trips to Cameron about business relations between the two banks. He represented to some of the depositors that the First National Bank was going to see the Bank of Cameron through during the year 1922. He told Strozier to talk to the depositors and tell them that the First National Bank would see the Bank of Cameron through during the year 1922. Strozier did tell some of the depositors this, as he was directed to do by Sims. Subsequently the First National Bank refused

to make further advances to the Bank of Cameron, and the latter became insolvent.

According to the evidence adduced in favor of the defendants, none of the officers or directors of the First National Bank made any promise to R. C. Strozier or to any other person that the First National Bank of Fort Smith or any of its officers would make loans to the Bank of Cameron to carry it through the year 1922. They only agreed to make a specific loan to the bank, and to make that loan after having received the collateral agreed upon. Sims was sent to Cameron for the purpose of obtaining this collateral, and had no authority whatever to represent to the officers of the Bank of Cameron, or to any one else, that the First National Bank would make loans to the Bank of Cameron and carry it through during the year 1922. Neil Sims and A. N. Sicard were witnesses for the defendant, and each one positively denied having made any such representations to R. C. Strozier or to any depositor of the Bank of Cameron.

There was a directed verdict in favor of the First National Bank and in favor of A. N. Sicard and Neil Sims as to certain of the plaintiffs. As to the remaining plaintiffs, there was a verdict of the jury in favor of the defendants, Neil Sims and A. N. Sicard. From the judgment rendered the plaintiffs have duly prosecuted an appeal to this court.

A. A. McDonald, for appellant.

Daily & Woods, for appellee.

HART, C. J., (after stating the facts). It is first sought to reverse the judgment because the circuit court erred in refusing to grant the petition of the plaintiffs for a change of venue.

Section 10341 of Crawford & Moses' Digest provides that the venue of civil actions shall not be changed unless the court or judge to whom the application for change of venue is made finds that the same is necessary to obtain a fair and impartial trial of the cause. In construing this statute in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Reilly,* 110 Ark. 182, 161 S. W. 1052, the court said:

"The statute means, of course, that the court must hear evidence on the subject, and be governed by it in reaching a conclusion on the issue whether or not a fair and impartial trial can be obtained in the county. The court has a certain amount of discretion in weighing the evidence, but cannot arbitrarily refuse to grant a change of venue when the evidence establishes the fact that a fair trial cannot be obtained there."

The allegations of the petition were not of such character as the court was bound to find that the plaintiff could not obtain a fair and impartial trial in the county. The defendants to the action were a bank and two of its officers. The petition for change of venue alleged that, on account of the undue influence of the defendants, the plaintiffs, who were residents of the State of Oklahoma, could not obtain a fair and impartial trial in the Fort Smith District of Sebastian County. The statement of affiants to the petition amounts to no more than an expression of opinion by them. They did not attempt to give any fact upon which their opinion was based. They merely stated their conclusions in the matter, which the court was not required to accept as establishing the facts alleged.

Again, it is sought to reverse the judgment because the court denied the challenge of the plaintiffs to certain jurors. In asking questions touching the qualifications of jurors, it was ascertained that some of the jurors did business with the First National Bank, and counsel for the plaintiffs challenged them for cause on this account. A person selected and returned as a juror is presumed to be competent and qualified to serve, and the burden is on the challenging party to establish a *prima facie* disqualification. *Shaffstall* v. *Downey,* 87 Ark. 5, 112 S. W. 176.

In discussing the subject in *Thompson* v. *Douglass,* 35 W. Va. 337, 13 S. E. 1015, the Supreme Court of Appeals of West Virginia said:

"As Lord Coke said centuries ago may be said now:

'The causes of favor are infinite.' No enumeration was ever attempted of what causes might be alleged as ground of challenges to the favor. It would be impossible to specify all that should be allowed in advance by a statute, for they depend upon each particular case and the circumstances and parties to it."

This view is in accordance with our holding on the subject. *Rumping* v. *Arkansas National Bank of Hot Springs,* 121 Ark. 202, 180 S. W. 749. The reason is that the judge who presides at a trial, and who observes the appearance and manner of jurors, when upon their *voir dire,* must necessarily exercise a judicial discretion in passing upon their qualifications. *Lavender* v. *Hudgens,* 32 Ark. 763.

It is next insisted that the court erred in refusing to allow some of the jurors to answer whether or not the fact that they did business with the First National Bank would cause them to believe an officer of the bank in preference to a stranger. The court did not abuse its discretion in sustaining an objection to this question. It was not shown whether or not the jurors were indebted to the bank or whether they were simply depositors. There had been nothing developed in their examination which tended to show that any special relation of friendship or business existed between them and the officers of the bank. Under these circumstances the court was right in refusing to allow the jurors to be examined as to the apparent credence which they would give to the testimony of the officers of the bank, who were defendants in the action, and the plaintiffs, who lived only a short distance away, in an adjoining State. 35 C. J. p. 392, paragraph 438 (2); *Horst* v. *Silverman,* 20 Wash. 223, 55 P. 52, 72 Am. St. Rep. 98; *Jenkins* v. *State,* 31 Fla. 196, 12 So. 677; *State* v. *McIntosh,* 141 La. 150, 74 So. 886; and *Commonwealth* v. *Porter,* 4 Gray (Mass.) 423.

This brings us to a consideration of the merits of the issues raised by the appeal. It is conceded that the general rule in nearly all States is that fraud must relate to a present or pre-existing fact, and cannot ordi-

narily be predicated on promises or statements as to what will be done in the future. The reason is that representations and promises as to future conduct are merely statements of opinion as to what the promisor intends to do, on which the party to whom they are made has no legal right to rely. This is the general rule laid down by this court in *Lawrence* v. *Mahoney,* 145 Ark. 310, 225 S. W. 340, and our earlier cases on the subject.

It is true that in *Lilly* v. *Barron,* 144 Ark. 422, 222 S. W. 712, the court referred to the exception to the general rule that, if the promise is accompanied with an intention not to perform it, and is made for the purpose of deceiving the person to whom it was made, and induces him to act in the premises, the same constitutes fraud. It will be observed, however, that the court said that no state of facts was presented in that case which would bring the case within the exception to the general rule, and there is nothing in the opinion to indicate that the court meant to recognize the exception to the general rule as the law in this State. In a case note to 51 A. L. R., p. 63, it is said that, according to the weight of authority, if the person making the promise or statement as to a future event is guilty of an actual fraudulent intent, and makes the promise or misrepresentation with the intention of deceiving and defrauding the other party, and accomplishes this result, to the latter's injury, fraud may, under many circumstances, be predicated thereon, notwithstanding the future nature of the representations. It is further stated that the weight of authority holds that fraud may be predicated on promises made with an intention not to perform the same, or, as the rule is frequently expressed, on promises made without an intention of performance. In such cases it is said that the gist of the fraud is not the breach of the agreement to perform but the fraudulent intention of the promisor and the false representation of an existing intention to perform, when such intent did not in fact exist. Among the cases in support of the rule we cite the following from the Supreme Court of Oklahoma: *Blackburn* v. *Morrison,*

29 Okla. 510, 118 Pac. 402, Ann. Cas. 1913A 523; *McLean* v. *Southwestern Casualty Ins. Co.,* 61 Okla. 79, 159 Pac. 660; *Rogers* v. *Harris,* 76 Okla. 215, 184 Pac. 459; and *Haggerty* v. *Key,* 100 Okla. 238, 229 Pac. 548.

In *McLean* v. *Southwestern Casualty Ins. Co.,* 61 Okla. 79, 159 P. 660, it was said that there is a wide distinction between the nonperformance of a promise and a promise made *mala fide* and without any intention at the time of making it to perform it; and, while ordinarily a statement upon which fraud may be predicated must be of an existing fact, yet if a promise is made to be performed in the future, as an inducement to obtain a contract, if the intention not to perform the promise be shown to have existed at the time the promise was made, such false promise constitutes cognizable fraud.

The circuit court adopted the view of the law laid down by the Supreme Court of Oklahoma in the cases above cited in trying the case at bar, and, inasmuch as the result of our views affirms the judgment of the circuit court, it will not be necessary for us to determine whether, in cases where the alleged fraudulent promises were made in another State and suit based thereon is brought in this State, the courts of this State will recognize the law on the subject as laid down by the Supreme Court of the State where it is alleged that the false promises were made.

The circuit court correctly directed a verdict in favor of the First National Bank. There is no testimony in the record tending to show that it authorized its assistant cashier to go to Cameron, Oklahoma, and make any representations to the Bank of Cameron to the effect that it would furnish the Bank of Cameron with money to operate on during the year 1922. While there was proof that Neil Sims, assistant cashier of the First National Bank, went to Cameron and told some of the depositors of the Bank of Cameron that the First National Bank would see the Bank of Cameron through during the year 1922, such declarations of the assistant cashier are not competent evidence against the bank,

because they were not authorized by the bank, and did not relate to any act done by him in the course of his agency. He went to Cameron for the purpose of getting collateral notes for a specific loan which the First National Bank was making to the Bank of Cameron. *Taylor* v. *Commercial Bank,* 174 N. Y. 181, 66 N. E. 726, 62 L. R. A. 783, 95 Am. St. Rep. 564. Hence the undisputed evidence shows that there was no liability to the plaintiffs by the First National Bank, and the court properly directed a verdict in its favor.

The court also directed a verdict in favor of Neil Sims against Ophelia Barton and twenty-four other plaintiffs, because there was no testimony tending to prove any statements made by Neil Sims or any one for him to said plaintiffs relative to the transaction in question. The record does not show that Neil Sims made any statement to these plaintiffs whatever, nor does it show that any one else for him made any statement to them relative to the matter. Therefore we hold that the court was right in directing a verdict in his favor as to these plaintiffs. Moreover, the action of the court in directing a verdict in favor of Neil Sims as to these plaintiffs was not one of the grounds for the motion for a new trial, and, under our settled rules of practice, no assignment of error could be based upon the action of the court. The reason is that it is the duty of the complaining party to call the court's attention to the particular error and give it an opportunity to correct the same. *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468, and *Oliphant* v. *Hamm,* 167 Ark. 167, 267 S. W. 563.

At the conclusion of the evidence the court directed a verdict in favor of the defendant A. N. Sicard against W. R. Brown and twelve other plaintiffs. The ruling of the court was not made one of the grounds for a motion for a new trial, and, as just stated, under our settled rules of practice the action of the court cannot be reviewed.

We have carefully examined the instructions given at the request of the plaintiffs, as well as those given at

the request of the defendants, and are of the opinion that they fully and fairly submitted the question at issue, under the law as laid down by the Supreme Court of Oklahoma in the cases above cited. According to the evidence of all the officers of the First National Bank who were present when they had the negotiations with the cashier of the Bank of Cameron, no promise whatever was made by the First National Bank or any of its officers or directors that it would see the Bank of Cameron through during the year 1922. According to the testimony of R. C. Strozier, cashier of the Bank of Cameron, such promise was made. The disputed question of fact whether or not the jury should find that such promise was made and whether or not there was an intention not to perform the promise as shown to have existed at the time it was made, was submitted to the jury under the principles of law above announced, and, under our settled rules of practice, the verdict being in favor of the defendants, it will be allowed to stand.

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

MORRILTON LUMBER COMPANY v. GROOM.

Opinion delivered March 5, 1928.

1. MORTGAGES—PRIORITY OF MATERIALMAN'S LIEN.—Under Crawford & Moses' Dig., § 6909, providing that a lien for materials shall attach to buildings for which they were furnished in preference to a prior mortgage existing on the land before the buildings were erected, *held* that, where a building was erected on mortgaged land, half from materials derived from old buildings on the lands and half from new materials furnished by the materialman, the lien of the mortgage was superior to the materialman's lien.
2. MECHANICS' LIEN—ENFORCEMENT OF MATERIALMAN'S LIEN.—A materialman's lien on a building can be enforced as superior to a prior lien on the land, under Crawford & Moses' Dig., § 6909, only by sale of the building as separate and distinct from the land.

3. MECHANICS' LIEN—PRIORITY OF MATERIALMAN'S LIEN.—Crawford & Moses' Dig., § 6909, providing that a materialman's lien shall attach to buildings for which materials were furnished in preference to a prior lien on the land, applies only where there is some independent structure erected on the land out of materials furnished for that purpose.
4. MORTGAGES—ESTOPPEL.—A mortgagee is not estopped to claim a superior lien on a building as against a materialman, where the mortgagee had knowledge that the mortgagors were using material derived from old buildings on the mortgaged land together with new materials furnished by a materialman in erecting a new building, since mere silence would not amount to an estoppel.

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

STATEMENT OF FACTS.

Morrilton Lumber Company brought suit in equity against Grover H. Webb, L. M. Sharp and Elvie Reynolds to establish a mechanics' lien upon certain lots in Morrilton, Arkansas, in the sum of $599.82. Charles Groom was allowed to intervene and claim a prior lien on the lots by virtue of a mortgage executed to him by the defendants.

On the 23d day of January, 1925, Charles T. Groom executed a warranty deed to Grover H. Webb, L. M. Sharp and Elvie Reynolds to lots 7, 8 and 9, in block 4 of Moose's Addition to the town of Morrilton, Arkansas. The consideration as recited in the deed was the sum of $4,500, evidenced by three promissory notes for $1,500 each, due respectively on November 1, 1925, 1926, and 1927, each bearing interest from date until paid at the rate of eight per cent. per annum. At the time of the execution of the deed there were on the land several houses. After the execution of the deed the owners of the property tore down the houses and used the lumber, together with other lumber which they purchased from the plaintiff, in the erection of a storehouse and barn on said lots. The property was estimated to be worth $2,000 more in its changed condition. The value of the lumber purchased from the plaintiff was $599.82, and the lumber taken from the dwelling-houses which were torn down was of about the same value. The old and new lumber

was mixed up and used in the construction of the new buildings.

The chancellor found the issues in favor of the intervener, Charles T. Groom, and granted him a decree of foreclosure of his mortgage, because, by the terms of the mortgage, all of the notes had become due because of the mortgagors' failure to pay any of the notes. It was decreed that the mortgage lien of Charles T. Groom was prior and paramount to the materialman's lien of the Morrilton Lumber Company, and that the proceeds of sale should be applied, first, to the payment of the indebtedness of Charles T. Groom, and the remainder, if any, should be applied, first, to the payment of the judgment claim of the Morrilton Lumber Company, and the residue, if any, to Grover H. Webb, Elvie Reynolds and L. M. Sharp. To reverse that decree Morrilton Lumber Company has duly prosecuted an appeal to this court.

Strait & Strait, for appellant.

J. H. Reynolds and *E. A. Williams,* for appellee.

HART, C. J., (after stating the facts). It is conceded that the lien of Charles T. Groom on the lots is superior to the materialman's lien of the Morrilton Lumber Company, but it is claimed the new house and garage which were constructed on the lots from the old lumber from the houses which were torn down and the new lumber which was purchased from the Morrilton Lumber Company is subject to the lien of the lumber company, and that the buildings may be taken off and sold and the proceeds applied equally towards the satisfaction of the judgment of the plaintiff, because the value of the old and new lumber was about the same. In making this contention, counsel for the plaintiff rely upon the provision of § 6909 of Crawford & Moses' Digest as construed in *Judd* v. *Rieff,* 174 Ark. 362, 295 S. W. 370. In that case it was held that a lien for materials for building a garage, furnished to a purchaser in possession under a land contract prior to the vendor's exercise of an option to declare the contract rescinded, was superior to the vendor's lien on the garage, under Crawford & Moses'

Digest, § 6909, providing that a materialman's lien on specific improvements shall be superior to prior incumbrances on the land. Section 6909 of the Digest reads as follows:

"The lien for the things aforesaid, or work, shall attach to the buildings, erections or other improvements for which they were furnished or work was done, in preference to any prior lien or incumbrance or mortgage existing upon said land before said buildings, erections, improvements, or machinery were erected or put thereon, and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter; (a) provided, however, that in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements or buildings, the said lien shall be prior to the lien given by this act."

Prior to the passage of this act it had been held that a mortgage lien was superior to a materialman's lien. *Monticello Bank* v. *Sweet,* 64 Ark. 502, 43 S. W. 500.

We are of the opinion that the chancellor correctly held that the lien of the mortgagee, Groom, was superior to that of the plaintiff as materialman. The statute in question gives one who purchases materials a new right, and, along with the superior right, gives him a remedy for the enforcement of it. The statute in express terms declares that the lien of the materialmen shall attach to the building for which the materials were furnished in preference to any prior mortgage existing upon the lands before said buildings were erected, and that any person enforcing such lien may have the building sold under execution, and the purchaser may remove it within a reasonable time thereafter.

According to our former decisions, if a new building had been erected entirely out of materials furnished by the plaintiff, its lien might have been enforced against such building, and the purchaser would have had the

right to remove it from the lots in a reasonable time, notwithstanding there was a prior mortgage on the lots. The lien can be enforced as a prior lien only by a sale of the building as a separate and distinct entity from the land. Such priority of lien exists only when a new building has been put upon the land subsequent to the execution of the mortgage, and the one claiming a prior lien for materials furnished must have furnished the materials for the erection of an entirely new building. To hold otherwise would put it in the power of the mortgagor to impair the security which he had given to the mortgagee. The houses were on the lots when the mortgage was executed, and constituted a part of the realty. Indeed, in many cases houses might constitute the most valuable part of the mortgage security. For the reason that the mortgage includes the houses situated on the lots as well as the lots themselves, the mortgagor would have no right to tear down the buildings without the consent of the mortgagee, and use them, in whole or in part, in making new improvements upon the mortgaged property.

As we have already seen, the materialman has no rights except as given him by the statute, and the statute only applies where there is some independent structure erected on the land out of materials furnished for that purpose. *Getchell & Tichenor* v. *Allen,* 34 Iowa 559; *James River Lumber Co.* v. *Danner,* 3 N. D. 470, 57 N. W. 343, and cases cited; *Thorpe Block Savings & Loan Assn.* v. *James,* 13 Ind. App. 522, 41 N. E. 978, and cases cited; Rockel on Mechanics' Liens, p. 388, § 148a; and Boisot on Mechanics' Liens, p. 149, § 150.

Counsel for plaintiff rely upon *Wimberly* v. *Mayberry,* 94 Ala. 240, 10 So. 157, 14 L. R. A. 305. This is an Alabama case, by a divided court; and, after reading carefully the majority and minority opinions in the case, we have reached the conclusion that the dissenting opinion is more in accord with our sense of reason and justice. The materialman had notice of the mortgage, and knew the purpose for which the materials were furnished. He was bound by the language of the statute, and could see

from its terms that it only contemplated giving him a lien superior to that of a prior mortgagee where a new building was erected out of materials furnished by third persons, and not where the new improvement was made out of old materials and new ones so intermingled that there could be no separation and sale of the building erected out of the new material.

It can add nothing to the rights of the materialman that the mortgagee knew that the mortgagor had torn down the old building and was using the lumber together with new lumber furnished by the plaintiff in the erection of a new building. His rights as mortgagee could only be defeated by some act of waiver or estoppel on his part, and this could not be accomplished by mere knowledge on his part that the mortgagor was using the old materials in connection with new ones in the erection of a building. The mortgagee, in order to be estopped, must have given his consent to the mortgagor, or have been guilty of conduct which would have estopped him from asserting his mortgage. Mere silence would not amount to estoppel, and it is not claimed that he expressly or by necessary implication waived any of his rights under the mortgage.

Therefore the decree will be affirmed.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* TILLEY.

Opinion delivered March 5, 1928.

1. INSURANCE—RIGHT TO RECOVER UNDER ACCIDENT POLICY.—In an action by the administrator of insured to recover on an accident policy for the death of insured, shot by his wife, who was beneficiary under the policy, evidence *held* to sustain a finding in favor of the plaintiff on the theory that the wife unlawfully shot her husband, as against her contention that she shot in self-defense.
2. APPEAL AND ERROR—PRESUMPTION IN FAVOR OF VERDICT.—In an action by an administrator of insured to recover on an accident policy for insured's death, having been shot by his wife, who was beneficiary under the policy, where the court instructed that the

administrator could not recover unless the testimony showed that the killing was unlawful, it will be assumed, on appeal from a verdict for the administrator, that the jury found that the killing was unlawful.

3. INSURANCE—ACCIDENTAL KILLING.—In an action by the administrator of insured to recover on an accident policy for the insured's death, having been shot by his wife, who was beneficiary under the policy, where the jury found that the killing was intentional, but not justified, such killing was "accidental" within the policy providing for payment if insured died through accidental means.

4. INSURANCE—ACCIDENTIAL KILLING.—In an action by the administrator of insured killed by the beneficiary to recover under a policy providing for payment if insured died through accidental means, no liability occurred under the policy unless the administrator showed that the killing of insured was accidental.

5. INSURANCE—NECESSITY OF PROOF OF DEATH.—Where the insurer denied liability under the policy to any one within the time when proof of death might have been made, it was not necessary to make such proof of death.

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

Strait & Strait, for appellant.

Edward Gordon, for appellee.

SMITH, J. The appellant insurance company issued to James Richard Holder an accident policy in the sum of a thousand dollars, whereby it agreed to indemnify the insured against certain disabilities, and, in the event of his accidental death, to pay the wife of the insured the sum of a thousand dollars. The policy contained the following provision, among others: "If the insured shall, through accidental means, sustain bodily injuries as described in the insuring clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the insured from the date of the accident, and result in any of the following specific losses within thirteen weeks, the association will pay, in lieu of all other indemnity: * * * For loss of life, $1,000." Indemnities were also provided for certain disabilities which might not result in death.

The insured was shot and killed by his wife, the beneficiary, and she brought a suit, after the company

had denied all liability and waived the time within which suit might be brought, and upon the trial of that action there was a verdict and judgment in favor of the insurance company. Thereafter the administrator of the insured's estate brought a suit in the chancery court, in which he sought to recover upon the policy, and to have the proceeds thereof declared a trust fund. It appears that, at the conclusion of this trial, when the chancellor indicated that he would find for the defendant, the plaintiff administrator elected to take a nonsuit, and the cause was then dismissed. Thereafter the administrator brought the present suit for the benefit of the estate of the insured, and alleged that the insured had been unlawfully killed by the beneficiary named in the policy. There was a verdict and judgment for the plaintiff for the amount of the policy, with the statutory penalty and an allowance for attorney's fees, and this appeal is from that judgment.

At the trial from which this appeal comes, witnesses detailed the circumstances under which the deceased had been killed, this testimony being to the effect that the insured and his wife had quarreled; that she left his home and went to that of her mother, to which place the insured followed her, and that he there forcibly took from her their baby and carried it back to their home; that she followed, crying and begging for the return of the child, and, when they arrived at their home, her entreaty being ignored, she unlawfully shot and killed the insured.

There was testimony contradicting that of Mrs. Holder and her stepson, a son of the insured by a former marriage, given at the trial from which this appeal comes, which tended to show that, in the first suit on the policy, Mrs. Holder had shown that she killed her husband in self-defense. This contradiction presented a question of fact for the jury, and upon this question the court charged the jury as follows:

"The court instructs you that, the contract being an accident policy, and Lillie Ethel Holder, the assured's wife, being the beneficiary named therein and alive at the time of his death, the plaintiff, as administrator of the

estate of James Richard Holder, cannot recover in this case unless you find from the testimony that he was purposely and unlawfully killed by his wife; that he himself did not, by his own misconduct, engage in or voluntarily enter the encounter which resulted in the injury causing his death."

Other instructions given by the court elaborated the proposition that the administrator could not recover unless it was shown by the testimony that the beneficiary named in the policy had unlawfully killed the insured. We must therefore assume that the jury found the fact to be that the beneficiary unlawfully killed the insured, and that the killing, while intentional, was not justified. Upon this finding was the plaintiff entitled to recover?

Appellant insists that the killing, while intentional, was justified, and insists that there can be no recovery, and the following cases are cited in support of that contention: *Ætna Life Ins. Co.* v. *Little,* 146 Ark. 70, 225 S. W. 298; *Metropolitan Casualty Ins. Co.* v. *Chambers,* 136 Ark. 84, 206 S. W. 64; *State Life Ins. Co.* v. *Ford,* 101 Ark. 514, 142 S. W. 863.

In reply to this contention, it may be said that the jury has found, under the instructions referred to above, that the killing was intentional, but not justified. This being true, the killing was "accidental" within the meaning of the language employed in the policy sued on.

In *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174, 167 S. W. 845, it was held that, if an injury occurs without the agency of the insured, it is "accidental," even though it may have been brought about designedly by another person. The question was again raised in the case of *Harrison* v. *Interstate Business Men's Accident Association,* 133 Ark. 163, 202 S. W. 34, where it was held, after a review of the authorities, that (to quote a syllabus): "If an injury occurs without the agency of the insured, it will be held to be 'accidental,' even though it may be brought about designedly by another person."

The case of *Henry* v. *Knights & Daughters of Tabor,* 156 Ark. 165, 246 S. W. 17, was a suit upon an ordinary

life policy, and the facts were that the beneficiary had killed the insured. It was there held that the beneficiary, having willfully killed the insured, could not recover on the policy, but that a recovery might be had for the benefit of the insured's estate. This holding was made upon the ground that, while public policy prevented the beneficiary in a policy, who had willfully murdered the insured, from collecting the insurance, public policy did not extend further than was necessary to prevent the felon from reaping the benefit of his crime, and that the proceeds of such a policy are payable to the estate of the insured.

The instant suit is prosecuted upon the theory that, while the beneficiary willfully killed the insured, and that she cannot recover the proceeds because it would be contrary to public policy to permit her to do so; but, as the policy sued on is an accident, and not an ordinary life, policy, it was essential that plaintiff show that the killing was accidental, as that term is defined in the cases above cited, before the administrator could recover. In other words, there was no liability to anyone unless the showing was made that the killing was accidental. The instructions required the jury to make this finding of fact before returning a verdict in plaintiff's favor, and, as that verdict was returned, we must assume that finding was made, and, as the testimony is legally sufficient to support that finding, the judgment must be affirmed.

It is insisted that no proof of death was made; but, inasmuch as the company, within the time when proof might have been made, denied liability under the policy to anyone, it was not necessary to make this proof.

As no error appears, the judgment must be affirmed, and it is so ordered.

BELL v. CONNER.

Opinion delivered March 5, 1928.

1. BRIDGES—NOTICE OF GRANT OF FRANCHISE.—A franchise to build a toll bridge, granted by the county court, was not void because no notice had been given thereof, since Crawford & Moses' Dig., § 10255, under which the court acted, does not require that notice be given.
2. BRIDGES—GRANT OF FRANCHISE—REVIEW ON CERTIORARI.—The fact that property owners, informed of the proceeding, might have become parties and appealed from the county court's order granting the franchise to build a toll bridge, did not preclude the right to review the county court's order on certiorari.
3. BRIDGES—VALIDITY OF GRANT OF FRANCHISE.—In a proceeding by certiorari, the county court's order and judgment granting a franchise to build a toll bridge under Crawford & Moses' Dig., § 10255, could not be *held* void where its invalidity did not appear from the face of the proceedings.
4. BRIDGES—INVALID FRANCHISE—REMEDY.—Where the invalidity of a county court's judgment granting the franchise to build a toll bridge did not appear from the face of the record in certiorari proceedings, the remedy of property owners was to institute proper proceeding to cancel the franchise in question.

Appeal from Woodruff Circuit Court, Northern District; *W. D. Davenport,* Judge; writ quashed.

Hughes & Davis, for appellant.

J. F. Summers, for appellee.

SMITH, J. Appellees, who are citizens and taxpayers of Woodruff County, sued out a writ of certiorari from the circuit court of Woodruff County to quash the order and judgment of the county court of that county granting to Alvin Bell a franchise to build a toll bridge over White River near Augusta, in Woodruff County.

It appears, from the record in this case thus reviewed, that on January 4, 1926, Alvin Bell filed in the Woodruff County Court a petition praying the court to grant him a franchise to build a toll bridge over the White River near Augusta, in that county, and the prayer of the petition was granted on that date, and that on the same date Bell formally accepted the franchise granted.

Upon the final hearing before the circuit court it was held that the order and judgment of the county court granting the franchise was void, and the judgment of the county court was quashed, and Bell has appealed.

At the hearing in the court below, testimony was offered to the effect that the county court had, at its January term, 1925, granted a franchise to R. L. Gaster substantially identical with the one granted a year later to Bell. The location of the bridge was the same in each instance, and each franchise provided that it should "be exclusive for a distance of ten miles on each side of said bridge, measured along the channel of said river," and that the county court should not "hereafter, during the life of this franchise, grant to any person, partnership, company, corporation, or association, any right, privilege, franchise or license to construct, maintain or operate another bridge or ferry across White River within said limits."

In the judgment granting a franchise to Bell it was provided that the franchise should be void and of no effect "if R. L. Gaster, who has a franchise for the construction of this toll bridge under an order of this court granted on the 27th day of January, 1925, complies in full with the ninth paragraph of said franchise, which is as follows: 'Ninth. The said R. L. Gaster, his successors or assigns, shall begin on actual work of construction within fifteen calendar months from the date of the acceptance of this franchise, and the said bridge shall be completed within three years from the beginning of actual work of construction, but the time of the completion of said construction shall be extended on showing to the court by the said R. L. Gaster, his successors or assigns, of reasonable cause for extension of time'."

It was also made to appear from the oral testimony heard by the court below that Bell was a son-in-law of the county judge.

It is first insisted that the franchise granted Bell is void because it appears, from the face of the record, that no notice thereof was given. This contention may be

answered by stating that § 10255, C. & M. Digest, under which the court acted, does not require, as a condition precedent to the exercise of this jurisdiction, that notice must be given.

It is further insisted by petitioners that the franchise granted Bell is void for the reason that it conflicts with the previous franchise granted Gaster, which had not then expired, as the fifteen months had not elapsed within which Gaster might begin the actual work of construction allowed for that purpose by the franchise granted him. The case of *Ratcliffe* v. *Pulaski Turnpike Co.*, 69 Ark. 264, 63 S. W. 70, appears to support this contention.

It is also insisted that the franchise granted Bell was void for the reason that the court was without jurisdiction to make the order, on account of the relation by affinity existing between the judge of the court and the petitioner, and the case of *Izard County* v. *Bank of Melbourne,* 123 Ark. 458, 185 S. W. 794, is cited in support of that contention, it having been there held that a county judge is disqualified to allow any claim presented against the county in which he is interested, except his own salary.

It is further insisted that the franchise is void as being unreasonable and unilateral, and, further, that the State Highway Commission has the authority from the Federal Government to erect a bridge at the site in question, which permit would exclude another from doing so, and also that the bridge in question is a part of the State Highway system, over which the county court has no jurisdiction. The cases of *Fulton Ferry & Bridge Co.* v. *Blackwood,* 173 Ark. 645, 293 S. W. 2, and *Conner* v. *Blackwood, ante,* p. 139, are cited in support of the last stated contentions.

It is insisted by appellant that petitioners should have appealed from the order of the county court, and that, as they had a remedy by appeal, they cannot now proceed by certiorari to review the order of the county court.

It has already been stated that no notice of the court proceeding was given or required, and, while a property owner who was advised of the proceeding might have become a party and have appealed within the time allowed by law for that purpose, the existence of this remedy does not preclude the right to review the order of the county court on certiorari. But, in a proceeding by certiorari, the validity of the order and judgment of the county court must be tested and determined by an inspection of the record in that case, and such order and judgment will not be held void on a certiorari proceeding unless the invalidity thereof appears from the face of the proceedings. *Cazort* v. *Road Imp. Dist. No. 3,* 175 Ark. 570, 299 S. W. 1014, and cases there cited.

The invalidity of the judgment of the county court here under review does not appear from the face of the record under inspection, and it will be necessary therefore for petitioners to institute a proper proceeding to cancel the franchise in question, as that relief cannot be granted here.

The writ of certiorari issued by the circuit court must therefore be quashed, and it is so ordered.

CLERGET v. WILLIAMS.

Opinion delivered March 5, 1928.

1. WORK AND LABOR—CONTRACT TO PAY FOR SERVICES.—The contract which the law ordinarily implies to pay for services and maintenance is not presumed between near relatives living together in the family relation.
2. WORK AND LABOR—PROMISE TO PAY FOR ANOTHER'S SERVICES.—As a general rule, where a party accepts the beneficial results of another's services the law implies a previous request and a subsequent promise to pay.
3. EXECUTORS AND ADMINISTRATORS—IMPLIED PROMISE TO PAY FOR SERVICES.—In the trial of a case on appeal from a probate court order disallowing a niece's claim against her aunt's estate for her services, evidence *held* to justify a finding of an implied promise on the part of the aunt to pay for such services.

4. EXECUTORS AND ADMINISTRATORS—PERSONAL SERVICES—EXCESSIVE AWARD.—A verdict for $800 for a niece's services in waiting on and attending to her aunt during the last six months of the latter's life, *held* excessive by $540; $10 a week, which the niece had earned at employment resigned by her, being sufficient, in the absence of evidence that she was a trained nurse or specially qualified, or that the duties were so much more arduous and trying than her former duties.

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

Edward Gordon, for appellant.

Strait & Strait, for appellee.

McHANEY, J. For approximately three years before the death of Mrs. Nancy E. Cowden, appellee, who was her niece, lived in her home at Morrilton, Arkansas, without charge for room and board. During all of this time appellee was employed as office girl in the office of Dr. Gray of Morrilton, at a salary of $10 per week, with the exception of the last six months of Mrs. Cowden's life. In June, 1925, Mrs. Cowden fell, and so injured herself that thereafter she was confined to her room, but not entirely confined to her bed, and was unable to attend to her usual household duties. She remained in this condition until the latter part of December, when she died. During this time, the last six months of Mrs. Cowden's life, appellee remained with her aunt, waited on her, and attended to the usual household duties, and did not work for Dr. Gray after the first of June. Appellee's father, who was a brother of Mrs. Cowden, was appointed administrator of her estate, and his daughter, the appellee, presented a claim to him against the estate for services rendered her aunt in the sum of $3,675, which he allowed, and directed an attorney who had been employed to contest the suit of Charlie Wood against this same estate, to abandon such contest. For the facts in the case of *Allnut* v. *Wood,* see the decision in that case this day filed. Shortly thereafter, the other heirs of Mrs. Cowden filed a petition in the probate court, and caused the removal of Williams as administrator, and appellant, Clerget, was appointed in his place. Clerget

thereafter disallowed the claim of appellee, which was then presented to and disallowed by the probate court. Appellee thereupon appealed from the order of disallowance to the circuit court, and upon a trial of the case there, before a jury, she obtained judgment for the sum of $800, and the administrator has brought the case here for our consideration.

The only question raised by this appeal is the sufficiency of the evidence to sustain the verdict and judgment appealed from, it being contended on the part of appellant that, since appellee admitted that she had no express contract, agreement or understanding with the deceased, that she was to receive compensation for her services, and being of near kin to the deceased, the law will not imply a contract to pay for such services, under the rule announced in the cases of *Hogg* v. *Laster,* 56 Ark. 382, 19 S. W. 975; *Lewis* v. *Lewis,* 75 Ark. 191, 87 S. W. 134; *Williams* v. *Walden,* 82 Ark. 136, 100 S. W. 898; and *Nissen* v. *Flournoy,* 160 Ark. 311, 254 S. W. 540. The rule as stated in the last case is as follows: "It is also an elementary principle of law that the contract which the law ordinarily implies to pay for services and maintenance is not presumed between parent and child, or in any other case of near relationship, where the parties live together and create the family relation."

As was also stated in the above case, "it is an elementary principle of the law of contracts that, where a party accepts the beneficial results of another's services, the law implies a previous request and a subsequent promise." In that case the relationship was brother and sister, and the court told the jury that the plaintiff could not recover without establishing a special or express promise to pay her, and further, that the evidence showed the relationship between the claimant and the deceased to be sister and brother, and that, where this relationship existed, the law presumed the services were rendered gratuitously. This court reversed the case on these instructions, and further said:

"No hard and fast rule can be laid down, and every case must be governed by its peculiar circumstances. It

is incumbent upon the claimant to show that, at the time the services were rendered, it was expected by both parties that she should receive compensation, but she may show this by circumstantial as well as by direct evidence. All the surrounding circumstances under which the services were performed may be proved."

The proof in this case shows that appellee rendered valuable and useful services to her aunt, and that, while there was no express promise to pay, yet it was discussed between them that a hired girl might be obtained for the sum of $3 per week, and her aunt expressed the wish that appellee should attend to and look after her wants and desires; that she discussed adopting appellee and the said Charlie Wood, to the end that they might inherit her estate, and the making of a will was also discussed, but neither idea was ever carried into execution. Under these circumstances, and others that might be detailed, we think it was quite competent for the jury to infer such a promise from all the circumstances in the case, under proper instructions from the court. No question is raised here regarding the correctness of the court's instructions, and an examination thereof by us discloses that the case was properly submitted to the jury. We are, however, of the opinion that the jury has rendered a verdict for an excessive amount, an amount not supported by any substantial testimony. At the time she quit work for Dr. Gray, appellee was earning the sum of $10 per week. It is not shown that she was a trained nurse, nor that she had any special or peculiar qualification for this particular work, nor that the duties were so much more arduous and trying as to make the services worth three and one-half times as much as she had been getting per week. It is shown that competent help could have been obtained for $3 per week, and we have concluded that $10 per week for a period of six months, or twenty-six weeks, is as much as the evidence authorizes a judgment to be entered for. If therefore the appellee will enter a remittitur of $540 within fifteen days, the judgment will be affirmed for $260; otherwise the cause will be reversed and remanded for a new trial.

ALLNUTT v. WOOD.

Opinion delivered March 5, 1928.

1. WILLS—ESTABLISHMENT OF LOST WILL—SUFFICIENCY OF EVIDENCE.—Under Crawford & Moses' Dig., § 10542, where the effect of testimony of a witness testifying to the execution of the lost will is to give him the entire subject-matter of litigation relative thereto, a will cannot be established by his testimony.
2. WILLS—SUFFICIENCY OF EVIDENCE TO PROVE LOST WILL.—In a suit under Crawford & Moses' Dig., § 10542, to establish a lost will and for an accounting, evidence *held* insufficient to prove the contents of such will, as required by § 10545.
3. WILLS—SUIT TO ESTABLISH—LACHES.—Plaintiff, suing to establish a lost will, and failing to bring an action until after the death of the life tenant 14 years later and after the death of one of the subscribing witnesses, *held* barred by laches.

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

Edward Gordon, for appellant.

Strait & Strait, for appellee.

SMITH, J. Appellee brought this suit to establish the alleged lost will of Dr. S. H. Cowden and for an accounting of the estate of Nancy E. Cowden, the widow of Dr. Cowden. The complaint alleged that Dr. Cowden died testate, and that by his last will he devised all his property, both real and personal, to his widow for life, with remainder to Charles A. Wood. Dr. Cowden died September 19, 1911, and was survived by his widow, who died December 25, 1925. Dr. Cowden left no lineal descendants, and, so far as is known, no collateral heirs.

The answer filed by the heirs of Mrs. Cowden denied that Dr. Cowden died testate, and further alleged the fact to be that, shortly before his death, he executed a deed to all his property to his wife, in which he conveyed to her in fee-simple all his real estate, and his personal property also. In the reply to this answer it was alleged that the purported deed from Dr. Cowden to his wife was a forgery.

The chancellor found the fact to be that Dr. Cowden executed a will in due form, whereby he devised all his

property to his wife for her life, with the remainder to Charles A. Wood, except that he devised to Ed Francis, subject to his wife's life estate, a certain triangular lot constituting a part of the testator's homestead. The estate of the testator consisted of a valuable lot in the city of Morrilton, containing about two and three-fourths acres, and a time certificate of deposit in the Bank of Morrilton for something over $2,700.

No children were born to the union of Dr. and Mrs. Cowden, but they took two small boys into their family and reared them. One of these was plaintiff, Charles A. Wood, who was Mrs. Cowden's nephew; the other was Ed Francis. These boys lived with Dr. and Mrs. Cowden as members of the family until they were grown and had married, when they established homes for themselves. The testimony shows that Dr. and Mrs. Cowden regarded these young men with the tenderest affection.

The testimony shows very clearly that Dr. Cowden executed a will, about two months before his death, but the will could never be found after his death. It is the theory of the plaintiff that Robert L. Williams, a brother of Mrs. Cowden, not only destroyed the will by burning it, but that he also forged the deed, and the finding of the chancellor accords with this theory.

Without reviewing the testimony, which we have carefully considered, we announce our conclusion to be that the testimony supports the finding that the will was destroyed and the deed was forged, but, notwithstanding the fact that we concur with the chancellor in these findings, we do not affirm the decree establishing the will as a lost instrument, because we do not think its provisions were established with the certainty which the law requires to restore a lost will, and also because we think plaintiff was barred by laches in instituting this suit.

The attorney who prepared the will testified that the will gave to Mrs. Cowden all the property for life, with remainder to Charles A. Wood, except a lot forming a part of Dr. Cowden's estate was devised to Ed Francis after the termination of Mrs. Cowden's life estate. This

witness testified that the testator gave certain directions about the wife of Charles A. Wood, but he did not remember whether the will as executed gave Mrs. Wood anything or not.

The attesting witnesses to the will were Dr. Charles D. Clark, who died in the lifetime of Mrs. Cowden, and Dr. Martin A. Metzger. The latter, when called as a witness, testified that the entire remainder was given to Charles A. Wood. Neither the attorney who drew the will nor Dr. Metzger remembered whether an executor had been named in the will or not.

Plaintiff Wood, testifying in his own behalf, stated that he was present when the will was executed, and that he heard it read, and he remembered its provisions to be as testified to by the attorney.

Dr. and Mrs. Cowden were frugal, and each kept a savings account, the accounts being kept in different banks. After the alleged forged deed had been placed of record, Mrs. Cowden's brother exhibited it to the cashier of the bank where Dr. Cowden's account was kept, and the account was transferred to Mrs. Cowden's name. Thereafter renewal certificates were issued annually by that bank in the name of Mrs. Cowden, who never used any of that account except the interest, and not all the interest, as the deposit was slightly more at the time of Mrs. Cowden's death than it was when her husband died.

It is strongly urged by counsel for plaintiff that the fact that Mrs. Cowden used only the interest on this deposit, when she was authorized by the will to consume the principal, if her necessities had required her to do so, shows that she recognized the fact that her husband had left a will. It appears also that, after the death of Dr. Cowden, his widow executed a deed to Ed Francis for the portion of the real estate which plaintiff testified was the part given Francis by the will, subject to the widow's life estate, and appellee insists that this was done because Mrs. Cowden knew that action accorded with the wishes of her husband as expressed in his will.

The statute provides for the restoration of lost or destroyed wills, and vests that jurisdiction in chancery courts. Section 10542, C. & M. Digest.

Section 10545, C. & M. Digest, reads as follows:

"No will of any testator shall be allowed to be proved as a lost or destroyed will unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator; nor unless its provisions be clearly and distinctly proved by at least two witnesses, a correct copy or draft being deemed equivalent to one witness."

Section 10529, C. & M. Digest, which is relevant to the facts of this case, reads as follows:

"If any person shall be a subscribing witness to the execution of any will wherein any beneficial devise, legacy, interest or appointment of real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, such devise, legacy, interest or appointment shall be void so far only as concerns such witness, or any person claiming under him, and such person shall be a competent witness, and may be compelled to testify respecting the execution of such will, in like manner as if no devise or bequest had been made to him."

It is true that appellee was not one of the subscribing witnesses to the will, but, in the effort to prove its loss and to restore it, he becomes such in effect, for the purpose and effect of his testimony was to prove its execution, and, according to his testimony, the will which he seeks to restore gives him all the testator's property, the life tenant being dead, except the lot conveyed by her to Francis. As appellee, in testifying to the execution of the will, becomes in effect a subscribing witness to its execution, and as the effect of his testimony is to give him the entire subject-matter of the present litigation, the will cannot be established by a consideration of his testimony.

As no copy or draft of the will was produced, the testimony of two witnesses as to its execution and con-

tents is essential. It is insisted that the testimony of the attorney and that of Dr. Metzger supplies this requirement.

The testimony of the last-named two witnesses proves the execution of the will, but there is a substantial conflict in their testimony as to its contents. According to the recollection of the attorney, there was possibly a devise to appellee's wife. The witness stated: "As I now recall, Dr. S. H. Cowden mentioned Mrs. Charles Wood, wife of Charles A. Wood, but as to whether or not any of the property was willed to her in said will, I cannot now state positively." This witness was very definite in his statement that the remainder interest in a portion of the real estate had been given Ed Francis, the description of which the witness did not recall. According to Dr. Metzger, the surviving subscribing witness, the entire estate was given to Wood, subject to the life estate of the testator's widow.

In the case of *Rose* v. *Humnicutt,* 166 Ark. 134, 265 S. W. 651, it was held (to quote a syllabus) that "it will be presumed that a testator destroyed a will which cannot be found after her death, with intention to revoke it, if she retained custody of it or had access to it, but this presumption may be overcome by proof."

In the case of *Rawlings* v. *Berry,* 128 Ark. 273, 194 S. W. 249, the court discussed the *quantum* of proof necessary to overcome the presumption that a lost will had been revoked, and it was there said:

"We think no error was committed in defining the *quantum* of proof necessary to establish and prove a lost will. In the case of *Nunn* v. *Lynch,* 73 Ark. 20, 83 S. W. 316, Chief Justice HILL, speaking for the court, quoted with approval from the case of *Rhodes* v. *Vinson,* 9 Gill (Md.) 169, 52 Am. Dec. 685, the following statement of the law: 'The policy of the law has thrown around last wills and testaments as many, if not more, shields to protect them from frauds, impositions and undue influence than any mode of conveyance known to the law. Can there be a doubt that, in cases like the present, where

the object is to establish the contents of a paper which has been destroyed as and for a last will, that policy does require the contents of such paper to be established by the clearest, the most conclusive, and satisfactory proof? We think not.' See also Underhill on the Law of Wills, vol. 1, § 275, and 14 Ency. of Ev., p. 465."

Appellee cites and relies upon the case of *Bradway* v. *Thompson,* 139 Ark. 542, 214 S. W. 27, as sustaining the decree of the court below in establishing the alleged lost will. But the facts in that case were stronger in support of the will than they are in the instant case. There a carbon copy of the will was produced, which the statute makes equivalent to one witness. There was no question about the provisions of the will. More than two witnesses proved its execution, and it was clearly shown to have been in the possession of the testator when he left his home for the hospital, from which he never returned, and it was also shown that a person had access to the will who would have profited by its destruction.

The instant case is more nearly like that of *Dudgeon* v. *Dudgeon,* 119 Ark. 128, 177 S. W. 402, in which case, as in this, the execution of the will was clearly shown, but its provisions were not. It was there said:

"While it is admitted there was a will, appellant failed to prove its provisions. Section 8062 of Kirby's Digest gives chancery courts jurisdiction to establish lost or destroyed wills, but it is not sufficient simply to establish the fact that there was a will. It is just as essential that the proof show its provisions. Section 8065 of Kirby's Digest provides that no will shall be allowed to be proved as a lost or destroyed will unless, among other requirements, its provisions be clearly and distinctly proved by at least one witness, a correct copy or draft being equivalent to one witness."

We are also of the opinion that plaintiff is barred by laches from prosecuting this suit.

In the case of *Dudgeon* v. *Dudgeon, supra,* it was said:

"The right to probate this will would not be defeated merely by the delay in the institution of this suit, although, with full knowledge of all the facts, appellant delayed over ten years in moving for that purpose. Yet this is a circumstance to be considered in determining what action the court should take."

Here, however, we have something more than mere delay. Dr. Cowden died in 1911, and his wife in 1925, and no effort was made to probate this will until after her death. It cannot be assumed that she was not interested in the devolution of the estate, whatever it was, which she acquired upon the death of her husband. Dr. Clark, one of the attesting witnesses, was also dead when the suit was filed. It is true that the attorney who prepared the will and one of the attesting witnesses still survived, but such time has elapsed since the death of the testator that one or the other of these last-named persons has become confused about the provisions of the will. During all this time there was of record a deed which apparently conveyed to Mrs. Cowden the entire estate. Appellee insists that the testimony shows that Mrs. Cowden did not claim under this deed, and that he was ignorant of its existence until after Mrs. Cowden's death. Had this suit been brought seasonably, it might otherwise appear.

Appellee insists that he could not have disturbed Mrs. Cowden's possession and use of the land or the money, for the reason that the will gave her the right thereto during her life; and this is true if there was such a will as he seeks to prove, but, even so, he could have probated the will during Mrs. Cowden's lifetime. He was certainly not required to wait until after her death to do so, but this he did, and his delay has thus caused the loss of very material testimony.

In the case of *Reese* v. *Bruce,* 136 Ark. 378, 206 S. W. 658, certain heirs questioned the apparent title of which their ancestor was seized at the time of his death, and, in denying them relief upon the ground of laches, the court said:

"It appears on the face of the bill that W. W. Tate died on the 29th day of May, 1899. If appellants had instituted this suit in his lifetime, he could have explained the character of his title and possession thereunder. Appellants have waited until conditions have changed and until appellees have been deprived of the evidence of their father. This court said, in the case of *Tatum* v. *Arkansas Lumber Co.,* 103 Ark. 251, 146 S. W. 135, that the true doctrine concerning laches was announced by Mr. Pomeroy, as follows: 'Laches, in legal significance, is not mere delay, but delay that works disadvantage to another. So long as the parties are in the same condition, it matters little whether he presses a right promptly or slowly within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. This disadvantage may come from the loss of evidence, change of title, intervention of equities, and other causes, but, when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.' 5 Pomeroy, Eq. Jur. (3 ed.), § 21."

For the reasons therefore that appellee has failed to prove the provisions of the will with the certainty required by law to restore it as a lost instrument, and because of his laches in instituting this suit, the decree of the court below must be reversed, and, as appellee has no interest in the Cowden estate in the absence of a will, the suit will be dismissed. It is so ordered.

SECURITY MORTGAGE COMPANY *v.* MEEKS.

Opinion delivered March 5, 1928.

DRAINS—NOTICE TO SUPPOSED OWNER.—In a proceeding by constructive service to enforce the benefit assessment of a drainage district, under Acts 1927, p. 417, notice naming the original owner of the land, who had legal title and right of possession, and was believed by the commissioners of the drainage district to be the "supposed owner," as the "supposed owner," rather than a commissioner appointed to make a sale on a mortgage foreclosure, *held* sufficient.

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

Gustavus G. Pope, for appellant.

Joseph Callaway, for appellee.

HUMPHREYS, J. Appellant brought this suit in the chancery court of Clark County to foreclose a mortgage lien on a certain one hundred acre tract of land in said county against the mortgagors, James and Lula Bell, and to redeem said land from a foreclosure sale for benefit assessments due the Ross Drainage District from appellee, O. O. Meeks, who purchased the land from the grantee, John F. Bevill, of said Ross Drainage District, after it purchased and obtained a deed to the land at its tax or benefit assessment sale.

In addition to setting out appellant's note and mortgage, and the failure of the Bells to pay the indebtedness, and a prayer for foreclosure, it was alleged in the complaint that the sale by the Ross Drainage District for the delinquent assessments of 1921 was void, because the notice named James Bell as the supposed owner, whereas, at the time of the institution of the foreclosure suit of the Ross Drainage District, a second mortgage, which the Bells had given to the Saunders Mercantile Company and the Citizens' National Bank, had been foreclosed, and the land ordered sold by Fred Dillard, who was appointed commissioner to make the sale. In other words, it was alleged that, by virtue of his appointment, Fred Dillard, as commissioner, should have been named as the supposed owner in the notice given by the Ross

Drainage District in the enforcement of its lien for delinquent assessments.

Appellee filed an answer, claiming ownership to the land by virtue of mesne conveyances from the Ross Drainage District, who purchased the land at its foreclosure sale for delinquent assessments of 1921, and denying the alleged invalidity of its tax or assessment sale.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a decree upholding the validity of the tax or benefit assessment sale of the Ross Drainage District and a dismissal of appellant's complaint for the want of equity, from which is this appeal.

The facts contained in the record are undisputed. On February 20, 1919, James Bell, jointly with his wife, executed a mortgage on said land to secure an indebtedness James Bell owed appellant, amounting to $2,000. Thereafter they executed a second mortgage on said lands to the Saunders Mercantile Company and the Citizens' National Bank to secure money Bell borrowed from them. Suit was brought in said court to foreclose the second mortgage, subject to appellants' mortgage, appellant being made a party thereto, and a decree of foreclosure was rendered and entered on June 8, 1922, in which James and Lula Bell were given until the first day of October, 1922, to pay the debt to the Citizens' National Bank and Saunders Mercantile Company. James and Lula Bell remained in possession of the lands during the entire year of 1922. They did not live upon it, but cultivated it and kept it until they gathered their crop. On June 17, 1922, the Ross Drainage District brought its suit to foreclose its lien for delinquent assessments for 1921, in accordance with the special act No. 92 of the Acts of the General Assembly of 1917 creating the district. The proceeding was *quasi in rem,* and named James Bell as the supposed owner of the land. The act required that the supposed owner of the land be named in the notice to sell same in the foreclosure proceeding to enforce a

lien for delinquent assessments. A decree was rendered in that case on October 3, 1922, ordering that the lands in the Ross Drainage District upon which the delinquent assessments of 1921 had not been paid should be sold by Fred Dillard as commissioner. The district purchased the land at the sale, and the court subsequently confirmed the commissioner's sale and ordered that he make a deed to the Ross Drainage District, which he did. The drainage district then sold the land to John F. Bevill, and Bevill afterwards sold it to appellee, O. O. Meeks.

Appellant contends for a reversal of the decree dismissing its complaint because the lands were sold by the Ross Drainage District in a proceeding enforcing its claim for delinquent assessments of 1921 upon constructive service, in which James Bell was named as the supposed owner thereof, instead of naming Fred Dillard as the supposed owner, who was appointed by the court to sell the land in the foreclosure decree rendered on the 8th day of June, 1922, in favor of the Citizens' National Bank and the Saunders Mercantile Company against James and Lula Bell. It is argued that the legal title to the land was placed in the commissioner by the decree of June 8, 1922, in trust for the future purchaser, and that he was the supposed owner on June 17, when the drainage district brought this suit to foreclose its claim for delinquent assessments of 1921. The decree of June 8, 1922, did not attempt to transfer the title in the land out of Bell and place it in the commissioner. It simply ordered a sale of the land to satisfy the lien in favor of the Saunders Mercantile Company and the Citizens' National Bank, if Bell did not pay the debt on or before October 1, 1922. Bell was left in possession of the land, and was in possession thereof, with a right to remain there and pay the debt, at the time the drainage district brought its suit. There is nothing in the record to indicate that the commissioners of the Ross Drainage District believed, or had reason to believe, that Bell was not the supposed owner. They had every reason to believe that he was the supposed owner, as he was the original owner

and still in possession of the land at the time it instituted the suit to collect the delinquent assessments. We think the rule announced in the case of *Simpson* v. *Reinman,* 146 Ark. 428, 227 S. W. 15, and in the *Security Mortgage Co.* v. *Herron,* 174 Ark. 698, 296 S. W. 363, delivered July 4, 1927, rules the issue involved here. The notice met the requirements of the statute under which the district was created, according to the rule announced in both those cases.

No error appearing, the decree is affirmed.

KELLY v. KELLY.

Opinion delivered March 5, 1928.

1. WILLS—INTENTION OF TESTATOR.—The cardinal rule in construing a will is to ascertain and declare the intention of the testator to be gained from reading the entire will and construing it to give effect to each clause and provision therein, if this can be done.
2. WILLS—TERM "CHILDREN" CONSTRUED.—Primarily, the term "children" is a word of purchase and not of limitation, and for that reason cannot be construed as equivalent of the words "heirs" or "heirs of the body," unless the context of the will shows that the testator intended to use the term in the sense of heirs.
3. WILLS—CONSTRUCTION.—Under a will devising a city block to the testator's son Tom and his children, providing that "the property is not to be mortgaged or sold during the lifetime of my son, Tom, or his children, but is to be kept as a home for the Kelly family," *held* the son and the children were vested with equal estates, the first clause therein vesting a fee simple to devisees and the last clause thereof being in the nature of direction not to sell or mortgage the land during life.

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

Joe P. Melton, for appellant.

Bogle & Sharp, for appellee.

HUMPHREYS, J. This appeal involves the construction of the first devising paragraph of the will of Bridget Kelly, the mother of appellee, and grandmother of appellants. Appellee brought this suit against the appellants

for a partition of the land, under the theory that the fee simple title was devised to him and his children jointly by the provisions of said paragraph.

Appellants maintain that a life estate only in said real estate was devised to appellee, and that the remainder in fee was devised to them by the paragraph of the will in question. The paragraph of the will is as follows:

"All the property in block twenty-seven in the city of Brinkley, Monroe County, Arkansas, known as the Kelly Hotel, I give and bequeath to my son Tom and his children. The property is not to be mortgaged or sold during the lifetime of my son Tom or his children's, but is to be kept as a home for the Kelly family."

This court announced the following rule with reference to the construction of wills in the case of *Finch* v. *Hunter,* 148 Ark. 486, 230 S. W. 554.

"The cardinal rule in construing a will is to ascertain and declare the intention of the testator. That intention is to be gained from reading the entire will and construing it so as to give effect to every clause and provision therein, if this can be done."

The other parts of the will throw no light whatever upon the intention of the testator with reference to the kind of estate she intended to vest at her death in appellants and appellee under the paragraph in question. For that reason we have not incorporated in this opinion the remaining paragraphs of the will. The intent therefore of the testator must be ascertained, if possible, from the language employed in the paragraph in question. Appellants argue that the terms "children" used in the first clause of the paragraph meant "heirs of the body," and was an effort to create an estate tail, which, under our statute, would vest a life estate in appellee with remainder in fee to appellant.

Primarily the term "children" is a word of purchase and not one of limitation, and for that reason can-

not be construed as the equivalent of the word "heirs" or "heirs of the body," unless there is something in the context showing that the testator intended to use the term in the sense of heirs. "Children" is a broader term than the word "heirs," and may include adopted children as well as children of one's body. There is nothing in the first clause of the paragraph restricting the use of the term "children" to heirs of the body of Tom, the testator's son. The plain meaning of the language used in the first clause is that the father and children should be vested with equal estates. The first clause must be construed as vesting a fee simple title to the land in all the devisees mentioned in the paragraph, unless there is something in the additional or last clause indicating otherwise. The last clause is an attempt to abridge the right of the devisees to sell or incumber the property. If the limitation attempted to prevent the sale or incumbrance thereof during the lifetime of appellee only, it might be argued with much effect that the testator only intended to vest a life estate thereto in appellee, with the remainder in fee to his children. In other words, that the testator used the term children as the equivalent of the word heirs; but the force of the argument is lost when it is observed that the attempted limitation for or abridgment of the right to sell or incumber the property holds throughout the life of the children also. Certainly the testator did not intend to limit the interest of appellants to a life estate by an attempted restriction against the sale and incumbrance of the land under the last clause of the paragraph. If we interpret the last clause as limiting the estate vested by the first clause in appellee to a life estate, the construction necessarily limits appellants' estate to a life estate also. The last clause does not purport to bequeath either a life or fee simple estate to any of the devisees. It is in the nature of a direction to the devisees not to sell or mortgage the land during their life, but to reside upon it as a home, rather than an attempt to vest any kind of an estate in them to the land. The first clause in unambiguous and definite language

vested a fee simple title in the devisees upon the death of the testator.

It follows that the decree partitioning the land between the devisees in equal shares is correct, and must be and is affirmed.

CAIN v. SONGER.

Opinion delivered March 5, 1928.

1. MORTGAGES—DELIVERY OF PROPERTY.—Where a bill of sale of a chattel was intended as a mortgage to secure a debt, delivery of property to the apparent buyer was not necessary to render the instrument valid or effective as a mortgage.
2. TRIAL—INSTRUCTION PRESENTING PLAINTIFF'S THEORY.—In a suit to recover possession of described personal property alleging ownership thereof by purchase and delivery under a bill of sale, in which the testimony conflicted as to whether the bill of sale was executed to evidence a sale or to secure an indebtedness, it was error to refuse an instruction presenting plaintiff's theory that the contract was one of sale.

Appeal from Woodruff Circuit Court, Northern District; *W. D. Davenport,* Judge; reversed.

Roy D. Campbell, for appellant.

Elmo CarlLee, for appellee.

HUMPHREYS, J. Appellant brought suit against appellee in the circuit court of Woodruff County, Northern District, to recover possession of certain sawmill machinery, equipment, wagons, horses and mules, particularly describing the property and alleging ownership thereof by purchase and delivery from appellee under a bill of sale executed to him on the 25th day of June, 1924. Appellant executed bond and took possession of the property.

Appellee filed an answer, admitting the execution of the bill of sale, but alleging that it was intended as a mortgage to secure the indebtedness of $500 which he owed appellant, and which had been paid prior to the institution of this suit.

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

The bill of sale, absolute upon its face, was introduced in evidence. The real issue involved was whether the property was delivered to appellant under the bill of sale or whether the instrument was intended as a mortgage to secure an indebtedness of $500, which, of course, would not require a delivery of the property, to be valid or effective.

The testimony introduced by appellant tended to show that the bill of sale was executed to evidence an absolute sale and purchase of the property; whereas the testimony introduced by appellee tended to show that it was intended as a mortgage to secure an indebtedness of $500. Appellant's testimony tended to show that, after the execution of the bill of sale, appellant rented the property to appellee. Appellee's testimony tended to show otherwise. If appellee rented the property from appellant at the time or after executing the bill of sale, it was proof conclusive of a delivery and complete sale. Appellant asked an instruction presenting this theory of his case, which was refused by the court, over his objection and exception. The instruction is as follows:

"If you find that, after the bill of sale was executed, the plaintiff and defendant entered into an agreement for the use of the property under which the defendant was to pay for the use of the sawmill outfit, then you are instructed that there was a delivery of the property after the bill of sale was executed, and you will find for the plaintiff."

This theory of appellant's case was not covered by any other instruction given by the court, and the court erred in not giving the requested instruction.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

NORTH ARKANSAS HIGHWAY IMPROVEMENT DISTRICT No. 2 v. HOME TELEPHONE COMPANY.

Opinion delivered March 5, 1928.

1. HIGHWAYS—ACTION AGAINST HIGHWAY DISTRICT—VENUE.—Where the domicile of a highway improvement district was fixed by Acts 1917, p. 2181, in Izard County, it was not subject to jurisdiction of the court in Fulton County.
2. JUDGMENT—WHEN ERROR TO RENDER JUDGMENT BY DEFAULT.—Where the defendant highway district came into court by attorneys and filed an answer showing no liability for damages done by a contractor as claimed, it was error to render judgment against the district by default.
3. JUDGMENT—WHEN SET ASIDE FOR MISTAKE OR FRAUD.—A judgment by default will be set aside after the term at which it was rendered if it appears that the judgment was rendered either by mistake or by fraud practiced by the successful party in obtaining it.
4. PLEADING—DEFECTIVE STATEMENT OF CAUSE OF ACTION.—The remedy to reach a cause of action defectively stated is by motion to make the complaint more definite and certain, rather than by demurrer.
5. JUDGMENT—ACTION TO VACATE JUDGMENT—PARTIES.—Where a judgment was obtained against a highway contractor with a judgment over against the highway district as garnishee, and the person securing the judgment was proceeding to enforce it against the district, it was not necessary, in the district's suit to vacate such judgment, that the highway contractor be made a party.
6. PLEADING—WANT OF PROPER VERIFICATION OF COMPLAINT.—The want of proper verification of a complaint cannot be reached by demurrer, nor raised in the Supreme Court for the first time on appeal.

Appeal from Fulton Circuit Court; *John C. Ashley*, Judge; reversed.

Coleman & Reeder and *S. M. Casey*, for appellant.

H. A. Northcutt and *Oscar E. Ellis*, for appellee.

KIRBY, J. Appellant brought this suit, after the expiration of the term, to quash, set aside and vacate a judgment for $686 obtained by appellee against it in the Fulton Circuit Court on August 26, 1925.

The petition alleged that the judgment was obtained without proper service, rendered without jurisdiction

and without notice to the district of the pendency of the suit until after the expiration of the term at which it was rendered. It was alleged that the district was created by special act 473 of the Acts of 1917.

"That on the 26th of August, 1925, the defendant obtained a judgment in this court against the plaintiff for the sum of $686 in a suit by the defendant against W. I. Davis Construction Company, in which it took judgment over, as it claimed, against the plaintiff, copy of which judgment is hereto attached, marked Exhibit A and made a part of this complaint. Plaintiff states that said judgment was taken against it without any proper service, and it had no knowledge that same had been taken until recently, when a garnishment was issued on said judgment against the collector of Fulton County, who had in his hands funds of the plaintiff"; that the court had no jurisdiction to render judgment under the pleadings in the case, and was without jurisdiction also, because, under the act of its creation, the district could only be sued in Izard County, and "plaintiff states that it was not indebted to the W. I. Davis Construction Company in any sum, nor to the defendant, Home Telephone Company, and it has a complete and full defense to said cause."

A general demurrer was interposed to this petition by the appellee company, which the court sustained, its judgment reciting that the cause was heard on the judgment and pleadings in the case of *Home Telephone Co. et al.* v. *W. I. Davis Construction Co.*, heretofore pending in this court, and which judgment is sought to be set aside.

The court, after hearing said demurrer and examining said judgment and pleading, is of opinion that plaintiff's remedy, if any, is by certiorari and not by proceeding under § 6290, C. & M. Digest, to vacate said judgment, and that the demurrer should be sustained. The plaintiff excepted to the ruling of the court, and, declining to plead further, the complaint was dismissed, from which judgment this appeal is prosecuted.

The judgment sought to be quashed or vacated, attached to the petition as an exhibit, recites that on the 26th day of August, 1925, "the plaintiff, Home Telephone Company, appeared in person and by its attorneys, H. A. Northcutt and Oscar E. Ellis, and announced ready for trial, and the defendant, W. I. Davis Construction Company, appeared by its attorneys, G. T. Humphries and J. M. Burrow, and the North Arkansas Highway Improvement District No. 2 failed to appear, and made default, although having been legally served with summons for more than 20 days before the convening of this court."

The pleadings upon which this judgment was rendered show that the suit was brought by the telephone company against the construction company in the Fulton Circuit Court for damages to the telephone line and poles of the plaintiff by the defendant in the construction of the highway leading from Batesville to Mammoth Spring, on the section thereof leading from Mammoth Spring to Salem, Arkansas; that defendant company was working and building the road or highway under a contract with the North Arkansas Highway Improvement District No. 2, and that the company had negligently and unlawfully destroyed the telephone line in the construction of the highway, to the damage of the plaintiff. On motion the complaint was made more specific.

The defendant, W. I. Davis Construction Company, moved to have the highway improvement district made a party, alleging that the commissioners in charge of the district had selected the route for the construction of the highway, and, after the survey was made and approved and notice given for all parties owning property along the right-of-way to appear and make their claim for damages, had contracted with the W. I. Davis Construction Company to build the highway, and put it in possession thereof; that, if any wrong was done to plaintiff, it consisted in the action taken by the commissioners of the improvement district, while acting under the authority of the State Highway Department; alleged

that, under the above statement and conditions, the defendant should not be liable to the plaintiff in any sum, and, if the commissioners were made parties, "that they can answer and show wherein this defendant is not liable to plaintiff in any sum whatever."

Thereupon the district filed a response to said motion, alleging that they had fully and completely paid and remunerated the said W. I. Davis for the work alleged to have been done by the plaintiff, Home Telephone Company, as mentioned and set out in said party's original and amended complaints, and prayed to be discharged, with costs. This response was filed by Oscar E. Ellis and H. A. Northcutt, the attorneys who brought suit for the telephone company against the Davis Construction Company.

The court was without jurisdiction to bring the highway district into court in Fulton County, its domicile being fixed by law in Izard County, and service being required to be had in all suits against it by service had on the commissioner of that county. Section 4, act 473 of the Acts of 1917.

When attorneys of the district, the same attorneys who represented plaintiff in the action against it, entered the appearance of the district, it was alleged in the response that the district had fully and completely paid and remunerated the contractor "for the work alleged to have been done by the plaintiff, Home Telephone Company, as mentioned and set out in said party's original and amended complaint."

Notwithstanding this answer, denying any liability on the part of the district to the contractor or the Home Telephone Company, the judgment recites that the district failed to appear, and made default, and "thereupon the plaintiff and defendant, W. I. Davis Construction Company, agreed in open court that a judgment should be entered in favor of the plaintiff in the sum of $686, and that the said W. I. Davis Construction Company took judgment over against North Arkansas Highway Improvement District No. 2 by default in the sum of $686."

Judgment was then rendered that the plaintiff Home Telephone Company have judgment against the Davis Construction Company in the sum of $686, that W. I. Davis Construction Company should have judgment against the North Arkansas Highway Improvement District No. 2 in the sum of $686, etc.

When the district came into court by its attorneys and filed an answer, showing that it was not liable to the plaintiff for any damage done by the contractor, having already paid him in full for the work done, the court should not have rendered judgment against the district by default.

The commissioners had the right to rely upon their answer and response, which showed a complete defense to any suit against it by the contractor, and certainly to any allegations of the complaint for damages alleged to have been caused by it or its contractor in the construction of the highway. The complaint itself did not allege a cause of action or liability on the part of the district for the damages alleged to have been done by the contractor in the construction of the highway, and the response or answer of the district showed it was not liable for any such damages. Such being the case, the allegations of the petitions, with the inferences arising from the recitals of the judgment sought to be set aside and the pleadings upon which it was rendered, exhibits thereto, are sufficient to show the judgment was rendered by mistake, or by fraud practiced by the successful party in obtaining it.

If such pleading, with the inferences arising from the allegations, are to be considered as stating a cause of action defectively, it should have been corrected by motion to make more definite and certain, rather than by sustaining a demurrer holding it insufficient, which was erroneously done.

It can make no difference that the construction company was not made a party to the proceedings to vacate the judgment, since the allegations showed that the judgment had been rendered against the district, which was

proceeding to enforce it against the appellant, and that the construction company had no interest therein. Neither could a want of proper verification of the motion or complaint be reached or taken advantage of by demurrer, nor can the question be raised here for the first time.

The court erred in not so holding, and the judgment is reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings in accordance with law and not inconsistent with this opinion.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT *v.* HOME LIFE & ACCIDENT COMPANY.

Opinion delivered March 5, 1928.

1. EMINENT DOMAIN—LIMITATION OF ACTION FOR TAKING OF LAND.—Under Crawford & Moses' Dig., §§ 3940, 3942, an action to recover damages for the taking of land by a levee or drainage district must be brought within one year after construction of the levee.
2. EMINENT DOMAIN—PERSONS BOUND BY CONDEMNATION PROCEEDINGS.—A mortgagee, not included in or notified of proceedings for condemnation of land by a levee district, was not bound nor his lien affected by such proceedings, and hence he was not prevented by payment of damages to the mortgagor from compelling a second payment to himself, although he would be first required to resort to the land remaining after condemnation.

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

STATEMENT OF FACTS.

This appeal was prosecuted from a judgment recovered against the appellant for damages awarded for lands condemned for levee purposes.

John N. Schichtl conveyed by deed of trust the Sullivan place, in Lee County, including the lands condemned, on August 19, 1919, to J. K. Sullivan, to secure the payment of three $10,000 promissory notes, the last due January 18, 1923. The notes and the mortgage were assigned to appellee on September 30, 1919, and it was the owner thereof on September 20, 1922. On April 13, 1920,

the appellant levee district proceeded to the condemnation of a strip of land 500 feet in width across part of the lands included in the mortgage, for levee purposes.

Schichtl, who appeared in the suit, filed exceptions to the report of the appraisers, and, on April 11, 1921, in the trial, judgment was rendered in his favor against the levee district for the sum of $19,580.71 damages for approximately 83 acres of additional right-of-way across the south half of section 27, north half of section 34, and the northeast quarter of section 33, township 2 north, range 5 east. The district paid said sum, with interest, on February 24, 1922, to said Schichtl, and the judgment was marked satisfied in full on that day.

The appellee alleged it was entitled, being the owner of the indebtedness and the mortgage securing same, to recover damages proportionately for 26 acres of the land condemned, included in its mortgage, of the value of $5,665.75, with interest. Appellee brought suit to foreclose its mortgage on June 22, 1922, and secured a judgment therefor on September 27, 1922, against Schichtl for $31,950, with an order of sale. The lands were sold and purchased by appellee for $15,000, which was credited on the judgment against Schichtl, who has been insolvent since the foreclosure of said mortgage, leaving a balance due on the judgment of $16,950.

The answer admitted the ownership of the lands by Schichtl on August 19, 1919, but denied any knowledge of their having been mortgaged and the transfer of the mortgage to appellee; admitted that on April 13, 1920, it proceeded to the condemnation of the lands, but denied that summons was issued for Schichtl, who appeared and filed exceptions to the board of appraisers, and denied that judgment was rendered on April 11, 1921, and that same had been satisfied; admitted that the proportionate part of the land condemned, included in the mortgage, was 15 acres, but denied any indebtedness to the plaintiff; admitted the foreclosure of the mortgage, the sale, and purchase of the lands by appellee. Appellant denied the insolvency of Schichtl; admitted that it

appropriated or condemned the 500 feet of land and additional width for levee purposes; alleged that, if appellee had any right of action to any of the damages awarded for the lands condemned, it was barred by the three-year statute of limitations (§ 6950), and the one-year statute of limitations (§ 3942, C. & M. Digest); also pleaded estoppel against appellant, alleging that it had permitted Schichtl to collect the entire amount awarded for damages, and elected to pursue its remedy against him therefor, and asked that the suit be transferred to equity.

The case was tried on an agreed statement of facts, showing the execution of the mortgage, the record thereof, the assignment of the notes and mortgage to appellee, the foreclosure thereof, the purchase of the lands, the condemnation of the lands by the levee district, and payment of the damages to the mortgagor, and the satisfaction of the judgment.

There was testimony tending to show that appellee, the holder of the mortgage, had knowledge of the condemnation proceedings and judgment rendered, although it was not a party thereto nor summoned therein, and from the judgment against it the levee district prosecutes this appeal.

Wils Davis, Sam Costen and *Mann & McCulloch,* for appellant.

Daggett & Daggett, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not holding the claim barred by the statute of limitations, and its contention must be sustained.

Our statute provides the remedy of the landowner where the board of directors of a levee or drainage district have appropriated or condemned lands for the construction or maintenance of levees or ditches, and that all actions for recovery of damages against such districts for the appropriation of lands shall be instituted within one year after the construction of the levee or drains, and not thereafter. Sections 3940, 3942, C. & M. Digest.

Appellee, the mortgagee of the lands, not having been included in the proceedings for the condemnation thereof, was not bound thereby, and his lien on the land not affected, not having been given notice of such proceedings, and the payment of the damages by the condemnor, under such circumstances, to the mortgagor, could not prevent the mortgagee from compelling a second payment to himself or foreclosure on the land taken for the improvement, although he would first be required to resort to the land remaining after the condemnation. *Schichtl* v. *Home Life & Accident Co.,* 169 Ark. 415, 275 S. W. 745.

The mortgagee should have been made a party to the condemnation proceedings, and notified thereof in the manner provided by statute, and could not be deprived of its superior lien by condemnation and award made without notice, and the payment of any such award was at the peril of the condemnor.

The mortgagee, although not bound by the condemnation proceedings, not being a party thereto and having no notice thereof, could have proceeded, after the foreclosure of his lien and the purchase of the lands, to the collection of the amount of damages for the land condemned for payment of his deficiency judgment. He must have done this, however, within the time provided by law for the bringing of such suits, one year after the construction of the levee, and, not having done so, the suit being brought more than one year and eight months after its construction, the statute being pleaded, his cause of action was barred, and the court erred in holding otherwise. *Young* v. *Red Fork Levee District,* 124 Ark. 61, 186 S. W. 604; *Guaranty L. & T. Co.* v. *Helena,* 148 Ark. 56, 228 S. W. 1045.

Having held that the appellee was not entitled to recover, his cause of action being barred by the statute of limitations, we need not discuss the other questions raised.

For the error designated the decree will be reversed, and the cause dismissed for want of equity. It is so ordered.

STEELCOTE MANUFACTURING COMPANY v. BYRNES.

Opinion delivered March 5, 1928.

1. SALES—UNSIGNED INSTRUMENT OF GUARANTY.—In an action on a verified account for paints sold, it was error to admit an unsigned printed form with the seller's name printed at the bottom as a written guaranty, where an unfilled blank indicated that the instrument was to be executed by the seller's general manager, and was not intended as a final signature authenticating a guaranty.
2. SALES—RIGHT TO RECOVER FOR BREACH OF GUARANTY.—Where paint was purchased under an alleged guaranty to keep the surface of a roof in water-proof condition for ten years, the buyer could not recover because of water coming through a leaky roof; where the proof did not show that he notified the seller that the paint was unsatisfactory or demanded that he furnish new paint to make the roof water-proof.
3. SALES—BREACH OF GUARANTY—BURDEN OF PROOF.—In an action on a verified account for roofing cement sold, where the buyer admitted delivery of the cement on contract of purchase at agreed price, the burden was on him to show that the material purchased was unfit for the purpose intended.
4. APPEAL AND ERROR—REFUSAL TO DIRECT VERDICT.—It was not error to refuse to direct a verdict where the evidence was conflicting.

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; reversed.

W. Irvine Whitty, for appellant.

J. Wythe Walker, for appellee.

KIRBY, J. Appellant brought suit in a justice court in Prairie Township, Washington County, on a verified account for $83.45, for roofing paint sold to A. M. Byrnes, and recovered judgment by default, from which Byrnes appealed to the circuit court, where, upon the trial, appellee recovered judgment for the sum of $90, from which this appeal is prosecuted.

It appears from the testimony that appellant sold, on open account, for $83.45, and shipped the paints to appellee on May 7, 1924, and, although it had written many letters about it, no reply had ever been received, and the account remained unpaid when suit was brought on October 31, 1925.

It was usual to make a written guaranty of the paints, when requested, on a standard printed form, but none was made to Byrnes, but an unsigned copy of the printed form of guaranty, upon the back of which the instructions for application of the paints were printed, was sent him.

Appellee testified that he had been a contractor and builder for 50 years, and purchased from an agent of appellant some roofing paint "Niedtcote Liquid Roofing Cement" for repainting his two brick buildings, upon which he was given a guaranty. Offered in evidence a copy of the printed form, which, being objected to as not signed, he then introduced, over appellant's objection, the copy attached to the deposition of Niedt, a member of appellant firm. The printed form introduced had the words "Steelcote Manufacturing Company" printed at the bottom and a blank, "general manager," but the blank was not filled or signed at all. Said the agent agreed to send the guaranty when he bought the paint, and did so. That he got it by mail afterwards. Stated the paints were received, and he instructed the man who did the work to put it on according to the directions on the back of the guaranty, and supposed he did so. After it was put on the tenants complained of the roof leaking "right along," and he went down and examined it, and found the water was running down on the cars in the showroom, and he had it fixed twice, the last time at a cost of $46.10 for material, and the first time for $15 or $16, and half of the roof was still in bad condition. The stuff didn't stand the weather for a year. Said he had not written to the company that the paint was unsatisfactory, but told his daughter to do so, and didn't know whether she had done so. That he had told an agent of the company that he had been damaged more than the price agreed to be paid for the paint, and did not owe the company anything. Admitted, on cross-examination, that he bought the paint before he received the guaranty; that the agent told him the company would guarantee it for 10 years, and that he took his word for it.

Perry stated he was a carpenter; had repaired the roof of the building about three weeks before the trial; found it leaking and full of cracks, and the water washing the plaster off. Repaired the roof on the east side; stated the amount charged therefor, and that the roof on the west side was not fixed, but needed repairing. The roofing that had been on was not good. Water went right through it. Said he was a carpenter, not a painter. Had never used the kind of roofing paint purchased from appellant, and knew nothing about it.

Byrnes testified it would cost from $75 to $100 to repair the plastering.

The court refused to direct a verdict for appellant, and from the judgment on the verdict against it the appeal is prosecuted.

Appellant rightly insists that the court erred in permitting the unsigned printed form to be introduced in evidence as a written guaranty. The printed name of the firm, followed by "....., general manager," with the blank unfilled, indicated that the instrument was to be further executed, and was not intended as a final signature authenticating the guaranty, and the court erred in holding otherwise. *Lee* v. *Vaughan Seed Store,* 101 Ark. 68, 141 S. W. 496, 37 L. R. A. (N. S.) 352, 25 R. C. L. 302.

No attempt was made to show that the salesman had any authority to bind the appellant company other than that possessed by an ordinary traveling salesman to receive and transmit orders (*Markstein Bros. Co.* v. *J. A. White & Co.,* 151 Ark. 1, 235 S. W. 39), and, under the terms of the alleged guaranty, if it had been executed and valid, it only bound the seller, if the paint failed "to give perfect satisfaction for ten years," to "furnish the user, without charge, a sufficient quantity of Niedtcote liquid roofing cement to keep the surface in waterproof condition until the ten years expire," and, had the terms been strictly complied with, the purchaser would only have been entitled to demand and receive more paint—"a sufficient quantity * * * to keep the surface in waterproof condition * * *."

The proof does not show that appellee notified appellant that the paint was unsatisfactory, and he does not even claim to have demanded that he be furnished new paint to make his roof waterproof, and in no event could he recover damages to his building caused by water coming through the leaky roof.

No case was made authorizing the recovery of special damages or damages to the building for a breach of warranty, if there had been such warranty that a breach of it could have entitled plaintiff to recover such damages, and appellee, having admitted the delivery of the roofing cement upon his contract of purchase for the amount agreed to be paid, was bound to the payment thereof, unless he could show that the material was unfit for the purpose for which it was sold and purchased—worthless, in fact—and the burden was upon him to do this.

We cannot say that there is no conflict in the testimony and that the undisputed evidence shows the appellee entitled to recover the contract price of the paints delivered, although such appears to be well nigh the case, and on that account we do not hold that the court erred in refusing to direct a verdict in appellant's favor.

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

ADKINS v. HOSKINS.

Opinion delivered March 5, 1928.

1. CANCELLATION OF INSTRUMENTS—SUFFICIENCY OF PROOF.—The cancellation of an executed contract is the assertion of the most extraordinary power of the court of chancery, which ought not to be exercised except in a clear case on strong and convincing proof.
2. CANCELLATION OF INSTRUMENTS—SUFFICIENCY OF PROOF.—Courts will not decree a cancellation of an executed contract on the uncorroborated evidence of plaintiff, unless it is clear, unequivocal and decisive.
3. FRAUD—MISREPRESENTATIONS AS TO MATTERS OF LAW.—As a general rule, fraud cannot be predicated on misrepresentations as to

matters of law, nor upon opinions on questions of law based on facts known to both parties, nor upon representations as to what the law will not permit to be done, especially when the representations are made by the avowed agent of the adverse interest.

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

Jesse Reynolds, for appellant.

Patterson & Patterson, for appellee.

MEHAFFY, J. The appellants brought suit in the Johnson Chancery Court to cancel and set aside deeds to certain property in Johnson County, Arkansas, which deeds were executed by appellant to appellee, George O. Patterson, Jr., at the instance of appellee, J. D. Hoskins.

The plaintiff alleged that he was a citizen and resident of Johnson County, and that defendant George O. Patterson, Jr., is a resident of Johnson County; that the defendant J. D. Hoskins is a resident of Greene County, and the defendant Gladys H. Adkins is a resident of Hot Springs, Arkansas.

The appellant alleged in his complaint that, prior to the second day of July, 1926, he was the owner of the land described in his complaint; that he and Gladys H. Adkins were married in Texas, and lived together as husband and wife until recently; that they got along together as husband and wife, and never had any trouble of any kind. Gladys H. Adkins was a teacher in the city schools of Hot Springs, Arkansas, but returned home on the 21st day of April, 1926, and remained at home until the 20th day of May, when she received a telegram from her mother at Floydada, Texas, telling her to come to Texas at once; that she left on the train that afternoon, stating that she would return as soon as conditions would permit; that, when she arrived at her mother's home, she wrote plaintiff a letter that she would return as soon as her mother's condition permitted; that, during the month of June, while she was with her mother, she wrote appellant several letters, all of which were very affectionate, and appellant was expecting her to return home very

soon; that, on the second day of July, 1926, she returned to Clarksville with John D. Hoskins, an attorney residing at Paragould, Arkansas; that, while appellant was busy at work, the said J. D. Hoskins came to his home, telling him that his wife had decided that she was not going to live with him any longer, and wanted a divorce and a division of the property, and he, Hoskins, had gone into the matter thoroughly, and that she had contributed certain funds from her own property in the amount of $1,400, which she was entitled to recover from him; that she had taught school at certain times, and did other work, from which she had earned $2,366, that she was entitled to recover from him this amount, with interest at 6 per cent., making a total of $3,766; that, in addition thereto, she was entitled to recover one-half of all his property, both real and personal; that Hoskins had looked up the value of their property, and that Mrs. Adkins was entitled to $7,500 or $8,000.

Plaintiff advised Hoskins that he was alarmed at the situation, did not understand this turn of affairs; that he wanted to see his wife, and wanted to talk with her, and inquired where she was, at which the defendant Hoskins told him that she was at the hotel, and that he would bring her up at one o'clock, and that at one o'clock the defendant Hoskins returned, and told him that his wife said she would not talk to him, and restated the matter with reference to his property rights and the division of his property, and stated that she would recover this amount in any event, and, unless he settled it without going into court, that, in addition thereto, there would be between $700 and $800 court costs, which would be taxed to this plaintiff. Hoskins assured appellant that he, Hoskins, was an attorney, learned in the law, and that matters he had represented to him were true, and that the affairs would result as he outlined to him; that it would be a great saving to plaintiff to make this character of settlement.

The appellant states that he had no knowledge of the law, and never had a lawsuit before, and was totally

ignorant of the law; that he did not know his rights in the matter except as outlined by defendant Hoskins, and that, believing Hoskins' statements and relying solely upon them, he had finally consented to a division of the property. He alleged that he has learned, or is advised and believes, and, so believing, alleges, that the statements of Hoskins as to the matters of fact therein contained are true and the matters of law as represented by the defendant Hoskins were false and fraudulent, and made for the purpose of deceiving and misleading this plaintiff, knowing that he was ignorant of the law and his rights in this particular case, and knowing that he was relying upon his statements.

The appellant stated that the defendant Gladys H. Adkins was not entitled to recover $1,400; that she is not entitled to recover $2,366; and that she is not entitled to recover one-half of his property, real and personal, and that the court cost in all probability never would exceed $150. Appellant alleged that all of said statements were false and fraudulent, and made for the purpose of deceiving and misleading this plaintiff into a division of his property. Hoskins told him that, in order to divide his property, they must deed it to some third person, and it was customary to use some single person, and for that person to deed back to them severally their portions, and that this would clear the title to the property that they held, and that they could sell and dispose of the property as they saw fit. The appellant alleged that these representations were false and fraudulent, and that the statements were made for the purpose of deceiving, and did deceive, this plaintiff, and that he did execute deeds to all of the property to the defendant G. O. Patterson, Jr., and that said G. O. Patterson, Jr., then deeded back to this plaintiff a forty-acre tract of land, and deeded to defendant Gladys H. Adkins the balance of the property, including their home. Appellant alleged that on the same date Gladys H. Adkins made and executed to the said J. D. Hoskins a mortgage on the property deeded to her

in the sum of $2,019.25, and that said mortgage was recorded in Johnson County, Arkansas.

Appellant stated that Gladys H. Adkins was not entitled to recover the amount of her earnings since their marriage; that she is not entitled to recover the $1,400; that no separate accounts have ever been kept between them; that their affairs have all been as one up to the time of the separation; and that she is not entitled to recover from this plaintiff any portion of his property, for the reason that she is not entitled to a divorce.

Appellant stated that the statements of Hoskins were false and fraudulently made to deceive him, and did deceive him, and that the deed to Patterson was executed without consideration; that he would not have consented to a division of his property but for the fraudulent statements of the defendant J. D. Hoskins.

Gladys H. Adkins filed answer, admitting that she and appellant were lawfully married; denied all of the other material allegations in the complaint. She alleged that, during their married life, she delivered and supplied to the plaintiff the sum of $3,800, which was used by the plaintiff in the acquisition of the property involved in this suit; said money was advanced by her with the understanding that she was to have an interest therein equal to the amount furnished by her. She alleged that Hoskins did not deceive or attempt to deceive with reference to the legal rights of the defendant and his property and affairs.

J. D. Hoskins filed separate answer, denying all the material allegations of the complaint.

George O. Patterson filed answer denying all knowledge of transactions, and alleging that said deeds were executed to him as a matter of transferring the property, as he thought, at the request of both of them.

Defendant filed a demurrer, but it was never passed on.

Gladys H. Adkins filed a suit for divorce. Adkins filed answer, and then an amendment, in which he asked for a divorce on his cross-complaint.

The two suits were consolidated and tried together in the chancery court. The court granted a decree for divorce to D. L. Adkins, dismissed the complaint of Gladys H. Adkins for divorce, and dismissed the complaint of D. L. Adkins against Gladys H. Adkins and others for cancellation of deeds for want of equity, and D. L. Adkins has appealed to this court.

Appellant's contention is that he was induced to make the settlement with his wife and convey his property on false and fraudulent representations as to the law. He does not claim there was any false representations as to any fact.

Attention is called by appellant to the statement in R. C. L. where it stated, in substance, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up property, a court of equity will relieve him, especially if he had been led into his mistake of the law by the other party. The section referred to by appellant in R. C. L. contains the following statement:

"It has already been pointed out that, in general, where the parties understand the facts, an erroneous deduction of law is not cause for annulling a compromise, but, while relief will rarely if ever be granted merely on account of mistake of law, there are cases where there are other elements not in themselves sufficient to authorize the court to interpose, but which, combined with such a mistake, will entitle the party to relief." 5 R. C. L. 898.

It is not urged in this case that any other elements entered into the agreement or brought about the agreement or compromise; but appellant's claim of a right to rescind is based solely on false and fraudulent representations as to the law. Indeed, the appellant himself knew as much about all of the facts as anybody could know, but it is his contention that Mr. Hoskins came to him, representing that he was a lawyer and was learned in the law, and that, under the law, his wife would recover one-half of his property in addition to recovering costs, which he states was represented by Hoskins to be $700 or $800.

Hoskins went to appellant's place about 10:30 in the morning, and he and appellant talked for about an hour, when Hoskins left, and told appellant he would be back at one o'clock.

There is no dispute about these facts, but there is considerable dispute about what was said between appellant and Hoskins during their conversations. Nobody was present but Hoskins and appellant, and the appellant testifies that he lives at Clarksville, was born and raised in that county, and is 53 years of age, and a schoolteacher. His wife was also a teacher. About ten o'clock Mr. J. D. Hoskins came to appellant's home, representing himself as being an attorney for Mrs. Adkins. Up to this time appellant had had no notice from any one that his wife contemplated bringing a suit for divorce. He was running his canning plant. Hoskins said he wanted to have a talk with appellant. Witness said: "We went to the house, and Hoskins said he was up there, that my wife had decided to leave me and not live with me longer, and that she had employed him to sue for divorce, and his business there was to talk about a property settlement." Witness told him he was surprised at the turn of affairs; that his wife was in Texas, visiting her sick mother. Witness said Hoskins told him that Mrs. Adkins was in town, and witness kept insisting on seeing his wife, and Hoskins kept talking about property. Hoskins finally said that he thought that whatever he said she would be willing to do, and that he would come back at one o'clock. Witness asked Hoskins the terms of settlement, and Hoskins told him. One item was $1,400 that Mrs. Adkins received from selling some property in New Mexico, and Hoskins demanded in settlement $3,700. Adkins said that his entire property was worth not more than $4,000. Hoskins promised to bring appellant's wife up to the house, but she did not come. Hoskins came back at one o'clock. He said he was an attorney at law, that he had been practicing law some ten or twelve years, and that he knew the law in the matter thoroughly, and, unless wit-

ness made settlement, he would bring suit at once, and that there was no doubt but what the court would allow the claim and, in addition thereto, $700 or $800 court costs. Hoskins told witness what the grounds for divorce were, and that he had the complaint drafted; had a copy of the complaint. He stated that he had the complaint prepared to file in case a settlement was not made. The charges in the complaint were the same as were later filed. He said in addition he had charges that he was prepared to make and prepared to prove in case appellant did not make settlement, and said that he would file the complaint that he had if they settled, and if they did not, he would file another complaint with additional charges. He represented that his statement about the property was the law, and that Mrs. Adkins could absolutely recover. He referred both to his personal and professional experience. Witness then said that he made the settlements on the basis of deeding away his entire property to a third person, and that was suggested by Hoskins, and then there was deeded back to him 40 acres of land and to Mrs. Adkins the rest of the land. He testified that the 40 acres of land was worth $2,500.

Hoskins testified that he was an attorney at law, and formerly lived at Paragould, Arkansas, but now lived in Little Rock; that Mrs. Adkins had employed him to bring suit for divorce, and by correspondence they agreed to meet in Clarksville. That he got to Clarksville one night, and next morning, about 10:30 or 11, saw Adkins; told Mr. Adkins his business; that his wife had employed him to represent her in recovering property and to bring suit for divorce. That the thing Mrs. Adkins was interested in was the recovery of $3,766 that she put in the property. He testified that Adkins said he realized she put the money into the property, admitted that he owed her that much money. Hoskins suggested that Adkins get him an attorney; that he could talk to his lawyer better than he could to him; told him that he was not representing him, but representing his wife, and told him what, in his judgment, the wife was entitled to. That

he went to the hotel, after they had talked a while, and went back at one o'clock. Witness put the figures down, at the suggestion of Adkins; $4,000 for the home place, $2,500 for the 40 acres, and some other property, which witness said totaled $8,650. Adkins admitted that he owed $3,766. Hoskins told Adkins that, after the settlement was agreed on, he would go down to Mr. Patterson's office and get deeds and papers drawn up, and Adkins said his deeds were at the Bank of Clarksville, and he would meet Adkins at the bank. They did meet at the bank, and went to Patterson's office. The only connection that George O. Patterson, Jr., had with the transaction was that they were merely using him in transferring the property. Hoskins swore that he told Adkins he was an attorney at law, but did not tell him he was learned in the law; never told him anything except that he was an attorney. He did not represent to Adkins to make the settlement.

There was a good deal of testimony both by Adkins and Hoskins about the wife, but that is immaterial on this question. They were the only witnesses as to the conversation that led up to the compromise, and their testimony is conflicting. The appellant admits that his wife sold some property and that he took the $1,400 and put it in the bank in his own name; told her about it; that it was an error to deposit it in his name. He also admits that she sent him $500 at one time. It appears that he was a man of intelligence and education, and had been teaching school for a number of years. He concluded to quit teaching, and the arrangement was that he should work about the home and the canning factory until he got where that would be a paying business, and that his wife would teach school, and she did teach for several years. It appears from the testimony that a good deal of the property was accumulated by the efforts of both of them. Both of them worked, and what they made went into a common fund, according to the testimony of appellant. When it is conceded that she put $1,400 in at one time, $500 at another, and then that both

of them contributed to make the living and accumulate a portion of the property, this shows that she was entitled to a considerable sum as her own property; not as much, perhaps, as she got, but quite a considerable sum.

While the appellant states that he was stunned or dazed by the information that his wife had decided not to live with him any more, yet, as we have said, he was a man of intelligence and education, was in the town where he had lived a long while, had many friends, knew all the lawyers in town, and, of course, knew all the facts. He knew how much his wife had contributed, how much money he had received from her; he knew the value of his property, and his wife's attorney left him in the forenoon to come back at one o'clock, and, on Hoskins' return at one o'clock, the settlement was made. There does not appear to have been any representations made, even according to Adkins' testimony, except what he says that Hoskins told him a court would do with reference to the property. And, after having this interval between the time Hoskins left in the morning and when he came back in the afternoon, it does not appear that he consulted anybody, but made the deed to the property, and a deed to 40 acres was made back to him. He now asks that these instruments be canceled, but it has been said that the cancellation of an executed contract is an assertion of the most extraordinary power of a court of equity and that it ought not to be exercised except in a clear case upon strong and convincing proof, and a court would not be justified in canceling a contract unless the proof was clear, strong and conclusive.

In this case there is no corroboration of appellant's testimony at all. The only persons to testify about the contract and what led up to the contract are the appellant and Hoskins, and courts will not decree a cancellation of an executed contract on the uncorroborated evidence of the plaintiff, unless the evidence is clear, unequivocal and decisive. *McGuigan* v. *Gaines*, 71 Ark. 614, 77 S. W. 52; *Ammonette* v. *Black*, 73 Ark. 310, 83 S. W. 910; *McNutt* v. *McNutt*, 76 Ark. 14, 88 S. W. 589.

"As a general rule, fraud cannot be predicated upon misrepresentations as to matters of law, nor upon opinions on questions of law based on facts known to both parties alike, nor upon representations as to what the law will not permit to be done, especially when the representations are made by the avowed agent of the adverse interest. Reasons given for this rule are that every one is presumed to know the law, both civil and criminal, and is bound to take notice of it, and hence has no right to rely on such representations or opinions, and will not be permitted to say that he was misled by them. Pursuant to this it has been held that fraud cannot be predicated on misrepresentations as to the legal effect of a written instrument, as, for example, a deed, or a Federal land warrant, or a contract of insurance." 12 R. C. L. 295.

It is not contended in this case that the facts were not known to both parties alike, or rather, it is not contended that the appellant did not know all the facts. He does not claim any misrepresentations as to facts, but claims misrepresentations as to the law.

There are some exceptions to the above rule, for instance, where a relation of trust or confidence exists between the parties. Or if Hoskins had misrepresented the law, knowing that Adkins was ignorant of it, and had taken advantage of him through such ignorance, and Adkins had relied upon the superior knowledge and experience, and the other party had advised him that it was unnecessary or inadvisable to consult a lawyer. None of these things, however, existed in this case. That is, they are not shown by a preponderance of the evidence to exist. There is a conflict as to what took place, as we have said, but Hoskins swears positively that he told Adkins to get him a lawyer, and it is nowhere contended that he told him it was unnecessary or inadvisable to get a lawyer. Since the appellant knew all the facts, and knew how much money his wife had contributed, and was at his home in a town where his friends lived, where he knew all the lawyers in town and had friends

that he could have consulted, it was his duty to make some effort and exercise some diligence to inform himself.

We cannot say that the evidence in this case on the part of the appellant is clear and convincing, and the decree of the chancery court will therefore be affirmed.

CLARK v. IMPERIAL COUNCIL OF JUGAMOS.

Opinion delivered March 5, 1928.

INSURANCE—EVIDENCE SHOWING MISTAKE.—In an action on a policy of fraternal benefit insurance, in which the amount of the recovery depended on deceased's age at the time the policy was issued, it was error to refuse to permit plaintiff to show that the age inserted in the policy was inserted either by mistake or wrongfully.

Appeal from Ouachita Circuit Court; *W. A. Speer,* Judge; reversed.

Thos. W. Hardy, for appellant.

Haynie, Parks & Westfall, for appellee.

MEHAFFY, J. The appellant brought suit in the Ouachita Circuit Court, alleging that her mother, Hettie Clark, died on July 29, 1925; that the appellee is a fraternal order, organized under the laws of Arkansas and engaged, as part of its work, in the insurance of its members upon the payment of certain dues, assessments and premiums. That Hettie Clark, deceased, was a member of the order, held a certificate of membership or policy of insurance in said order, which she had carried for several years, and had paid dues, assessments and premiums up to the time of her death. That the value of said policy at her death was $300. Proof of death was made in August, 1925. That, after the death of the said Hettie Clark, the certificate of membership or policy was sent to the company at Forrest City, Arkansas, and that defendant has possession of said policy, and appellant is unable to exhibit it. Appellant is the administratrix, and the policy is made payable to the

estate of Hettie Clark. She alleged that appellant refused to pay, and prayed judgment for $300.

The appellee answered, admitting that it was a fraternal order, admitting that Hettie Clark, deceased, was, at the time of her death, a member of said order, and held a policy upon which the dues, assessments and premiums had all been paid. But it denies that the policy was, at the time of the death of Hettie Clark, of the value of $300, but states that it was of the value of $100; that that sum was due; that it had heretofore been tendered, and rejected by the appellant; that defendant has continuously held itself ready to pay the amount, and offers to confess judgment for $100.

One of the policies, the one sued on, was issued in January, 1918, and the appellant testified that that was the only policy her mother ever had. She knew that was the policy, because her mother, before she died, told her where to find it, and it was the only policy found where her mother told her it was, and it was the policy that she returned to the company, and she knew it was the one because of a stain on the back of it.

Plaintiff introduced the policy, dated the 15th day of January, 1918. In this policy Hettie Clark's age was shown to be 37. The plaintiff called Joe Holmes as a witness, and he was an officer of the local lodge, and testified that the policy issued on January 15 had lapsed because of the nonpayment of dues and assessments, but that there had been issued after that time another policy, dated October 15, 1918. This policy had never been delivered to her, but it was held by the lodge, waiting for her to return the policy issued January 15, 1918, which she never did return. But she continued to pay her dues, and the insurance company conceded that she was entitled to recover $100 on the policy of October 15, 1918. The age in this last policy was stated to be 60 years, and the plaintiff asked permission to show that the age was inserted wrong, that the age as given in the last policy was wrong, that she was not 60 years of

age, and that, if the age had been correctly stated, she would have been entitled to $300 instead of $100.

The plaintiff in the suit thought that was the only policy that was ever issued or that her mother ever held, but the undisputed proof on the part of the company shows that that first policy was lapsed and that the other one issued. And the only question in the case was whether she was entitled to recover $100 or $300, and, since this depended entirely upon the age of the deceased at the time the policy was issued, plaintiff should have been permitted to introduce proof to show that the age of 60 was inserted by mistake, or wrongfully inserted. If that age was correct, she was only entitled to recover $100. If her age was as contended by plaintiff, she was entitled to recover $300.

The court should have permitted the plaintiff to show the age of Hettie Clark, and, for this error, the case is reversed, and remanded for new trial.

SHACKLEFORD v. STATE.

Opinion delivered March 5, 1928.

1. WITNESSES—CROSS-EXAMINATION.—In a prosecution for manufacturing liquor, it was competent to cross-examine defendant as to his being at a certain place with liquor and gun, as affecting his credibility.
2. CRIMINAL LAW—MOTION TO EXCLUDE TESTIMONY.—Where no objection was made to testimony at the time it was offered, a motion to exclude cannot be insisted on as a matter of right, but addresses itself to the discretion of the court.
3. CRIMINAL LAW—DISCRETION AS TO EXCLUDING TESTIMONY.—Where defendant did not object to the testimony introduced by the State tending to impeach the defendant, and thereafter cross-examined a State's witness at great length, the trial court did not abuse its discretion in refusing to exclude the testimony on defendant's motion.
4. CRIMINAL LAW—MATTERS NOT SHOWN BY BILL OF EXCEPTIONS.—An assignment of error as to receiving a verdict in defendant's absence, assigned in the motion for new trial, but not otherwise appearing in the record, will not be considered on appeal.

5. INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.—In a prosecution for manufacturing liquor, evidence *held* to support a conviction.

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; affirmed.

George A. Hurst, for appellant.

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

McHANEY, J. Appellant was convicted for manufacturing liquor, and sentenced to one year in the penitentiary. Appellant was a witness in his own behalf, and, on cross-examination, he was asked if he remembered being down at Hattabaugh's place with a fruit jar of liquor and a gun, at which time he was about to get into a fight with the Hattabaughs, and he denied being there with liquor, or that he had any gun, or any trouble with the Hattabaughs. Upon objection, the court held that the witness could answer whether he had any liquor there.

This testimony was competent, as affecting the credibility of the witness. In the recent case of *Jim Bowlin* v. *State,* 175 Ark. 1115, 1 S. W. (2d) 533, where the assignment of error was that the court had erred in permitting the prosecuting attorney to ask the appellant, on cross-examination, if he was the same Jim Bowlin that had been sent to the penitentiary from Newton County for cutting a preacher up, and also what he was convicted of, and why he had served a jail sentence at Dardanelle about a year before, we there said: "Appellant was a witness in his own behalf, and the above questions were asked on cross-examination, and it is well settled in this court that the defendant may be asked on cross-examination about other crimes committed by him, whether he has been in jail, the penitentiary, or any other place that would tend to impair his credibility"; and we there quoted from the leading case of *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41, 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." See also *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937.

The cases cited by appellant, to the effect that a witness may not be asked concerning mere accusations of other crimes, are not in point here. Here the witness was asked concerning a fact peculiarly within his knowledge, that is, whether he had had a fruit jar with liquor in it at a certain place, and brandished a gun. There was no error in permitting this cross-examination.

After the conclusion of the appellant's testimony, the State called Henry Lollar as a witness in rebuttal, who contradicted appellant regarding the fruit jar with liquor in it, and the brandishing of a gun in connection with the Hattabaughs, and appellant contends that the questions asked Earle Shackleford were on collateral matters, and that the admission of Henry Lollar's testimony in contradiction thereof was erroneous and prejudicial. A sufficient answer to this assignment is that no objection was made to the admission of the testimony of Henry Lollar, who was fully cross-examined by counsel for appellant, both with regard to the liquor and the brandishing of a pistol.

At the conclusion of this witness' testimony, counsel for appellant moved the court to exclude the testimony of the witness, Henry Lollar, which was overruled by the court, and he excepted. This court has many times held that, where no objection is made to the testimony at the time it is offered, a motion to exclude cannot be insisted upon as a matter of right, but addresses itself to the discretion of the court. See *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995, where the court said: "A defendant is not permitted to sit by and allow testimony to be developed against him and then, as a matter of right, have it withdrawn from the jury. The exclusion of the testimony, after it had been offered, was a matter

in the discretion of the court, and it does not appear to us that the court abused its discretion in this regard."

So here appellant not only sat by and permitted Henry Lollar's testimony to be developed by the State without objection, but he cross-examined him at length, and we cannot say that the court abused its discretion in not excluding the testimony, on motion of the appellant. *Stone* v. *State,* 162 Ark. 154, 258 S. W. 116; *Stevens* v. *State,* 143 Ark. 618, 221 S. W. 186; *Farris* v. *State,* 133 Ark. 599, 203 S. W. 4; *Warren* v. *State,* 103 Ark. 166, 146 S. W. 477, Ann. Cas. 1914B, 698.

The next error assigned by counsel is, "because the jury brought in its verdict at about 10 o'clock at night, and turned the same into the court in the absence of the defendant and his attorney, and the court discharged the jury in the absence of the defendant and his attorney, and, so far as he knows, without making any effort to locate him or his attorney; and that said verdict was read to him by the court, on the next day, after the jury was discharged." These allegations of fact on this assignment do not appear in the record. There is nothing to support this assignment in the record, except that the error is assigned in the motion for a new trial and the affidavit of counsel for appellant, filed with the record in this case. It does not appear in the bill of exceptions. These matters should have been set out in the bill of exceptions, and if the court refused to sign the bill of exceptions as prepared, appellant could have then established his assignment and incorporated it in the bill by bystanders, as provided by § 1322, C. & M. Digest, or have proved same on his motion for a new trial, if counsel for the State would not stipulate with him as to the bill. This assignment of error in the motion for a new trial, being supported only by the affidavit of counsel for appellant, is not sufficient to contradict the record, which appears regular on its face, and we therefore overrule this contention.

It is finally insisted that the verdict is not supported by sufficient testimony; in other words, that there is no

substantial testimony in the record tending to show appellant's guilt. We have examined the testimony carefully. Appellant was found at the still, and the witnesses testified that they saw him and another, jointly indicted with him, carrying water to the still, and performing other duties about the still, which was in operation at the time of their arrest. Without setting the testimony out in full, or going into the matter further, there was sufficient testimony to support the verdict, and the judgment is accordingly affirmed.

JOHNSON v. HARPOLE.

Opinion delivered March 5, 1928.

BANKRUPTCY—LIABILITY OF PURCHASER OF BANKRUPT'S INTEREST.—A husband and wife, tenants by entirety, executed a mortgage to secure a note; the husband's interest was sold by the trustee in bankruptcy, and after maturity of the note the wife paid the principal and interest; *held*, there being no obligation on the part of the purchaser at the trustee's sale to pay the note, or any part, except to protect his interest in the land, he was chargeable only with half of the note and interest paid.

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

F. G. Taylor, for appellant.

C. T. Bloodworth, for appellee.

McHANEY, J. For some years prior to November 12, 1921, appellee and her husband, M. L. Harpole, were the owners as tenants by the entirety of the land in controversy. A short while prior to said date, M. L. Harpole was adjudged a bankrupt, and on said date all his interest in said land was sold by the trustee in bankruptcy to appellant, who received a deed therefor from the trustee, subject to a mortgage on said land in favor of W. D. Polk in the sum of $1,000, given to secure a note to said Polk in said sum, dated February 14, 1921, due February 14, 1923, with interest at 10 per cent., both the note and mortgage being signed by M. L. Harpole and

appellee. After appellant purchased the interest of M. L. Harpole, appellee refused to recognize any right or interest therein of appellant, she holding possession, receiving and using all the rents and profits therefrom. She made some improvements, paid some taxes, and refused to make any accounting to appellant for his interest therein. On the 3rd day of May, 1924, some months after the maturity of the note, appellee paid to Polk, the holder of the mortgage, the principal sum and interest due thereon, and he made the following indorsement on the mortgage: "For value received I hereby assign and transfer the within note, together with all security, without recourse, to Paralee Harpole, this 3d day of May, 1924. W. D. Polk."

This suit was brought by appellant for an accounting on the 31st day of January, 1925, in which he claimed that he was entitled to one-half the rents and profits from said land for the year 1922 and subsequent years, less his share of the taxes and the mortgage paid by appellant, if any, the exact allegations in the complaint being as follows: "Plaintiff further states that said defendant has received all the rents and profits from said land since he became the joint owner of the same, that the reasonable rental value of said land per year is $800, which, to include that year, would amount to the sum of $2,000 for his share of the rent of said land; that if said defendant has paid any taxes on said land or any part of the mortgage due thereon, she is entitled to credit for same."

On a trial the court found the rental value of the land to be $225 per year for the years 1922 to 1926 inclusive, and that appellant was entitled to one-half thereof for each year, with 6 per cent. interest from the first day of January of each year subsequent to the year in which the rent was due. Appellant was charged with one-half the taxes for each year, with 6 per cent. interest from the date of payment, $150 for repairs, and further charged with the whole amount of the amount of the mortgage with interest at 10 per cent. from February 14, 1921, and

a lien was fixed on his interest in said land to secure the payment thereof. A decree was entered in accordance with these findings, from which is this appeal.

The only question we find it necessary to determine in this case is whether the court correctly charged appellant with the full amount of the mortgage indebtedness existing against the land at the time he purchased M. L. Harpole's interest therein. This is an estate by the entirety. The whole estate was mortgaged to secure the indebtedness to Polk, and both the note and mortgage were executed jointly by M. L. Harpole and appellee. Each testified that it was the debt of the other. They were both jointly liable for this debt. Appellant, by his purchase at the trustee's sale, did not assume or agree to pay this indebtedness. He merely bought M. L. Harpole's interest in this estate, subject to this indebtedness. Appellee did not pay this note when it was due, and neither did her husband. It was paid after maturity. It is a general rule, supported by a unanimity of authority, as well as by our statute, that "a negotiable instrument is discharged when the principal debtor becomes the holder of the instrument at or after maturity in his own right." See 7885, C. & M. Dig., sub. 5. See also *Harding* v. *Hagler, ante,* p. 146. The first subdivision of the above section of the Digest also provides that "a negotiable instrument is discharged by payment in due course, by or on behalf of the principal debtor." The attempted assignment by Polk to appellee amounted to no more than a cancellation of the instrument, as, under the law, the instrument was discharged when she became the holder of it in her own right, after maturity. There being no obligation on appellant to pay this note, or any part thereof, except to protect his interest in the land, we are of the opinion that fairness and equity will only require him to be chargeable with one-half of the amount of the note and interest paid by appellee. It was paid for the protection of their joint interest, each being equally interested in one-half the net profits from the land, and both interests being equally

imperiled by the mortgage thereon, and that he should be charged with interest on one-half of the interest payments made by appellee, as well as one-half the principal debt from the date of such payments, at 6 per cent. per annum.

The other questions raised with reference to the amount of taxes paid, both general and special, may be adjusted between counsel on a remand of the case, as seems apparent from the brief of counsel for appellee.

The cause will therefore be reversed, and remanded with directions to enter a decree in accordance with this opinion. It is so ordered.

STIFFT v. W. B. WORTHEN COMPANY.

Opinion delivered March 5, 1928.

1. GIFTS—EFFECT OF GIFTS INTER VIVOS.—Gifts *inter vivos* are gifts between the living, and are perfected and become absolute during the lifetime of the donor and the donee.
2. GIFTS—VALIDITY OF GIFTS INTER VIVOS.—To constitute a valid gift *inter vivos*, the donor must be of sound mind, must actually deliver the property to the donee, and must intend to pass title immediately, and the donee must accept the gift.
3. GIFTS—TAKING EFFECT IN FUTURE.—A gift *inter vivos* cannot be made to take effect in the future, as such a transaction would only be a promise or agreement to make the gift, and, being without consideration, would be unenforceable and void.
4. CONTRACTS—CONSIDERATION OF PROMISE TO MAKE GIFT.—Considerations of blood or love and affection are not sufficient to support a promise to make a gift in the future.
5. GIFTS—SUFFICIENCY OF EVIDENCE TO ESTABLISH GIFT.—Evidence that a memorandum was found in decedent's safety deposit box, to which his wife had keys, to the effect that certain bonds mentioned were the property of his wife, but no bonds were found therein, and that, while decedent had made declarations that he had given such bonds to his wife, he continued to exercise acts of ownership over them and pledged them as his own, and finally sold them, collected the money and deposited it to his credit, *held* not to show delivery of an intended gift necessary to make the gift complete.

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

Frauenthal & Johnson, Rose, Hemingway, Cantrell & Loughborough, for appellant.

G. DeMatt Henderson and *Cockrill & Armistead*, for appellee.

McHANEY, J. Appellant is the widow of Chas. S. Stifft, deceased, and appellees are the executors of his estate. Some time after the death of Mr. Stifft, appellant presented her claim to the probate court of Pulaski County, alleging that she was the owner of $21,700 of the bonds of the Arkansas Diamond Corporation, by virtue of a gift thereof from her husband, and that he had sold said bonds for the sum of $14,647.50 and had deposited said sum in the bank of appellee, W. B. Worthen Company, in his own name, and that he had drawn checks for his own use against said account, leaving a balance therein of $9,027.02 at the time of his death. She prayed that said sum be delivered to her, and that she have judgment against the estate for the remainder of the sale price of the bonds, with 6 per cent. interest from the date of sale, July 26, 1926. She later amended her demand, claiming that there was an additional $1,000 of bonds belonging to her which her husband had sold and converted to his own use, the exact sale price being unknown to the claimant, but which she presumed were sold at the same price, 67½ cents on the dollar, and asked judgment for $675 additional. The probate court allowed the claim as a fourth-class claim, and both parties appealed to the circuit court, where the cause was submitted to the court sitting as a jury, on substantially the following facts:

A large envelope was found in Mr. Stifft's desk, entirely empty, bearing the indorsement: "Within bonds of Arkansas Diamond Corporation, $22,700, are the property of my wife, Sophia Leon Stifft. June 16, 1923. Chas. S. Stifft. Witness: L. J. Gibson." Appellant saw this envelope in Mr. Stifft's desk with the bonds in it, but just when she saw this, or how many bonds there

were in the envelope, is not shown. No bonds were in it at the time of his death, nor is it shown how long it had been since there were any bonds in it. After Mr. Stifft's death, his safety deposit box in the American Southern Trust Company was opened in the presence of the executors and appellant, and a slip of paper was found therein with the following writing thereon: "The within bonds of the Arkansas Diamond Corporation are the property of my wife, Sophia Leon Stifft, without liability on her part. The amount of the bonds is $22,700, more or less. Chas. S. Stifft." This writing was likewise dated June 16, 1923. Both writings were in the genuine handwriting of Chas. S. Stifft. No bonds were found in the safety deposit box. It is not shown that these bonds were ever in the safety deposit box, except as it may be inferred from this writing, and except the testimony of Mrs. Lally, the custodian of the safety deposit vault of the American Southern Trust Company, who stated that Mr. Stifft told her that there were bonds in the box, and that everything in the box belonged to Mrs. Stifft. Appellant and Mr. Stifft each had a key to this box.

Mr. Stifft stated on several different occasions to Mr. and Mrs. Leon, brother and sister-in-law of appellant, and in her presence, that he had given all the stock and bonds he owned in the diamond mines to appellant, and referred to them several times as her property.

On July 25, 1923, Mr. Stifft borrowed from appellee, W. B. Worthen Company, $3,500, and deposited as collateral to his note therefor $3,500 of these bonds. These same identical bonds remained in the possession of the W. B. Worthen Company from that date until January 11, 1926, when they were delivered by it to the Union Trust Company. On December 27, 1923, Mr. Stifft borrowed a sum of money from the Union Trust Company and deposited $10,000 of these same bonds with it as collateral for said loan, and on December 28, 1925, he deposited the remainder of said bonds, $8,200, with the Union Trust Company, making a total amount of $18,200

of these bonds then in the hands of the Union Trust Company, where they remained, together with the $3,500 it received from the W. B. Worthen Company, until June 15, 1926, when the whole amount thereof, $21,700, was shipped by the Union Trust Company to Mr. Samuel W. Reyburn in New York, in completion of a sale of said bonds by Mr. Stifft to Mr. Reyburn. On July 26, 1926, Mr. Reyburn issued his check in payment of said bonds in the sum of $14,647.50, payable to Chas. S. Stifft, which check was delivered to Mr. Stifft in New York, who sent same direct to the W. B. Worthen Company for deposit and credit to his personal account, which was done, and he thereafter checked against same up to the date of his death. He also collected the interest coupons attached to the bonds, and used the money as his own. Mr. Stifft left a will, dated March 30, 1926, containing the following provision: "I also give to my said wife, Sophia Leon Stifft, all money which I have to date of my death paid in the American Building & Loan Association, also twenty-one thousand seven hundred dollars ($21,700) bonds of the Arkansas Diamond Corporation."

Based on these facts, the circuit court found that the evidence did not establish a gift of said bonds by Chas. S. Stifft to appellant, and entered a judgment disallowing the claim of appellant, and she has appealed.

Was the court correct in finding "that the evidence does not establish a gift of the bonds aforesaid by the said Charles S. Stifft to the said Sophia Leon Stifft?" This is the question we are called upon to decide. The facts are undisputed.

Our statute, § 4876, C. & M. Digest, throws some light on the question. It is as follows: "Every gift of goods and chattels, and all other conveyances of the same, not on consideration deemed good in law, shall be void as against all creditors and purchasers; and all such gifts, grants and conveyances shall not be void even against the grantor unless possession really and *bona fide* accompany such gift or conveyance." It cannot be said, under the above facts, that possession of these bonds did

"really and *bona fide* accompany such gift or conveyance." Appellant never "really" had the possession of said bonds—only a constructive possession thereof by virtue of having a key to the safety-deposit box wherein they may or may not at one time have been deposited. The only written evidence that they were ever in said box is the memoranda dated June 16, 1923, found in the box after Mr. Stifft's death. It is shown beyond all controversy that, if they were in there at that time, less than thirty days thereafter, on July 5, he took $3,500 of them out, deposited them as collateral to a loan with W. B. Worthen Company, and never again did they find their way back therein. The same thing is true with reference to the $10,000 of said bonds deposited with the Union Trust Company on December 27, 1923, and the $8,200 thereof deposited with the same company on December 28, 1925. No *real* possession, no actual possession thereof, was ever had by appellant, and, even though it be conceded that all the bonds were in the box on June 16, 1923, the constructive possession thereof by appellant did not continue long thereafter. Gifts *inter vivos,* or *donatio inter vivos,* are gifts between the living, and are perfected and become absolute during the lifetime of the donor and the donee. *Hatcher* v. *Buford,* 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507. The elements necessary to constitute a valid gift *inter vivos* were stated by this court in *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030, to the effect that the donor must be of sound mind, must actually deliver the property to the donee, must intend to pass the title immediately, and the donee must accept the gift. It will therefore be seen that a gift *inter vivos* cannot be made to take effect in the future, as such a transaction would only be a promise or agreement to make a gift, and, being without consideration, would be unenforceable, and void, and considerations of blood or love and affection are not sufficient to support such a promise. 12 R. C. L. 930. This court, from *Hynson* v. *Terry,* 1 Ark. 83, down to the present time, in an unbroken line of cases, has held that actual delivery is essential, both at law and in equity, to

the validity of a gift, and that without it the title does not pass. Mere delivery of possession is not sufficient, but "there must be an existing intention accompanying the act of delivery to pass the title, and, if this does not exist, the gift is not complete. *McKee* v. *Hendricks,* 165 Ark. 369-383, 264 S. W. 825, 952, and cases cited. In the case of *Carter* v. *Greenway,* 152 Ark. 339, 238 S. W. 65, it is said:

"Gifts *causa mortis,* as well as *inter vivos,* are based upon the fundamental right every one has of disposing of his property as he wills. The law leaves the power of disposition complete, but, to guard against fraud and imposition, regulates the methods by which it is accomplished. To consummate a gift, whether *inter vivos* or *causa mortis,* the property must be actually delivered, and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts *inter vivos,* the moment the gift is thus consummated it becomes absolute and irrevocable."

See also the opinion of Judge Sanborn in *Allen-West Com. Co.* v. *Grumbles* (C. C. A.), 129 Fed. 287, where it is said:

"Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion and control of the subject of the gift *in praesenti* at the very time he undertakes to make the gift (citing cases); the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no further act of dominion or control over it (citing cases); and the delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it. This delivery must be an actual one 'so far as the subject is capable of it. It must be *secundum subjectam materiam,* and be the true and effectual way of obtaining the command and dominion of the subject.' 2 Kent's Com. 439. If the subject of the gift is a chose in action, such as a bond, a note, or stock in a corporation, the delivery of the most

effectual means of reducing the chose to possession or use, such as the delivery of the bond, or the note, or the certificate of stock, if present and capable of delivery, is indispensable to the completion of the gift." See also *Chambers* v. *McCreery* (C. C. A.), 106 Fed. 364.

Mr. Stifft wholly failed to consummate his intended gift. He did not divest himself of the title, dominion and control of these bonds on June 16, 1923, or at any other time thereafter. He thereafter continued to exercise acts of ownership, dominion and control over them, actually pledged and hypothecated them as his own, collected the interest coupons attached to them as his own, made them the subject of a specific bequest to appellant in his will dated March 30, 1926, thereby negativing, if not completely repudiating, his former intention to make a gift *inter vivos,* and finally sold them as his own, collected the money, deposited it to his credit, and checked on it until his death. So, as was said by the court in *Chambers* v. *McCreery, supra,* it is "impossible to apply the facts as we find them to be in the case we have now to decide with the law we have just referred to, and thereby sustain the contention of the complainants below. The 'constructive' delivery insisted on by counsel for appellants is inconsistent with the conduct of the alleged donor from the date of the declarations made by him from which the delivery is said to be inferred to the day of his death."

We must therefore overrule the contention of learned counsel for appellant, and the judgment will be affirmed.

WEAR-U-WELL SHOE COMPANY v. ARMSTRONG.

Opinion delivered March 12, 1928.

JUDGMENT—SEPARATE JUDGMENTS FOR JOINT TORT.—Where, in an action for malicious prosecution against an individual and a corporation, the jury returns separate verdicts against the individual defendant for $750 and against the corporation for $1,750, it was error to render judgment against the corporation for an amount larger than the jury found against its individual joint tort-feasor.

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; judgment modified.

STATEMENT OF FACTS.

This appeal comes from a judgment for damages assessed in a suit for malicious prosecution.

The facts are substantially that the appellant, the Wear-U-Well Shoe Company, a corporation, with its principal place of business at Kansas City, Missouri, operates chain stores in various places and parts of the country, and furnishes its shoes to different persons to sell on a commission basis, the shoes being sold by the persons to whom furnished and the proceeds remitted to the company.

On or prior to May 25, 1926, the appellee, Armstrong, was engaged in the selling of shoes for appellant in the city of Bentonville. He had notified appellant that he desired to settle up and quit, and they had requested him to wait until the auditor in the regular course reached his place. John Rule, who was sued jointly with appellant, was, at the said date, auditor of the company, and came to Bentonville about May 25, 1926, on his regular round of auditing the accounts of the various persons and agencies handling shoes for appellant, and, upon the audit of Armstrong's account, a dispute arose as to the amount he owed the appellant company, Rule demanding $68.20 and Armstrong insisting that certain credits, naming them, should be given him, and that he only owed $56.95, which he offered to pay.

After some controversy Rule became impatient, and said that if the whole amount was not paid he would have him arrested for embezzlement as soon as he could hear from the company. Rule sent and received in reply the following telegram and answer thereto:

"Western Union Telegram

"Received at 2026 Broadway, Kansas City, Missouri.

"Bentonville, Arkansas.

"1114A May 26, 1926.

"Wear-U-Well Shoe Company, K. C. Mo.

"Shortage sixty-eight twenty gross tickets fifty-six ninety-five agent refuses to pay difference shall I prosecute have signature on audit.

"John Rule."

"1134A."

"Western Union Telegram

"Received at 1221 South Main Street, Bentonville, Arkansas.

"Kansas City, Mo. 1208P

"May 26, 1926.

"John Rule, Bentonville, Arkansas.

"Collect cash in full or have party arrested embezzlement charge.

"Wear-U-Well Shoe Co.

"1252P."

Rule showed the reply to his telegram to appellee, who still refused to pay more than $56.95 in settlement, the amount he conceded to be due. He then laid the whole matter before the prosecuting attorney with a view to having Armstrong arrested for embezzlement, and was advised by the prosecuting attorney, who refused to have a warrant issued, that he ought not to have Armstrong arrested. He persisted in the matter, and went to a justice of the peace and swore out a warrant for his arrest on a charge of embezzlement, and Armstrong was arrested, and, upon the examination or trial, discharged.

Fred Wilson testified he was secretary and treasurer of appellant company, which had auditors to check up the

affairs and accounts of its different sales agencies. That John Rule was the auditor of the company on the 25th and 26th of May, 1926, and that it had a contract with Armstrong, the appellee, under which he was employed as sales agent at Bentonville, Arkansas, for the disposal of the company's goods, receiving a commission for making sales. That Armstrong advised the company, about the 20th of May, that he wanted to quit the business, and asking that a man be sent to check him up. Rule went to Bentonville to make the audit, on his regular tour. He admitted that the company received the telegram and sent the reply thereto, as already set out, but said he thought it related to the agency at Nowata, Oklahoma, where there had been a shortage of which the company had been notified by Mr. Rule from Independence, Kansas, on the 19th of May, asking: "Please wire me at Bentonville what to do about the shortage of Boggs at Nowata, Oklahoma; will be there about the 25th." He thought, in sending the telegram to Bentonville, that he was ordering the arrest of Boggs in Oklahoma, and not Armstrong. While the company had understood that Boggs' shortage was $198, he had none of the papers, and was not definitely informed, and they had no other report from Rule after he wrote from Independence, Kansas, on the 19th, until the telegram was received from Bentonville on the 25th.

Appellee testified that he was a shoe repair man, and sold some shoes, and had resided at Bentonville, and had a contract with appellant company for the sale of its shoes, made August 16, 1924, under which they furnished him shoes amounting to $800 to sell on a commission basis. It was introduced in evidence. He continued to sell shoes for them until May 26, 1926, without any misunderstanding or unpleasantness. Settled with them once a year, and was checked up three times a year. The company made no objection to his method of keeping accounts. He kept tickets for each sale made, and sent them in with his report, and all the money received, and the house sent him his 10 per cent. com-

mission from Kansas City. Said he notified them in May that he wanted them to take up the agency, and they sent Rule down to check him up. He was out of town, and, when he returned, Rule had the shoes all packed and ready to send out, and handed him a check-statement, which he signed without verifying it. "All of the stock was listed by numbers. The ticket showed I owed the company $56.95. He made up the statement, and I signed it. We tried to get a settlement of just how much I owed. After he figured it all up he figured I owed him $68.20, and a dispute arose. I claimed it amounted to $56.95. I claimed I was entitled to some credits for shoes he didn't take up, but he would not allow them, and I offered to pay the $56.95, and made out a check for that amount. He wouldn't take the check. The difference arose over some certain rubber-heel shoes which I wanted them to take back, and Mr. Rule would not do it. He claimed that the shoes had been worn. He took up the stock of shoes I had, but wanted me to pay the $68.20, and I refused to do it. Mr. Rule had me arrested. He said he was going to wire the company and ask them about it. The deputy sheriff served the warrant on me on the 26th of May, charging me with embezzlement."

Witness had been selling the shoes for appellant for two years, made up his own statements, and never had any trouble with them or been complained about. Introduced a letter from appellant, in reply to his request for an audit of his accounts in the closing of his business, in which it stated that they would cancel his contract, if he desired it, but could not do so until they could get a man to Bentonville to check up his accounts and dispose of the shoes. Said they preferred to have it done by the regular auditor on his usual rounds. Expressed regret that witness found it necessary to terminate "their pleasant business relations," etc.

Beasley, the deputy prosecuting attorney, stated that he asked Rule to explain his case, had him go over the whole case, and then advised him not to have the man

arrested. "Told him I did not think he could convict, and that he might have a damage case. Rule said something about collecting debts that way, didn't remember exactly what it was."

Rule made no answer, and was not present at this trial.

The jury returned two separate verdicts, one "against John Rule in the sum of $750," and the other against appellant company "in the sum of $1,750," each signed by S. B. Banks, foreman, and from the judgments thereon this appeal is prosecuted.

Duty & Duty, for appellant.

Rice & Dickson, for appellee.

KIRBY, J., (after stating the facts). Appellant contends that certain instructions objected to were erroneous, but a careful examination of them does not disclose any error committed, and the court gave all the instructions asked by appellant, except the one for a directed verdict. It is insisted, however, that the court erred in returning judgment against appellant upon the jury's separate verdict for a larger sum than the amount the jury found against the joint tort-feasor, Rule.

In the case of *Spears & Purifoy* v. *McKinnon,* 168 Ark. 357, 270 S. W. 524, where the plaintiff was injured through the joint negligence of two surgeons, and recovered a judgment for damages in the total sum of $7,000, which recited that one-half thereof, or $3,500, be recovered against each of the defendants, the court modified the judgment pronounced thereon, limiting the total sum recovered to $3,500, saying that the defendants were joint tort-feasors and liable as such, if at all, but, as there was only one tort and one damage, there could be only one recovery, and, as the jury had fixed the liability of each tort-feasor at $3,500, there could be no greater recovery against either or both of them than that sum.

So here there was only one tort committed and one damage resulting therefrom, and, since the jury fixed the liability of each tort-feasor and that of Rule, who actively committed the wrong, his company only being

liable therefor as having consented thereto and authorized his act, and since he was liable also for the whole damage resulting, there could be no greater recovery against either or both of the joint tort-feasors than the lower sum assessed by the jury against Rule, $750.

The lower court should only have rendered a judgment upon the finding or verdict of the jury in the said sum of $750, which can and will be rendered here. See *Coleman* v. *Gulf Refining Co. of La.*, 172 Ark. 428, 289 S. W. 2, 26 R. C. L., § 32, page 780; *Marriott* v. *Williams*, 152 Cal. 705, 93 P. 875, 125 Am. St. Rep. 87; *Smithwick* v. *Ward*, 52 N. C. 64, 75 Am. Dec. 453; and *Nashville Ry. etc. Co.* v. *Trawick*, 118 Tenn. 273, 99 S. W. 695, 10 L. R. A. (N. S.) 191, 121 Am. St. Rep. 996, 12 Ann. Cas. 532.

The judgment is modified accordingly as indicated, and, as modified, will be affirmed. It is so ordered.

OGLETREE v. SMITH.

Opinion delivered March 12, 1928.

1. CONTRACTS—EVIDENCE.—In a suit to foreclose a mortgage on land in which defendants filed a cross-complaint for alleged breach of contract by one of the plaintiffs to build them a residence, the chancellor's finding that the contract was made with said plaintiff *held* contrary to the preponderance of the testimony, where the building contract introduced in evidence was not signed by such plaintiff, and the testimony did not show that he was in partnership with the contractor who signed it.
2. PRINCIPAL AND AGENT—LIABILITY OF AGENT.—Even though plaintiff negotiated a building contract as agent for his brother, who signed the contract, the principal being disclosed, the agent could not be held liable thereunder.
3. EVIDENCE—CONTRADICTING WRITING BY PAROL.—Parol contemporaneous evidence is inadmissible to contradict, vary, or add to the terms of a valid and unambiguous written contract.
4. REFORMATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.—In an action to reform a contract by proof of its execution by the wrong party as by mistake or fraud, the proof must be clear, convincing and decisive.

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

Steel & Edwards and *J. R. Campbell,* for appellant.

Lake, Lake & Carlton, for appellee.

KIRBY, J. Appellant and the Bank of DeQueen brought this suit to foreclose a mortgage on certain parts of block 8, Locke Heights Addition to the city of DeQueen, given by appellee and wife to secure three promissory notes to appellant, Claude Ogletree, amounting to $140.22, and by him transferred in due course to the Bank of DeQueen.

Appellees admitted the execution of the notes and mortgage; denied any indebtedness to either appellant or the bank. Alleged they had entered into a contract with appellant by which he undertook to build for them a four-room residence, furnish labor and materials for an agreed price, all of which had been paid, except the amount represented by the three notes referred to in the complaint, and for payment of which the mortgage foreclosure was sought. Alleged that the materials used in the building were of an inferior quality, and not in accordance with the specifications; that the workmanship was poor, the roof defective, the concrete pillars defective and unfit; and that, by reason of such breach and violation of the contract in the furnishing of inferior materials and workmanship and failure to construct the house in accordance with the contract, they had been damaged in the sum of $400, for which judgment was prayed.

Appellant replied, denying the allegations of the answer and cross-complaint, and praying for foreclosure of the mortgage as in the original complaint.

Upon the hearing the chancellor found in favor of the bank upon its complaint for foreclosure and against appellant upon the cross-complaint of appellees, and rendered judgment in their favor for $400 damages as against him, from which this appeal is prosecuted.

There was much testimony introduced, some of it tending to show that defective materials and workmanship were used in the construction of the house, that it

was not built in accordance with the specifications, nor like a certain other house, which it was claimed should have been used as a pattern for its construction, and tending to show that damage had resulted to appellees on account thereof. We do not find it necessary to go into this matter in detail, however, since the only question here is whether appellees had a contract by which appellant was bound to the construction of their house.

He testified that he had made no contract with appellees for building the house, but only represented his brother, H. M. Ogletree, with whom the contract was made, in the negotiations before its execution. Said that his brother was a carpenter and builder, not well acquainted in the city, having but recently arrived, and he was helping him as much as he could in securing contracts for his employment. That the building contract was made by appellees with his brother, H. M. Ogletree; that it was written, with specifications attached thereto, and signed by the parties, H. M. Ogletree and Greer W. Smith. Said that he arranged to get the money from the bank to enable appellees to pay the balance due for the construction of the house upon its completion, having taken the notes secured by the mortgage and transferred same to the bank in order to procure it.

Appellee, Greer Smith, testified that he made a contract with Claude Ogletree for the construction of the house. That he had a copy of it, but had lost it. Being handed instrument which appellant contended was the contract, he examined it, and admitted that it was his signature at the bottom of it, but stated that $1,117 was not in the contract that he signed, which was only for $1,000. Admitted that the writing signed by him was the original contract, with that exception. Said he made the contract with Claude Ogletree, notwithstanding it was signed by H. M. Ogletree, whom he first saw when the building was commenced. Knew that the work on the building was done by H. M. Ogletree and under his

direction, and Claude Ogletree's name was not signed to the contract.

H. M. Ogletree testified that he was a carpenter and contractor and construction foreman, and had been for 35 years; that he built Smith's house under a written contract which Greer Smith signed, and was signed by him. This contract was offered in evidence, and was the same one about which Smith was questioned and admitted the execution of. He said that certain extras were agreed on before the execution of the contract, amounting to $117, which was inserted in the contract before it was signed by the parties. Denied that there was any defective material used in the construction of said house, and said that it could not have been better built with the materials specified; that the leak was not due to the shingles, but to the plan of the house, the pitch of the roof, as other witnesses also testified.

Appellant also stated in his testimony that the change from $1,000 to $1,117 for the construction was made in the contract and inserted before it was signed by the parties, and that he was not in partnership with his brother at the time of the execution of the contract and construction of the house, and had no interest whatever in it, except as indicated.

The chancellor's finding that the contract for the building was made with appellant is contrary to the preponderance of the testimony. The duplicate or copy of the building contract executed by appellee and H. M. Ogletree, introduced in evidence, and which appellee admitted was signed by him, only claiming it had been changed in the respect of increasing the contract price $117, was not and did not purport to have been signed or executed by appellant.

It was not alleged that appellant was in partnership with H. M. Ogletree when the contract was executed and the building constructed, and there is no testimony showing such to be the case.

Even though appellant be regarded as having negotiated the building contract, as the agent for his brother,

who signed it, his principal was disclosed on its execution, and no claim is made of his not being bound thereby, and appellant could not be held liable on that account as agent thereunder. *Meier* v. *Hart,* 143 Ark. 539, 220 S. W. 819; *Rittenhouse* v. *Bell,* 106 Ark. 315, 153 S. W. 1111.

Parol contemporaneous evidence is inadmissible to contradict, vary or add to the terms of a valid and unambiguous written contract. *Bradley Gin Co.* v. *Means,* 94 Ark. 130, 126 S. W. 81; *Delaney* v. *Jackson,* 95 Ark. 131, 128 S. W. 859; *Armstrong* v. *Union Trust Co.,* 113 Ark. 509, 168 S. W. 1119; *Luce* v. *Arkansas Brick & Mfg. Co.,* 125 Ark. 219, 188 S. W. 566.

Attempting to prove that the contract was in fact made with appellant, who did not execute it, would be a most material change, and, if the action be regarded as one to reform the contract by proof of its execution by the wrong party, as from mistake or fraud, the rule requires that it must be done by clear, convincing and decisive testimony, and is in no wise met by the proof herein.

Whatever damages appellee may have been entitled to, if any, under his contract with H. M. Ogletree, appellant was in no wise liable to the payment thereof, and the court erred in holding otherwise.

The decree on the cross-complaint against appellant is therefore reversed, and cause dismissed for want of equity.

TEMPLE COTTON OIL COMPANY *v.* SOUTHERN COTTON OIL COMPANY.

Opinion delivered March 12, 1928.

1. WORDS AND PHRASES—"SOAP STOCK."—"Soap stock," in the business of refining cottonseed oil, is the resultant product of the treatment of crude cottonseed oil with caustic soda solution.
2. WORDS AND PHRASES—REFINING LOSS.—The refining loss is the difference between the weight of the crude cottonseed oil and the weight of the refined oil produced therefrom.
3. WORDS AND PHRASES—CRUDE COTTONSEED OIL.—Crude cottonseed oil is the mill run oil pressed from cottonseed.

4. WORDS AND PHRASES—PRIME COTTONSEED OIL.—Prime cottonseed oil is pressed from sound decorticated seed, sweet in flavor and odor, free from water and settlings, and, when refined, produces prime summer yellow oil with a loss in weight not exceeding 9 per cent.

5. CONTRACTS—INTENTION OF PARTIES.—One of the principal rules in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles.

6. CONTRACTS—CONSTRUCTION OF PARTIES.—In the interpretation of contracts the construction the parties themselves have placed on the contract is entitled to great weight.

7. CUSTOMS AND USAGES—CONSTRUCTION OF CONTRACT.—Local usages and customs of trade will not defeat the express terms of a contract, and the course of dealing between parties under similar circumstances cannot be invoked as a waiver of an express and unambiguous stipulation in a new contract.

8. COMPROMISE AND SETTLEMENT—CONCLUSIVENESS OF SETTLEMENT.—When a complete settlement is made according to usage or custom or according to the terms of a contract, so far as that particular contract is concerned, no right of action thereafter exists in favor of either party.

9. COMPROMISE AND SETTLEMENT—EFFECT OF SETTLEMENT.—In all contracts where the terms are ambiguous, or where there is a dispute about its terms, a complete settlement between the parties is binding on them.

10. COMPROMISE AND SETTLEMENT—CONCLUSIVENESS OF SETTLEMENT.—The seller of crude cottonseed oil is not entitled to recover from the buyer the value of excess soap stock, in view of complete settlement between the parties after each shipment of oil and failure of the seller to present any such claim at the time of such settlements.

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

Jones & Jones, for appellant.

James D. Head, Dufour, Rosen & Kammer and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

MEHAFFY, J. The Temple Cotton Oil Company brought fourteen suits against the Southern Cotton Oil Company, in the circuit court of Miller County. These suits were consolidated, by order of the circuit court, and transferred to equity, over the objection of appellant.

Appellant owned and operated cottonseed-oil mills at Little Rock, Arkadelphia, Hope and Ashdown, in Arkansas, and at these mills it crushed cottonseed and produced cottonseed oil, which it sold through brokers to cottonseed-oil refineries. Appellee owned and operated cottonseed-oil refineries, one of which was located at Gretna, in the State of Louisiana, and bought cottonseed oil from appellant. During the season of 1925-26 appellant sold and delivered to appellee 72 tanks of cottonseed oil, delivered to appellee in its tanks at appellant's oil mills.

These suits were brought by appellant to recover from appellee the value of soap stock carried in the crude oil sold by appellant to appellee. Soap stock is the resultant product of the treatment of crude cottonseed oil with caustic soda solution in the process of refining. Refining loss is the difference between the weight of the crude cottonseed oil and the weight of the refined oil produced therefrom. The weight of the soap stock is the weight of refining loss plus the weight of the caustic soda solution used in refining crude oil. The fatty acid content of the refining loss runs from 90 per cent. to 98 per cent. The fatty acid content of the soap stock is reduced to about 50 per cent. by the addition of the caustic soda solution used in refining the crude oil.

The contracts of sale under which the crude oil was sold and delivered by appellant to appellee were all made subject to the rules of the Interstate Cottonseed Crushers' Association. Rule No. 142 of that association, which was made part of the contract of sale, provides for the payment of the value of the excess soap stock. These suits were brought to recover the value of the excess soap stock derived from refining the crude oil sold by appellant to appellee.

The 14 suits at law involved $30,710.72. All of these contracts sued on were made through brokers, except the contract upon which suit No. 2810 is brought, which contract is for five tank cars alleged to contain soap stock of the value of $2,387.39.

The total number of contracts involved in the suits is 26, of which 18 were made through Zimmerman-Alderson-Carr, brokers, Memphis, Tennessee, covering 55 tank cars, of which 45 contained crude oil with excess refining loss, and it is alleged that the value of the soap stock in these 45 cars is $22,441.28. Four contracts were made through T. W. Brode, broker, Memphis, Tennessee, covering 13 tank cars, of which 11 contained crude oil with excess refining loss, and the value of the soap stock in those 11 cars is alleged to be $5,052.06. Four contracts of date in February, 1924, were made through Young Commission Company, brokers, Memphis, Tennessee, covering 8 tank cars, 6 of which contained crude oil with excess refining loss of the alleged value of $829.99. All of the contracts, except the four made through Young Commission Company, were entered into and all shipments made thereunder during the season of 1925-26.

The following is a copy of one of the contracts made through Young Commission Company:

"Young Commission Company

"Duplicate No. M-2513

"Exhibit A

"Memphis, Tenn., January 9, 1924.

"Seller: Temple Cotton Oil Company, Hope, Arkansas.

"Buyer: The Southern Cotton Oil Company, New York, New York.

"Dear sir: We confirm transaction today for your account as follows:

"Quantity two (2) tanks, sixty thousand (60,000) pounds each. Commodity cottonseed oil.

"Quality basis prime crude flag settlement.

"Price nine and three-quarters (9¾) cents per pound f. o. b. cars.

"Seller's mill, Ashdown, Arkansas.

"Shipment last half January, 1924.

"Terms: Sight draft, B/L attached, free of exchange to buyer.

"Rules Interstate Cottonseed Crushers' Association.

"Brokerage 13½c per barrel. To be paid by seller.

"Young Commission Company
"By W. S. Battaile.

"Seller's acceptance

"Date

"Seller: Temple Cotton Oil Co. By F. O. Collman, general manager.

"Buyer's acceptance

"Date

"Buyer: The Southern Cotton Oil Co. by M. W. Lyons."

Eighteen contracts were made through brokers, Zimmerman-Alderson-Carr Company, and the following is a copy of one of them:

"Zimmerman-Alderson-Carr Company
Cotton Exchange
"Memphis, Tenn., Oct. 15, 1925.

"Ex. A. Number M-3350.

"Temple Cotton Oil Company, seller.

"The Southern Cotton Oil Company, buyer.

"Gentlemen: Per our exchange of telegrams and telephone conversations between Temple Cotton Oil Company of Little Rock, Arkansas, and the Southern Cotton Oil Company of New Orleans, Louisiana, and ourselves, we beg to confirm having this day sold to the Southern Cotton Oil Company for the account of Temple Cotton Oil Company

"Five (5) tank cars, 60,000 lb. each, basis.

"Prime crude cottonseed oil, all at eight and three-quarters (8¾) cents per pound f. o. b. buyers' tank cars, Little Rock, Arkansas.

"Shipment, first half November, 1925.

"Exchange free to buyer.

"Terms: Weight and quality guaranteed at destination. Sight draft bill lading attached. Sale made subject to the rules of Interstate Cottonseed Crushers' Association.

"In case oil is off, settlement as described under the word 'Flag' in Yopp's cipher code to govern.

"Commission to be paid by seller, namely, 13 1/3c per barrel of 400 lb.

"Yours very truly,
"Zimmerson-Alderson-Carr Company
"As brokers only.
"Battaile.

"Accepted: Temple Cotton Oil Company, W. H. Doflin.

"M-3350

"Accepted: The Southern Cotton Oil Company.
"M. W. Lyons."

(On back): "Received, Temple Cotton Oil Co., Oct. 16, 1925, North Little Rock mill."

Crude cottonseed oil is the mill-run oil pressed from cottonseed. To be prime it must be pressed from sound decorticated seed, sweet in flavor and odor, free from water and settlings, and when refined produce prime summer yellow oil with a loss in weight not exceeding 9 per cent. If the loss in weight is greater, but it would still make prime summer yellow oil, it may not be rejected, but shall be reduced in price by a corresponding per cent. of the contract price of the oil.

Yopp's Cipher Code is a book got out in several editions by W. I. Yopp, to facilitate trading in cottonseed oil products.

When the cars were shipped under contracts extending from January 9, 1924, until February 4, 1926, the appellant would load the tank-car at one of its mills, take a sample of the oil in it, and have it analyzed. When shipped to appellee, appellant would draw a draft on appellee with bill of lading attached for the total or approximate total value of the car, based on the contract price for prime crude cottonseed oil, according to its weight and analysis at the point of shipment Appellee paid each draft immediately on presentation. When each car reached appellee, it would be reweighed, and a sample of the oil would be taken and analyzed, and the amount of

deductions from the contract price according to the settlement terms in Yopp's Code, under the proper code word, would be arrived at and communicated to appellant. Appellant would either agree by wire to the settlement at a reduction of the contract price, or request two outside chemists to make other analysis. The parties would then settle on the analysis of the two chemists. The car was held on the track at its destination until settlement was agreed on, and no attempt made to unload it until the settlement was agreed on. When this settlement was reached, the car would be unloaded into the refinery, and the contents put in vats with the contents from other cars. When settlement was made, appellee would send appellant a statement of account on that car and close the transaction on that car with a draft on appellant if the balance was in favor of appellee, or a check to appellant if the balance was in favor of appellant.

The last contracts in suit were made on February 5, 1926, and the last settlement, March 26, 1926, for about $970, which appellant promptly paid. No claim was made by appellant and nothing said about any claim for soap stock until about the middle of May, 1926.

The abstracts and briefs in this case are very large and the testimony voluminous, but the principal question involved is the meaning of the contract, especially with reference to soap stock.

It is contended by the appellant that, under the contracts, the appellee was under obligation to pay for soap stock, because they say that the clause in the contract, "sale made subject to the rules of Interstate Cottonseed Crushers' Association," requires a settlement to be made under rule 142 of the said Interstate Cottonseed Crushers' Association, which reads as follows:

"Where a claim is made for excess loss in the refining of oil, the value of the excess soap stock, less any additional cost of handling such oil, shall be taken into consideration in settlement between parties at interest."

A great deal of the testimony is given by experts, and is technical and conflicting. One of the principal

rules in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, if it can be done consistently with legal principles. This may be said to be the principal rule, because parties should be bound for what they intended to be bound for, and should not be bound for a thing that they did not intend to be bound for. And courts will always hold the parties bound according to their intention, if that intention can be ascertained. Of course courts, in arriving at the intention of the parties, do so when it can be done from the contract itself. In other words, the court undertakes to find out what was meant by the language used in the contract.

"The intention of the parties, which courts seek to discover in giving construction to a contract, is to be gathered, not from particular words and phrases, but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the courts can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from beginning to end, and all its terms must pass in review; for one clause may modify, limit, or illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized, if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible

of another which gives effect to all of its provisions. The courts will look to the entire instrument, and, if possible, give such construction that each clause shall have some effect and perform some office. Likewise, where a contract as a whole discloses a given intention, they will be construed, if possible, so as to be consistent with the general intent." 6 R. C. L. 837.

Another important and well established rule in the interpretation of contracts is that the construction the parties themselves place upon the contract is entitled to great weight.

"In fact, where, from the terms of the contract, or the language employed, a question of doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that practical construction. It is to be assumed that parties to a contract know best what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights, and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions. It has even been said that the practical construction of the ambiguous terms of a contract will be adopted, although the language used may more strongly suggest another construction." 6 R. C. L. 853; *Gauss* v. *Orr*, 46 Ark. 129; *Keopple* v. *National Wagon Stock Co.*, 104 Ark. 466, 149 S. W. 75; *Ins. Co.* v. *Dutcher*, 95 U. S. 269, 24 L. ed. 410.

The parties to these contracts were the buyer and seller. The seller would ship the cottonseed oil and draw

a draft with bill of lading attached for the estimated value of the car when it reached its destination. The amount of the draft was for the approximate value of the car, based on the contract price for the article purchased, according to its weight and analysis at the point of shipment. The purchaser would pay the draft drawn by the seller immediately on presentation. But, when the car reached the buyer, it would be reweighed, a sample of the oil analyzed, and from that it would be determined what amount of deduction, if any, from the contract price should be made. The purchaser would immediately communicate with the seller, and they would agree on a reduction of the contract price according to the figures of the purchaser, or, if the seller was not satisfied, an analysis would be made by two outside chemists. The parties would then settle according to this analysis. The car was held on the track at its destination until a settlement was agreed on. In some instances the seller would have to send check to the buyer in settlement. In other instances the purchaser would have to pay a certain sum to the seller. In other words, at the time of the shipment a draft was made for what the seller assumed to be its approximate value. If the analysis at destination was different from that at the place of origin, the difference would be agreed to, and one would make payment to the other in settlement of the matter.

It is earnestly contended by the appellant that local usages and customs of trade cannot be invoked to defeat the express terms of the contract, and also that the course of conduct under similar contracts cannot be invoked as a waiver of an express and unambiguous stipulation in a new contract.

Appellant is correct in its contention that the local usages and customs of trade will not defeat the express terms of a contract, and that a course of dealing between the parties under similar contracts cannot be invoked as a waiver of an express and unambiguous stipulation in a new contract. But we do not have that situation in this

case. The authorities cited by appellant in support of this contention undoubtedly contain correct statements of the law. But they differ from the contracts in this case at least in this particular. In the instant case there was a settlement, and we think a complete settlement for each car. And it is not contended that a settlement for one car, according to custom and usage, would bind the parties in a new contract if the seller, in making the new contract, had stated that he would not be bound by custom or usage, or that he expected to insist on the terms of the contract. If such notice were given, and the contract was unambiguous, the parties would have a right to insist on the terms of the contract, although the custom and usage might be different. But, when a complete settlement is made according to usage or custom, or according to the terms of the contract so far as that particular contract is concerned, no right of action would thereafter exist in favor of either party. But, in all contracts where the terms are ambiguous or where there is a dispute about the terms of the contract, a complete settlement between the parties is binding on the parties.

It is the contention of the appellant that, when a claim is made for excess loss in refining of oil, the value of the excess soap stock, less any additional cost of handling such oil, shall be taken into consideration in settlement by the parties in interest. This is the rule of the Interstate Cottonseed Crushers' Association, relied on by appellant as a basis for its cause of action. In the first place, if a settlement is made as was made in these contracts, and nothing said about pay for excess soap stock or additional cost of handling, there is no claim by either party because of additional cost of handling or because of excess soap stock. And certainly it cannot be said that the value of the excess soap stock, less any additional cost of handling, was not taken into consideration. The very fact that the parties settled, and that nothing was claimed until after all of the contracts had been settled, is a circumstance tending to show that these things were taken into consideration and

that the settlement was final. And, while the authorities referred to by appellant hold that local usages and customs cannot defeat the express terms of a contract, these authorities also hold that the usage may be resorted to to explain the meaning of a commercial term, although it can never be received to contradict the express terms of a contract nor to give words a meaning different from their settled legal interpretation.

There is no charge of any mistake or fraud, duress or coercion, but the parties themselves settled, drew drafts and gave checks in settlement, evidently taking into consideration everything that they regarded as necessary to a complete settlement of the contract. And when parties have settled under such circumstances, the settlement is binding on the parties. The parties had a right, even if the contract was not ambiguous, to make any settlement satisfactory to themselves. They had a right to make such settlement, although it might not be according to the terms of the original contract. They had as much right to do this as they did to make the original contract.

"Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally. However, as a contract is made by the joint will of two parties, it can be rescinded only by the joint will of the two parties. It is obvious that one of the parties can no more rescind the contract, without the other's express or implied assent, than he alone can make it. But, if the parties agree to rescind the contract, and each one give up the provisions for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them." 6 R. C. L. 921.

There was a settlement for the first shipment in these cases in 1924. No suggestion was made that the settlement was not complete until after the last shipment, which was many months after the settlement for the first shipment. There is no better rule for ascertaining the intention of a party in a contract than the rule that the

construction the parties themselves have placed on the contract shall be considered.

Having reached the conclusion that there was a settlement by agreement of parties at the time of each shipment, it becomes unnecessary to decide the other questions discussed by learned counsel. The judgment of the lower court is correct, and is therefore affirmed.

ARLINGTON HOTEL COMPANY v. FANT.

Opinion delivered March 12, 1928.

1. APPEAL AND ERROR—DECISION ON FORMER APPEAL.—A decision of this court on former appeal, that the State court had jurisdiction of actions to enforce the liability of innkeepers, accruing in the territory ceded to the United States, and that Crawford & Moses' Dig., § 5567, enacted by the State subsequent to the cession of jurisdiction over such territory, is inapplicable to causes of action * * * arising in such territory, *held* the law of the case on the second appeal.
2. UNITED STATES—STATE LAWS IN FORCE UPON RESERVATION.—The laws of Arkansas in existence when the State ceded the territory constituting the Hot Springs Reservation to the United States remain in effect upon such reservation, in so far as they are not inconsistent with the laws of the United States and have not been abrogated.
3. UNITED STATES—OPERATION OF STATE STATUTE ON RESERVATION.—Crawford & Moses' Dig., § 5567, restricting the liability of innkeepers for the loss of baggage of guests, *held* not operative in territory ceded to the United States as the Hot Springs Reservation, since the statute was enacted after cession of the territory.

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

Martin, Wootton & Martin, for appellant.

Cockrill & Armistead and *Murphy & Wood*, for appellee.

MEHAFFY, J. Three suits were begun in the Garland Circuit Court against the appellant, and were consolidated by order of the court, and tried together. The suits were to recover compensation for loss of baggage

which was destroyed in the fire on April 5, 1923, when the Arlington Hotel was burned.

This is the second appeal in this case. The decision on the former appeal is in 170 Arkansas 440, 280 S. W. 20. When the suits were first brought in the Garland Circuit Court the court sustained a demurrer to the complaints of the plaintiffs, and, when the case was here before, the court said that the demurrers presented a question, first, whether or not the courts of this State have jurisdiction to enforce civil liability which accrued within territory over which exclusive jurisdiction has been ceded by the State to the United States Government; and second, whether or not a statute regulating civil liability, enacted after a cession of jurisdiction, is applicable to causes of action arising within that territory. And on the questions above mentioned, which were passed upon by this court in the former appeal, the decision on the former appeal is the law of the case on second appeal.

The court on the former appeal, after stating the questions raised by the demurrer, said:

"Our conclusion in regard to the first question is that the courts of this State are not deprived, by the State's cession to the General Government of exclusive jurisdiction, of the right to exercise judicial power in the enforcement of rights of action in civil matters which accrue in the ceded territory. We are not dealing with a local action, such as one which concerns the title to real estate, and what we say now must, of course, be confined to the character of action involved in these appeals. These are transitory actions which may be enforced anywhere that jurisdiction can be acquired over the person of the defendant. * * * The power of the State and General Government over ceded territory has been discussed at length by the decisions of the Supreme Court of the United States in several cases."

The court then cites the cases that have discussed this question. Again the court said: "The next question presented is one which necessarily arises, but which

counsel for appellee disclaims being presented in the present status of the case."

This second question is whether or not the statute regulating civil liability enacted after the cession of jurisdiction is applicable to causes of action arising within that territory. The court, it will be observed, held that this question necessarily arose, and it was stated: "We think it is equally clear that the statute was inoperative. The cession of jurisdiction was necessarily one of political power, and it took away the authority of the State Government to legislate over the territory ceded to the General Government." *Fant* v. *Arlington Hotel Co.*, 170 Ark. 440, 280 S. W. 20.

Appellants also rely on the case of *Williams* v. *Arlington Hotel Co.*, decided by the United States District Court for the Eastern District of Arkansas. This suit grew out of the same fire, and after appellant's argument in this case was decided by the Court of Appeals, and the Court of Appeals reached the same conclusion that was reached by this court in the case above referred to. The district court, in the case of *Williams* v. *Arlington Hotel Co.*, sustained a demurrer to the petition, and the Court of Appeals said:

"We think the trial court was in error, under the authority of the three so-called Leavenworth Reservation cases" (citing the cases), and the court then said of the cases relied on: "The above quotations show clearly that those cases involved portions of the reservation not being then used for military or other governmental purposes. Therefore we think they are directly in point here as to the validity of the cession made by the State of Arkansas. The McGlinn case (114 U. S. 542, 5 S. Ct. 1005, 29 L. ed. 270), is direct authority for the contention made by plaintiff in error, that the laws of the State in existence at the time of the cession continue upon the reservation, where not inconsistent with the laws of the United States or where not abrogated by Congress after the cession." *Williams* v. *Arlington Hotel Co.* (C. C. A.), 22F. (2d.) 669.

It therefore seems settled by the above authorities that the laws in existence in the State of Arkansas at the time of the cession are still in effect upon the reservation, as they are not inconsistent with the laws of the United States and have not been abrogated, and that the law of 1913 relied on by appellant is not operative.

Since we hold that the questions of law are settled by these authorities, it becomes unnecessary to decide any other question discussed by counsel.

The judgment of the Garland Circuit Court is therefore affirmed.

SHARP v. WEST.

Opinion delivered March 12, 1928.

1. BROKERS—WEIGHT OF EVIDENCE.—The weight of evidence was a question for the jury in a real estate broker's action for a commission.
2. TRIAL—CREDIBILITY OF WITNESSES.—The credibility of witnesses was a question for the jury in a real estate broker's action for commission.
3. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDING.—A jury's finding, if supported by substantial evidence, is conclusive on appeal.
4. BROKERS—WHEN AGENCY NOT EXCLUSIVE.—An owner's agreement to pay a real estate broker a specified commission if he would find a purchaser, *held* not to create an exclusive agency for the sale of the property.
5. BROKERS—RIGHT TO COMMISSION.—A broker, in order to be entitled to a commission, is bound to procure a purchaser ready, able, and willing to buy the property.
6. BROKERS—PROCUREMENT OF PURCHASER—EVIDENCE.—Where a real estate broker procured a purchaser, and this purchaser bought the land, this was the best possible proof that the broker procured a purchaser who was ready, able, and willing to buy the property.
7. BROKERS—PROCUREMENT OF PURCHASER—EVIDENCE.—Evidence *held* sufficient to sustain a finding that a real estate broker procured a purchaser to whom the land was sold.
8. APPEAL AND ERROR—REMARKS OF COURT—PREJUDICE.—Remarks of the court in ruling on a question put to a witness, that, if defend-

ant's broker procured a purchaser and sale was made to him, the fact that it was made by canceling defendant's contract with the bank and letting the bank convey to the purchaser would not prevent the broker from recovering his commissions, *held* not prejudicial.

9. BROKERS—INSTRUCTION.—An instruction that the burden was upon a real estate broker suing the owner of land for a commission to show that he did procure a purchaser, *held* not error.

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

W. R. Morrow, for appellant.

L. A. Hardin, for appellee.

MEHAFFY, J. The appellee brought this suit, alleging that he procured a purchaser for certain property of appellant, under a contract by which he was to be paid a commission of $75 for procuring a purchaser at a price of $2,500, terms to be agreed on between appellant and purchaser. The appellant had purchased the property from the Bankers' Trust Company for $2,100, paying $200 cash and agreeing to pay $20 a month. He was behind in his monthly payments, and wanted to sell the property, and agreed with appellee that, if appellee would find him a purchaser, he would pay him, as commissions, $25 cash and $12.50 a month for four months.

There was some conflict in the evidence, but the weight of the evidence and the credibility of the witnesses were questions for the jury, and if the jury's finding is supported by any substantial evidence it is conclusive on this court.

Appellant contends, first, that, as there was no exclusive agency for the sale of the property and no definite time within which West was to find a purchaser, the authority was revoked. He contends that, before an agent is entitled to commissions, he must procure a purchaser ready, able, and willing to buy.

Appellant is correct in his statement that there was no exclusive agency, and he is also correct in his statement that an agent, in order to be entitled to commissions, must procure a purchaser ready, able, and willing to buy. The proof shows that appellee did procure a

purchaser, and that this purchaser bought the property. There could be no better evidence of one's being ready, able and willing to buy than the fact that he did actually buy, as the purchaser secured by West did in this case. Appellant, however, contends that the evidence is not legally sufficient to show that appellee procured the purchaser to whom the property was sold.

The undisputed evidence shows that there was a contract, and that the commission was to be $75. Appellee testified that he advertised the property in the Democrat, and showed it to two or three persons, one of them being Mr. Warrington, and that Mr. Browning came with Mr. Warrington and looked at the property. Appellee also testified that Browning told him he was ready to buy the place; that he wanted to close the deal, and appellee then got in touch with Mr. Sharp. Browning corroborates appellee in this. The undisputed proof shows that the property was sold to Browning. Sharp had bought from the bank, was behind with his payments, and, after West had got Browning interested, Sharp went to the bank and requested the bank to refund the money that he had paid and take a new contract with Browning. The bank declined to do this, but finally agreed with Sharp that it would give him credit for the amount he had paid on the price of some lots on the pike. This was done, and the contract between Sharp and the bank was canceled, and the bank made a contract with Browning by which Browning was to pay $2,500 for the property. The cancellation of the Sharp contract and the sale by the bank to Browning was all one transaction, and the sale was made to a purchaser procured by West, and Sharp received the benefit exactly as he would if he had sold directly to Browning. This testimony about the transaction with the bank is undisputed.

The appellant also complains of the remarks made by the court. Appellant's attorney asked a question of Risley, and the court stated: "I do not think that is material in this case; it is taking up unnecessary time." Whereupon the attorney stated: "I am trying to prove

how the property was sold, and by whom." The court then said: "There is no dispute about to whom it was sold, is there?" and then stated: "As far as that is concerned, if the sale was made to Browning, and the plaintiff procured the purchaser and brought about the sale, I am going to instruct the jury to find for the plaintiff if they find those facts. I will not allow any such defense that the sale was made to the bank, so far as this case goes." Appellant insists that the above remarks of the court were prejudicial.

We do not think so. We have already said that the cancellation of Sharp's contract and the sale to the bank was but one transaction. The remarks of the court amounted to no more than saying that, if West procured a purchaser, and the sale was made to him, the fact that it was made by canceling Sharp's contract and letting the bank convey to Browning would not prevent West from recovering his commissions.

Of course, the court could not charge the jury with regard to matters of fact, but these are facts about which there was no dispute, and it was therefore a question of law and proper to tell the jury that the manner in which the contracts were made was immaterial; that, if West procured a purchaser, and the purchaser bought the property, the fact that it was made in the manner in which it was was immaterial. The court properly instructed the jury, telling them that, before a real estate broker was entitled to a commission for selling real estate or procuring a purchaser, he must procure a purchaser, and must, by his efforts, bring about a sale of the property, and that the burden was upon the plaintiff to show that he did procure a purchaser, and this must be shown by a preponderance of the evidence.

The court fully instructed the jury, and we find no error, and the judgment is therefore affirmed.

EISENMAYER MILLING COMPANY v. GEORGE E. SHELTON PRODUCE COMPANY.

Opinion delivered March 12, 1928.

CORPORATIONS—FOREIGN CORPORATION DOING BUSINESS IN STATE.—Where a foreign corporation shipped flour into the State for sale by brokers and stored the flour with a produce company, retaining the title to the flour, and thereafter, on failure of the brokers to sell the flour, arranged with the produce company to sell it, the transaction being nothing more than an agency contract, *held* that the corporation was "doing business in the State," within Crawford & Moses' Dig., §§ 1825-1832, regulating foreign corporations doing business within the State, and, not having complied therewith, was precluded from maintaining an action within the State.

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

Rogers, Barber & Henry and *J. A. Tellier,* for appellant.

John E. Miller and *Charles W. Mehaffy,* for appellee.

McHANEY, J. The only question necessary for our determination in this case is whether the appellant, a Missouri corporation, not having complied with the laws of this State relating to foreign corporations, was doing business in this State in violation of such laws, and therefore not authorized to maintain this action. The circuit court held against appellant in this regard, and it has appealed. The facts are substantially as follows:

Appellant shipped a carload of flour to Sevier & Linthicum, brokers, in Little Rock, and had same stored with appellee for a stipulated fee of 30 cents per barrel for storage and delivery, and invoiced same to Sevier & Linthicum at a stipulated price, to be sold by them at such price above the invoice price as they might add by way of profit, and requested appellee to furnish appellant with copies of dray tickets in order that they might check deliveries. Appellant also instructed appellee to have said flour insured in the name of appellant, and have the policy sent to it, and it would pay the premium. In other words, appellant shipped and invoiced a carload of

flour to Sevier & Linthicum, and, by its own arrangement, stored same with appellee, insuring it in its own name, was the owner of the property, and authorized Sevier & Linthicum to peddle the flour out to purchasers at their own price, and to settle with it for the invoice price. A letter from appellant to appellee regarding these matters is as follows:

"Please confirm by mail to the Eisenmayer Milling Co., Springfield, Missouri, arrangement we made yesterday for you to store and deliver our flour in Little Rock on basis of 30 cents per barrel. We will be represented in Little Rock by Sevier & Linthicum, and you will please make deliveries in accordance with their instructions, and mail the mill once a week copies of all dray tickets; these dray tickets will enable the mill to keep track of the flour in your warehouse, as well as the sales made by Sevier & Linthicum. I will also ask that you kindly attend to the insurance as soon as the first car arrives, have policy issued for $2,000 in favor of Eisenmayer Milling Company, Springfield, Missouri. Please instruct agent to mail policy direct to the mill, and they will remit to cover."

This arrangement between appellant and the brokers lasted only three or four weeks, during which time the brokers sold only eleven or twelve barrels of this carload of flour, and paid appellant therefor. Sevier & Linthicum then dissolved partnership, and, as a result, were unable to continue to dispose of appellant's flour. Upon being advised of this fact, appellant arranged with appellee to sell the remainder of this carload of flour, and to remit to it as the flour was sold, appellee to receive 30 cents per barrel selling charge, in addition to the 30 cents per barrel for storage and delivery, and a charge made for re-sacking some of the flour, sacks for which were furnished by appellant. In other words, the arrangement made with the brokers, and, subsequent thereto, with appellee, was nothing more than an agency contract with the brokers and appellee to sell appellant's flour and to remit therefor as the same was sold.

There was no outright sale of said flour either to the brokers, Sevier & Linthicum, or to appellee. Such flour was not the property of the brokers or appellee, could not have been levied upon by creditors as their property, but, on the contrary, according to the undisputed testimony of appellant's witnesses, said flour had at all times belonged to it, and was being sold for its account by the brokers and appellee. Appellee failed to pay for a portion of said flour, and this suit resulted.

As heretofore stated, the circuit court held that appellant was doing business in this State in violation of the foreign corporation laws of this State, and was therefore not authorized to maintain this suit. Sections 1825 to 1832 inclusive, C. & M. Digest, provide the terms and conditions under which foreign corporations may do business in this State, and the penalty for doing such business without compliance therewith, a part of the penalty therefor being the making unenforceable of any contract by such foreign corporation in this State, and prohibiting its enforcement in any of the courts of this State.

In the recent case of *Kansas City Structural Steel Co.* v. *State,* 161 Ark. 483, 256 S. W. 845, the steel company, a foreign corporation, contracted to build a bridge in this State, and sublet the work to the Yancey Construction Company. It thereafter shipped the structural steel into this State, consigned it to itself, and furnished the subcontractors with bolts, reinforced rods and other material, although the actual work of construction was done by the Yancey Construction Company as independent contractors, and this court held that these transactions constituted "doing business" in this State within the provisions of C. & M. Digest, §§ 1825-1832, regulating foreign corporations doing business in this State as aforesaid. In that case, as in this, the contention of appellant was that these transactions were wholly interstate in character. They relied there, as here, upon the case of *Rose City Bottling Works* v. *Godchaux Sugars, Inc.,* 151 Ark. 269, 236 S. W. 825, and *L. D. Powell Co.* v. *Roun-*

tree, 157 Ark. 121, 247 S. W. 389, 30 A. L. R. 414. We there held, as we now hold, that the facts in those cases do not control here. To illustrate, in the case of *L. D. Powell Co.* v. *Rountree, supra,* the L. D. Powell Company is a lawbook company, a foreign corporation, not having complied with the laws of this State, and, through its traveling salesman, took an order from a party in this State for the sale of certain law-books, which were shipped to the purchaser under a contract retaining title until the purchase price was paid. The purchaser thereof, having failed to pay for the books, later turned them over to an attorney in payment of a fee. The book company claimed the books under its reservation of title, and the attorney having them in possession admitted the validity of the claim and offered to deliver the books to the agent of the company. The agent thereupon, by agreement with the attorney, resold the books to him, under a contract similar to the one under which they were first sold. This court held that the first transaction was interstate in character, and that the latter was but a continuation of the original transaction, and did not constitute the doing of business in this State in violation of our laws. It was there said:

"The books were not shipped into the State as sole and independent property of appellant for the purpose of selling them to the appellee or any other person. On the contrary, they were shipped into the State by appellant to McNeill on an order for future delivery, obtained by appellant's traveling agent. The McNeill contract clearly covered an interstate transaction. The recovery of the books under the McNeill contract amounted to a collection growing out of an interstate transaction. The collection was made in books instead of money, and we think the resale of them, in order to convert them into money, was a continuation of the interstate transaction." *Hogan* v. *Intertype Corporation,* 136 Ark. 52, 206 S. W. 58.

In the latter case this court differentiated between an interstate and intrastate transaction as follows:

"One test laid down by the Arkansas cases differentiating an interstate transaction from an intrastate transaction is the ownership of the property after it arrives in the State. An interstate transaction contemplates a consignor without and a consignee within a State, or *vice versa.*"

We think the facts in the case at bar are much stronger to show an intrastate transaction than were the facts in the cases just quoted from. Here there was no sale of the flour to Sevier & Linthicum. On the contrary, it was shipped and invoiced to them, stored with appellee by an arrangement made between appellant and appellee to pay 30 cents per barrel for storage and delivery while Sevier & Linthicum were peddling the flour to such purchasers as they might induce to buy same. This arrangement lasted about three weeks, during which time Sevier & Linthicum sold only about twelve barrels of flour, for which they paid appellant, and then dissolved their partnership. Thereupon appellant employed appellee to sell its flour, and agreed to pay him an additional 30 cents per barrel for making sales thereof. The facts in this case are altogether different from those in the recent case of *Linograph Co.* v. *Logan,* 175 Ark. 194, 299 S. W. 609, where many of the decisions of this court pertaining to this subject are collected.

It would serve no useful purpose to set out the facts in that case and attempt to distinguish it from this. Suffice it to say that the undisputed facts here show that the shipment of the flour into this State in the first instance was not a sale to Sevier & Linthicum, and that the arrangement between appellant and appellee was not a sale thereof in continuation of the former arrangement between appellant and Sevier & Linthicum. It amounted to no more than a storage of the flour in this State as its own, and the employment of an agent to make sales thereof from time to time, as purchasers could be found therefor. Had it been a sale in the first instance, with title retained, and the flour retaken and a resale thereof made to appellee, the facts would be wholly different,

and the result would be a transaction in interstate commerce, as held in the case of *L. D. Powell Co.* v. *Rountree, supra.*

We therefore hold that the undisputed facts show the transactions in this State were intrastate in character, which constituted the doing of business in this State in violation of law, and that appellant cannot maintain this action. Judgment affirmed.

MEHAFFY, J., disqualified, and not participating.

KIRBY, J., dissents.

WALKER *v.* FERGUSON.

Opinion delivered March 12, 1928.

1. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—Where lands are sold at a tax sale, and are struck off to a private purchaser, the sale for the delinquent taxes constitutes a contract between the purchaser and the State or the instrumentality of the State, the obligation of which cannot be impaired by subsequent legislation extending the period for redemption.
2. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—The title acquired by the State or an instrumentality thereof at a tax sale is not the same as that vested in a private purchaser, since the object of the purchaser is not the acquisition of the property, but rather the collection of the taxes, and the period of redemption may be extended by subsequent legislation without impairing the obligation of the contract.
3. TAXATION—EXTENSION OF TIME FOR REDEMPTION.—The Legislature may bind the State and its assignee by an act extending the time for redemption from a tax sale to the State, such extension being without the State's consent, while the subsequent assignees of the State's title take subject to the conditions imposed by existing statutes.
4. HIGHWAYS—EFFECT OF ROAD DISTRICT'S DEED.—A quitclaim deed, executed by a road improvement district which purchased lands conveyed at tax sale, carried only such title as the district had when the deed was executed.
5. HIGHWAYS—TAX SALE TO ROAD DISTRICT—REDEMPTION.—Under Acts 1925, p. 1033, § 1, the owner of land sold for taxes in 1923 to a road improvement district, which executed a quitclaim

deed to another in 1926, had three years in addition to the two years allowed by Acts 1921, p. 296, to redeem; a grantee having acquired no greater rights than the district had.

Appeal from Grant Chancery Court; *William R. Duffie,* Chancellor; affirmed.

Isaac McClellan, for appellant.

Brouse & McDaniel, for appellee.

HART, C. J. On May 24, 1926, the appellees brought suit in equity against the appellants to cancel a deed by appellant road district to appellee Ferguson, and also to redeem the lands embraced in the complaint from the tax sale, if it should be held that the sale was valid. The suit was defended on the ground that the sale was valid and that the appellees' time for redemption had expired.

The facts necessary to a decision of the issues raised by the appeal may be briefly stated as follows: Road Improvement District No. 9 of Grant County, Arkansas, was duly organized under the provisions of what is commonly called the Alexander Road Law. A. L. Ferguson had been the former owner of the lands involved in this suit, and had sold them to J. R. Kern. The lands were forfeited for the nonpayment of the road taxes for the years 1922 and 1923, while J. R. Kern owned them. Kern failed to pay the purchase price of the lands, and reconveyed them to A. L. Ferguson. The improvement district commissioners foreclosed in equity the lien of the road district, and the lands were struck off to it at the foreclosure sale for the nonpayment of the road taxes for the years 1922 and 1923. On April 8, 1924, the lands were redeemed by A. L. Ferguson for the taxes for the year 1923. On December 19, 1925, a deed was executed by the commissioner who conducted the foreclosure sale to the commissioners of the road improvement district. On January 11, 1926, the road improvement commissioners executed a quitclaim deed to said lands to J. S. Walker. Other facts will be stated or referred to in the opinion.

The chancellor was of the opinion that the appellees were entitled to redeem said lands, and were allowed to do so upon the payment, within thirty days, of the delinquent road taxes found to be due. A decree was accordingly entered of record permitting the appellees to redeem said lands in accordance with the finding of the chancellor, and to reverse that decree the appellants have duly prosecuted this appeal.

The principles of law applicable to cases of this sort and numerous decisions announcing them are cited and reviewed in *Northern Road Improvement District* v. *Meyerman,* 169 Ark. 383, 275 S. W. 762, and no useful purpose could be served by again extensively reviewing these principles. Where lands are sold at a tax sale and are struck off to a private purchaser, the sale for the delinquent taxes constitutes a contract between the purchaser and the State, or the instrumentality of the State, the obligation of which cannot be impaired by subsequent legislation extending the period of the right to redeem. Hence this court has held that the right to redeem in such cases from a tax sale is governed by the statute in existence at the time the sale is made, and no subsequent statute extending the period of time for the right to redeem is constitutional.

The title acquired by the State, or an instrumentality thereof, at a tax sale is not the same as that vesting in a private purchaser, since the object of the purchase is not the acquisition of the property, but rather the collection of the taxes. 37 Cyc. 1355, and *Commissioners* v. *Lucas,* 93 U. S. 108, 23 L. ed. 822. Hence the rule that a statute extending the time to redeem from a tax sale is not constitutionally applicable to sales made before its enactment is subject to an exception where the State or one of its instrumental subdivisions was the purchaser.

The Legislature may bind the State and its assignee by an act extending the time of redemption from tax sales, because, as to the State, the grant of additional time to landowners to redeem is with its consent, and,

as respects subsequent assignees of the title acquired by the State, they, of course, take subject to the conditions imposed by the existing statute. Case-note to 1 A. L. R. 145, 38 A. L. R. at 229; *State* v. *Smith,* 36 Minn. 456, 32 N. W. 174; *Adkin* v. *Pillen,* 136 Mich. 682, 100 N. W. 176; *Pace* v. *Wight,* 25 N. M. 276, 181 Pac. 430; *Warner* v. *Pile,* 105 Kan. 724, 185 Pac. 1041.

As we have already seen, the road district in question was organized under the general laws of the State, and the statute applicable at the time the lands were struck off to the district at the foreclosure sale for the nonpayment of the road taxes for the year 1922 was act No. 223 of the Acts of 1921, page 296, amending § 5440 of Crawford & Moses' Digest. Under this act the period of redemption was two years, and it is claimed by counsel for the appellants that this act applies. The record shows that the lands were struck off to the district and that it executed a quitclaim deed to J. S. Walker on January 11, 1926. This deed carried only such title as the road improvement district had at the time it was executed. *St. Louis Refrigerator & Wooden Gutter Co.* v. *Langley,* 66 Ark. 48, 51 S. W. 68. Thus it will be seen that the right of appellees to redeem depends upon whether or not the statute of 1925 extending the time to redeem the property sold for delinquent taxes in road improvement districts applies. See Acts of 1925, page 1033. Section 1 of that act reads as follows:

"That the time for the redemption of any land or real property situated in any road improvement district in this State, on which default has been made in the payment of any annual assessment or installment upon the assessed benefits or betterments, shall be and is hereby extended for a period of three years, in addition to the period of redemption heretofore fixed by law for the redemption of lands for the nonpayment of such annual assessment in any and all improvement districts."

Under the principles of law above announced, it cannot be questioned that it was competent to extend the time for redemption for property sold for the nonpay-

ment of road taxes, so far as the rights of the State or its instrumentalities are concerned. This brings us, then, to the question of whether or not the Legislature has expressed an intention to that effect in 1925. It will be noted that the language of the act is very explicit. It provides that the time for the redemption of any land situated in any road improvement district in the State on which default has been made in the payment of any annual assessment shall be and is hereby extended for a period of three years, in addition to the period of time heretofore fixed for the redemption of such land. The Legislature could not have more plainly manifested its intention to extend the period of redemption for a period of three years longer than that already given to the landowners. Under the statute in existence at the time the sale was made, in 1923, the landowner had a period of two years. Add to this three years, and this gave him five years within which to redeem his land. The period of redemption had not expired at the time this suit was brought. The purchaser from the road district stood in its shoes, under the principles of law above announced, and J. S. Walker, having purchased after the passage of the act of 1925 extending the period of redemption, acquired no greater rights than the road improvement district had. Hence the chancellor correctly held that the appellee had a right to redeem, and the decree of the chancery court will therefore be affirmed.

PARKS v. GRAY.

Opinion delivered March 12, 1928.

1. MORTGAGES—EFFECT OF PRIOR SALE.—One who takes a mortgage with notice that the mortgagor had previously sold the mortgaged land, takes no title, though the mortgage was recorded before the deed.
2. EQUITY—BILL OF REVIEW.—Where a decree has become final, and no error of law appears on the face of the record, the decree will not be subject to review in proceeding by a bill of review.

3. EQUITY—RELIEF BY BILL OF REVIEW.—Relief against a decree because against the preponderance of the evidence will not be granted in a proceeding by bill of review, which cannot be resorted to as a substitute for appeal to bring up for decision questions as to preponderance of the evidence.

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

W. L. Kincannon, for appellant.

Holland & Holland, for appellee.

SMITH, J. This is a proceeding by bill of review to modify a decree of the Logan Chancery Court, Northern District, from a portion of which decree an appeal was prosecuted to this court. *First National Bank of Paris* v. *Gray,* 168 Ark. 12, 268 S. W. 616. In the decree thus sought to be reviewed the court had made the following findings of fact:

That on October 1, 1917, George Heim had conveyed to A. L. Gray a tract of land, containing 160 acres, for the consideration of $1,400, and that a balance of $795.30 was then due and evidenced by notes given for the purchase money, which were secured by a vendor's lien; that Heim had assigned these notes to H. Bollwig, then deceased, and the same were held by A. F. Niemier, as executor of Bollwig's estate; that on February 13, 1920, A. L. Gray conveyed to J. M. Cauldwell a 160-acre tract of land, which included 40 acres of the land bought by Gray from Heim, for the consideration of $500 cash and five notes for $500 each, and that Gray had in due course assigned these notes to the First National Bank of Paris as collateral security for certain indebtedness due the bank; that on September 12, 1921, A. L. Gray had executed a mortgage to T. C. Gray, conveying 120 acres of the land sold Cauldwell by Gray, to secure the payment of a note for $1,000, due December 1, 1922; that on February 16, 1920, A. L. Gray conveyed to H. J. Pistole and H. Cowden a quarter-section of land for a cash consideration and six notes for $500 each, and these notes were also indorsed by Gray to the bank. One hundred and twenty acres of the land conveyed by

Gray to Pistole and Cowden were embraced in the deed from Heim to Gray, and the court held that this conveyance was subject to the vendor's lien reserved by Heim for the balance of unpaid purchase money, as was also the 40 acres sold Cauldwell by Gray which was included in the deed from Heim to Gray.

The court declared a lien on the 120 and 40 acre tracts last mentioned in favor of Bollwig's executor, and directed that these lands be sold in satisfaction of these liens. And, subject to the prior lien in favor of Heim, which Niemier, as executor, had acquired, it was decreed that the bank, as the holder of the purchase money notes given Gray by Pistole and Cowden and Cauldwell, had a lien upon the lands in partial payment of which the notes had been executed. It was adjudged, however, that, inasmuch as the mortgage from A. L. Gray to T. C. Gray, securing the thousand-dollar indebtedness due from A. L. Gray to T. C. Gray, had been placed of record before the deed from Gray to Cauldwell had been recorded, Cauldwell had taken title subject to the mortgage lien. Sales of the lands were ordered, and it was decreed that, from the proceeds thereof, the indebtedness be paid in the order of priority as the same had been adjudged in the decree.

No objection appears to have been made by any one to this decree, except that it concludes with the following recital:

"To the findings of fact and declaration by the court that the defendant, T. C. Gray, is an innocent purchaser for value, without notice, and by reason of prior filing of his A. L. Gray mortgage to the filing of record of the A. L. Gray warranty deed to J. M. Cauldwell, held prior and a first lien to cross-plaintiff, First National Bank of Paris, Arkansas, at the time excepted, and prayed an appeal to the Supreme Court of Arkansas, which is granted, and 90 days given to file bill of exceptions."

This appeal was duly prosecuted, and the only question presented for our decision on the appeal from this decree was the question whether the deed from A. L.

Gray to Cauldwell was subject to the mortgage on the same land from A. L. Gray to T. C. Gray.

We reversed the portion of the decree appealed from. See *Bank* v. *Gray, supra,* in which case it was held (to quote the syllabus) that "the possession of a tenant or lessee is not only notice as against a subsequent mortgagee of all his rights and interest connected with or growing out of the tenancy or lease, but is also notice of all interests he may have acquired through subsequent or collateral agreements." The necessary effect of this holding was to declare the mortgage from A. L. Gray to T. C. Gray invalid, for the reason that A. L. Gray had, prior to the execution of the mortgage, previously conveyed the land to Cauldwell.

G. W. Parks, as administrator of the estate of C. S. Parks, deceased, had intervened in this suit, and he alleged that, as administrator of the C. S. Parks estate, he was entitled to be subrogated to the bank's collaterals after the bank had been paid in full, for the reason that his intestate had paid certain portions of the indebtedness due the bank from A. L. Gray, for which his intestate, C. S. Parks, was security to the bank for Gray. The relief prayed by the administrator was granted, and it was "ordered and decreed that the said G. W. Parks, as the administrator of the estate of the said C. S. Parks, deceased, be and is hereby subrogated to the rights of the said First National Bank to said notes, after the said First National Bank is paid in full." This last adjudication was embraced in a separate decree, but both decrees were rendered at the same term of the court.

The opinion of this court on the appeal of the bank was delivered February 16, 1925, and thereafter the attorneys for T. C. Gray obtained from the court below permission to file a "supplemental answer and a petition in the nature of a bill of review," in which it was alleged that there was an error of law apparent on the face of the record in subrogating G. W. Parks, administrator, to the rights of the bank to the notes pledged to the

bank to secure indebtedness due the bank, it being alleged that C. S. Parks was neither the maker, surety nor indorser, nor in any other manner liable thereon or bound by the same, and it was denied that the said C. S. Parks had in fact paid anything thereon. It was further alleged that such sums as were paid by C. S. Parks had been paid on an indebtedness for the security of which the notes indorsed by Gray to the bank had not been pledged as collateral.

To this supplemental answer and petition a demurrer was filed, for the reasons: (1) "As a supplemental answer, it does not state fact or facts, and does not raise any question that has not been adjudicated by this court; (2) as a bill of review, it does not state any new matter or facts or cause as will entitle this court to set aside the decree rendered herein on the 25th day of September, 1923." The demurrer was overruled, whereupon Parks, as administrator, filed an answer, setting up certain payments made by his intestate for Gray, which it was alleged the collateral notes secured.

The court appointed a receiver to take charge of the collateral notes and collect them, and to make a report thereof. The court also referred the testimony taken on these supplemental pleadings to a master, with directions to make findings of facts. This report was made, but exceptions were sustained to these findings. The master found that the mortgage lien claimed by T. C. Gray was void; that the five $500 notes of Cauldwell to A. L. Gray were the property of Gray, "subject to the orders of subrogation to the position of the bank to the extent of $2,589.65 judgment and accrued interest obtained on September 14, 1922, by said bank against A. L. Gray and G. W. Parks, administrator." That said notes carry a reservation of title in A. L. Gray to the quarter section of land sold Cauldwell, and that Parks, as administrator, has a lien on said land by reason of "being subrogated to the position held by the First National Bank of Paris under assignment by A. L. Gray, for collateral security, subject to said sum due T. C.

Gray for taxes advanced." Gray having paid certain taxes, the master found that the amount thereof constituted a first lien on the land.

The master further found that the vendor's lien on the Cauldwell land should be foreclosed, and that the proceeds of the sale and other assets in the hands of the receiver should be first applied to the payment of the costs of the suit; second, to reimburse T. C. Gray for taxes paid; third, to the payment of any balance due the bank on the Gray Mercantile Company notes as security for which the Cauldwell notes had been pledged; fourth, to G. W. Parks, as administrator, in satisfaction of the judgment recovered against his intestate, "which judgment is the basis of the right of subrogation order heretofore made by this court of equity;" fifth, balance, if any, to be applied on the satisfaction of judgment rendered in this court in favor of T. C. Gray.

The decree denied the right of subrogation as found by the master, and further found that the mortgage for a thousand dollars from A. L. Gray to T. C. Gray was a valid and subsisting lien, "subject, however, to any balance that may be remaining due the First National Bank of Paris." The court found that this mortgage lien had been foreclosed by a commissioner appointed to make sale, and that T. C. Gray was the purchaser at this sale. It was ordered that this sale be approved, and that the commissioner execute his deed to T. C. Gray.

This decree must be reversed, and it will be so ordered. As has been said, the necessary effect of the opinion of the court in the case of *First National Bank of Paris* v. *Gray, supra,* is to hold the mortgage from A. L. Gray to T. C. Gray void, for the reason that A. L. Gray had previously sold the mortgaged land to Cauldwell. No title could therefore have passed by this mortgage, and, upon the remand of this cause, a decree will be entered canceling it.

We are also of the opinion that the court was in error in reopening the question of the right of Parks, as administrator, to subrogation, as that question had

been adjudicated in his favor in the portion of the original decree from which no appeal was ever prosecuted by any one. That decree therefore became and is final, and, as no error of law appears upon the face of the record in which that decree was entered, the decree was not subject to review in this proceeding.

It was held in the case of *Rayburn* v. *Kirk,* 134 Ark. 605, 204 S. W. 611, that a bill of review could not be resorted to as a substitute for an appeal to bring up for decision questions as to preponderance of evidence, it being there said:

"Of course, a proceeding by bill of review could not be resorted to as a substitute for an appeal to bring before us for decision some question of the preponderance of evidence. We could not decide in this proceeding, if we had the testimony heard at the former trial before us, any question dependent upon a finding of preponderance of the testimony, for that was a proper question to raise by appeal."

Parks, administrator, had prayed relief by subrogation in the original proceeding, and that relief had been granted, and the master found, on the resubmission of the question, that he was entitled to this relief. But, whether the preponderance of the evidence supports that finding or not, the right of subrogation was decreed on the original submission, by a decree from which no appeal was prosecuted, and relief against that finding, although it may not, in fact, be supported by the preponderance of the evidence, cannot be granted in this proceeding. The report of the master should therefore have been approved, as it accords with the original decree of the court, and, upon the remand of the cause, a decree to that effect will be entered, and the funds herein involved will be distributed in accordance with the master's findings.

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

LEE v. LEE.

Opinion delivered March 12, 1928.

1. MARRIAGE—DURESS.—Duress in the procurement of a marriage was shown where the father of the woman who gave birth to a child approached carrying a rifle and said plaintiff would have to give the baby a name, and plaintiff's fears that he would be killed had he not consented to the marriage were well founded.
2. MARRIAGE—EFFECT OF DURESS.—Where plaintiff was approached by the father of the woman who gave birth to a child, and stated that plaintiff would have to give the child a name, and plaintiff's fears that he would be killed had he not consented to a marriage were well founded, the fact that the woman whom he married was not cognizant of the duress was immaterial.

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

Steve Carrigan, Allen H. Hamiter and *Edwin Upton,* for appellant.

Searcy & Searcy, for appellee.

SMITH, J. Appellant, Ida Moncus Lee, gave birth to a child without being married, and, following its birth, she became delirious, and remained so for several days. Upon recovering consciousness she told her father, R. E. Moncus, that appellee, Fred Lee, was the father of the child. The following day Mr. Moncus took his rifle, and, accompanied by his son, Oce Moncus, drove to the home of Jim McDaniel, who was his brother-in-law and an uncle of appellant. The three drove some miles in an automobile to Lewisville, to a garage where appellee was employed. Upon reaching the garage the three men left the car, and Mr. Moncus, with rifle in hand, walked up to appellee and told him that he had ruined his daughter, who had given birth to a child, and that he would have to go and give the baby a name. Appellee asked Mr. Moncus if his daughter had said that he was the father of the child, and Moncus replied that she had. Appellee then said, "I am ready." No other conversation occurred between the parties, except that McDaniel had been crying, and said to appellee, "God damn you, I will kill you."

R. T. Laster, who is a justice of the peace, testified that he observed that something unusual was happening, and that he went to the garage, and, upon arriving there, he said to Mr. Moncus, "Richard, do not be rash; you have enough trouble," and Moncus answered, "Uncle Bob, I am not going to do any wrong; all I want is for Judge (a nickname by which appellee was known) to give that baby a name."

As the parties got in the car, appellee said that he would like to change his clothes, and he was driven to the house where he roomed. Appellee's nephew, Howard McClendon, was at the McClendon home when the party arrived, and appellee and McDaniel went to appellee's room. Nothing was said while they were there, but McDaniel kept his hand in his bosom until they left. The services of a minister had been secured, without appellee's knowledge or consent, and the minister was waiting at the office of the county clerk when the party arrived there. Appellee procured from the clerk a marriage license, and paid the fee therefor with a check drawn by himself. The party then entered the car, and drove twelve miles to the home of Mr. Moncus. Appellee was placed on the front seat, and Mr. Moncus, with his rifle, sat on the rear seat. When the party arrived at the home of Mr. Moncus, appellee said that he wanted to speak to appellant, and for about five minutes he was in the room with her alone, but during that time Mr. Moncus stood near the door with his rifle. McDaniel and Oce Moncus were present in the house.

Appellee told the minister that he was ready, and the party went into the room where appellant was lying in bed. The minister directed appellee to take appellant's hand, and he did so, and the ceremony began, when the minister observed that appellee had released appellant's hand, and he again told appellee to take her hand. When finally the minister asked appellee if he would take appellant as his wife, there was a perceptible pause, but appellee answered "I will."

The minister testified that he was aware that an unusual ceremony was being performed. He saw Mr. Moncus had his rifle, but no demonstration was made with it. About fifteen minutes after the ceremony, appellee, without having any further conversation with his bride, asked to be carried back to town, and this request was complied with. Appellee did not pay the minister for his services, and was not asked to do so. Appellant testified that she had not seen appellee since the wedding.

Appellee brought this suit for divorce, alleging as ground therefor that he had married appellant under duress, and, in support of that allegation, offered the testimony set out above.

Appellant testified that she knew nothing of any duress, and that she supposed appellee had consented to marry her to right, in part, the wrong done her, as she also testified that appellee had seduced her under a promise of marriage. The granting of the divorce was opposed upon the ground that there had been no duress.

Mr. Moncus testified that all he asked appellee to do was to give the baby a name, and that he had his rifle for the purpose only of defending himself in the event appellee assaulted him.

Mr. McDaniel admitted that he was armed, but he testified that was a deputy sheriff, and had his pistol because he had certain papers to serve, and that he went along to keep the peace. He admitted, however, that he went with appellee to appellee's room, but stated that he did this because he did not know but that appellee would come out with a gun, and he knew there would be bad times if he did so. He admitted cursing appellee at the garage, but said he did this because of his indignation, and that he did not threaten to kill appellee or to do him any violence.

The testimony did not show that either the gun was ever pointed at appellee or that McDaniel ever drew his pistol.

It appears that, when the party entered the automobile, the sheriff was standing by, and it is insisted that,

if appellee was unwilling to marry appellant, he had only to call the sheriff for protection.

A decree was granted appellee, and for the reversal of that decree it is insisted that duress was not shown, and, if so, that appellant was not a party to it.

We think duress was very clearly shown. Appellee testified that he offered no protest, as he feared he would be killed had he done so, and we think his fears were well founded. From the testimony set out above it appears very highly probable that, if there had not been a wedding, there would have been a funeral. It may be true that appellant was not cognizant of the duress. Indeed, her physical condition at the time of the wedding strongly indicates that she was not, but it was not essential that she should have been.

In Nelson on Divorce and Separation, vol. 2, § 622, page 592, it is said:

"It is immaterial from what source the threats emanate, or who is the active instigator of the proceedings at law which constitute the duress. If others have so frightened the complainant that his consent is involuntarily given—'a yielding of his lips, but not of his mind'—the marriage is voidable for want of consent. If the woman was ignorant of the actions of her friends in procuring his consent by duress, this would not render the marriage valid. The lack of consent is vital in all cases of duress, and therefore the complicity of the other party or her ignorance of the duress is immaterial." See also *Marks* v. *Crume* (Ky.), 29 S. W. 436.

In the case of *Honnett* v. *Honnett,* 33 Ark. 156, 34 Am. Rep. 39, it was held that, if one, having seduced a woman, marries her through fear of the natural and probable consequences of his crime, it would not, in the absence of force or threats of bodily harm at the time, be such duress as would avoid the marriage, and appellant insists that the testimony here shows nothing more; but we do not concur in this contention. We think the testimony very clearly shows such duress as warranted the court below in finding that the marriage was not a vol-

untary act on the part of the appellee, and that there has been no subsequent ratification thereof on his part. *Fowler* v. *Fowler,* 13 Ala. 1088, 60 Sou. 694; *Sheppard* v. *Sheppard,* 174 Ky. 615, 192 S. W. 658; *Marsh* v. *Whittington,* 80 Miss. 400, 40 Sou. 326; Cooley's Tiffany on Domestic Relations (3d ed.), page 13; *Simmons* v. *Stevens,* 132 La. 675, 61 Sou. 734; 1 Bishop on Marriage, Divorce and Separation, § 538, page 231; *Bassett* v. *Bassett,* 9 Bush (Ky.) 696; *Willard* v. *Willard,* 65 Tenn. 297, 32 Am. Rep. 529, 2 Schouler on Marriage, Divorce, Separation and Domestic Relations (6th ed.), § 1149, page 1408; 18 R. C. L., chapter Marriage, § 38.

The decree of the court below is therefore affirmed.

HONEA v. STATE.

Opinion delivered March 12, 1928.

1. GAMING—EVIDENCE.—In a prosecution for gaming by playing poker, the sheriff's testimony as to the similarity as to arrangement and equipment in the boat where the raid took place and other poker games which he had raided, *held* admissible.
2. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Refusal of the court to give requested instructions was not error, where the instructions were fully covered by the instruction given.
3. CRIMINAL LAW—ABSTRACT INSTRUCTIONS.—A requested instruction to disregard whatever knowledge the jury had, or whatever proof had been introduced concerning defendants' character, was properly refused where there was no testimony in the record concerning their bad character.

Appeal from Crawford Circuit Court; *J. O. Kincannon,* Judge; affirmed.

C. M. Wofford, for appellant.

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

HUMPHREYS, J. Appellants were arrested for gaming, upon information of the prosecuting attorney, filed before a justice of the peace in Crawford County. The information charged them with unlawfully and willfully

betting the sum of one dollar in a certain game of hazard and skill with cards, and commonly called poker. They were fined $10 each, and appealed to the circuit court, where, upon a trial *de novo,* they were again convicted, and fined $10 each, from which is this appeal.

Their first assignment of error for a reversal of the judgment is that the evidence was insufficient to sustain the verdict and judgment. The sheriff and one of his deputies had observed a number of boys frequenting a houseboat on the river, to the right of a little island in said county. He and one of his deputies entered the boat to ascertain the cause. As they entered, Albert Honea saw the sheriff, snapped his fingers at the other boys, and said two or three times, "Let's go to town." The boys were shuffling around, and one of them threw a deck of cards into the river. Others were putting money into their pockets. The sheriff found two or three unopened decks of cards on a shelf in the boat. Albert Honea asked the sheriff who had tipped them off.

Over the objection and exception of appellant, the prosecuting attorney was permitted to ask the sheriff whether the arrangement and equipment in the boat were the same he had found when he had raided other poker games. The sheriff answered that they were identical. The admission of this testimony is urged as a ground for reversal of the judgment. We think the testimony of the sheriff was admissible as to the similarity of the paraphernalia in the boat to that he had discovered when he raided other poker games.

This testimony, together with the circumstances detailed above, was substantial evidence tending to show that appellants were guilty of playing poker, contrary to the statute inhibiting same.

Appellant also assigns as reversible error the refusal of the court to give instructions numbered 1, 2 and 3 requested by him. Instructions 1 and 2 are fully covered by the court in instruction No. 5. There was no testimony introduced concerning the bad character of

appellants, so requested instruction No. 3, telling the jury to disregard whatever knowledge they had or whatever proof had been introduced relative to the character of appellants, had no place in the case, and was properly refused.

No error appearing, the judgment is affirmed.

J. H. PHIPPS LUMBER COMPANY v. PHIPPS.

Opinion delivered March 12, 1928.

1. CORPORATIONS—POWER TO LEASE OR SELL LAND.—A corporation which was authorized to buy timber lands had the inherent power to lease of sell such lands, although no such provision was contained in its charter.
2. CORPORATIONS—AUTHORITY OF PRESIDENT TO MAKE CONTRACTS.— In an action against a corporation for breach of a contract for lease and option of certain lands, the question whether the president of the corporation, who owned the majority of the stock and dominated the corporation, acted as agent for it in making the contract of lease and option, *held* for the jury.
3. CORPORATIONS—EVIDENCE AS TO CONTRACT.—In an action against a corporation for breach of a contract for lease and option of lands entered into by the corporation through its president, testimony as to the contract and its terms was properly admitted, where there was testimony from which the authority of the president to act as agent of the corporation could be implied and tending to show a subsequent ratification of the contract by accepting benefits from it.
4. EVIDENCE—VALUE OF LUMBER.—In an action for breach of a contract for lease and option by a sale of land to another, whereby plaintiff was denied the right to remove improvements, testimony as to the original bill of lumber used by plaintiff in constructing a house was admissible as a basis for estimating the value thereof as second-hand lumber in the knockdown.
5. EVIDENCE—BREACH OF CONTRACT.—In an action for breach of a contract for the lease and option of land by sale of the land to the government, which prohibited plaintiff from removing improvements, a letter from the government inspector directing plaintiff not to remove such improvements *held* properly admitted as a circumstance tending to show a breach of the contract.
6. CORPORATIONS—INSTRUCTION ON RATIFICATION.—In an action against a corporation for alleged breach of a contract, evidence

that the corporation accepted benefits under the contract was sufficient to authorize a court to instruct a jury upon the law of ratification.

7. VENUE—ACTION FOR BREACH OF CONTRACT.—An action for breach of a contract for the lease and option to buy land is transitory and not local, and was properly brought in the county of defendant's domicile, rather than in the county where the land is situated.

Appeal from Washington Circuit Court; J. S. *Maples,* Judge; affirmed.

J. W. Grabiel and *W. N. Ivie,* for appellant.

Walker & Walker, for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Washington County for $2,500 damages on account of the alleged breach of a contract for lease and option to appellee by appellant of certain lands in Franklin County, Arkansas, when it got ready to sell same, and, if appellee should not then desire to purchase said lands, that he should have the right to remove such improvements as he had made thereon.

Appellant filed an answer, denying the material allegations in the complaint.

The cause was submitted upon the pleadings, testimony introduced by the respective parties, and the instructions of the court, resulting in a verdict and consequent judgment in favor of appellee for $700, from which is this appeal.

According to the undisputed testimony, appellant is a domestic business corporation, and in 1919 owned 9,000 acres of timber land in Franklin County. It was engaged in the hardwood lumber business, railroad and mercantile business, the two latter being incidental to the manufacture of hardwoods for the market. Jay Fulbright was its president, and J. H. Phipps its vice president and manager. Jay Fulbright controlled a majority of the stock, and dominated the corporation. In the fall of 1919 Fulbright, acting for the corporation, but without any express authority under charter or specially delegated to him by the board of directors, entered into

a contract of lease and option to appellee of about one hundred acres of said land, with the privilege to appellee to remove his improvements off the land if he should not choose to buy same when appellant decided to sell its lands, or this particular land. The directors and officers of appellant knew of the contract, but never approved it in a formal way. The minutes of the meetings of the board are silent on the matter, and the directors and officers who testified in the case had no recollection of the matter ever having been reported to the board or acted upon by them. Appellee testified that he talked to some of the directors about it, but made no formal report to the board relative to the contract or its terms. He said that, in making the contract, he regarded and treated Fulbright as the corporation itself.

Pursuant to the agreement between Fulbright and appellee, he built a house upon the land, which cost $2,000, and built a hog-proof wire fence around same at an expense of $500. The improvements were completed in the spring of 1920, and appellee's son moved on the property to farm it and look after the hogs and herd of cattle, which appellee bought from Fulbright. At the expiration of two years appellee's son moved away, and the house was unoccupied most of the time prior to the purchase of the land, in 1924, by the United States Government, from appellant. The Government purchased said tract of over 9,000 acres from appellant for forest reserve purposes, at $2.75 per acre, and refused to allow appellee to remove his improvements. This sale was made after Jay Fulbright died, and after he was succeeded as president of appellant by his son, Jack Fulbright. When appellee heard of the sale to the Government, he consulted Jack Fulbright with reference to removing his improvements, and was informed that he would have to take the matter up with the United States Government. He did so, and was notified by the United States Government not to remove the improvements.

The original charter conferred authority upon it to purchase, lease and sell real estate. The charter, as

amended in 1913, authorized the purchase of real estate, but contained no provision authorizing it to lease or sell same.

Learned attorneys for the respective parties differ in their interpretation of the testimony relative to the agreement to pay rent for the land upon which the improvements were made. Appellants' attorneys interpret the evidence to mean that the agreement to pay rent was a separate contract, and wholly disconnected from and not growing out of the contract of lease and option made between Fulbright and appellee; whereas appellee's attorney interprets the evidence as meaning that the agreement was to pay $100 per year for the use of the land as a part of the lease and option contract. The testimony shows, without dispute, that the rent was paid directly to appellant corporation for two years, 1920 and 1921, during which time appellee occupied and used the house and land which he had fenced. Appellee testified, on page 37 of the transcript, that he paid rent in 1920 and 1921, in connection with his statement that his son moved out of the house after occupying it two years.

Mr. Jeter, who was in charge of appellant's mills, and who was interested in the corporation, testified, on page 50 of the transcript, relative to the lease and option contract made by Fulbright and appellee at Combs, as follows:

"Q. Mr. Jeter, was there anything said in that conversation as to how much land Mr. Phipps was to rent or use? A. Well, I do not know that there was any more than to use all there was in that country for grazing purposes; he had that privilege from the company. Q. Was there anything said in that conversation about Mr. Phipps paying rent? A. I do not remember as to that. Q. You do not remember as to that? A. No, that was settled, I think, in the office here; however, I understand that he did pay rent. Q. Do you know whether Mr. Phipps paid rent at the rate of $100 a year? A. That is my understanding that he did."

Appellant's first contention for a reversal of the judgment is that the court should have instructed a verdict in its favor, under the undisputed facts in the case. It requested a peremptory instruction, which the court refused, over its objection and exception. It argues that the contract was in excess of the charter powers, and *ultra vires,* because the amended charter of 1913 did not authorize the corporation to lease or sell its real estate. The amended charter authorized it to purchase and hold real estate in connection with its business. The charter, prior to being amended, authorized it to lease and sell its real estate. This provision was omitted from its amended charter. Although omitted from the charter, the power was inherent in the corporation to lease or sell its real estate which it bought in connection with its business; else how could it realize on its assets? Especially is this true of lumber concerns, which buy large tracts of timber land to obtain raw material for manufacturing the lumber. It would be indeed a strange doctrine that such corporations could not dispose of their cut-over lands or could not lease them for agricultural purposes, simply because express authority was not conferred in their charters.

We cannot agree with appellant's contention that the contract was *ultra vires.* It argues, however, that the president of the corporation had no right to make the contract without authority conferred by charter or by the board of directors. It is true that the general inherent power of a president of a corporation does not include the authority to make contracts for the corporation, but this cause was sent to the jury upon the theory that the president, Jay Fulbright, had authority to lease and option the lands on account of holding a majority of the stock and dominating the business affairs of the corporation. The issues submitted to the jury were whether Fulbright had *implied authority* to act for the corporation, by virtue of owning most of the stock and being permitted to dominate its affairs, and whether the corporation was bound under the contract

by accepting benefits under it. The testimony tended to show that the corporation was a one-man corporation, being controlled and dominated by its president, who was also the owner of most of the stock, and also tended to show that the corporation, through its officers and directors, accepted rents for the use of the land, and subsequently sold same to the United States without reserving the improvements for removal by appellee. The improvements were substantial and valuable. The inference may have been drawn by the jury that these improvements enhanced the value of the land and that appellant received benefits from them in the sale thereof. It is true that it does not affirmatively appear in the record that the Government and appellant took the improvements into consideration in agreeing upon the purchase price, yet the Government refused to allow the improvements to be removed, and appellant did not reserve them when it sold the land. In the state of the record the jury may have concluded that the agreement to pay rent of $100 a year was a part of the consideration for the lease and option contract. If so, then the corporation received $200 in rents on account of the lease and option. Certainly appellee would not have paid $200 for the purpose of grazing cattle and hogs on open or range land owned by the corporation, when he or any one else could have let his stock run at large on the land without paying anything for the privilege; but, to say the least of it, the issue was one for the jury.

Appellant contends for a reversal of the judgment because Phipps and Jeter were permitted to testify relative to the contract and terms thereof without first showing that Jay Fulbright had express authority to act for the corporation. The testimony of both was admissible, because testimony was introduced from which such authority might be implied, and because there was testimony tending to show a subsequent ratification of the contract by receiving benefits therefrom or thereunder.

Appellant also contends for a reversal of the judgment because appellee and his witness, Duncan, were

permitted to testify to a bill of lumber bought from T. J. Gillstrap Lumber Company and to identify and introduce the bill of lumber as an exhibit, which lumber was used in the construction of the house. This bill of lumber amounted to $557.21. It was admissible to introduce the original bill of lumber used in the house as a basis for estimating the value thereof as second-hand lumber in the knockdown.

Appellant also insists upon reversal of the judgment because appellee was permitted to testify relative to receiving a notice or letter from the Government inspector at Russellville in 1924, directing him not to remove the improvements. The basis of the suit was the refusal of appellant to allow appellee to remove the improvements, and appellee was told by appellant's president to take the matter up with the United State Government, to whom it had sold the land. This piece of evidence was a circumstance to show a breach of the contract, and was clearly admissible, the notice and letter purporting to come from a representative of the United States Government.

Appellant also contends for a reversal of the judgment because the court gave instruction No. 1. The objection urged to the instruction is that it assumed that Fulbright acted as agent for the corporation in making a contract of lease and option with appellee. It does not assume agency. It submitted that issue to the jury, and properly so, for testimony was introduced in the case tending to show that Fulbright owned and dominated the corporation, in which event the jury might have drawn a reasonable inference that he was acting for the corporation.

Appellant also contends for a reversal of the judgment because the court instructed the jury upon the law of ratification and the refusal to give its requested instructions because they omitted any reference to the law of ratification. The argument is made that no evidence was introduced tending to show a ratification of the contract by the corporation. We think there was.

The testimony tended to show that the corporation accepted benefits under the contract. Appellant pleaded the statute of frauds as a defense to the action, and contends for a reversal of the judgment because the contract had relation to the lease and sale of lands, and, to be binding, should have been written. The contract was partially performed, which removed it from the operation of the statute of frauds.

Appellant also contends for a reversal of the judgment upon the ground that the circuit court of Washington County had no jurisdiction to try the cause of action. It is argued that the action is local, and should have been brought where the land is situated. This is not a suit for specific performance of the contract, but for a breach of contract for lease and option to buy, and is transitory and not local. The Arkansas domicile of the corporation is in Fayetteville, hence the suit was properly brought in Washington County, of which Fayetteville is the county seat.

There being no reversible error in the record, the judgment is affirmed.

ETHERIDGE v. BIRD BROTHERS.

Opinion delivered March 12, 1928.

LANDLORD AND TENANT—LIEN FOR ADVANCES.—Under Crawford & Moses' Dig., § 6890, a landlord is not entitled to a lien on his tenant's crop for money advanced to make a pleasure trip.

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

J. A. Eades, for appellant.

Strait & Strait, for appellee.

McHANEY, J. Appellees, plaintiffs below, brought this suit in the justice court against appellant and one Melvin Mitchell, tenant of appellant, to recover $45.63 alleged to be due on an account for merchandise furnished by appellees to Mitchell. An order of general attachment was issued out of the justice court, and three

bales of cotton seized. Appellant gave a forthcoming bond for the attached cotton. It was agreed that Mitchell had turned over to appellant, his landlord, his crop, including the attached cotton, in settlement of his indebtedness to appellant, and that this crop was in possession of appellant at the time of filing the suit. A writ of garnishment was also issued and served upon appellant upon the usual allegations and interrogatories. On the day of trial Mitchell made default, but appellant appeared and defended his right to the property. Judgment was rendered in the justice court against both defendants, and the attachment and garnishment sustained. An appeal was prosecuted by appellant only, to the circuit court, and, at the conclusion of the testimony, a verdict was instructed against appellant, Etheridge, and he has appealed.

It is first contended for a reversal of the case that, since Mitchell was the tenant of appellant during the year 1925, and was indebted to him in excess of the value of the crop produced, lacking $23.30 of paying appellant's account, he had a prior lien for the amounts furnished by him to Mitchell. It is shown that appellant had an account against Mitchell amounting to $331.83, which began January 1, 1925, and terminated October 10, 1925. In the account filed by appellant there is one item of $60 cash advanced, and it is agreed that this $60 was furnished Mitchell by appellant to make a pleasure trip to visit his kinsfolk in Oklahoma. This being the fact, appellant had no lien on the crop for this item The advances covered by the statute, § 6890, C. & M. Digest, for which the landlord has a lien, must be made to enable his tenant to make and gather the crop, therefore the lien given by the statute did not attach to the crop in favor of appellant as to this item, and, although the crop had been turned over to appellant at the time the suit was brought, the lien of the attachment was ahead of appellant's claim for this item. Since, as we have already seen, the attachment lien was superior to appellant's claim with reference to this $60 item, and since this

amount is more than sufficient to cover appellee's debt, we do not decide the other questions raised in the brief, including the question of usury, in appellant's account with Mitchell.

The judgment of the circuit court directing a verdict against appellant was therefore correct, and it is accordingly affirmed.

DOZIER v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered March 12, 1928.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.—In an action for personal injuries under the Federal Employers' Liability Act, a section foreman operating a motor car, who violated the railroad's rules by failing to put out a flag to signal trains, to get a line-up from the station agent on all overdue or extra trains, or to maintain a lookout at the time of collision with an extra train, *held* as matter of law to have assumed the risk of injury and to have been guilty of negligence, which alone caused the injury.
2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Under the Federal Employers' Liability Act, there can be no recovery when the employer is guilty of no negligence, and the injuries result solely from the negligence of the employee.

Appeal from Marion Circuit Court; *J. F. Koone,* Judge; affirmed.

J. H. Black, for appellant.

McHANEY, J. Appellant brought this action under the Federal Employers' Liability Act to recover damages for personal injuries received by him early in the morning of October 12, 1925, while working for appellee in the capacity of section foreman, at or near Buffalo, Arkansas. Appellant was an experienced section man, having been employed by appellee in such capacity for eight years, six of which he had been its foreman, and had never had an accident.

On the morning of October 12, about 8 o'clock, he took his motor-car from the tool-house, with a helper, to go over the track on his section, to ascertain if there

were any washouts or obstructions on the track, a heavy rain having fallen, which was still continuing at the time. The motor on his car was operating badly on account of the rain, and it was necessary for his helper to push the car a distance before it started to run. He had gone only a short distance when he had a head-on collision with another motor-car operated by appellee's superintendent, receiving severe and painful personal injuries. The superintendent's car was much larger than the section foreman's car, and could not be removed from the track, as could appellant's car. On this account the superintendent's car was operated under orders of the dispatcher, and, on this particular morning, was running as an extra, just as if it had been a train. The collision occurred on a sharp curve. Appellee had a rule applicable to appellant, to the effect that he should expect trains at any time, without warning or notice, and from any direction, and, in order to protect himself, to put out a flag each way, in front and behind. This rule was not complied with. Appellant admitted also that he did not get a line-up, that is, that he did not go to the station agent at the station of Buffalo and get a line-up on all trains overdue or any extra trains. Appellee had a rule that required this to be done when practicable. Appellant says he did not comply with this rule for the reason that the station agent was always late, and went on duty at 8:30, although the station agent lived in the depot at Buffalo, from whom he could have got a line-up on all trains, including the superintendent's motor-car running as an extra train, if he had asked for it, as it is not disputed that the station agent always had train orders by 8 o'clock in the morning. Rule 148 also provides that all hand and motor-cars must be run with care and caution, carefully protected by signals when necessary, and must not be used on main track in foggy weather, and requires the keeping of a constant lookout for trains while such hand and motor-cars are being operated. Said rule further requires that the foreman or man in charge shall stop and send flagmen ahead around all obscure

curves to prevent the possibility of colliding with trains or other motor-cars.

Appellant frankly admits that he violated all these rules, but contends that it was not practicable under the circumstances. He admits that he did not keep a lookout and did not see the car in which the superintendent was traveling until he was within five or six feet of it, for the reason that he had his head down, adjusting the needle-valve on the carburetor in order to adjust same so that it would hit regularly. Neither appellant nor his assistant was keeping a lookout, and the assistant says that the superintendent's car had slowed up and was not running over ten miles an hour at the time of the collision. Under this state of the evidence, without setting out more of it, the court directed a verdict against appellant, and he has appealed.

We think the court was correct in directing this verdict. The undisputed evidence shows that there was no negligence on the part of appellee in the operation of the car in which the superintendent was riding. On the other hand, the proof shows conclusively that appellant was guilty of the grossest kind of negligence in the operation of his motor-car, in violation of every rule on the subject; and, in taking the car out and in leaving the station without getting a line-up, as the witnesses call it, giving him all information concerning movement of trains or motor-cars operated under orders over his section, he assumed the risk of any injury he might receive by reason thereof. There was no negligence in the operation of the car of the superintendent, as it was being operated under orders of the dispatcher, just as a train, and, by calling at the station in Buffalo, appellant would have known of the movement of this car as an extra over his section.

While it is true, under the employers' liability act, contributory negligence is not a complete defense, assumption of risk is, and, when the employer is guilty of no negligence and the injuries result solely from the act or negligence of the employee, there can be no recovery.

No error appearing, the judgment is affirmed.

CONLEY v. STATE.

Opinion delivered March 19, 1928.

1. INTOXICATING LIQUORS—POSSESSING STILL—EVIDENCE.—Evidence *held* to sustain a conviction of possession a still.
2. INTOXICATING LIQUORS — ADMISSIBILITY OF EVIDENCE. — Where defendant and his wife were found near a still, it was not error to admit in evidence a fragment of goods which matched the wife's dress, found among the rags apparently used in wiping out the still, since the jury could infer that the fragment was so used by appellant because it was a piece of his wife's dress goods.
3. WITNESSES—COMPETENCY OF WIFE.—In a prosecution for possessing a still, where a fragment of cloth which matched the defendant's wife's dress was found among the rags at a still, and was apparently used to wipe the still, it was not error to refuse to permit defendant's wife to testify that such fragment did not come from her dress, and that tracks leading from the still were not her tracks, since she was not a competent witness for or against her husband.
4. WITNESSES—COMPETENCY OF WIFE.—Crawford & Moses' Dig., § 6178, providing that no one shall be excused from testifying in prosecutions for violating the act relating to intoxicating liquor, *held* not to change or repeal the rule regarding exclusion of testimony of the husband or wife for or against each other.
5. CRIMINAL LAW—INSTRUCTIONS.—In a prosecution for possessing a still, refusal of defendant's instruction that, before the jury could convict, all facts and circumstances must together be inconsistent with any reasonable hypothesis except that of guilt, was not error, where the court instructed on reasonable doubt and presumption of innocence, and stated that the jury must find beyond reasonable doubt that the defendant owned the still or exercised control over it, before he can be convicted.

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

Pratt P. Bacon, for appellant.

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

HART, C. J. L. A. Conley prosecutes this appeal to reverse a judgment of conviction against him for the statutory crime of possessing a still.

The first assignment of error is that the evidence is not legally sufficient to support the verdict. Accord-

ing to the evidence for the State, two Federal prohibition agents met L. A. Conley and his wife on the main road, just before they got to Boyd, in Miller County, Arkansas. It was late in the evening, and the Conleys were going towards home. There had been no other cars along the road, and the prohibition agents backtracked the car of the Conleys, or followed its tracks back to where it had come from. Where the car had stopped there was a turn-around which had been used in turning the car around on other occasions. Near where the car had been stopped and turned around the officers found a complete two-hundred-gallon copper still with a 3-ply 16-foot copper worm. The worm was lying in a branch near by, and the branch had been dammed up. The still was complete except for the cap. The officers returned to the place on the next morning and discovered L. A. Conley and his wife within 15 or 20 feet of the still. They approached them and arrested them when they had got about 50 yards or more away from the still. The officers found that the still had just been wiped out with some rags. Among the rags they found a piece of cloth that matched the dress of Mrs. Conley. They followed a woman's tracks leading from the still, and found a cap which just fitted the still. They went back to the Conleys' house, and found some sheet copper under it. They also found a workbench in some open woods about 50 yards from his house, and on it were some pieces of sheet copper. About 16 barrels of mash were found by the officers at the still, and the still had been wiped out, evidently for the purpose of making a run. This evidence was legally sufficient to support a verdict of guilty.

It is true that, according to the evidence for the defendant, he and his wife were hunting work, and did not own the still or have it in their possession. The jury, however, were the judges of the credibility of the witnesses, and might have believed, under the attendant circumstances, that the defendant was in possession of the still. He was seen by the officers going from the

direction where the still was found, late one evening, and his car tracks led to a place near the still, and the ground indicated that the car had been turned around there several times. Early the next morning the defendant and his wife were found within 15 or 20 feet of the still, and a piece of goods which matched his wife's dress was found among some rags which appeared to have been used in wiping out the still.

Counsel for the defendants claim that it was prejudicial error to admit as evidence testimony to the effect that the piece of goods found near the still appeared to have been a piece of his wife's dress. We do not think so. This was evidence of a substantive fact, and the jury might have inferred, from the fact that the piece of dress goods was found among other rags which had been used by some one in wiping out the still, that it was so used by the defendant, for the reason that it was a piece of the dress goods of his wife.

It is next contended that it was error for the court to refuse to permit the defendant's wife to testify that the piece of cloth did not come off her dress, and that the tracks leading from the still to the place where the cap was found were not her tracks. The wife was not a competent witness for or against her husband, and there was no error in excluding her evidence from the jury. *Woodard* v. *State,* 84 Ark. 119, 104 S. W. 1109; *Padgett* v. *State,* 125 Ark. 471, 188 S. W. 1158; and *Gin Fuey Moy* v. *United States,* 254 U. S. 189, 41 S. Ct. 98, 65 L. ed. 214.

But it is claimed that the general rule has been changed by § 6178 of Crawford & Moses' Digest, which provides:

"No person shall be excused from testifying before the grand jury or on the trial in any prosecution for any violation of this act; but no disclosure or discovery made by such person is to be used against him in any criminal or penal prosecution for or on behalf of the matters disclosed."

This act was passed by the Legislature of 1917, and was part of an act prohibiting the shipment of intoxicating liquors into the State and the transporting of the same within the State, and for other purposes regulating and prohibiting the sale and storage of intoxicating liquors. It was not intended to repeal, change or alter the rule with regard to the admission or exclusion of the testimony of husband and wife for or against each other. The purpose of the statute was simply to prevent the testimony given on any prosecution for a violation of the act from being used against the person giving it in any criminal trial which involved the matters disclosed. Hence we hold this assignment of error is not well taken.

It is next contended that the court erred in refusing to give instructions Nos. 5 and 9 asked by the defendant. Instruction No. 5 in effect told the jury that, before it could convict the defendant, it must find from the evidence, beyond a reasonable doubt, that the defendant was present when the crime was committed, and had the still in his possession. In other instructions given by the court the jury was told that, if it should find from the evidence, beyond a reasonable doubt, that the defendant, in Miller County, Arkansas, at any time within three years before the indictment was returned, had in his possession a still, it would be its duty to convict the defendant. Thus it will be seen that the matters embraced in instruction No. 5 were contained in the instructions given by the court.

In instruction No. 9, requested by the defendant, the jury was asked to be instructed that, before it could convict the defendant, all the facts and circumstances considered together must be inconsistent with any reasonable hypothesis except that he is guilty. The court instructed the jury fully and fairly on the question of reasonable doubt and the presumption of innocence which accompanies the defendant throughout the trial, and expressly told the jury that it must find, beyond a reasonable doubt, that the defendant was the owner of

the still, or exercised control over it, before he could be convicted. This was sufficient. *Bost* v. *State,* 140 Ark. 254, 215 S. W. 615.

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

FEARS v. FARMERS' & MERCHANTS' BANK.

Opinion delivered March 19, 1928.

1. EQUITY—WHEN DECREE PREMATURE.—Since a cause does not stand for trial in equity until 90 days after issues joined, it was error in a suit to cancel a conveyance by a debtor to his children alleged to be in fraud of creditors to enter a decree on pleadings on the same day the answer of the guardian *ad litem* for the minor defendants was filed.
2. APPEAL AND ERROR—PREMATURE DECREE PREJUDICIAL WHEN.—In a suit to cancel a conveyance by a debtor to his children as in fraud of creditors, it was error to enter a decree against minor defendants on the day on which their answer was filed, no proof having been taken in the case.
3. APPEAL AND ERROR—PARTIES TO APPEAL.—Where, in a suit to set aside a conveyance as in fraud of creditors, defendants had a common defense, and the prayer of appeal was in general terms and for defendants generally, without limiting it to individual defendants, the appeal must be deemed as taken for all.

Appeal from Baxter Chancery Court; *A. S. Irby,* Chancellor; reversed.

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to recover judgment for the balance due on certain promissory notes and to cancel a conveyance by J. H. Cunningham, one of the appellants, to his children, other appellants, to certain lands as having been made in fraud of their rights as creditors. The complaint alleges that said conveyance was made with the intent of defrauding appellees in the collection of their debts, and that the consideration recited in it is the sum of one dollar and the love and affection he has for the grantees, who are his heirs at law.

Some of the appellants are adults, and some of them are minors. The appellants who signed the notes sued on denied that the conveyance was made with the intent of defrauding appellees in the collection of their debts. They denied that appellants who signed the notes with J. H. Cunningham had no property out of which the notes might be collected. A guardian *ad litem* was appointed for the infant appellants, and he filed an answer for them, in which all the allegations of the complaint were denied.

The complaint was filed on the 21st of February, 1927, and the answer of the guardian *ad litem* for the minor defendants, who are appellants, was filed on May 7, 1927; and on the same day the chancery court rendered a decree for the respective amounts due appellees by appellants, as shown by the complaint, and it was further decreed that the deed executed by J. H. Cunningham, conveying the land in question to his children, was fraudulent as to appellees, who were his creditors, and that the same should be set aside.

On the 6th day of October, 1927, an appeal was granted upon a prayer for appeal, which is as follows:

"Come the defendants by their attorney, J. H. Black, and pray the clerk of the Supreme Court of Arkansas for an appeal herein. This the 4th day of October, 1927."

J. H. Black, for appellant.

Dyer & Dyer, for appellee.

HART, C. J., (after stating the facts). Counsel for appellants ask for a reversal of the decree upon the authority of *Sager* v. *American Investment Co.,* 170 Ark. 568, 280 S. W. 654, where it was held that a cause does not stand for trial in equity until ninety days after issues joined, and that a decree prematurely rendered will be set aside on appeal. That case controls here. A decree was entered upon the pleadings upon the same day the answer of the guardian *ad litem* for the minor defendants was filed.

It is conceded by counsel for appellees that the decree was prematurely rendered, but they insist that the error

was harmless, for the reason that the answer tendered no defense. Some of the appellants who were defendants in the chancery court were minors, and it was the duty of the guardian *ad litem* to deny all the allegations of the complaint and to require strict proof thereof. The guardian *ad litem* did file an answer denying the allegations of the complaint, but no proof was ever taken in the case, and a decree was entered before the minor defendants had any opportunity to take proof. In this connection it may also be stated that it was taken within ninety days after the adult defendants had filed an answer.

The prayer of appeal has been copied above, and purports to pray an appeal for all the defendants by their attorney. The language of the prayer for appeal does not limit it to any defendant, as was the case in *Camden National Bank* v. *Donaghey,* 145 Ark. 529, 237 S. W. 457. Appellants all had a common defense, and the prayer for appeal, being in general terms and for the defendants generally, without limiting it to any individual defendant or defendants, the appeal must be deemed as taken for all.

The result of our views is that the decree must be reversed, because it was prematurely rendered, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

POWELL v. HAYES.

Opinion delivered March 19, 1928.

1. WILLS—WHO MAY OFFER FOR PROBATE.—Where the widow of a testator, by taking out letters of administration, in effect refused to offer a written instrument alleged to be a will as such, a devisee named in the will, being an interested party, could offer it for probate.
2. WILLS—INSTRUMENTS ENTITLED TO BE OFFERED FOR PROBATE.—Only written instruments of testamentary character may be offered for probate under the statute.

3. WILLS—VALIDITY OF INSTRUMENT OFFERED FOR PROBATE.—A written instrument entitled a "death will," under which a testator gave to the devisee certain property, with the balance of his property to his wife and heirs, as the law provides, when construed as a whole, and read in the light of circumstances surrounding testator at the time of making thereof, *held* a valid will, and entitled to be offered for probate by the devisee named when the other parties beneficially interested refused to probate it.
4. WILLS—MEANING OF TERM "HEIRS."—Where a testator gave the balance of his property to his wife and the heirs, as the law provides, the strict legal meaning of the word "heirs" signifies those on whom the law casts the inheritance of land, but this construction will give way if there be on the face of the instrument sufficient to show that it was to be applied to children.
5. WILLS—PROVINCE OF PROBATE COURT.—It is no part of the proceeding on probate of a will to construe or interpret its provisions or determine what provisions are valid and what are invalid; the construction and interpretation of the will being questions to be determined by other courts having jurisdiction of the matter.

Appeal from St. Francis Circuit Court; *W. D. Davenport,* Judge; affirmed.

STATEMENT OF FACTS.

This proceeding was commenced in the probate court by Annie Hayes offering for probate an instrument in writing purporting to be the last will and testament of E. P. Powell, deceased, which reads as follows:

"Death will of 1926 to Miss Annie Hayes as follows: One lot, number 12349 and 10 in section 19, arranged two and three including 82 acres of land of which I will to Miss Annie Hayes at my death for her faithfulness and service as an attendant doing her life. This will is not to be annulled and avoided should Miss Annie Hayes be faithful doing the life of giver, otherwise this will be annulled and avoided to the giver. The balance of my property to my wife and heirs as law provides. Given for consideration of the above mentioned statements under my hand and seal of notary this.....1926.

"E. P. Powell."

Maggie Powell, the widow of E. P. Powell, deceased, had become administratrix of his estate. Maggie Powell,

as administratrix of the estate of E. P. Powell, deceased, and as his widow, and George Powell, Robert Powell, Vernon Powell; Ernest Powell and Roosevelt Powell, children and only heirs at law of the said E. P. Powell, were allowed to contest the probating of said alleged will. The probate court rejected the offer for probate of said instrument in writing as the last will and testament of E. P. Powell, deceased.

Annie Hayes duly appealed to the circuit court. In the circuit court the case was heard upon the instrument of writing in question and the oral evidence of witnesses introduced. Evidence was adduced in favor of the widow and children of said E. P. Powell, which tended to show that the description of the property in the devise to Annie Hayes was too indefinite to be located. On the other hand, evidence was introduced by Annie Hayes tending to show that said property devised to her was a farm upon which she lived at the time the testator made the will in question and at the time he died.

The judgment of the circuit court was that said paper writing should be admitted to probate as the last will and testament of E. P. Powell, deceased. The case is here in appeal.

Mann & Mann, for appellant.

J. M. Prewett, S. S. Hargraves and *M. B. Norfleet, Jr.,* for appellee.

HART, C. J., (after stating the facts). The instrument of writing in question specifically names Annie Hayes as one of the devisees therein. The record shows that the widow of E. P. Powell, deceased, took out letters of administration upon his estate, and thereby in effect refused to offer the instrument of writing in question as his last will and testament. In such cases the general rule is that a devisee is an interested party, and may offer the will for probate. 40 Cyc. 1229; Page on Wills, 2d ed., vol. 1, § 535; and 28 R. C. L. 360, § 361.

Of course, the instrument in writing offered for probate should be of a testamentary character, because only

wills are entitled to be offered for probate under our statute. This brings us to a consideration of whether the instrument offered for probate is a will.

If it be conceded that the devise to Annie Hayes is too indefinite in description of the property to be capable of enforcement, still we think that, when the instrument is construed as a whole and read in the light of the circumstances surrounding the testator when it was made, it is a will. It will be noted that the testator, after the devise to Annie Hayes, wills the balance of his property to his wife and heirs, as the law provides. This court has held that a will in which the testator provides for all of his children as a class, without expressly naming them, is a sufficient mention of his children within the statute providing that, when any person shall make a will and shall omit to mention the name of a child, he shall be deemed to have died intestate as to such child. *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373.

In the alleged will under consideration in this case the testator gave the balance of his property to his wife and heirs, as the law provides. In its strict legal sense the word "heirs" signifies "those upon whom the law casts the inheritance of real estate." But this construction will give way if there be upon the face of the instrument sufficient to show that it was to be applied to children. *Flint* v. *Wisconsin Trust Co.,* 151 Wis. 231, 138 N. W. 629, Ann. Cas. 1914B, p. 67, and case-note at p. 70; Commentary on Wills, by Alexander, vol. 2, par. 850-852 inclusive; Page on Wills, 2d. ed., vol. 1, p. 1496, § 891; and 28 R. C. L., p. 248, § 216.

The word "heirs" has been held to be susceptible of two interpretations; the one which is technical, and embraces the whole line of heirs; the other, not technical, but common, and is used to denote the heirs who may come under the designation of heirs at a particular time, and it is often used in common speech as synonymous with children. *Turman* v. *White,* 14 B. Mon. (Ky.) 450; and *Feltman* v. *Butts* (Ky.), 8 Bush. 115. The holding of this court is in accordance with this rule. *Robinson* v.

Bishop, 23 Ark. 378, and *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782, Ann. Cas. 1914B, 712.

Looking at the entire will and all the circumstances surrounding the testator, we think the word "heirs," as used in the will, manifestly meant children. The word was not used to denote succession but to describe devisees who were to take under the will. The record shows that the testator had several pieces of real estate, and left surviving him his widow and several children, who state that they are his only heirs at law. He devises the balance of his property, after the devise to Annie Hayes, to his wife and heirs as the law provides. This meant that they should take such part of his estate as they were entitled to under our statutes of descent and distribution, and shows that he did not intend to omit any of his children from his will. Under these circumstances the instrument in writing offered for probate must be considered to be a valid will, and hence was entitled to be offered for probate by a devisee named in the will, when the other parties beneficially interested had failed or refused to probate it.

The question whether or not the attempted devise to Annie Hayes is sufficiently definite in description of the property to be capable of enforcement cannot be considered by us on this appeal, for that would be to construe the will, which, as we have already seen, we can only do in so far as it is necessary to ascertain whether or not the instrument offered for probate is of a testamentary character and might be considered as a will.

In *Cartwright* v. *Cartwright,* 158 Ark. 278, 250 S. W. 11, it was held that whether an offered instrument is testamentary in form or in substance so as to be admitted to probate is a question of law for the court to determine from the face of the instrument. It was also held that the functions of a probate court, when a will is offered for probate, are limited to inquiring into and determining whether the instrument presented as the last will of the decedent was executed in the manner prescribed by stat-

ute and when he was legally competent to execute it, and free from duress, menace, fraud, and undue influence; but questions as to property rights which might arise out of the consideration of the terms of the will are not to be determined in a proceeding for the probate of a will. The court said, if the instrument offered for probate purports to bequeath or devise any property, either in general or in particular terms, to an individual or class of individuals, then it is of a testamentary character, and may be admitted to probate; but that the probate court has no jurisdiction to interpret or construe the will for the purpose of determining its effect upon the distribution of the property of the testator.

This holding is in accordance with the views expressed by the Supreme Court of Oklahoma in construing our statute. *Taylor* v. *Hilton,* 23 Okla. 354, 100 P. 537, 18 Ann. Cas. 385. In that case the court had under consideration § 6521, Mansfield's Digest, which is now § 10525 of Crawford & Moses' Digest, providing that, when the proceeding to probate a will is taken to the circuit court, the court or jury trying the proceeding shall try how much of any testamentary paper produced is or is not the last will of the testator. It is no part of the proceeding on probate to construe or interpret the will or any of its provisions or to determine what provisions are valid and what are invalid. If the instrument offered for probate is a will, it must be admitted to probate, and the construction and interpretation of the various provisions are to be determined by other courts having jurisdiction in the matter.

It follows that the judgment of the circuit court must be affirmed.

OLD AMERICAN INSURANCE COMPANY v. HARTSELL

Opinion delivered March 19, 1928.

1. INSURANCE—HEALTH OF INSURED AT ISSUANCE OF POLICY.—Evidence *held* insufficient to show that insured was not in good health when the policy was issued, where the only evidence was the failure of insured's attending physician, who first saw him more than a month after the policy was issued, to answer the question whether insured was considered a good insurable risk on the date the policy was issued.
2. INSURANCE—BURDEN OF PROOF AS TO INSURED'S HEALTH.—In an action on a life insurance policy, evidence that the premiums were paid, the policy delivered, and the proof of death made, established a *prima facie* case, placing the burden on defendant to show that insured was not in good health when the policy was delivered.
3. INSURANCE—EVIDENCE OF INSURED'S GOOD HEALTH.—In an action on a life insurance policy, evidence *held* to support a finding that insured was in good health when the policy was delivered.
4. INSURANCE—PENALTY FOR NONPAYMENT.—The provisions of Crawford & Moses' Dig., § 6155, imposing a penalty on insurer for failure to pay a loss within the time specified in the policy, applies to a company governed by Acts 1925, p. 390.
5. CONTINUANCE—ABSENT WITNESS.—It was not an abuse of discretion to deny a motion for continuance for the absence of a witness who had been subpoenaed, where there was no showing as to the location of the witness or as to when or where he might be found.

Appeal from Monroe Circuit Court; *W. J. Waggoner*, Judge; affirmed.

John L. Crank, for appellant.

F. C. Nolen, for appellee.

SMITH, J. This is a suit by Clara E. Hartsell, as the beneficiary named in a policy of insurance issued by the appellant insurance company on December 29, 1925, on the life of her husband, John T. Hartsell, in the sum of one thousand dollars. The complaint alleged the issuance of the policy, the payment of the premiums, the death of the insured, and the proof of loss, and prayed judgment for the amount of the policy, with the statutory penalty and attorney's fee, as the company had denied liability.

An answer was filed, in which the company admitted the execution of the policy, the payment of the premiums

thereon, and that proof of death had been made, but denied liability upon the ground that the issuance of the policy had been procured through the false representations of the insured that he was in good health at the time of the issuance and delivery of the policy to him, whereas he was an invalid, and was aware of that fact.

The policy sued on was issued without a medical examination being previously required, but the insured was required, as a condition precedent to the issuance of the policy, to warrant that his health was good at the time of the delivery of the policy. This he did in the application, which contained the following recitals:

"Knowing that my age and insurability will be determined by the company by the answers and statements above made by me, as no medical examination is required of me by the company for determining such facts, I hereby state that I have, before signing this application, read or had read to me each of the foregoing answers and statements, and I state that each of such is unqualifiedly true. I therefore warrant that each answer and statement reflects an existing fact and that the company may rely upon them to such extent. I agree that, in the event any such answer be discovered to be erroneous or false, or, in the event any such statement be discovered to be erroneous or false, even though such be deemed immaterial by me or the beneficiary, then, in either event, this policy shall stand canceled as of the date of its issuance, and this regardless of the date of the discovery of such breach. I further warrant that the statements and answers above set forth are complete, and that I have made no statement or answer touching upon any of the above questions or statements to any agent of the company except as above set forth, and I hereby bind myself and beneficiary to the truthfulness of this warranty; and further, I agree that the policy to be issued on this application shall not be in force or effect until and unless it be delivered to me while I am in good health and alive. In the event I should become

ill or die between the date of this application and before such delivery of the policy to me, then it is agreed that any premium paid with the application shall be returned to me or my legal representatives, the application to be treated as withdrawn."

The answer alleged that the insured was not in good health when he made his application, nor when the policy was delivered, which facts were well known to the insured, and that the policy was therefore fraudulently obtained.

The insured was an active soliciting agent of the appellant company, and sent in his own application, and received his policy directly from the company.

Under the admissions of the answer the plaintiff introduced the policy and rested, whereupon the defendant called appellee as a witness. She admitted signing the following statement, which was offered in evidence:

"April 14-26, as to John T. Hartsell. Moved to Brinkley in Jan. 1926. Was sick 2 weeks. Died 16 Feb. Week with flu and week with pneumonia. Rented from Mr. Cooper house No. 4 in Brinkley and lived there all time we paid rent. Bad cold about Dec. 1 developed in flu and pneumonia. (Signed) Clara E. Hartsell, wife of John T. Hartsell."

She explained this writing by stating that it was prepared by an agent of the company after the proof of death had been made, and that it was not read to or read by her, and she was unaware, when she signed the statement, that it recited that the insured had a bad cold about December 1 which developed "in flu and pneumonia," and that the fact was that the insured was sick for only two weeks immediately preceding his death; that he had the influenza, which developed into pneumonia, and this caused his death, and that his illness extended over a period of only two weeks.

The defendant company offered in evidence the certificate of the physician who attended the insured in his last illness. In the blank furnished the physician for the purpose of making this part of the proof of death, the following question, among others, was asked:

"No. 12. From your knowledge of the deceased, would you have considered him a good insurable risk on the 29th day of December, 1925?"

The blank space following this question contained no answer. It is alleged that the failure to answer this question is, in effect, equivalent to the statement that the physician did not think the insured was in good health on December 29, 1925. We do not think so. The physician was not called as a witness, and, in answer to another question in the proof of death blank, the physician stated that he saw the deceased for the first time on February 9, 1926; that the duration of the illness was two weeks, and that deceased died February 16, so that the insured had been ill a week when the physician first saw him.

There was no other testimony tending to show that the insured was not in good health when the policy was delivered to him, except that of a clerk in the home office of the company, who testified that the insured had sent in no application for insurance after the middle of December, except his own.

Upon this record the court charged the jury, in view of the admissions contained in the answer, that the burden was on the defendant to show that the insured was not in good health at the time the policy was delivered.

We think this instruction was correct, as a *prima facie* case was made when it was admitted that the premiums on the policy had been paid, that the policy had been delivered, and that proper proof of death had been made. *Knights & Ladies of Security* v. *Lewellen,* 159 Ark. 400, 252 S. W. 585; *Grand Lodge of Knights of Pythias* v. *Whitehead,* 87 Ark. 115, 112 S. W. 199; *Eminent Household of Columbian Woodmen* v. *Howle,* 131 Ark. 299, 198 S. W. 286.

The jury found for the plaintiff for the face of the policy, and we are unable to say that the testimony does not support this finding, as it does not appear that such a showing was made that the insured was not in good

health when the policy was delivered that it was arbitrary to find otherwise.

The statutory penalty provided by § 6155, C. & M. Digest, was imposed, and an attorney's fee was assessed, pursuant to the authority of that section, and this action is assigned as error, for the reason, as appellant insists, that it is exempt from the provisions of that section under act 137 of the Acts of 1925 (Acts 1925, page 390).

Act 137 is entitled: "An act providing for stipulated premium insurance companies operating on the stipulated premium plan, and regulating same." Section 16 of this act provides that "all acts or parts of acts repugnant to or in conflict herewith are hereby repealed; and provided, further, that the general insurance laws of this State or any laws governing the organization and control of mutual assessment companies shall not apply to or govern companies organized under this act."

Act 137 applies to appellant company, and the act, which was approved March 7, 1925, was in effect when the policy here sued on was issued, and it is insisted therefore that the provisions of § 6155, C. & M. Digest, do not apply.

We think, however, that counsel misinterprets the purpose and effect of § 16, above quoted, as the purpose of that section was to make the organization and control of companies "operating on the stipulated premium plan" subject to the provisions of that act. Section 6155, C. & M. Digest, does not relate to the organization or control of insurance companies, as that section was passed to require prompt settlement of any liability "in all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor," and the provisions of that section apply to the companies named, regardless of the manner in which they may be organized or controlled.

It is finally insisted that the court erred in overruling appellant's motion for a continuance on account of the absence of James A. Cooper, a witness subpoenaed by it. The motion for continuance recites that "defendant says that he had a subpoena issued for the above witness about ten days ago, to appear on the 12th day of July, 1927, and that the officer has been unable to serve the same or find the witness." There was no showing, however, as to the location of the witness, or as to when or where he might be found. It was therefore no abuse of discretion on the part of the court to overrule the motion for a continuance.

As no error appears, the judgment will be affirmed.

OUTLER v. GLADSON.

Opinion delivered March 19, 1928.

1. SALES—IMPLIED WARRANTY OF SECOND-HAND MACHINE.—In an action on a note which showed on its face that it was given in part payment for a second-hand machine, there was no implied warranty of the serviceability of the machine.
2. BILLS AND NOTES—SUFFICIENCY OF EVIDENCE.—In an action on a note, execution of which was admitted, the defense being that the note had been canceled, *held*, in the absence of competent testimony that the note had been paid and canceled, it was proper to direct a verdict for plaintiff.
3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—It was not error to refuse a new trial for newly discovered evidence, where it was not shown that appellant did not know of such testimony before the trial and could not by reasonable diligence have procured the attendance of witness at the trial.

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

C. T. Cotham, for appellant.

Murphy & Wood and *Cobb & Cobb*, for appellee.

SMITH, J. Appellee, as administrator of the estate of A. F. Smith, deceased, brought this suit to recover on a note executed by appellant to the order of plain-

tiff's intestate, which was given in part payment of a second-hand Delco light plant, that fact being recited in the face of the note. There was a cash payment of $100, and the note evidenced the balance of the purchase price.

The answer alleged that the plant was worn out and worthless, but did not allege there had been any warranty or breach thereof. An amended answer alleged that the note had been paid and satisfied under an agreement had with one J. B. Chapline, as agent of the Delco Light Company, whereby it was agreed that appellant should purchase a new light plant and should have credit for the amount of the note sued on. In other words, as a consideration for entering into a contract to buy a new plant it was agreed that the note given for the old one should be canceled.

At the conclusion of all the testimony the court directed the jury to return a verdict for plaintiff for the face of the note and the interest, upon the theory that no valid defense to the note had been shown.

It is quite probable an issue for the jury might have been made upon the question of an agreement between appellant and the payee in the note whereby the note sued on was to be canceled, but for the statute which prohibited him from testifying concerning transactions had with the plaintiff's intestate. Section 4144, C. & M. Digest. Realizing this handicap, appellant attempted to show that Smith, the intestate, and Chapline, the agent of the light company who made the sale of the new plant, were partners in the agency for the light company, and that Chapline had, in Smith's presence, assented to the arrangement, and he thereby bound his partner, and that both sales were in fact partnership transactions. The testimony was not sufficient to support a finding that Smith and Chapline were partners in the agency, although both were agents, and therefore the court properly refused to submit that question.

The contract for the sale of the new light plant, which appears to have been negotiated by Chapline as agent, was offered in evidence, and it does not appear

from this contract that any diminution of the price of the new plant was to be made on account of the worthlessness of the old one. The note sued on was not given to the light company, but was made direct to Smith, and it does not appear that the light company was in any manner interested in it. On the contrary, the undisputed testimony shows that the old plant, in part payment of which the note sued on was given, was the individual property of Smith.

As the note sued on shows that it was given in part payment of a certain second-hand machine, there was no implied warranty of the serviceability of the machine, and an express warranty could have been shown in this case only by proving statements of the intestate in the transaction between himself and appellant, the defendant in the case, and this could not be done because the statute prohibited it. Indeed, as we have said, there was no allegation of a breach of warranty in the answer.

Appellant insists there was testimony from which the jury could have found that Smith and Chapline were partners, but, if this were true—and we do not think it is—there is an entire absence of testimony that the partnership owned or was interested in the note sued on. As this note was the individual property of Smith, Chapline could not have agreed to its cancellation. There was therefore no competent testimony that the note had been paid and canceled, and the verdict was therefore properly directed in appellee's favor, as the execution of the note was admitted.

A new trial was asked upon the ground of newly-discovered evidence, which we do not review, for, even though the testimony were held to be competent and material, no showing was made that appellant did not know of this testimony before the trial and could not, by reasonable diligence, have procured the attendance of the witness at the trial.

As no error appears, the judgment must be affirmed, and it is ordered.

LIGHTLE v. BLACKWOOD.

Opinion delivered March 19, 1928.

1. BRIDGES—REPEAL OF STATUTE.—Acts 1925, p. 384, authorizing the Highway Department to construct a bridge across Red River at a particular location, was neither expressly nor impliedly repealed by Acts 1927, p. 282, authorizing the Highway Department to build a larger and more substantial bridge.
2. BRIDGES—AUTHORITY OF HIGHWAY DEPARTMENT.—Where the Highway Department found that the bridge contemplated by Acts 1925, p. 384, would be inadequate to accommodate anticipated future travel, it was authorized under Acts 1927, p. 282, to build a larger and more expensive bridge as part of the State Highway system.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

Carter & Carter and *Robinson, House & Moses,* for appellant.

H. W. Applegate, Attorney General, *O. A. Graves, W. H. Arnold, W. H. Arnold, Jr.,* and *David C. Arnold,* for appellee.

SMITH, J. Appellants alleged that the State Highway Department is undertaking to construct a bridge across the Red River at Fulton, and that they are the owners of both banks of the river at the proposed location. That the General Assembly, at its 1925 session, passed an act No. 136 (Acts 1925, page 384) authorizing the Highway Department to construct a bridge across Red River at this particular location, and limited the total cost of the bridge, including the lands which would have to be condemned and acquired for that purpose, and all other expenses, to the sum of $500,000. That the Highway Department is ignoring this act, and now proposes to construct a bridge at approximately the same location, and has obtained orders of the county courts of the counties in which the proposed bridge is to be located, authorizing a change of route, and that the bridge which the Highway Department now proposes to construct will cost approximately $750,000, and is undertaking to do so under the authority of act No. 104, passed at the 1927 session of the General Assembly (Acts 1927, page 282).

It is alleged in appellant's complaint that the Highway Department has no authority to proceed under the 1927 act, and that it is without authority to proceed with the construction of the bridge now proposed, or to condemn appellants' lands for that purpose, for the reason that the total cost will exceed the limit of cost authorized by the act of 1925.

It appears from the answer filed in the case and the testimony heard in the court below, that the bridge in question supplies a link in one of the principal highways in the State, and the testimony shows that the bridge will be largely used in interstate travel. It was ascertained by the State Highway Commission that a bridge could be constructed under the 1925 act at a cost not exceeding $500,000, but it was also ascertained by the Commission that such a bridge would not be adequate to accommodate the anticipated future travel over it. Accordingly, the plans were revised and the route slightly changed, and the Highway Commission now proposes to build a larger and more substantial bridge than could be built under the act of 1925. This suit was brought to determine whether the Highway Commission has this authority.

Opposing counsel agree that the act of 1927 does not repeal the act of 1925, and we concur in that view. It does not attempt to do so expressly, and there is no such repugnancy between the two acts that it must be said that a repeal is implied. See *Cordell* v. *Kent,* 174 Ark. 503, 295 S. W. 404, and cases there cited. But it is insisted that, if the act of 1925 is a valid and subsisting statute, the Highway Commission must proceed under it, and cannot exercise the discretion which would otherwise exist to proceed under the act of 1927.

The act of 1925 was upheld as a valid statute in the case of *Fulton Ferry & Bridge Co.* v. *Blackwood,* 173 Ark. 645, 293 S. W. 2, and the Commission might proceed under its authority to erect the bridge, but, if this were done, a bridge could not be constructed the total cost of which would exceed $500,000, as the act contains that limitation.

It has been ascertained, however, that a suitable bridge—one which will not only accommodate the present travel, but the anticipated travel of the future—cannot be constructed at a cost of $500,000. The question for decision therefore is whether a suitable bridge may not be constructed under the act of 1927.

We think this authority was conferred by act 104 of the Acts of 1927. This act was construed and upheld in the case of *Conner* v. *Blackwood, ante,* p. 139, decided January 30, 1928, it being there held that the act conferred a discretionary authority upon the State Highway Commission to build bridges as a part of the State Highway system, and that bonds might be issued to pay the cost thereof, the bonds to be paid by tolls collected from the users of the bridge, the collection of which is to cease when the bonded indebtedness had been discharged.

The purpose of the act of 1925 was to secure a bridge across the Red River at Fulton, but the act of 1927 also confers authority to build such a bridge if the Commission elects so to do, and the agency to perform this duty is the same under both acts—the State Highway Department. It is not to be assumed that the Department will build a bridge under both acts, and the pleadings contain no such allegation. But we think a bridge might be constructed under either act. Under the act of 1925 the cost could not exceed $500,000, while the act of 1927 contains no such limitation. The Department has determined, in the exercise of the discretion conferred by the act of 1927, to build a bridge the cost of which will exceed $500,000, and the court below found that in so doing the Department was "proceeding within and according to law," and upon that finding dismissed appellants' complaint as being without equity.

As we concur in the finding of the court below, the decree must be affirmed, and it is so ordered.

WALKER v. BRANDON & BAUGH.

Opinion delivered March 19, 1928.

1. LANDLORD AND TENANT—IMPROVEMENTS IN PAYMENT OF LAND.—In a suit on a note given for the rent of land in which defendant by answer and cross-bill set up the value of improvements and repairs as an offset, a finding to the effect that the repairs and improvements made were in part payment of the rent was not against the preponderance of the evidence.
2. PLEDGES—RIGHT OF SET-OFF.—In a suit to recover rents evidenced by a note pledged by the payees who were cotenants of the tenant to a bank to secure another note, refusal to allow as an offset the maker's claim against the payees which would reduce the bank's security below the amount necessary to liquidate the indebtedness to it, and which would in effect result in the preference of the maker as a general creditor of the payees, who were insolvent, was proper.

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

W. J. Lanier, for appellant.

Mann & Mann and *C. W. Norton,* for appellee.

HUMPHREYS, J. This suit was brought by appellees, W. P. Brandon, J. D. Baugh, W. W. Campbell (their attorney in fact), S. H. Mann and W. W. Campbell, as receivers for Brandon & Baugh, and the Bank of Eastern Arkansas, at Forrest City, against appellants, George P. Walker and Ossie Walker, in the chancery court of St. Francis County, to recover rent in the sum of $2,400, with interest for the year 1925 on an undivided one-half interest in the Baugh & Walker farm, in sections 9, 17, 18 and 20, township 4 north, range 5 east, in said county, and to enforce a landlord's lien against the crop raised upon said undivided one-half interest by attachment and injunction.

The rent was evidenced by note executed by George P. Walker to Brandon & Baugh, which they indorsed and delivered to their attorney in fact, W. W. Campbell, to pay an additional indebtedness they owed the Bank of Eastern Arkansas of about $2,000, for which they executed their note on the day that the rent note was

assigned to W. W. Campbell, as attorney in fact for Brandon & Baugh, with which to pay said indebtedness. The note is as follows:

"Forrest City, Arkansas,
"February 13, 1925.
"G. P. Walker."

"1st day of November, 1925, after date, I promise to pay to the order of Brandon & Baugh twenty-four hundred and no/100 dollars at (as) rent on the Baugh & Walker farm for 1925.

"Value received, with interest at ..... per centum per annum.

"G. P. Walker."

The indorsement appearing upon the back of the note is as follows:

"We hereby name, constitute and appoint W. W. Campbell our agent and attorney in fact, exclusively and irrevocably, for the collection of the within note, including the right to bring suit and enforce our lien therefor, and to proceed otherwise as in his judgment may seem best for the collection thereof, in our name and stead and with the same and like effect as though done by us in person, and to apply the proceeds as collected for the payment of any indebtedness we may owe the Bank of Eastern Arkansas, of Forrest City. This 25th day of February, 1925. Revenue stamps canceled 23c.

"Brandon & Baugh
"By J. D. Baugh,
"W. P. Brandon."

Appellant filed an answer, admitting that George P. Walker executed the note, but interposing as a defense thereto two items, one being for $1,482.93 for repairs and improvements made by G. P. Walker on said lands during the years 1920-1925, and the other an item of $2,710, which G. P. Walker claimed was due him out of a loan procured by all of them from S. M. Williamson & Company on said land, but which it was alleged Brandon & Baugh appropriated to their own use. In the answer and accompanying cross-bill G. P. Walker admitted that

Brandon owned one-fourth interest and Baugh one-fourth interest and himself one-half interest in the land, and prayed for a partition thereof in kind, requesting that his portion be assigned to him so as to include the improvements he had made thereon, and, if it could not be divided so as to effect such purpose, that he be allowed the value of his improvements out of the proceeds thereof when sold, and that same, together with taxes paid by him upon the undivided one-half interest of Brandon & Baugh, be declared a lien upon such portion of the land as might be assigned to Brandon & Baugh.

The cause was heard by the court upon the pleadings and the testimony introduced by the respective parties, which resulted in a decree in favor of W. W. Campbell, attorney in fact of Brandon & Baugh, for the face of the note and interest, to be paid out of a check which the Walkers deposited with the clerk of the court in lieu of the crops, which had been released, by agreement, from attachment, with direction that, when collected, the amount collected should be paid to the Bank of Eastern Arkansas in satisfaction of the debt which Brandon & Baugh owed it and for which the rent note was pledged as security. The offset for improvements was disallowed, and judgment was given against the receivers of the estate of Brandon & Baugh in favor of G. P. Walker for $769.04, the amount found by the court due Walker out of the S. M. Williamson & Company loan. The court rendered judgment in favor of G. P. Walker for $143.09 taxes paid by him for them, and declared same a lien on their interest in said land. A partition of the land was also decreed, subject to a mortgage which the parties had placed thereon in favor of Sweet.

An appeal has been duly prosecuted to this court from said decree.

Appellant contends for a reversal of the judgment on the ground that the improvements made by Walker upon the lands during the years 1920 to 1925 are attributable to the relationship of the cotenancy of the parties in

the land, and were not made by Walker in part payment of his rental contracts during that period, as found by the court. The testimony reflects that G. P. Walker rented the Brandon & Baugh interests in the land during the period mentioned, and paid the rents due them under the contracts each year until 1925, without deducting any amount for or claiming any deduction on account of repairs and improvements. He executed the note set out above for the rents of 1925, and never made any claim for repairs he made prior to 1925 until he was sued upon the note. After the rent note matured, he promised Campbell that he would pay it, from time to time, without claiming any offset on account of repairs and improvements he had placed upon the property, either prior to or after he executed the note. Campbell's testimony is undisputed upon this point, and is as follows:

"Q. Then, up to the time this suit was filed, April 9 (1926), what was your information as to whether Mr. Walker admitted owing this debt or not? A. He had admitted owing it, and told me that he would pay this note. Q. Up to the time of filing this suit, April 9, 1926, had he ever denied owing it? A. Not to me. Q. You had had several conversations with him about it? A. Yes sir. Up in the spring he offered me a note—he offered to put up a rent note of T. B. Sellers to secure $2,000 as part payment on the note. Q. As part payment on this 1925 rent note? A. On this 1925 rent note, and pay the balance cash. Q. And that was in the spring of 1926? A. Yes, in the spring of 1926."

During the years 1920 to 1925 inclusive Walker did not charge Brandon & Baugh for the repairs and improvements on his books, but charged them to his farm account. In the answer filed by Walker he alleged he was entitled to an offset for the improvements on account of a contract with Brandon & Baugh to the effect that they were to pay one-half of the repairs and improvements upon the place, but he admitted in his testimony that he had no such contract with them. Brandon testified that G. P. Walker agreed to make all repairs and

improvements, during the period he had entire charge of the lands, at his own expense. Walker denied doing so. Baugh testified both ways on the proposition.

Walker's payment of rent each year, without claiming anything for repairs and improvements, his failure to charge Brandon & Baugh for them on his books, his promises to pay the note to Campbell, all strongly corroborate the testimony of Brandon, and we cannot say, in this state of the record, that the finding of the chancellor to the effect that the repairs and improvements made by Walker were in part payment of the rent was contrary to a clear preponderance of the testimony.

Now, with reference to the $2,700 item claimed as an offset by G. P. Walker, growing out of the loan they obtained from S. M. Williamson & Company, G. P. Walker admitted, on cross-examination, he had received credit in his accounts with Brandon & Baugh for his portion of the loan, except $769.04. The court gave him a judgment for this amount as a general creditor against the receivers of Brandon & Baugh. The rent note sued upon was pledged by Brandon & Baugh for the payment of a $2,000 note and interest to the Bank of Eastern Arkansas, and to allow an offset of $769.04 against the rent note would reduce the security below the amount necessary to liquidate the bank's indebtedness. Again, should this offset be allowed, it would result in a preference to one general creditor of Brandon & Baugh over another. The item of $769.04 is not connected in any way with the rental contract, so that in equity the one ought to be offset against the other.

No error appearing, the decree is affirmed.

ROBINSON v. CRAVENS.

Opinion delivered March 19, 1928.

1. EJECTMENT—PLAINTIFF'S TITLE.—To recover in ejectment, plaintiff must prevail upon the strength of his own title.
2. EJECTMENT—SUFFICIENCY OF EVIDENCE.—In ejectment the failure of plaintiff to show the location of boundaries in a deed under which he claimed on account of inability to locate the beginning point or to find any plat which would determine the boundaries, *held* to require a reversal of judgment for plaintiff.

Appeal from Greene Circuit Court, First Division; *W. W. Bandy,* Judge; reversed.

M. P. Huddleston, for appellant.

Jeff Bratton, for appellee.

HUMPHREYS, J. Appellees brought suit in the circuit court of Greene County, First Division, against appellant, in ejectment, to recover a strip of land five feet wide by thirty-six feet long, described as follows: "Beginning at a point 60 feet south of a point 75 feet east of the northwest corner of said lot 6, block 1, of Hunt's Addition to Paragould, Arkansas, running thence east 36 feet, thence south 5 feet, thence west 36 feet, thence north 5 feet, to place of beginning."

Appellees claim title to the strip by purchase and warranty deed of date November 16, 1923, from Robert Rutherford, alleging that said strip was embraced in the land described in the deed, which description is as follows: "That part of lot 6, in block 1 of Hunt's Addition to Paragould, Arkansas, described as follows: Beginning at the northwest corner of said lot 6 and run east on north line thereof 75 feet, thence south 50 feet, thence east 36 feet, more or less, to the alley, thence south 30 feet, thence west to the east line of Pruett Street, at a point which is 48 feet south of the beginning, and thence north to the northwest corner of said lot 6."

It was further alleged in the complaint that appellant was in the unlawful possession of the land, claiming title thereto by mesne conveyances from Robert Rutherford.

Appellant filed an answer to the complaint, denying that the strip of land was embraced in the land described in appellee's deed of date November 16, 1923, from Robert Rutherford, or that he was in the unlawful possession of same. He admitted that he was in possession of the strip of land in question, but alleged that he was in the rightful possession thereof by deed from Dora Bridges, who obtained title thereto by devise from Robert Rutherford.

According to the allegations contained in the pleadings, it will be observed that each claimed title to the strip in question from the same source.

The cause was submitted upon the pleadings, the testimony introduced by the respective parties and the instructions of the court, which resulted in a verdict and judgment in favor of appellees for the strip of land in question, from which is this appeal.

Appellant contends for a reversal of the judgment, because he alleges that there is no substantial evidence in the record to sustain same. Appellee introduced his deed and an engineer by the name of J. E. Garrett, as a witness, in an effort to show that the strip of land in question was embraced within the boundaries of the land described in his deed from Robert Rutherford. The engineer was unable to locate the boundary lines in the deed, because he could not locate the beginning point. He was unable to find any plat of Hunt's Addition to Paragould, or any other plat by which he could determine the width of Pruett Street, referred to in the description, so as to definitely locate the east line thereof, or to find any map or plat showing the width of the alley referred to in the description, or to obtain any other accurate information by which he could determine the beginning point called for in the deed. After acquiring such information as he did, he made a tentative plat of lot 6, block 1, of Hunt's Addition, which he admitted was not accurate or dependable.

Before the dispute as to the division line between the land claimed by appellees and that claimed by appel-

lant can be determined, it will be necessary to definitely locate the beginning point in some way in appellee's deed. If he recovers at all he must recover upon the strength of his own title, and, in order to show that the strip is embraced in the boundaries mentioned in his deed, he must in some way definitely locate the boundaries.

We are not quite sure that the case has been fully developed, else we would reverse the judgment and dismiss the case. Thinking perhaps that these boundaries can be definitely ascertained in some way, we reverse the judgment, and remand the case for a new trial.

ÆTNA INSURANCE COMPANY v. MILLS.

Opinion delivered March 19, 1928.

1. AUTOMOBILES—USE OF UNREGISTERED CAR.—Where an insurance company claimed an automobile through transfer from insured to whom the insurance company paid insurance because of theft thereof, and defendant sought damages for its detention, the insurance company could not claim that the car had no usable value when seized or during its detention because it had not been registered, under Crawford & Moses' Dig., § 7413, where defendant testified that it was his intention to place a license thereon when he got it out of the repair shop.
2. AUTOMOBILES—MUTILATION OF SERIAL NUMBERS.—In replevin for an automobile where defendant claimed damages for its detention, plaintiff could not claim that there was no usable value on it when seized or during detention, because the serial number had been mutilated and its use therefore prohibited under Crawford & Moses' Dig., § 7437, where the only testimony was that of witnesses who failed to find the serial numbers.
3. REPLEVIN—USABLE VALUE OF AUTOMOBILE.—In replevin for an automobile, where defendant prayed damages for its detention under the writ, testimony of defendant, a painter, that he purchased the car to go to and from work and to haul materials from place to place, together with testimony of witnesses as to its worth per day in such use, *held* sufficient to show a usable value of the car to defendant.
4. REPLEVIN—EVIDENCE AS TO USABLE VALUE OF VEHICLE.—In replevin for an automobile where defendant claimed damages for its detention, testimony as to defendant's use of the car during the

period of detention should be limited or restricted to the character of use he was making or intended to make of it.

5. EVIDENCE—VALUE.—In proving values, it is generally a matter of opinion.

Appeal from Faulkner Circuit Court; *W. J. Waggoner,* Judge; affirmed.

C. A. Holland, for appellant.

George W. Clark and *R. G. Bruce,* for appellee.

HUMPHREYS, J. Appellant brought suit against appellee in the circuit court of Faulkner County to recover a Nash sedan automobile, 1925 model, engine number 181580, serial number 2971566, alleging ownership thereof by transfer from John D. Reagon, to whom it paid $800 on an insurance policy on account of same being stolen. A replevin bond was executed by appellant. Appellee's Nash sedan, which had no engine or serial number upon it, was seized by the sheriff under the writ of replevin issued in the suit, and detained thereunder for five months and twenty days, or until the trial of the cause.

Appellee filed an answer, denying appellant's title, and claiming and praying for damages for the detention of his automobile under the writ.

The cause was submitted to a jury upon the pleadings, testimony, and instructions of the court, resulting in a verdict and consequent judgment in favor of appellee for the car and for $342 damages for the detention thereof.

Appellant has prosecuted an appeal to this court from that part of the judgment awarding damages against it for detention of the car under the writ. It contends for the reversal thereof upon two alleged grounds:

First, that the automobile had no usable value when seized or during its detention, because it had not been registered and a license paid thereon, under the requirements of § 7413 of Crawford & Moses' Digest, and because the motor and serial number had been mutilated, which prevented its use under inhibitions contained in § 7437

of Crawford & Moses' Digest. Second, because the testimony failed to show any usable value of the car to appellee.

(1). Appellee testified that it was his intention to register his automobile and put the license thereon as soon as he could get it out of the repair shop. It does not lie in the mouth of appellant to say that appellee would not have carried out this intention, after seizing and detaining the car at the time it was being repaired. This disposes of appellant's suggestion that the car could not have been used on account of the penalty imposed by failure to comply with the requirements of § 7413 of Crawford & Moses' Digest with reference to registering it and paying a license to use same. The other statute referred to persons, firms and corporations having automobiles in their possession upon which the motor and serial numbers have been mutilated so that the same cannot be read. There is no testimony in the record showing that the numbers had been mutilated. The witnesses testified that they failed to find any motor or serial number upon the car. Unless the testimony showed mutilation of the numbers, the statute could have no application to the facts in the case.

(2). Appellee testified that he purchased the automobile in question to go and come home from his work, and to haul his ladders and materials from place to place. He was a painter, and lived out a mile from the town in which he carried on his business. The testimony relative to the usable value of the car took a wide range, without any objection to the introduction of same by the appellant. C. E. Ramsey testified that, in his opinion, a car used for business and pleasure both would be worth two or three dollars a day. C. E. McNutt testified that the usable value of the car was four or five dollars a day. McNutt based his opinion upon the fact that the car would carry four or five passengers and that the fare per passenger from the home of appellee to Little Rock would be two or three dollars.

The court instructed the jury that the measure of damages was the usable value of the car, meaning, of course, that the use to which appellee intended to put the car governed in arriving at the amount of his damages for the detention of same. In the case of *Kelley* v. *Altemus,* 34 Ark. 184, 36 Am. Rep. 6, which was cited and approved in the case of *Minkwitz* v. *Steen,* 36 Ark. 265, this court announced that the true measure of damages during the unlawful detention of property in replevin suits, which has a usable value, is the value for the use thereof during the time. In stating the rule the court also announced that special damages for deterioration might be shown. In § 883 of the 8th edition of Huddy on Automobiles it is stated: "In case of unlawful detention of a vehicle, there being no physical injury to the vehicle, the value of the use during the period of detention fairly represents the damages." The rule thus announced seems to be sustained by the decided weight of authority. In the application of the rule, of course, the testimony relative to the use during the period of detention should be limited or restricted to the character of use the owner was making or intended to make of the automobile. It was disclosed by the record in the instant case that the owner intended to use the automobile going to and returning from the town where he did business, and in hauling his ladders and materials from place to place. Being a sedan, it is reasonably inferable that he would use it to some extent for pleasure. One of appellant's witnesses testified that, in his opinion, where it was used for business and pleasure both it would be worth from two to three dollars a day. In proving value it is generally a matter of opinion, and there is substantial evidence of this kind in the record unobjected to. It cannot therefore be said that the instruction was abstract. We cannot agree with appellant that there is no evidence in the record at all justifying or warranting the court in submitting the issue of damages to the jury.

No error appearing, the judgment is affirmed.

JACKSON v. ROACH.

Opinion delivered March 19, 1928.

1. INFANTS—PROCEEDING TO DECLARE CHILDREN DEPENDENT AND NEGLECTED.—Since proceedings under the Juvenile Court Act (Crawford & Moses' Dig., § 5751 *et seq.*, as amended by Acts 1921, p. 419), to declare children to be dependent and neglected, is a special proceeding, any judgment procured thereunder, to be valid against collateral attack, must recite the necessary jurisdictional facts.
2. INFANTS—ADOPTION—COLLATERAL ATTACK.—Where a judgment of the juvenile court declared certain children dependent and neglected, a subsequent contest in the probate and circuit courts over the adoption of one of the children, upon the ground that the previous order of the juvenile court was void, constituted a collateral attack on such judgment, relied on as a basis for the adoption proceedings.
3. INFANTS—VALIDITY OF ORDER DECLARING CHILDREN DEPENDENT AND NEGLECTED.—A judgment of the juvenile court declaring a child to be dependent and neglected, which failed to show that its mother was a party to the proceedings and duly served by summons, as required by Crawford & Moses' Dig., §§ 5758, 5759, was void for failure to recite such jurisdictional fact, and was subject to collateral attack.

Appeal from Independence Circuit Court; *S. M. Bone,* Judge; reversed.

T. A. Gray, for appellant.

W. M. Thompson, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Independence County affirming judgments of the probate court of said county appointing Mrs. Lula G. Parse, probation officer of said county, guardian of the person of Lewallen Jackson, a minor, and adopting said minor to Lamon Roach and his wife.

The judgments of the probate court, which were affirmed by the circuit court, from which is this appeal, were based upon a judgment rendered and entered of record by the juvenile court of said county on the 14th day of September, 1926. That judgment is as follows:

"September 14, 1926.

"State of Arkansas v. Gady, Charles, Hadley, Lewallen and Virginia Jackson. In the juvenile court of Independence County, Arkansas.

"Now on this, the 14th, day of September comes Lula G. Parse, probation officer, who brings into court Gady, Charles, Hadley, Lewallen and Virginia Jackson, age of 11, 9, 7, 5 and 4 years, respectively, who are charged with being dependent and neglected children, said children appearing by their uncle, Jeff Engles, who has legal custody and control of said children, and the court, after hearing the evidence and being fully advised in the premises, finds said children are dependent and neglected children.

"It is therefore considered by the court that the said children be and remain wards of the court, that they be permitted to go hence subject to the visitation of the probation officer, and that suitable home or homes be found for them. E. R. Hooper, Judge of Juvenile Court."

The juvenile court judgment was procured under §§ 5758 and 5759 of Crawford & Moses' Digest, which provides the method by which either a dependent or neglected child may be taken from its unfit parent or parents, custodian or guardian, and placed under the guardianship of some suitable person. The statutes mentioned require, among other things, that the parents or parent, if living, of the child shall be named in the written petition, made defendants, and notified of the proceeding by summons, if residents of this State.

The proceeding under the juvenile court act is a special proceeding, so any judgment procured thereunder, to be impervious against collateral attack, must recite all necessary jurisdictional facts. The appeal in the instant case from the probate court judgments to the circuit court and from the circuit court to this court is a collateral attack on the juvenile court judgment relied upon as a basis for the guardianship and adoption proceedings. By reference to that judgment, which is set out in full above, it will be seen that it fails to show that the mother of Lewallen Jackson, the appellant herein, was made a party to the proceedings and duly served by summons, as required by §§ 5758 and 5759 of Crawford & Moses'

Digest. The juvenile court judgment is void for failure to recite this jurisdictional fact, and subject to collateral attack.

The trial court erred therefore in affirming the probate judgments, and, on account of such error, the judgment of the circuit court is reversed, and remanded for further proceedings not inconsistent with this opinion.

Mr. JUSTICE WOOD and Mr. Justice McHANEY dissent. They are of the opinion that the judgment of the juvenile court herein set out is not void on its face and therefore open to collateral attack, also that the order of adoption is a valid order. The judgment of the circuit court was based on oral testimony not preserved in a bill of exceptions, and should be affirmed for that reason.

BENNETT v. BELL.

Opinion delivered March 19, 1928.

1. AUTOMOBILES—DUTY OF DRIVER TOWARD PASSENGERS.—The driver of an automobile is bound to exercise ordinary care in its operation for the safe transportation of his passengers, whether they are guests by sufferance, invited or self-invited.
2. NEGLIGENCE—INSTRUCTION DISREGARDING ISSUE.—In an action for personal injuries by a passenger against the driver of an automobile, an instruction allowing the jury to find for defendant if they believed the injury was caused by the road condition and not from the high rate of speed, if persons of ordinary experience and sagacity could not have foreseen the alleged accident might have occurred, *held* erroneous as disregarding the alleged negligence in operating the car at an excessive and dangerous rate of speed, considering the condition of the road.
3. NEGLIGENCE—INSTRUCTION DISREGARDING ISSUE.—In a personal injury action by a passenger against the driver of an automobile, an instruction permitting a finding for defendant if the jury found another automobile was approaching the one in which plaintiff was driving, and that it was necessary for defendant to drive to the side of the road in meeting said car, and that loose gravel caused the car to skid without defendant's fault, and that an accident was caused thereby, *held* erroneous as disregarding the alleged negligence in operating the car at an excessive and dangerous speed in view of the condition of the road.

4. NEGLIGENCE—SOLE CAUSE OF INJURY.—Negligence need not be the sole cause of injury to render one liable therefor.
5. NEGLIGENCE—PROXIMATE CAUSE.—The law will regard the proximate cause as the efficient and responsible cause of an injury.
6. TRIAL—MATTER OUTSIDE OF PLEADING.—In a personal injury action by a passenger against the driver of an automobile, an instruction telling the jury that, if they believed plaintiff got into defendant's automobile knowing that defendant was so intoxicated as to make him unduly reckless in driving the automobile, plaintiff assumed the risk and could not recover, *held* erroneous as being outside of the pleading and ignoring contention as to the nature of the ride.
7. TRIAL—INSTRUCTION UNDULY STRESSING RELEASE.—In a personal injury action by a passenger against the driver of an automobile, an instruction that the jury was called upon first to determine whether there had been a settlement of the claim for damages and that they need not consider either the question of defendant's negligence or the extent of plaintiff's injuries until they had decided such matter, *held* erroneous as unduly stressing the settlement and release.
8. COMPROMISE AND SETTLEMENT—INSTRUCTION.—In an action by an automobile passenger against the driver for personal injury in which it was admitted that the defendant had paid part of plaintiff's damages, an instruction from which the jury might have understood that if the passenger settled any part of his damage claim he could not recover, *held* erroneous.

Appeal from Columbia Circuit Court; *L. S. Britt,* Judge; reversed.

STATEMENT OF FACTS.

Appellant brought this suit for damages for personal injuries received while riding in appellee's automobile at his invitation.

The complaint alleged that he, with E. D. Thomas, was invited by appellee, Brooks H. Bell, to ride in his car from Bell's garage around to a restaurant near the hotel where they were stopping. They got into the car for that purpose, and appellee, instead of driving around to the restaurant, turned his car, over the protest of appellant and Thomas, and drove off in an opposite direction from Smackover; that, upon coming to a place about two and one-half miles out, where a bridge had been burned, he turned the car around, and started back

at a dangerous and reckless rate of speed, appellant and his friend both protesting against such speed, and, in turning a sharp curve in the road, he ran into some loose gravel, and the car turned over, injuring plaintiff terribly; three of his ribs were broken, and his spinal column was fractured, and he had suffered great pain, and he will continue so to do, and he is permanently injured, and his earning capacity destroyed.

The answer denied the allegations of the complaint, and alleged that Thomas had suggested the drive, and he and the appellant got into his car, and he drove on down to where the bridge was burned out; that appellant and Thomas were licensees merely, and that, if he was driving at a high rate of speed, they knew it, and made no protest against it, and were guilty of contributory negligence, and assumed the risk, which barred appellant from any right of recovery.

It appears from the testimony that appellant, Bennett, and Thomas had driven over to Smackover on the afternoon of the injury in the evening, where they were engaged in work on a schoolhouse. They stopped at the hotel where they had been staying, and went down to put their car in Bell's garage, where they had been keeping it. That Bell had a new Lincoln car, and insisted on taking them driving. They protested that they had had enough driving, and did not care to go. He finally suggested that they get into the car and he would take them around to the restaurant or cafe, near their rooms, where he was going for supper. They got into the car, and he started off in a different direction, but they still thought he was going to turn at a place further on, but, instead of doing so, he drove on into the Smackover-El Dorado Road and down towards El Dorado, to the burnt bridge, about two and one-half miles. That he turned the car there and started back, saying to appellant, "You don't believe this car will make sixty-five miles per hour in second gear, do you?" to which he replied, "Yes, but you be damn sure you don't try to make it."

Appellee drove about one hundred yards, and shifted the gears again, and Bennett asked him not to drive so fast, and Thomas said: "Slow down; you are on this curve." Bennett said he looked at the speedometer, and it was standing on 65 when they struck the curve, and the light shone out through the brush, and he saw that they were close to the ditch. That Bell gave the car a cut, and the hind end could not turn, and the car turned over, and virtually turned around, the front of the car being in the opposite direction from which they were going. Bennett stated it turned over on them, and he and Mr. Thomas went under it, and it rolled again, and he went with it, and the car turned over again after it fell on them.

The roadbed was about three or four feet high where the injury occurred, with a ditch by the side, cut by the grader. There was some loose gravel on the road at the place where the wreck occurred.

Bennett stated that his back was broken, and he couldn't get up, and that Thomas had not yet regained his breath, and couldn't talk when Bell asked if they were hurt. About that time another car drove up and carried Bennett and Thomas to a little hospital in Smackover, but nobody was there, and they carried them to the hotel, and went back to get Mr. Bell.

Plaintiff was severely injured, his spinal column being broken, and his legs paralyzed to some extent. He has been operated on since, and some of the fractured bone removed. He will never recover.

Appellee denied that he had asked appellant to ride in his car, and that he was driving or handling the car recklessly, and said he was only driving about 35 or 40 miles per hour when the accident occurred; that, on account of meeting an approaching car at the curve, he had tried to turn out to the side, when the loose gravel caused the car to skid and finally turn over. Said that they had had one or two drinks before going out for the drive, but nobody testified that appellee, the driver of the

car, was intoxicated or under the influence of liquor. Appellee also pleaded a release in bar of the action.

The court instructed the jury, giving, over appellant's objections, general and special, instructions Nos. 2, 6, 8, 10, 11 and 14, and from the judgment against him this appeal is prosecuted.

Joiner & Stevens and *Jones & Jones,* for appellant.

McKay & Smith, for appellee.

KIRBY, J. The driver of an automobile or motor vehicle is bound to the exercise of ordinary care in the operation thereof for the safe transportation of his guests and other passengers and to avoid personal injury to them, and this duty extends to all such passengers, whether guests by sufferance, invited or self-invited. *Black* v. *Goldwebber,* 172 Ark. 862, 291 S. W. 76, 2 R. C. L. 1183; Huddy, Automobiles, 117, § 18; *Mitchell* v. *Raymond,* 181 Wis. 591, 195 N. W. 855, 859.

There are two acts of negligence alleged in the complaint; the driving of the car at an excessive and dangerous rate of speed, and the handling of it in its operation in a careless, negligent and dangerous manner, and it is complained that some of the instructions given for the appellee disregard altogether one of the charges of negligence.

Instruction No. 11 allowed the jury to find for the defendant if they believed from the evidence that the plaintiff's injury was caused by the condition of the road at the place of the wreck, and not from the high rate of speed it was being driven, if a person of ordinary experience and sagacity could not have foreseen that the accident might occur.

Under instruction No. 14 they were told, if they found an automobile was approaching the one in which plaintiff was riding from an opposite direction, and that it was necessary for defendant to drive to the side of the road in meeting said automobile, and that loose gravel on the side of the road where the defendant necessarily drove caused the car to skid, without the fault of the

defendant, and that the wreck of the automobile was caused thereby, they should find for the defendant.

These instructions disregarded the alleged negligence in operating the car at an excessive and dangerous rate of speed as combined and concurring with the operation of the car upon the bad road, and were both erroneous. If the injury was caused by the alleged negligence of operating the car at a high and dangerous rate of speed on the bad road, or in turning out on the loose gravel to avoid the oncoming car, the defendant would still have been liable for the injury.

It is well settled that negligence, in order to render a person liable, need not be the sole cause of the injury, and that one is liable if his negligence concurred with an inanimate cause producing it. The negligent act or omission must be the cause which produced the injury, but it need not be the sole cause, nor the last or nearest one. The law will regard the proximate as the efficient and responsible cause. Of course, no injury could have resulted from the bad condition of the road or the loose gravel unless the car was being operated thereon, and its operation at the place and in the manner might have been negligent because of such bad condition, even though it had been driven at a much lower rate of speed than alleged; in other words, ordinary care in the operation of the car required the driver to take into consideration the existing bad condition of the road over which he was driving.

Appellee stated that the road was new, had just been completed, and there was no watchman on it since the bridge had burned out, and there was a curve where the accident happened, something like a mile from the creek, and he was almost around the curve, "and I saw the lights of a car coming, and I got out of this little place where the tracks had been running, and when I did I got over the side, and my hind wheels skidded, and that gravel had not been packed, they just throwed it up there on the bed of the road; they did not subgrade, and all I could account for is that the hind wheels got out of the

ruts and skidded in that loose gravel, and my car turned right square to the left, and I like to have gone over in the ditch to the left, and then I turned to the right, and that is when the car turned over."

The court also erred in giving defendant's requested instruction No. 8, telling the jury that, if they believed from the evidence that plaintiff got into the defendant's automobile knowing he was in such an intoxicated condition as to make him unduly reckless in the driving of the automobile, he assumed the risk of riding in the automobile under such conditions, and cannot recover for any injury caused thereby. This instruction was abstract, defendant's intoxicated condition not having been pleaded, nor any risk assumed by plaintiff on account of it, and the evidence offered to show such condition was objected to, and the instruction disregards altogether appellant's contention that he only consented to ride around the block to the restaurant, in accepting the invitation and getting into the car.

The instructions relative to the settlement and release were also erroneous. No. 4 unduly stresses the question, and told the jury they were called upon, first, to determine whether there had been a settlement of the claim for damages, and that they need not consider either the negligence of the defendant or the extent of the plaintiff's injuries until they had decided the question. Instruction No. 2 told the jury that, if the defendant went to the residence of the plaintiff, and plaintiff offered to accept from the defendant the sum of $400, or any other sum, in full settlement "of any claims that he might have against the defendant for damages," and that, pursuant to said agreement, the defendant paid said sum to the plaintiff, he was bound by the settlement, and could not recover, notwithstanding that they, the jury, might believe the settlement was improvident and unwise.

The plaintiff testified that the defendant wanted to pay certain hospital bills and expenses, which he was entitled to, specifying them, as part of his damages if he recovered, amounting to $400, and that he permitted

him to do so. That nothing was said about a settlement of his entire claim for damages, and that he had no intention of doing so, and did not make any settlement of it.

Said instruction No. 2 was misleading, and the jury could have understood from it that, if he settled any claim or any part of the damages, he could not recover in the suit, and especially was this true since the court had laid so much stress on the question of settlement, having told the jury to first determine whether a settlement had been made, and not to regard either the negligence of the defendant or the extent of the plaintiff's injuries until they had decided the question of settlement. Of course, if plaintiff had made, without fraud or imposition, a full settlement of his claim for damages for $400, and accepted the payment thereof, he would have been bound thereby, and could not have recovered anything further, as the court told the jury in instruction No. 3 given at appellee's request.

For the errors designated the judgment is reversed, and the cause remanded for a new trial.

HILL v. CONE.

Opinion delivered March 19, 1928.

1. STATES—BUILDING CONTRACT—EXTENSION OF TIME.—Under a contract for the construction of a tuberculosis sanatorium under Acts 1927, pp. 64, 1130, which contract provided for liquidated damages for delay unless the contractor obtained an extension of time approved by the architect, the obligation of the contractor to make a claim for extension was a condition precedent to the right thereto.
2. STATES—BUILDING CONTRACT—CONCLUSIVENESS OF ARCHITECT'S DECISION.—The architect's decision that a contractor constructing a tuberculosis sanatorium under Acts 1927, pp. 64, 1130, was not entitled to an extension of time for completing the work, *held* binding on the contractor in the absence of fraud or such gross mistake as to imply bad faith, where the contract provided that the extension of time must be approved by the architect.

3. STATES—BUILDING CONTRACT—WAIVER OF STIPULATED DAMAGES.—Where a contract for construction of the tuberculosis sanatorium provided that an extension of the time for completion must be approved by the architect, the action of the board of trustees of the sanatorium in allowing the contractor an extension of 14 days, notwithstanding the architect's refusal to approve it, *held* not to constitute a waiver of the right to insist on stipulated damages for other delay.

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

STATEMENT OF FACTS.

The appellants, the board of trustees of the Arkansas Tuberculosis Sanatorium, brought this suit against the Auditor of State for a mandamus to compel him to issue to them a warrant for $6,000, the balance alleged to have been appropriated for the sanatorium under acts Nos. 21 and 351 of the Acts of the General Assembly of 1927, and incidentally to determine what amount, if any, was still due the contractor, George W. Fair, for the construction of the hospital at the Tuberculosis Sanatorium.

The hospital at the sanatorium was destroyed by fire on January 13, 1926, and on January 20, 1926, the Governor, under authority of § 2839, C. & M. Digest, issued a proclamation authorizing the board to incur an indebtedness of $35,000, with interest at the rate of six per cent. per annum, for the purpose of constructing a new hospital. That the indebtedness was incurred and a contract was entered into with George W. Fair, contractor, for the construction of the hospital building, which has been completed, and is now occupied.

The Legislature by said act 351 appropriated for the use of the board of trustees of the sanatorium the sum of $35,000 principal and $1,050 interest, for paying the indebtedness incurred in the construction of the hospital building, the act containing a provision that the Auditor shall issue no warrants pursuant thereto unless and until there shall have been filed with the said board of trustees receipts showing payment in full of all claims by contractors, laborers, materialmen and others, for material

and labor furnished and used in connection with the erection of said hospital building.

It was alleged that the auditor had issued warrants for all the said appropriation except $6,000, and, notwithstanding the board had filed the receipts with him, as required by the act, for all claims of whatever kind incurred in the construction of the hospital building, he had refused to issue a warrant to the board for the $6,000 of said appropriation, withholding the same on account of the pretended claim of George W. Fair, which he claims the board owes him. It was alleged that Fair was the contractor, and claimed there was an unpaid balance due him, under his contract, which was unjust and unfounded, and also that they had paid him all the amount due under the contract, and filed with the Auditor his receipt for the last and final payment, which was certified to by the architect superintending the construction, as the full amount due him; that Fair declined to receive the amount in full payment, however, and unjustly claims the board owes him some amount, and because of the pretended claim the Auditor refused to issue a warrant for the balance of the appropriation.

Fair was made a party defendant, so that he might assert his claim and have the court determine whatever amount, if any, was due him, so that the Auditor be required to issue a warrant for the amount due the board, and, if any amount is found to be due Fair, for such amount as might be due him.

The Auditor answered, admitting the passage of act 351, making the appropriation of the sum of $36,050 for paying the indebtedness incurred by the board in the construction of the hospital building. He set out the provisions of the act requiring receipts showing full payment of all indebtedness for the construction, before warrants should be issued in its payment, and admitted that he had issued warrants to the board for all the appropriation except $6,000, the board having first certified to him that they had paid out $46,124.21 for the construction of the building, which constituted full payment

of everything, labor and materials, used in the building, for which the board was liable. Stated that he knew nothing about the controversy between the board and the contractor, but that, before issuing any warrants to the board, it had entered into a stipulation with Fair consenting that the Auditor should issue warrants in favor of the board for all the appropriation except $6,000, which was sufficient to cover the amount in controversy between the board and contractor. That he was ready and willing to issue warrants against the $6,000 appropriation to the persons entitled thereto after they are determined by the court. He asks that the controversy be determined, and that he be directed to issue warrants on the balance of the appropriation to the persons entitled thereto.

Fair answered, admitting the allegations of the complaint, except he denied that he had been paid the amount due under the contract and that the board had filed with the Auditor his receipt for the last and final payment, and denied that said payment was certified to by the architect as the just amount due him under the contract. Admitted that he declined to receive it in full payment. Alleged that the Auditor could not lawfully issue a warrant to the board for the $6,000 claimed to be due him, because it had not filed a receipt showing the payment of all claims for the construction of the building. Also alleged that the board of trustees had not filed with the Auditor the receipts required to be filed showing payment in full of all claims for the construction of the hospital, in accordance with § 1 of Acts 23 of 1927. Stated that he had made a contract for the erection of the building, the amount that had been paid him thereunder, that he was required to do certain extra work, and that there was a balance due him under the contract of $5,936.42, with interest at 6 per cent. from October 1, 1926. Prayed that the petition of the board be denied, and that they should be ordered and directed to pay the said sum, with interest.

The testimony shows that there were 43 patients in the building before it had been destroyed in January,

and that there were many others on the waiting list, necessitating an increase in the capacity of the hospital. About $14,000 was realized from the insurance, and, with the deficiency appropriation authorized, the board made a contract for the construction of the new building with George W. Fair. This contract was in writing, and specified how the building should be constructed, under the direction and supervision of the architect, whose decision should be final upon any question about the plans and specifications, and no alterations should be made in the work except upon the written order of the architect, which should state the amount to be paid or allowed the contractor by virtue of such change, and required the completion of the building under article 6 of the contract, as follows:

"The contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to-wit: The contractor agrees to complete the building not later than June 24, 1926. The contractor shall pay to the owner as liquidated damages the sum of $50 per day for every day that the building remains uncompleted after said date for completion. Additional time is only to be allowed for delays beyond the contractor's reasonable control, and approved in writing by the architect; it being distinctly understood by the parties hereto that said sums of money are agreed upon as the amounts due the owner as liquidated damages for the owner's inability to use said building."

Article 7 provides that, if the contractor should be delayed in the prosecution or completion of the work, the time fixed for the completion should be extended an equivalent period by reason of the causes specified therein, the extension to be determined by the architect; but no allowance should be made unless a claim therefor was presented to the architect within 48 hours after the occurrence of such delay.

No claim was made by the contractor in writing for any extension of time on account of delay under the

contract. The contractor claimed he lost a certain amount of time for which he should not be charged as delay, because of having to tear out and rebuild certain stairways after the building was virtually completed, and that he should not be charged with 30 days for the delay caused by inability to procure sand for the construction, on account of the high and overflowing condition of the river from which the sand had to be taken. He also insisted that more of the delay was occasioned by his inability to procure the tiling agreed to be used in the construction, which was a patented article, and could not be supplied by any one else nor furnished any sooner than it was delivered by the person with whom he had made the contract of purchase thereof.

There was some testimony tending to show that the contractor was not proceeding with diligence and that there was unnecessary delay, and, although the board allowed the contractor for a part of the time which he claimed to be for delay in the procuring of the sand, it did so over the certificate of the architect that he was not entitled thereto, and the board refused to allow any part of the contractor's claim for extension for delay for the construction of the stairway and the extra cost thereof, the board contending and the architect deciding that the contractor alone was responsible for not having built the stairway in accordance with the contract, and was not entitled to any of the expense incident to tearing it out and rebuilding it in accordance with the specifications, nor to an extension for any delay of the completion of the building because thereof.

The testimony showed the amount that had been paid the contractor, and the court virtually split the difference on the contention about crediting him and in requiring him to pay the $50 a day claimed to be liquidated damages for only one-half the time which the board contended it should be paid.

Moore, Gray & Burrow, for appellant.

Downie & Schoggen, for appellee.

KIRBY, J., (after stating the facts). Appellants insist that, upon a correct construction of the provision of the building contract relative thereto, the amount per day provided and required to be paid and allowed to be charged against the contractor for the time required to construct and finish the improvement beyond the time it was agreed to be finished, should have been charged, and that the court erred in not rendering a judgment for the full amount claimed as liquidated damages by the board for such delay, and this contention must be sustained. The authorities are reviewed and the rule for assessment of liquidated damages again announced in *Robbins* v. *Plant,* 174 Ark. 639, 297 S. W. 1027, 31 L. R. 491.

Said article 6 binds the contractor to the completion of the building not later than June 24, 1926, and to the payment to the owner as liquidated damages the sum of $50 per day for each day the building remains uncompleted after said date; that additional time, for delays beyond the contractor's reasonable control, is only to be allowed when approved in writing by the architect, and that it is expressly understood that said sums of money are agreed upon as the amount due the owner as liquidated damages for the owner's inability to use said building.

The damages for the breach of the contract in respect of delay in the completion of the building are in their very nature uncertain and difficult of ascertainment, it being well-nigh impossible to prove any pecuniary loss to the board or the State on account of it, all of which was recognized by both parties thereto, and it was expressly agreed that such amount should be regarded as liquidated damages.

In *Rutherford* v. *Kohler,* 174 Ark. 894, 298 S. W. 9; *Robbin* v. *Plant, supra,* the court quoted from *Wait* v. *Stanton,* 104 Ark. 9, 147 S. W. 446, which had passed upon precisely the same as article 7, already set out herein, and held: "The obligation of the contractor to make claim

for an extension was a condition precedent to his right thereto."

There is no evidence showing that the contractor made any claim to the architect for an extension of time, in accordance with said article 7 of the contract, or otherwise, at any time during the period of the claimed delays, or at all, before the completion of the building. Nor does the proof show nor is it even claimed that the delays were caused by the act, neglect or default of the owner or its architect. Then, too, the architect testified that the contractor was not entitled to an extension of time on account of any of the delays, because they resulted from his own failure to order and arrange for procuring his materials on time, as he was bound under the contract to do.

The architect's decision was binding on the contractor, too, in the absence of fraud or such gross mistake as necessarily implied bad faith on the part of the architect, and none such was even alleged, nor was there any proof conducing to that effect. *Boston Store* v. *Schleuter,* 88 Ark. 213, 114 S. W. 242; *Carlile* v. *Corrigan,* 83 Ark. 136, 103 S. W. 620; *Federal Grain Co.* v. *Hayes Grain Commission Co.,* 161 Ark. 51, 255 S. W. 307; *Hayes Grain Commission Co.* v. *Federal Grain Co.,* 169 Ark. 1072, 277 S. W. 521; *U. S.* v. *Gleason,* 175 U. S. 588, 20 S. Ct. 23, 44 L. ed. 284; *Ripley* v. *U. S.,* 223 U. S. 695, 32 S. Ct. 352, 56 L. ed. 614.

The board did allow the contractor for 14 days' extension of time for delay claimed by him to have been caused by frequent rises in the river, preventing his being able to get the sand necessary for the construction, notwithstanding the architect's judgment that he was not entitled to it, but this constituted no waiver of its right to insist upon the stipulated damages for all the rest of the delay in the completion or construction and delivery of the building, as the lower court erroneously held.

The judgment is accordingly reversed, and, the contractor having been fully paid, as well as all other

claims for construction of the building, the cause is remanded with directions to issue a mandamus to compel the Auditor to issue warrants for payment of the balance of the appropriation to the board, in accordance with the law and the prayer of the petition.

E. L. BRUCE COMPANY v. LEAKE.

Opinion delivered March 19, 1928.

1. MASTER AND SERVANT—ASSUMED RISK.—A servant does not assume any risk or hazard caused by the negligence of the master, unless he knows that the risk exists, or unless the risk is an ordinary or usual one, of which the servant could have known by the exercise of ordinary care.
2. MASTER AND SERVANT—SAFE PLACE TO WORK.—A railroad company owed its brakeman the duty to use reasonable care to make inspection and ascertain that obstructions on or near the track were not so close as to be dangerous to the brakeman in the performance of his duties, and he had a right to assume that the railroad would perform its duties in this respect.
3. MASTER AND SERVANT—ASSUMED RISK.—A servant has a right to assume, not only that the master will perform his duty, but also that each of the other servants will perform their duty, and if, while in the exercise of ordinary care, he is injured either by the negligence of the master or by the negligence of a fellow servant, he has a right to recover.
4. MASTER AND SERVANT—CONTRACT EXEMPTION FROM NEGLIGENCE.—The master cannot make a valid contract exempting himself from his own negligence, and his servant does not assume the risk of the master's negligence, since the doctrine of assumed risks is based on contract.
5. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—In an action by a brakeman against the railroad company for injuries caused by the proximity of the track to a stump which caught the brakeman's foot as he stood on a stirrup after having coupled cars, the question whether he knew of the risks on account of obstructions near the track and therefore assumed the risk, *held* a question for the jury.
6. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—While a servant should exercise reasonable care in the performance of his work, the fact that he is engaged in the performance of such work and must give his attention to that should be taken into

consideration in determining whether he was guilty of contributory negligence.

7. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS DEFENSE.—In an action by a brakeman against the railroad for injuries caused by the master's negligence, contributory negligence did not bar plaintiff's recovery, though it could be shown in reduction of his damages.

8. TRIAL—JURY QUESTIONS.—Questions of fact about which fair-minded men might differ are properly submitted to the jury.

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

McRae & Tompkins, for appellant.

William F. Denman, for appellee.

MEHAFFY, J. The appellee brought suit in the Nevada Circuit Court against the appellant, alleging that he was employed by appellant as brakeman upon its log-train, which operated from the log camp in the woods to the town of Kilgore, a distance of about twelve miles. That on the 12th day of January, 1927, the train was returning from the log camp with a load of logs, when, on account of the rough and uneven condition of the track, the train, in rounding a curve, became uncoupled or broke in-two. That it was appellee's duty as brakeman to make the coupling, and he got down from the car, adjusted the drawheads of the couplers, and, after the train started, he stepped upon the step or stirrup on the car he had coupled. That the train was moving, and, as he stood on said step or stirrup, a large stump, standing within a very few inches of the track, caught appellee's foot between the stump and the step on which he was standing, breaking the bones in his foot and causing severe and permanent injuries. That the injury resulted from the negligence of the company in allowing and permitting said stump to stand within a few inches of the track, when it knew or should have known the same was dangerous to its employees. The suit was for $3,000.

Appellant filed answer, denying all the material allegations, and pleaded contributory negligence and an assumption of risk.

The appellee is 35 years old; was in the employ of the company as brakeman on a log-train and working under the orders of C. L. York, the engineer, who was his foreman. He was the only brakeman on the train, and his duties were to couple and uncouple cars, set out cars, and make up the train. At the time he was hurt they had made up the train, and were coming into Kilgore. They had several cars of logs and flatcars, and the train became uncoupled. Appellee got off to make the coupling, and it was on a curve, and he had to get out some distance, so the engineer could see him when he flagged him. He made the coupling, gave the signal, and, when the train started up, he got on. He caught the train with both hands and pulled himself up on the car, and had gone but a few yards when he hit the stump. His foot was in the stirrup, and when the stump was hit it broke his foot. He did not see the stump until it was hit. There was no switch-track there. He was confined to his room 91 days, and then had to walk on crutches for a time. He had been braking for the company about four years; was earning 35 cents an hour when he was hit, and is able now to earn but little. He had had experience as brakeman on other log roads.

The train would be taken out to the woods where the logs were by pushing the empty cars ahead of the engine, and, when the logs were loaded, the engine then pulled the cars into Kilgore. The track is not level, but there are hills and hollows and soft places, and these cause the couplers to miss or pass over each other.

Appellee got on the train after making the coupling as quickly as he could. He had made a statement about how the injury occurred, and admitted signing the statement which was made to the company. In that he stated that the stirrup cleared the stump about two inches. Appellee went over the road twice every day, and sometimes three times. They made all their trips in the daytime, unless they had trouble.

The physician testified that his foot was broken, and that the injury was permanent. Another physician tes-

tified that it was impossible to tell whether the foot was broken without an X-ray, and that he did not think the injury was permanent.

The road was just a log-road cut through the bottom, laid on top of the ground on poles and ties. It is not graded. The bottom there overflows, and the track crosses sloughs. There are obstructions along the side of the track too close to clear a brakeman on the side of a car. There are stumps and logs, and sometimes there are tree-tops. The day appellee was hit the train was on a curve, and there was a stump there that would not clear the brakeman. They had in the train that day six or eight cars. They often have trouble with the train becoming uncoupled or breaking in two. The right-of-way is narrow. The road is not fully spiked. The train would break in two all along the road, and it was appellee's business to couple it.

The company has a section foreman, and it is his duty to keep up the track. The stumps are out in the open, where everybody can see them. There is nothing to hide them. There had been a great deal of trouble with car stirrups being bent back or knocked off by stumps. The road was built to get logs into the mill. There is nothing about the brakeman's duty that requires him to ride on the side of the car while the train is in motion. After he makes a coupling he has to get on the train, but he does not have to ride on the side of the car. He would have to catch the side of the car or rear end. If a coupling is made on a curve, the brakeman would have to move back from the track until he got where he could be seen. When the signal was given the train would start, and the brakeman would have to catch the train while it was in motion. The engineer started the train as quickly as he could after getting the signal. There are sink-holes in the track, stumps, tree-tops and logs scattered all along the line. They just maintain the track so that they can get the log-cars over it. The track is moved as the timber is cut out. The company has a good deal of trouble caused by

obstructions along the track knocking stirrups off the cars. The right-of-way is very narrow, just wide enough for the train to get over. The road is not made for people to travel over. It is safe for a brakeman if he is on the cars. When the train breaks in two, the brakeman has to get on the ground to make the coupling. A man making a coupling would not have the opportunity to see all the obstructions. Practically all work connected with a logging railroad is dangerous.

The appellant's first contention is that the plaintiff assumed the risk, and that the court below should have given a peremptory instruction.

The appellee was the brakeman, and it was his duty to couple the cars and give the engineer the signal to move ahead. At the place where the injury occurred there was a curve that made it necessary for him to get some distance from the track to give the signal, and, when the signal was given, the engineer started the train. After the brakeman had given the signal, he then had to get on the train again after it was in motion. While in the performance of his duty coupling the cars, giving the signal and getting on the train of cars, it was not possible for him to notice obstructions near the track that one could notice who was not engaged in the performance of any duties. Duties must be performed, and there is no contention that he was not performing them in the proper manner.

He testifies that he caught the train with both hands, got his foot in the stirrup, and got on the train as quickly as he could. One riding on a train in the manner that the witnesses testified that the employees had to ride, in the middle of the car, would probably not be able to tell whether the stumps and other obstructions near the track were close enough to injure them or not. He knew there were stumps on the right-of-way, and knew that there were other obstructions. He knew that some of them were near the track, but there is no evidence that he knew that they were near enough to injure him. And, unless it could be said that, riding back and forth

on the track, as appellee had for a long while, he could tell that the obstructions were close enough to be dangerous, then it cannot be said he knew the hazard, although he knew the obstructions were near the track.

Appellant, in support of his contention that the court below should have given a peremptory instruction because appellee had assumed the risk, cites *Asher* v. *Byrnes*, 101 Ark. 197, 141 S. W. 1176, and quotes as follows:

"When a servant enters into the employment of any one, he assumes the ordinary risks and hazards which are incident to the service, and this includes all those defects and dangers which are obvious and patent. He assumes all the risks which he knows to exist and all those which are open and obvious."

The above is a correct statement of the law, but it will be observed that it refers to the ordinary risks and hazards incident to the service. And it is true that he assumes the obvious risks, but, because an obstruction is near the track and the object itself or obstruction is obvious, does not necessarily mean that the risk or hazard is obvious. The servant does not assume any risk or hazard caused by the negligence of the master, unless he knows that the risk or hazard exists. If it were an ordinary or usual risk or hazard, then he would assume the risk, even if he did not know it, if he could, by the exercise of ordinary care, have known it. But, in order to assume the risk caused by the negligence of the master, he must know that the risk exists. He has a right to assume that the master will not be guilty of negligence, and he has the right to rely on that assumption, unless he knows that the contrary is true.

In the instant case it was the duty of the appellant to make inspection and to ascertain whether or not obstructions were so near the track as to be dangerous, but the employee was not under any duty or obligation to make inspection. He had a right to assume that the master had performed his duty, and did not have to make any investigation or inspection to find out whether or not the master had been guilty of negligence.

This court has many times held that, while an employee assumes all the risks and hazards usually incident to the employment he undertakes, he does not assume the risk of the negligence of the company for whom he was working, or any of its servants. He has a right to assume, not only that the master will perform its duty, but he has a right to assume that each of the other servants will perform their duty, and if, while in the exercise of ordinary care, he is injured either by the negligence of the master for whom he works or by the negligence of any other servant of the master, he has a right to recover.

The above is substantially the declaration of law by this court in *Aluminum Co. of America* v. *Ramsey,* 89 Ark. 522, 117 S. W. 568, and it has been approved many times since that decision.

It was the duty of the appellant in this case to use reasonable care to see that the obstructions on the track were not so close as to injure a servant in the performance of his duty. It was its duty to make inspection and use reasonable care to keep the road in this condition.

"That it was the duty of the railroad company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employees had a right to rely upon this being the case, is too well settled to require anything but mere statement. * * * Sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train. This general duty of reasonable care as to the safety of its appliances resting on the railroad. the instructions in question proposed to limit by confining its performance solely to such foreign cars as are received by a railroad 'for the purpose of being hauled over its own road.' * * * The argument wants foundation in reason, and is unsupported by any authority.

In reason, because, as the duty of the company to use reasonable diligence to furnish safe appliances is ever present and applies to its entire business, it is beyond reason to attempt, by a purely arbitrary distinction, to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition." *Texas & P. R. Co.* v. *Archibald,* 170 U. S. 665, 18 S. Ct. 777, 42 L. ed. 1188.

It is the duty of the company to use this reasonable care with reference to every part of its business and with reference to seeing that obstructions on the track are not so close to the track that they will injure an employee in the performance of his duty. It will be remembered that the doctrine of assumed risk is based on contract, and the master cannot make a valid contract exempting itself from its own negligence. And this would be the result if an employee was held to assume the risk resulting from the negligence of the master, because assumed risk is based on contract. If the servant assumed the risk of the negligence of the master, this would be permitting the master to contract for exemption from its own negligence.

In a case of injury of a servant by a railroad company, the following instruction was given at the request of the plaintiff and excepted to by the defendant: "If the exigencies of the situation were such as to make it necessary for them to place the track so near the post as to be a source of danger, or to allow the post to remain so near the track as to be a source of danger, then it was their duty to notify their employees of that source of danger." The appellate court said: "This instruction was proper." *Savage* v. *Rock Island Co.,* 28 R. I. 391, 67 Atl. 633.

In that case a conductor riding on the running-board of an electric car was struck by a pole near the track. The court said:

"The danger from this pole, if any, was either an obvious risk, and so assumed by the deceased; or else it was non-obvious or extraordinary, and, if so, it was a matter as to which the deceased was entitled to special warning and instruction from the defendant. And, of course, it is well settled that in the latter case the burden of proof is upon the defendant to show that proper warning and instruction was given. * * * The railroad company and any other employer of labor and any other person cannot be allowed to contract himself out of his own negligence." *Wilson* v. *New York, N. H. & H. R. Co.*, 29 R. I. 146, 69 Atl. 364.

It will of course not be contended that the company could contract itself out of its own negligence. That is, it could not contract so as to relieve it from liability for its negligence.

"An examination of the language and reasoning of the courts shows that the question whether a risk is or is not an ordinary one may be determined with reference to either one of two conceptions which are logically distinct. According to one of these, the differentiating test is furnished by the principle already adverted to in § 895, *ante,* viz., that every risk which is not caused by a negligent act or omission of the master's part is assumed by the servant." Labatt's Master & Servant, 2d ed. vol. 3, 3110.

Whether the appellee in this case knew of the risks and hazards was a question for the jury. Instruction No. 2, given at the request of the appellee, was a correct statement of the law. A servant does not assume the risk of the negligence of the company unless he knows of such negligence. And, for the same reason, instruction 10 was properly refused.

Appellant also complains at the refusal of the court to give its instruction No. 6. Number 6 was a peremptory instruction. When a servant is in the performance of his duty, as the brakeman was in this case, he does not have the opportunity to look out for obstructions of the kind mentioned here that he would have if he

was not so engaged. It is his duty to perform his work. Of course he should exercise reasonable care in the performance of it, but the fact that he is engaged in the performance of a duty and must give his attention to that should be taken into consideration in determining whether he was guilty of contributory negligence. Contributory negligence is not a bar, but may be shown in order to reduce the damages. And the jury was properly instructed by the court with reference to contributory negligence.

We think as to whether the servant would know that the obstructions were close enough to injure him was a question about which fair-minded men might differ, and therefore was properly submitted to the jury, and their verdict is conclusive on this court.

Finding no error, the judgment is affirmed.

COLLUM v. HERVEY.

Opinion delivered March 19, 1928.

1. JUDGMENT—CONCLUSIVENESS AGAINST WIFE OF DECREE AGAINST HUSBAND.—A decree against a husband in a suit brought against him and others to quiet title to land owned by his wife, *held* binding on the wife, though she was not made a party, where the husband and wife had occupied the land together, and when the writ of possession had issued as the result of such decree, the husband and wife had vacated the premises, since the wife was represented in the suit by her husband and was in privity with him, and her subsequent suit for possession was barred thereby.
2. JUDGMENT—CONCLUSIVENESS.—Where title to land had been quieted against the husband in a suit to which his wife had not been made a party, *held* that, even if the decree against the husband was not binding on the wife, the fact that, on the issuance of the writ of possession, she claimed no interest separate from her husband, and vacated the premises without claiming that she was not bound by the decree, constituted a ratification of the husband's subsequent acts so as to bind her by the decree.
3. JUDGMENT—CONCLUSIVENESS OF DECREE AGAINST PRIVY.—In ejectment for recovery of land, plaintiff was bound by a previous

judgment against her grantor, under which the judgment title had been quieted as against such grantor, since plaintiff was a privy with her grantor.

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

J. D. Cook, Sr., and *J. D. Cook, Jr.*, for appellant.

Pratt P. Bacon, for appellee.

MEHAFFY, J. The appellee, plaintiff below, began this suit in the Miller Circuit Court, alleging that she was the owner of 15 acres of land in section 33, township 14 south, range 28 west, in Miller County, Arkansas, which land was described in her complaint, and claimed title to said land as follows: That, prior to the year 1909, plaintiff's sister, Mary Day, was in possession of the 40-acre tract, which included the 15 acres sued for, and had been in possession for many years, working said land and improving same and claiming to be the owner of the whole 40-acre tract. That said Mary Day put plaintiff in possession of the 15-acre tract involved in this suit, and that, immediately upon said gift, the plaintiff entered into possession of said 15 acres, which was then in the woods, and plaintiff cleared same, fenced it, built houses thereon, and put said 15 acres in cultivation, and openly and notoriously held the adverse possession thereof all the time, claiming to be the owner for more than seven years, until she was some time ago dispossessed by some kind of a writ issued against her husband. She alleged that the defendants, appellants here, were in the unlawful and wrongful possession of said lands, claiming to be the owners, and that plaintiff was entitled to the possession.

Defendants filed a demurrer, which was by the court overruled. They also filed a motion to make more definite and certain, which was also overruled, and exceptions saved. The defendants then filed answer, alleging that R. B. Collum was the owner of the tract of land claimed by plaintiff; that he purchased from John P. Hervey, and that Hervey inherited the lands from his

father, Charles Hervey, and tendered deeds showing title to said lands.

The defendants further answered, alleging that neither Mary Day nor Isom Hervey ever had title to said lands, and denied the material allegations of plaintiff's complaint. Defendants admitted that at one time Mary Day lived on the land, and had given plaintiff and her husband the privilege of living on the land. Defendants alleged that defendants' grantor, being a minor, brought suit by Sally E. Hyden, his guardian, in the Miller Chancery Court, to quiet the title to said land in John B. Hervey. The suit was against Mary Day and Isom Hervey, plaintiff's husband. It is alleged that the suit included the plaintiff. That in said suit all the rights and equities ever existing in behalf of the plaintiff were pleaded, and the same inquired into and disposed of in said cause, and that the title of John P. Hervey, defendants' grantor, was quieted in him, and a writ of assistance was issued in support of said decree and the right of the defendant's grantor under same, ejecting all of said defendants, including plaintiff, from said 40 acres, which included the 15 acres claimed by plaintiff.

The plea of *res judicata* was submitted to the court, in the absence of the jury, and the defendants introduced and read in evidence chancery record in the case of John P. Hervey, an infant, by Sally E. Hyden, his guardian, against Mary Day and Isom Hervey. The suit resulting in the decree which was introduced involved the lands in controversy in this suit, and said decree showed that the lands had been adjudged and decreed to the plaintiff, John P. Hervey; that he was the owner of the legal title, and it was decreed that he have and recover of and from the defendants, Mary Day and Isom P. Hervey, and their tenants, the possession of said lands; and that, upon failure of defendants and their tenants to deliver possession, plaintiff should have a writ of possession. Said decree also adjudged and decreed that the title of plaintiff, John P. Hervey,

be and it is hereby established, quieted and confirmed against all persons claiming by, through or under any of the conveyances as set out in this decree.

The plaintiff objected to the introduction of the decree because Senie Hervey, the plaintiff, is not a party to the suit. Said objection was overruled, and plaintiff excepted. Defendants then introduced and read in evidence the pleadings in said chancery cause, and it was admitted that Senie Hervey was the wife of Isom Hervey, but objection was made because Senie Hervey was not a party to the suit.

The will of Mary Mays was introduced, Mary Mays being the same person as Mary Day, above mentioned. Objection was made to the introduction of the will, and said objection overruled, and exceptions saved. The defendants then introduced and read in evidence the writ of possession issued by the Miller County Chancery Court, commanding the sheriff that he take from the possession of the defendants, Mary Day and Isom Hervey, the land and premises described in the chancery decree, and deliver the same to John P. Hervey.

After the introduction of the above evidence the court overruled defendant's plea of *res judicata,* and thereupon the parties introduced the evidence on the main issue, and the case was submitted to the jury, and a verdict returned in favor of the plaintiff.

The testimony showed that the plaintiff claimed title through Mary Day, her sister; that she was living with her husband at the time suit was brought against Mary Day and her husband; that a decree was rendered against this plaintiff's husband and Mary Day, and Hervey, the grantor of appellants, was decreed to be the owner and entitled to possession of the land involved in this suit. Plaintiff offered to introduce in the trial of the case before the jury the decree of the chancery court. Objection was made and sustained, and appellants were not permitted to introduce and read in evidence the decree of the chancery court.

As the judgment or the decree of the chancery court, introduced on the question of *res judicata,* is binding on the wife, the suit being against the husband, the plea should have been sustained by the court. It appears that the husband and wife were living together on this 15 acres as husband and wife; that the suit was against the husband alone, a decree rendered, a writ of possession issued, and, as a result of the decree and writ of possession, both the husband and wife and Mary Day vacated the premises, and possession was delivered to the grantor of appellants.

A majority of the judges are of opinion that this was not the separate property of the wife, but that, the husband and wife living together, the husband's occupancy was her occupancy, or rather that she was occupying it as a wife and because her husband was occupying it; that the domicile of the husband is the domicile of the wife, and that the decree in the chancery court, although the wife was not a party, under the circumstances in this case, was binding on her.

The writer does not agree with this view, but a majority of the judges do, and it is therefore the opinion of the court that the decree of the chancery court, although the wife was not actually made a party, is binding on her as well as the husband.

"A judgment in favor of or against the husband in an action involving a debt due the community will, it has been held, bind the wife, regardless of her nonjoinder." 21 Cyc. 1694.

"The judgment in an action by a husband to determine the boundary line of land which was community property is conclusive on both husband and wife, although the wife was not a party to the action, in the absence of proof that it was brought without her consent." *Leggett* v. *Ross,* 14 Wash. 41, 44 Pac. 111.

"A judgment in an action against a husband only to determine adverse claims to land is a bar to subsequent action by such husband and his wife against plaintiff in

the former action involving the same questions, although the land is community property." *Lichty* v. *Lewis,* (C. C. A.), 63 Fed. 535.

"But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them or in privity with them are equally included by the same proceedings. * * * The ground therefore upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded. Hence all privies, either in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity." *Litchfield* v. *Goodnose,* 123 U. S. 549, 8 S. Ct. 210, 31 L. ed. 199.

It is the opinion of the majority of the judges that Senie Hervey, being the wife of Isom Hervey, living with him at the time that she was represented by the husband in the suit, was in privity with him, and equally concluded by the proceedings.

"A judgment in favor of or against the husband in an action involving a debt due the community will bind the wife, regardless of her nonjoinder. But some courts hold that, where the wife was not a party defendant in an action wherein judgment was rendered against the husband, she is entitled to a determination, in an appropriate action or proceeding, of the question whether the judgment was based on a community debt or liability. A determination as to the community character of certain property is *res judicata* where it is fairly in issue and both husband and wife are parties. And in jurisdictions where the wife is not a necessary party in actions against the husband affecting community real property, a judgment against the husband is binding and conclusive upon him, the wife, and the community estate, is not to be impeached by a collateral action, and stands as a valid adjudication until annulled or reversed in some direct

proceeding for that purpose. Where the wife directly attacks the judgment and seeks to have it reopened, she can urge only such defenses as existed at the time of the rendition of the judgment, and not those subsequently accruing. And even in jurisdictions where both husband and wife are necessary parties in actions affecting community real property, a judgment either for or against the husband in an action to which the wife is not a party is not necessarily void on collateral attack; where the action was brought by the husband alone, the judgment is binding on the wife, unless she avoids it by showing that it was commenced and prosecuted without her knowledge or consent." 31 C. J. 160.

This court has many times held that the domicile of the husband is the domicile of the wife, even though the wife may abandon and desert her husband and live in another State. The husband is the head of the family, and, as such, according to the opinion of the majority, had the right to represent his wife in the suit, which resulted in a decree against the husband. Moreover, if he did not have the absolute right to do so, when the writ of possession was issued the wife made no claim to any interest in the land separate from her husband. She vacated when he did, and made no claim that it was her property and that she was not bound by the judgment against her husband. Her conduct was a ratification of the acts of her husband, and she is bound by the judgment, and the plea of *res judicata* should have been sustained. Again, the person under whom she claims was a party to the suit, and that judgment would bind her. She claimed under Mary Day, and the suit was against Mary Day, and the decree was against Mary Day, specifically awarding to appellants' grantor against Mary Day and the husband of the appellee. And judgments are binding upon all parties and their privies.

"In regard to the persons in whose favor or against whom the doctrine of *res judicata* is applicable, it is well settled that a judgment or decree is binding upon all par-

ties to the proceeding in which it was rendered and their privies." 15 R. C. L. 1005.

"As used when dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property, and it is classified as privity in estate, privity in blood, and privity in law, in all of which kinds there must be an identity of interest. A privy in estate is one who derives title to property from another. He comes in by succession to property by contract or law. To make one person a privy in estate to another, that other must be predecessor in respect to the property in question, from whom the privy derives his right or title. Examples of this class of privies are joint tenants, donor and donee, lessor and lessee, and successors in office. Privies in representation are illustrated by executor and testator, administrator and intestate." 15 R. C. L. 1015.

In this case the appellee here was certainly privy in estate to Mary Day, under whom she claimed. Claiming under Mary Day and being the wife of Isom Hervey, living with him at the time, the husband being the head of the family, the judgment against Mary Day and the husband of Senie Hervey is binding on Senie Hervey.

Having held that the plea of *res judicata* was proper and should have been sustained, it becomes unnecessary to discuss the other points raised by counsel.

The judgment of the court is reversed, and remanded with directions to sustain the plea of *res judicata* and dismiss plaintiff's complaint.

WEBB v. STATE.

Opinion delivered March 19, 1928.

1. ANIMALS—PERMITTING STOCK TO RUN AT LARGE.—Evidence *held* to sustain a conviction of permitting stock to run at large in violation of Sp. Acts 1921, No. 593, § 4, as amended by Sp. Acts 1923, No. 237.
2. CONSTITUTIONAL LAW—LEGISLATIVE POWERS.—The State Constitution is not a grant or enumeration of legislative powers, but is a limitation on the exercise of such powers, and the Legislature can exercise all the powers not expressly or by fair implication forbidden by the Constitution.
3. CONSTITUTIONAL LAW—WHEN STATUTE INVALID.—Courts will not declare an act of the Legislature unconstitutional, unless it clearly appears that some provision of the Constitution has been violated or that the Legislature is prohibited, either expressly or by implication, from enacting the statute.

Appeal from Crawford Circuit Court; *J. O. Kincannon,* Judge; affirmed.

O. D. Thompson, for appellant.

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

MEHAFFY, J. Appellant, Joe T. Webb, was indicted, charged with permitting stock to run at large in section 23, township 10 north, range 31 west, in Crawford County, Arkansas. The act under which he was indicted is a special act of 1921, prohibiting the running at large of stock in certain territory and fixing the punishment for a violation of said act.

Act No. 467 of the Acts of 1923 amended act 593 of the Acts of 1921, enlarging the restricted territory so as to include the lands mentioned in the indictment. The original act, act 593 of the Acts of 1921, contains the following provision:

"Section 4. If any owner or person having charge of any such stock or fowls allow or permit the same to run at large in said territory, he shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined $10, and for each subsequent offense shall be fined said sum.

and imprisoned in the county jail some period of time, not exceeding 30 days."

This case was tried upon an agreed statement of facts containing the following:

"The defendant, Joe T. Webb, did permit cattle, on the 8th day of March, 1927, to run at large, and outside of an inclosure, within section 23, township 10 north, range 31 west, Crawford County, Arkansas. That the said Joe T. Webb was the owner of said cattle, knowingly permitting them to run at large as aforesaid."

The cause was tried before the court sitting as a jury, and appellant was found guilty and his punishment fixed at a fine of $10.

Appellant filed a motion for a new trial, which was overruled, exceptions saved, and he prosecutes this appeal to reverse said judgment. The appellant filed a demurrer in the court below, and in his argument he discusses two questions only. First, it is insisted that the evidence is insufficient to justify the conviction.

We do not agree with appellant in this contention. The Legislature passed the act creating the district, fixing its boundaries, prohibiting the running at large of stock within said district; and appellant, in the agreed statement of facts, admits that he owned the stock and knowingly permitted them to run at large within said district. If he did this, he violated the act, and the evidence was ample to sustain the conviction.

The next contention is that the court erred in overruling his demurrer to the indictment, because he alleges that the act under which the indictment was drawn is unconstitutional. It is argued that the act of 1921 was a general act, and that in 1923 the Legislature passed a special act amending the general law, and it is contended that the Legislature could not constitutionally do this. In the first place, the original act of 1921 was a special act, and it was amended in 1923 by another special act simply by including additional territory or adding additional territory to the original district. In 1915 the Gen-

eral Assembly enacted a statute providing for stock-law districts to be formed upon vote of the qualified electors of three or four townships in any county. The act provided for the county court ordering an election upon the petition of a certain per cent. of the qualified electors. Under this general act a stock law was formed in Carroll County. In 1919 a special act was passed by the Legislature, exempting one of the townships and the electors and citizens of said township from the provisions and effect of the general act. It was contended that the special act was void. The court said, in passing on the Carroll County case:

"The court also sustained the attack on the ground that it is not within the power of the Legislature to dismember a district created under a valid statute by vote of the electors in accordance with the terms of the statute. The answer to this is that the statute, when put into operation, is a police regulation, and is entirely subject to legislative control. The organization of the district is dependent upon legislative will, and it is entirely within the power of the lawmakers to either repeal or amend the statute, or to abolish the district, or to exclude any territory from it. In other words, the power of the Legislature over the subject is supreme, there being no fixed right in a mere police regulation." *Johnson* v. *Pinckley,* 141 Ark. 612, 217 S. W. 805.

The State Constitution is not a grant or enumeration of legislative powers, but is a limitation upon the exercise of such powers, and the Legislature can exercise all the powers not expressly or by fair implication forbidden by the Constitution. We know of no provision of the Constitution that prohibits the Legislature from creating the district, amending the act, abolishing the district, or making such changes as, in its judgment, are desirable. The Legislature can do anything which is not forbidden, either expressly or by implication. See *Butler* v. *Bd. Dir. Fourche Drain. Dist.,* 99 Ark. 100, 137 S. W.

251; *St. L. I. M. & S. R. Co.* v. *State,* 99 Ark. 1, 136 S. W. 938; *Vance* v. *Austell,* 45 Ark. 400.

Courts will not declare an act of the Legislature unconstitutional unless it clearly appears that some provision of the Constitution has been violated or that the Legislature is prohibited either expressly or by implication from enacting the statute. The Legislature clearly had the right to pass the original act and the right to amend it, as it did in 1923.

The judgment of the circuit court is affirmed.

YEAGER v. STATE.

Opinion delivered March 19, 1928.

1. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.—Where there is any substantial testimony tending to support a verdict, the judgment of conviction will not be set aside; but, if there is no substantial evidence tending to connect the defendants with the commission of the crime, or if the evidence is purely speculative or conjectural, the verdict will be set aside.
2. INTOXICATING LIQUORS—MAKING MASH—SUFFICIENCY OF EVIDENCE. —Evidence *held* to sustain a conviction of unlawfully making and fermenting mash fit for distillation.
3. INTOXICATING LIQUORS—MAKING MASH—SUFFICIENCY OF EVIDENCE. —Where, in a prosecution for unlawfully making mash fit for distillation, the only evidence was that defendant was seen handing whiskey over a fence to his co-defendant, it was insufficient to sustain a conviction of the co-defendant for unlawfully making and fermenting mash fit for distillation.

Appeal from Miller Circuit Court; *J. H. McCollum,* Judge; reversed as to Ben Yeager; affirmed as to George Yeager.

Dexter Bush and *Will Steel,* for appellant.

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

McHANEY, J. Appellants were indicted, tried, convicted and sentenced to one year each in the penitentiary on a charge of unlawfully making and fermenting mash

fit for distillation. They prosecute this appeal to reverse the judgment on the sole issue that the evidence is insufficient to support the verdict.

The rule of law governing this court on this assignment of error is that, if there is any substantial testimony tending to support the verdict, the judgment of conviction will not be set aside, for the reason that the guilt or innocence of the defendants is purely a question of fact for the determination of the jury. If, however, this court finds that there is no substantial evidence tending to connect the defendants with the commission of the crime, or if the evidence in this regard is purely speculative or conjectural, then it is the duty of this court to set aside the verdict. *Hogan* v. *State,* 170 Ark. 1145, 282 S. W. 984; *Cook* v. *State,* 173 Ark. 711, 293 S. W. 32; *Holford* v. *State,* 173 Ark. 998, 294 S. W. 33.

The evidence on behalf of the State, briefly stated, is that the officers had information that a still was being operated in the vicinity of the residence of the appellants, and, acting upon such information, they went into that locality and made a search. They found a still located from a half to one mile north of George Yeager's residence, and two large vats of mash. It had rained recently, and the officers found wagon tracks leading from the still into George Yeager's lot. They followed this wagon track from the still right in behind George's residence, where they found a wagon with a 3½-inch tire on it, which one of the officers said looked like the wagon that had made the trip to the still. Another road or trail led from George Yeager's house east through his field into a ravine, where a still-site was found. A vat was also found at the still-site containing a quantity of mash fit for distillation. Apparently the still had been moved, or was in the process of being removed, from the site east of the house to the place where it was found north of the house, and apparently the mash was being transported from the old to the new still, as the officers found mash scattered along the road where it had spilled from the containers while being transported, and this condi-

tion existed right up to George Yeager's house. Two of the officers saw Ben Yeager and George in the field back of George's house, Ben being on the inside and George on the outside of the fence, and Ben was handing whiskey over the fence to George in half-gallon containers. They halloed at them, and George ran away. The officers found some broken half-gallon containers of moonshine whiskey, and they found Ben with a half-gallon still unbroken. These are substantially all the facts that tend to connect either of them with the unlawful possession of mash fit for distillation.

Under this state of the record, we are of the opinion that the evidence was sufficient to go to the jury on the question of the guilt or innocence of George Yeager, but was insufficient as to Ben. Ben lived with his brother Gus a mile and a half to the southwest of George's place, and the only evidence in the record tending to connect him with any offense was the fact that he was handing liquor over the fence to George. This might have been sufficient on a charge of possessing and transporting, but certainly was insufficient to show that he ever had anything to do with the making or possessing of the mash for which he was indicted. While it may be true, as the jury has found, that Ben is equally guilty with George on the charge against him, yet there is no substantial testimony in the record to show that he was guilty. The jury, in order to convict him, would have to deal purely with speculation and conjecture, which are insufficient in law to justify a conviction.

The judgment of conviction as to George Yeager will therefore be affirmed, and as to Ben Yeager it will be reversed, and remanded for a new trial.

LYONS v. SMITH.

Opinion delivered March 19, 1928.

1. DAMAGES—MENTAL SUFFERING.—Where defendant trespassed upon plaintiff's property and prevented her from having her land put into cultivation by intimidation and threats of violence, an instruction permitting recovery for plaintiff's humiliation and mental suffering was not erroneous, as the rule excluding recovery for mental suffering unaccompanied by physical injury was inapplicable.
2. TRIAL—INSTRUCTION NOT APPLICABLE TO EVIDENCE.—Where, in a suit for damages by reason of defendant's trespass on plaintiff's property and interference with the cultivation thereof, the evidence showed only threats of violence, refusal of defendant's requested instruction that the jury must have found that actions of violence prevented cultivation of the land, *held* proper.

Appeal from Marion Circuit Court; *J. F. Koone,* Judge; affirmed.

J. H. Black, for appellant.

McHANEY, J. Appellee had been in the peaceable possession for 35 or 40 years of a certain plot of ground in Rush, Arkansas, containing about three-fourths of an acre, on which she lived, and which she cultivated for garden and truck purposes. In the spring of 1926 she employed one John Melton to plow her land so that she could plant same for garden and other purposes for such year. When said Melton appeared with team and plow for this purpose, appellant, who is the president of the Morning Star Mining Company, came upon the property and forbade Melton from plowing the lands, and by threats and intimidation, in the presence of appellee, prevented him from doing such work, claiming that the Morning Star Mining Company was the owner of such land. An argument then occurred between appellant and appellee regarding the title to the land, in which appellant did some ugly talking. According to the testimony of appellee, which is not disputed, appellant became angry and conducted himself in such a manner as to shock and hurt appellee's feelings, causing her to cry and to become sick on account of the worry and trouble over this matter; that appellant also prevented any one else from

plowing up said land for her. According to Mrs. John Melton, who was present and heard the conversation, appellant used some rough language to appellee, acted angry, and appeared vindictive. The proof further showed that the usable value of the land was $100, and that it would cost approximately $25 to grow the crop. No evidence was offered on behalf of appellant.

Appellee brought this action against the Morning Star Mining Company and appellant, to recover actual and punitive damages, but, at the conclusion of the testimony, the court instructed a verdict for the Morning Star Mining Company, and submitted the case to the jury as to appellant. There was a verdict and judgment for appellee for $75 actual damages, and $25 punitive damages.

Error is assigned on account of instruction No. 1 given by the court. It is as follows: "The court instructs the jury that, if you find for the plaintiff, you will assess her damages in any sum not to exceed $100, as you may believe from the evidence will compensate her for being wrongfully deprived of the use of her land for the year 1926, and if you find for the plaintiff, and further find that plaintiff was caused to suffer insult, annoyance, humiliation, oppression, aggravation, mental suffering, by the willful, malicious, vindictive or wrongful acts of James K. Lyons, at times when said Lyons was ordering the employee or employees off or from her premises, who had gone there to work for plaintiff, or by fear, frightening or threatening prevented other parties from working for plaintiff on her lands, or that defendant acted with oppressive or vindictive spirit and manner in presence, about and toward the plaintiff, then you have a right to give the plaintiff exemplary damages in addition to compensatory damages, in any sum which you may believe proper, not exceeding $300, as shown from the evidence you may believe will be commensurate with the wrongs done to plaintiff."

It is said that this instruction is erroneous for the reason that mental suffering, annoyance, fear, intimida-

tion, etc., unaccompanied by physical injury, will not sustain a cause of action for damages, and the cases of *C. R. I. & P. Ry. Co.* v. *Moss*, 89 Ark. 187, 116 S. W. 92, and *St. L. I. M. & S. R. Co.* v. *Taylor*, 84 Ark. 42, 104 S. W. 551, 13 L. R. A. (N. S.) 159, are cited in support of this contention. These cases are authority to the effect that mental anguish or mental suffering cannot be made the basis of an action against a railroad company, in the absence of physical injury accompanying same. Many other cases may be found in the reports to the same effect, but these cases are not controlling here, and have no application to the facts in this case. Here the appellant, by the undisputed evidence, committed a willful and wanton wrong against appellee, trespassing upon her property and preventing her from having her land put into cultivation by intimidation and threats of violence. By such acts he caused her to lose the productive value of such land, which the jury has found to be $75. This loss she sustained directly from appellant's tortious acts. By its verdict the jury has also found that his acts were willful and malicious, and has penalized him therefor in the sum of $25. Having suffered this actual loss, we think the court correctly instructed the jury in this regard.

It is next insisted that the court erred in refusing to give appellant's requested instruction No. 1, to the effect that, before they could find for the plaintiff against appellant, they must find that appellant, through acts of violence, prevented the plaintiff from cultivating the lands in question. This instruction was properly refused, as there was no evidence of violence in the case, only threats and putting in fear of violence.

We find no error, and the judgment is affirmed.

NO. 7 OF LITTLE RIVER COUNTY.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY v. ROAD IMPROVEMENT DISTRICT NO. 7 OF LITTLE RIVER COUNTY.

Opinion delivered March 26, 1928.

1. APPEAL AND ERROR—HOLDING ON FORMER APPEAL.—In an action by a road district against a railroad company for a sum expended in the construction of a railroad crossing, the holding of this court on a former appeal that the railroad had notice to construct a crossing, *held res judicata.*
2. RAILROADS—LIABILITY FOR CONSTRUCTION OF CROSSING.—In a road district's action against a railroad company for a sum expended in the construction of a crossing, as required by Road Acts 1919, No. 292, p. 1205, *held* that the railroad was liable for the sum expended over the entire width of its right-of-way, and not merely across its tracks.
3. EVIDENCE—JUDICIAL NOTICE.—It is a matter of common knowledge that public travel is conducted largely by motor vehicles, and this is especially true where public highways are improved.
4. RAILROADS—CONSTRUCTION OF CROSSING—NOTICE TO RAILROAD.—In an action by a road district against a railroad under Road Acts 1919, No. 292, p. 1205, for a sum expended for construction of crossings where, after notice had been given to the railroad, plans were altered by execution of a supplemental contract because of increased price in material and the necessity of more material, *held* that the supplemental contract was not a substantial change in the plans requiring additional notice to the railroad.
5. RAILROADS—LIABILITY FOR CONSTRUCTION OF CROSSING.—In an action by a road district against a railroad company for a sum expended in the construction of a crossing, where the railroad contended that it could not be compelled to construct the crossing because it had paid assessments for benefits under provision of Road Acts 1919, No. 292, p. 1205, and could not legally be required to pay an additional amount, *held* that the construction of highway crossings is under the police power of the State, and had no part in the assessment of benefits, and that the railroad company was liable.

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

STATEMENT OF FACTS.

Road Improvement District No. 7 of Little River County, Arkansas, instituted this action in the circuit court against St. Louis-San Francisco Railway Com-

pany to recover judgment in the sum of $1,929.36 for an amount expended by it in constructing a railroad crossing, which the defendant was required to construct, under act 292 of the road acts of 1919, and which it had failed and refused to construct as required by the terms of said act. This is the second appeal in the case.

Upon the former trial the court sustained a demurrer to the complaint, and dismissed it for want of equity. Upon appeal the judgment was reversed, and the court held that a road improvement district, compelled to construct a highway crossing at a railroad, is not a mere volunteer, and is therefore entitled to recover the cost thereof from the railroad. It was further held that the act under which the road district was organized, having provided that, whenever the contemplated highways should cross the track of any railroad, the company owning the track should make the crossing and bear the cost and maintenance thereof, notice to the railroad company to construct such highway crossing was not necessary. *Road Imp. Dist. No. 7* v. *St. Louis-San Francisco Ry. Co.*, 172 Ark. 368, 288 S. W. 884.

Upon the retrial of the case it was shown that the commissioners of the road improvement district had filed in the office of the county clerk plans and specifications for the highways to be improved, as required by the act, and that the plans covered the four crossings involved in the suit. The amount of yardage of each crossing and an itemized statement of the materials out of which it should be constructed and the cost thereof were filed with the plans and specifications. The contract for the construction of the highways provided for the crossings to be constructed in the same manner and at the same cost as the balance of the highways. After the original contract was entered into, the price of materials increased, and it became necessary to make an additional contract in order to secure the construction of the proposed highways. The amount of materials to be used in the crossings was also increased. This

supplemental contract was entered into about a year after the execution of the original contract, and the highway crossings in question were constructed under its terms. An itemized statement of the materials used and the cost of construction was introduced at the trial in the court below. The attorney of the road district notified the section foreman and the station agent of the railroad company to construct the crossings in question, and the railroad company failed and refused to construct the same. Evidence was adduced by the railroad company tending to show that the cost of materials and price of labor in the account of the road district were excessive. Other facts will be stated or referred to in the opinion.

The jury returned a verdict for the plaintiff in the sum of $1,500, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

King, Mahaffey & Wheeler and *A. P. Steel,* for appellant.

J. O. Livesay and *Otis Gilleylen,* for appellee.

HART, C. J., (after stating the facts). The road district in question was organized pursuant to a special act passed by the General Assembly of 1919. Road Acts of 1919, vol. 1, p. 1205. Complaint is again made that no notice to construct the crossings in question was given the railroad company. This question was decided adversely to the contention of counsel for the defendant upon the former appeal, to which attention has been called above. Upon the former appeal the court had under consideration the provisions of § 24, which provides that, when the highways shall cross the track of a railroad, the company owning the track shall make the crossing of the same material and in the same manner as the highway on either side, and shall bear the cost of constructing the crossing and its maintenance. The court said that, under the statute, it was the duty of the railroad company to construct and maintain the crossing, and that the railroad company must take notice

of the duties imposed upon it by the statute. The court also called attention to the fact that the plans for the crossing had been prepared and filed with the clerk, and that no additional notice was necessary to make the requirements of the statute binding upon the railroad company. This holding of the court upon the former appeal became the law of the case and governs us upon the present appeal.

It is next contended that the judgment should be reversed because the crossing was constructed over the entire width of the right-of-way, and not merely across its tracks. This contention of counsel for the defendant was decided adversely to them in *Chicago, Rock Island & Pacific Ry. Co.* v. *Redding,* 124 Ark. 368, 187 S. W. 651, Ann. Cas. 1918B, 183. In that case it was held that, in constructing and maintaining crossings over public roads and streets, railroad companies must anticipate the reasonable demands of the public, and, where the traffic requires it, the crossing must be made available for the entire width of the road or street. The road improvement district in question was organized for the purpose of improving certain public highways in the district. The plans for the proposed improvement contemplated that the railroad crossings should be constructed of the same material as the roads on either side. This was proper, in order to secure safety in travel. It was also proper that the whole of the right-of-way should be considered a part of the crossing. The crossing of the railroad would be more dangerous than if the crossing was not constructed of the same material and in the same manner as the highways on either side of it. It is a matter of common knowledge that public travel is conducted largely by motor vehicles, and this is especially true where the public highways are improved, as in the present case.

It is next contended that the judgment should be reversed because the original plans were altered after they were filed in the office of the county clerk. This is

true, but such a course became necessary in order to secure the construction of the proposed improvement. The price of materials greatly advanced, and it became necessary to execute a supplemental contract in order to secure the construction of the improved highways according to the plans and specifications on file in the office of the county clerk. In order to accommodate the public travel and meet its reasonable requirements, it became necessary to change the plans of the public crossings, so that they required more material to be used in the construction thereof. No material change in the plans was had, however; and we do not think that the additional material and the advance in price which caused the execution of the supplemental contract could be said to be such a substantial change in the plans and specifications as to require additional notice to the railroad company.

It is next insisted that the railroad company could not be compelled to construct the crossings, because it had paid its assessment of benefits under the provisions of the act, and could not legally be required to pay any further additional amounts of taxes for the improvement of the highways. We do not agree with counsel in this contention. The construction of the highway crossings was under the police power, and had no part in the assessment of benefits. In *State of Minnesota* v. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, it was held that the State may, in the exercise of its police power, impose upon railroad companies whose lines intersect public highways laid out after the construction of the railroad the uncompensated duty of constructing and maintaining at such crossings all such safety devices as are reasonably necessary for the protection of the traveling public. It was further held that such a requirement, being referable to the police power, is not a taking of private property for public use, in violation of the Constitution. This case was

affirmed by the Supreme Court of the United States in 214 U. S. 497, 29 S. Ct. 698, 53 L. ed. 1060, on the authority of the *Northern Pacific Railway Co.* v. *Duluth,* 208 U. S. 583, 28 S. Ct. 341, 52 L. ed. 630. In the latter case it was held that, under the police power, a municipal corporation could require a railway company to repair, at its own expense, a viaduct and its approaches which carried a street over the right-of-way, notwithstanding the fact that the street was opened after the construction of the railroad, and that the railroad company's charter did not expressly require it to construct or maintain crossings at streets thereafter opened. It was also held that the right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise, as it is immaterial upon what consideration the attempted contract is based.

This holding is in accordance with our previous decisions bearing on the question. In *St. Louis-San Francisco Rd. Co.* v. *Fayetteville,* 75 Ark. 534, 87 S. W. 1174, it was held that, upon the opening of a new street across a railway right-of-way, the railway company was not entitled to the prospective cost of erecting an overhead crossing, as the Legislature might at any time compel it, without compensation, to construct such a crossing and keep it in repair.

Again, in *Kansas City Southern Ry. Co.* v. *City of Mena,* 123 Ark. 323, 185 S. W. 290, it was held that, where a city opened a street across the right-of-way and tracks of a railroad company, the railroad company is required to construct and maintain the crossing, but it cannot recover from the city any damages or compensation on that account.

The judgment of the circuit court was correct, and it will therefore be affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. ELVINS.

Opinion delivered March 26, 1928.

1. RELEASE—MISTAKE AS GROUND FOR RESCISSION.—A release of damages for personal injuries cannot be avoided on the ground of mistake, merely because the injuries proved more serious than the releasor at the time of executing the release believed them to be, even though his opinion may have been based upon that of the physician employed by the releasee to examine and report on the extent of his injuries.

2. RELEASE—INNOCENT MISREPRESENTATION BY RELEASEE'S PHYSICIAN.—Innocent misrepresentations of the releasor's injury made by the releasee's physician may be effective to avoid a release induced thereby.

3. RELEASE—EXECUTION UNDER A MUTUAL MISTAKE.—In an action by an automobile driver injured by being struck by a train while crossing the railroad track, brought after execution of his release, evidence *held* to sustain a finding that the settlement was made under mutual mistake of the parties as to whether the injuries were temporary or permanent.

4. RELEASE—RESCISSION—TENDER OF CONSIDERATION.—In an action to rescind a release obtained under mutual mistake as to whether the injuries were temporary or permanent, *held* that a tender of the consideration received was not a condition precedent to the maintenance of the action.

5. RELEASE—RATIFICATION OF SETTLEMENT UNDER MISTAKE.—In an action to rescind a release for personal injuries where plaintiff collected a draft given for such release after he had ascertained from an X-ray picture that there had been no union of bones in his leg, and that the injuries were probably permanent, *held* that collection of the draft did not constitute a ratification of the settlement.

6. RAILROADS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—In an action by an automobile driver injured by being struck by a train at a railroad crossing, evidence *held* to sustain a finding that his injuries were occasioned by the negligence of the railroad company.

7. RAILROADS—INVITATION TO CROSS TRACK.—In an action by an automobile driver against a railroad company for injuries sustained by being struck by a train while crossing the track, where the flagman failed to raise his stop signal, *held* that there was an implied invitation to cross the track resulting from the flagman's action.

8. DAMAGES—WHEN NOT EXCESSIVE.—A verdict of $18,500 for a broken leg, bones of which failed to unite, *held* not excessive, in view of Crawford & Moses' Dig., § 8575.

9. EVIDENCE—JUDICIAL NOTICE—VALUE OF MONEY.—Courts and juries may take judicial notice that money today has much less purchasing power than it had 20 or even 15 years ago.

Appeal from Hempstead Circuit Court; *James H. McCollum,* Judge; affirmed.

STATEMENT OF FACTS.

Jesse J. Elvins instituted this action in the circuit court against the Missouri Pacific Railroad Company to recover damages for personal injuries caused by the negligent operation of one of the defendant's passenger trains while he was driving over a public crossing in Hope, Arkansas. The defendant denied any negligence, and set up in bar of the action a release of all damages executed by the plaintiff.

The record shows that the plaintiff was injured while driving an automobile across a public crossing where the tracks of the Missouri Pacific Railroad Company cross Walnut Street, in Hope, Arkansas. Walnut Street is 36 feet wide between the curbs where it crosses the tracks of the Missouri Pacific Railroad Company in Hope. At that point the railroad runs east and west, and Walnut Street runs north and south. There is a large freight station to the right of the crossing, which obstructs the view of any one approaching the railroad tracks from the south. There is a house-track between the freight depot and the main track. North of the main line are several other tracks. There are stop-gates at the crossing, operated from a tower, but they were not in use on the day of the accident because they were out of repair. A flagman was stationed at the crossing, whose duty it was to hold up a stop flag when trains were approaching the crossing. Passenger train No. 5 was late on that day. The flagman had held up his stop sign for a passing switch engine. A. E. Holstead, who was approaching the crossing from the south

in an automobile, saw the switch engine on the north side of the main track, and stopped to let it pass over the crossing. Then he started up his automobile, and drove on across the track. He did not hear any warning of an approaching train by the ringing of a bell or the sounding of a whistle. The crossing watchman or flagman was on the north side of the track, standing with his flag down, talking to other persons. Other witnesses near the scene of the accident said they did not hear the warning of an approaching train by the ringing of a bell or the sounding of a whistle. They also testified that the flagman was standing with his flag down, and did not give any warning of the approach of a train.

According to the testimony of Jesse J. Elvins, the plaintiff, he drove up to the Walnut Street crossing of the Missouri Pacific tracks from the south, and stopped his automobile behind another car which had stopped for the crossing. The gates were open, and he heard no bell or whistle warning him of the approach of a train. He had some acquaintance in Hope, but was not familiar with conditions there. When he saw a man ahead of him drive across the track, he followed. He saw two men on the north of the track, but they did not hold up any stop sign. Just as the plaintiff drove across the first track on the main line, he saw that the train was right in his face, but could not avoid it. The train struck the automobile in which he was riding, and severely injured him. His leg was broken between the knee and the hip.

The plaintiff was carried to a hospital in Hope, and attended by Dr. J. H. Weaver, a resident surgeon at Hope for the Missouri Pacific Hospital Association. The plaintiff was kept in the hospital for about 30 days, with his leg in a cast. During this time the plaintiff talked with the claim agent of the defendant about settling his damages. Dr. Weaver measured his leg every day, and told him that there would be a good alignment of the

bones, and that there would only be a normal shortening of the limb amounting to one-half inch. Dr. Weaver told the plaintiff that he would not make an X-ray of his leg, because it might disturb him. He said that the bones had knit together in good alignment, and that he would be up in a couple of weeks and out of the hospital in less than 30 days. Relying on these representations, the plaintiff signed a release of all damages in favor of the railroad company for $3,500 and his hospital fees for 30 days. On the day after the settlement an X-ray picture was made of the plaintiff's leg, and it was ascertained that the bones had not united, and Dr. Weaver admitted to the plaintiff that he was responsible to the plaintiff for the condition of his leg. The plaintiff was then carried to Dr. Willis Campbell, at Memphis, Tennessee, and Dr. Campbell performed three operations on his leg. These operations were very painful, but did not cause the bones of the leg to unite. Subsequently an operation was also performed by Dr. Risner of Chicago. None of these operations were successful, and the plaintiff has to wear a brace on his leg to use it. He spent all the money received in settlement for treatment, and $800 more. The plaintiff was forty-four years of age, and had contracted a venereal disease while in the army, but had been pronounced cured. He would not have made the settlement if he had known that he was permanently injured. He relied upon the statement of Dr. Weaver to the effect that there would be a good alignment of the bones of his leg and that they had united.

Another witness who was present when the settlement was made corroborated the plaintiff as to the representations made by Dr. Weaver and as to the subsequent fact that the bones of the plaintiff's leg had not united.

According to the evidence of Dr. Willis Campbell, there was no approximation of the ends of the bones. A blood test showed that the plaintiff had had syphilis, and no union of the bones was obtained by the operations

performed upon him. The bone showed no sign of syphilis when Dr. Campbell first examined him. Sometimes bones fail to unite in persons who have not had syphilis, and sometimes the bones of persons with syphilis do unite. According to the evidence of the witness, syphilis was the cause in the present case of the bones not uniting. Witness said that he did not believe plaintiff would ever have a normal limb even with a successful bone graft operation.

According to the testimony of Dr. L. M. Lile, the leg of the plaintiff which was injured is of no use, and his injury is permanent.

According to the evidence adduced for the defendant, the bell of the passenger train was ringing and the whistle was sounding as it approached the Walnut Street crossing. The engineer and fireman were both keeping a lookout, but were not able to stop the train after they saw the plaintiff attempting to drive over the crossing. The flagman at the crossing testified that the gates were out of order, and that it was his duty to hold up a stop signal when a train was approaching the crossing. He had held up his stop sign for a switch engine to pass over the crossing. After the switch engine had passed, he lowered his signal and turned to talk to some persons who were near him. He had forgotten that the passenger train in question was late, and did not see it until it was right at the crossing. Other witnesses testified that the flagman had up his signal when the switch engine passed, and that he had it up just as the passenger train in question approached the crossing.

According to the testimony of Dr. J. H. Weaver, he examined the plaintiff after the accident, and found the right femur, the large bone running from the knee to the hip, broken in-two. He put the plaintiff in a wire splint, with a weight extension on it to overcome the rigidity of the muscles. The witness had set a great many bones, and was competent to perform that operation. He put the bones in place at the time he set it. He had

three bricks for weights for the first ten days, and for the following ten days he had two bricks. Ordinarily he would expect results in twenty-five or thirty days to permit a removal of the splint. On the next morning after the injury he asked the plaintiff expressly if he had ever had syphilis, and the plaintiff told the doctor he had never had it. The splints were taken off at the end of four weeks, but this was not done with reference to the settlement. It was not necessary to take an X-ray before that time. The witness had been keeping measurements daily and regarded that as his guide. There was no indication of overlapped bones. After removing the splints he took an X-ray, and this showed that there was about one and one-half inch overlap in the bones. If there had been an overlap before the measurements, this would have been shown. If for any reason there is a non-union of the bones, when the splints were removed the contraction of the muscles would misplace the bone. The plaintiff did not lie quietly in bed, and would not leave his extension alone. He would raise up in bed and reach down and take the extensions off his leg. This might have prevented the bone from uniting. Another reason is that syphilis might have prevented the bones from uniting. The witness had nothing to do with the settlement. According to the testimony of this witness and of the claim agent, the plaintiff was anxious to make the settlement, and on several occasions tried to hurry it up.

In rebuttal the plaintiff denied that Dr. Weaver asked him if he had ever had syphilis, and said that if he had he would have told him that he had it while in the army.

The jury returned the following verdict: "We, the jury, find for the plaintiff, and assess his damages in the sum of $18,500, less credit of $3,500."

Judgment was rendered upon the verdict, and the defendant has appealed to this court.

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

Luke F. Monroe and *Steve Carrigan,* for appellee.

HART, C. J., (after stating the facts). The main reliance of counsel for the defendant for a reversal of the judgment is that the plaintiff is bound by the release which he executed in favor of the railroad company. The release recites that, for the sum of $3,500, the plaintiff releases, discharges and receives full satisfaction of all damages for personal injuries growing out of the accident in question.

In 48 A. L. R. 1464, it is said that the general rule is that a release of damages for personal injuries cannot be avoided on the ground of mistake merely because the injuries prove more serious than the releasor, at the time of executing the release, believes them to be, and several Arkansas cases are cited. On page 1467 of the same case-note it is said that the rule is well settled, according to the great weight of authority, that a general release of a claim for personal injuries may, under proper circumstances, be avoided on the ground of mutual mistake as to the nature or circumstances of the injuries, and several Arkansas decisions are cited on page 1471 in favor of the rule. It is true that, where there is no misrepresentation or fraud on the part of the releasee, a releasor cannot subsequently avoid his release on the ground that his injuries were more serious than he had thought them to be, even though his opinion at the time of making the settlement may have been based upon that of a physician employed by the releasee to examine and report on the extent of his injuries. It is equally true, however, that an innocent misrepresentation of the releasor's injury, made by the releasee's physician, may be effective to avoid a release induced thereby. In the first type of cases the parties rely upon opinions and in the latter cases upon statements of existing facts.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hambright,* 87 Ark. 614, 113 S. W. 803, it was held that, if the chief surgeon of a railroad company fraudulently

represents to an injured employee that his injuries are slight and temporary, when they are serious and permanent, and this induces him to sign a release of the railroad company from damages, such release is not binding. It was also held that, if the chief surgeon of a 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.

Again, in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Morgan,* 115 Ark. 529, 171 S. W. 1187, where, in an action for injuries to a railroad employee, there was evidence sufficient to warrant a finding that the physician or surgeon who treated the plaintiff at the hospital represented to him that he was not permanently injured, and that the settlement was induced by this statement, the court held that, even if this statement of the company's physician was made in good faith, the release was not binding if the injuries were not slight and temporary, as represented, but were serious and permanent.

In a later case, *F. Kiech Manufacturing Co.* v. *James,* 164 Ark. 137, 261 S. W. 24, it was held that, where a plaintiff, injured in the defendant's employment, signed a release, relying upon a mistaken opinion of the defendant's doctor that his injury was not permanent, he was not bound thereby, notwithstanding the release recites that he acted on his own judgment, and that no representations were made on which he relied.

In *St. Louis-San Francisco Ry. Co.* v. *Cox,* 171 Ark. 103, 283 S. W. 31, it was held that, 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.

In *Sun Oil Co.* v. *Hedge,* 173 Ark. 729, 293 S. W. 9, it was said that this court has frequently held that a release executed by an injured party, relying upon the mistaken opinion of the physician of the party responsible for the injury, that it was slight and temporary, and not permanent, is not binding upon the party making it.

Under the evidence in the case before us the jury was fully warranted in finding that the settlement was made under a mutual mistake of fact as to the nature and extent of the plaintiff's injuries. In fact, the undisputed evidence shows that the injuries to the plaintiff turned out to be permanent, when, at the time of the settlement, both parties thought they were only temporary. The physician of the defendant, who set the leg of the plaintiff and had him under his charge for about thirty days after the accident, told the plaintiff that the bones had been placed in good alignment and that they were united. It turned out that there had been no union of the bones, and that, as soon as the splint was removed, which was done on the next day after the settlement was made, the bones overlapped, and that, after successive operations by eminent surgeons, no union of the bones could be had. In the opinion of the physician, non-union was caused because of the bad condition of the blood of the patient resulting from syphilis, which he had contracted during the World War. According to the evidence for the defendant, its physician expressly asked the plaintiff, after the accident, if he had ever had syphilis, and the plaintiff replied that he had not. The plaintiff denied that the physician asked him this question, and said that he would have told him the facts if such question had been asked him. The jury found this issue in favor of the plaintiff, and the case stands as if no such question had been asked. It follows then that the undisputed proof shows that the settlement was made under a mutual mistake of the parties as to whether the injuries were temporary or permanent.

It is earnestly insisted, however, by counsel for the defendant that the release must stand because the plaintiff did not tender the consideration received by him before he instituted the present action. It may be conceded that this is the general rule laid down by the text-writers, but we are of the opinion that this court has adopted the contrary rule. The text-writers recognize that there is much confusion and doubt in the adjudicated cases bearing on the question. It is conceded that there need not be a return of the consideration where the settlement was induced by fraud, or when it was made at a time when the releasor was suffering great pain, or when he was under the influence of opiates; but it is contended that, where it was made and intended to be made by the parties, a return of the consideration should be made before bringing suit, even though the settlement was the result of a mutual mistake of the parties or of a mistake on the part of the releasor coupled with fraud on the part of the releasee.

In the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hambright,* 87 Ark. 614, 113 S. W. 803, it was argued that the court erred in entertaining the suit without the plaintiff having made a tender of the amount received in the settlement. The court held that tender was not necessary. It is now claimed that the court based its holding in this respect on the ground that the release was induced by fraud, because the plaintiff only thought he was making a settlement for doctor's bills, expenses and wages, and did not know that the element of compensation for his injuries entered into the settlement. It is true that this seems to be the reasoning of the court, but it will be remembered that the court also submitted to the jury the question whether the settlement was made under a mistake of fact, that both parties believed the injuries to be slight and temporary, when, in fact, they were serious and permanent, and that the plaintiff was thereby misled into signing the release. The court held that a tender of the consideration of the

release before suing was not necessary, and this was bound to apply to the question of mistake of fact as well as to the question of fraud in inducing the release.

This will be seen to be the reasoning of the court in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Morgan,* 115 Ark. 529, 171 S. W. 1187. In that case it was contended that the Hambright case could and should have been decided entirely on the question that the release was obtained by fraud, but the majority of the court based their views upon the decision of the law that, even if the settlement was not fraudulent, it constituted a mistake of fact which absolved the parties from the binding force of the contract. The court then quoted the syllabus on this phase of the case, and said that it correctly reflects the substance of the decision.

In the case of *St. Louis-San Francisco Ry. Co.* v. *Cox,* 171 Ark. 103, 283 S. W. 31, it was expressly held that, where a passenger was induced to sign a release of liability for personal injuries by a false representation, he is not bound, in this State, to return the sum had before suing to recover the damages sustained, though the injury was received and the release executed in another State, in which he would have been bound to make such return before suing, if his suit had been brought in that State. In that case the injury was received in the State of Missouri, and the settlement was made there. According to the evidence for the plaintiff, the release of liability was secured from her 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; and the court held that, under such a state of facts, the release was not binding, and no return of the consideration was necessary. Attention was called in the opinion to the Hambright case, and it was construed as a case holding that it is not a condition precedent to a maintenance of the action that the consideration for the release be tendered to the defendant before the action is instituted. In the Cox case the

court expressly said that, under our decisions, as reviewed in the opinion, a failure to return or make tender of the consideration for the release relates only to the remedy, and is not a matter of substance pertaining to the right of the action itself. Hence it was held that it was not necessary to return the consideration for the execution of the release as a condition precedent to the maintenance of the action. The court said that, in this jurisdiction, the failure of tender is a matter that does not reach to the basis of the right of the action itself, but is connected merely with the remedy.

There can be no difference in principle whether the release was the result of a mutual mistake of the parties or whether it was the result of a mistake on the part of the releasor coupled with fraudulent representations on the part of the releasee that the injuries were temporary, when in fact they were permanent. In each case the releasor signed the release because he relied upon the representations of the physician of the releasee, who told him that his injuries were temporary, when in fact they were permanent. The gist of the matter is that he signed the release believing that his injuries were temporary, when in fact they were permanent, and that he was induced to do this by the representations of the physician of the releasee stating matters as an existing fact, and not merely as his opinion. No good reason appears to us why there should be any distinction as to the restoration of the consideration in the two classes of cases. The decision in the Cox case is our latest enunciation on the subject, and, from the opinion, appears to have been made after a deliberate review of our former decisions by a judge who has been on the bench during the whole period of time when the subject has come up for consideration, and there does not appear to have been any dissenting voice from the decision. Therefore the decision in the Cox case will be taken as the rule governing cases of this sort in this State.

Again, it is insisted that there was a ratification of the settlement by the plaintiff because he collected the draft given him by the railroad company in settlement after an X-ray picture had been made and he had ascertained that there had been no union of the bones, and that his injuries were probably permanent. If we are correct in holding that the plaintiff was not required to return the consideration, there would seem to be no useful purpose to be served by him in refraining from collecting the draft. If he was entitled to receive the consideration, he might expend it for any necessary purpose and use it as a credit on his ultimate settlement with the railroad company. This was what the plaintiff said that he did in the present case. According to his testimony, which is not disputed, he expended the full amount of the release and in addition $800 in a vain attempt to secure a union of the bones in his injured leg by operations performed by eminent specialists. Hence we hold this assignment of error was not well taken.

On the subject of the negligence of the defendant but little need be said. In addition to the statutory presumption of negligence arising from the injury having been caused by the operation of one of the defendant's trains, it may be said that the great weight of the affirmative evidence shows that the injuries were caused by the negligence of the defendant. There was an implied invitation to cross the track resulting from the action of the flagman in failing to raise his stop signal. *Chicago, Rock Island & Pacific Ry. Co.* v. *Hamilton,* 92 Ark. 400, 123 S. W. 379; *Bush* v. *Brewer,* 136 Ark. 246, 206 S. W. 322; and *Mo. Pac. Rd. Co.* v. *Havens,* 164 Ark. 108, 261 S. W. 31.

It is next insisted that the court erred in failing to give an instruction requested by the defendant on contributory negligence. We do not think the court erred in refusing to give the instruction. The Legislature of 1919 passed an act providing, in substance, that in all

suits against railroads for personal injury or death caused by the running of trains in this State, contributory negligence shall not prevent a recovery where the negligence of the person so injured or killed is of a less degree than the negligence of the employees of the railroad causing the damage complained of; provided, when such contributory negligence is shown on the part of the person injured or killed, the amount of recovery shall be diminished in proportion to such contributory negligence. Crawford & Moses' Digest, § 8575. The instructions given by the court on the question of contributory negligence or comparative negligence were in accord with the construction of the statute by this court in *Missouri Pacific Rd. Co.* v. *Robertson,* 169 Ark. 957, 278 S. W. 357.

Finally, it is insisted that the judgment should be reversed because the verdict is excessive. We do not agree with counsel in this contention. There was a verdict of $18,500. The plaintiff was forty-four years of age at the time of the accident which caused him to have a fractured thigh bone. He was first carried to a hospital for about thirty days, and during this time suffered great pain. When the splint was removed from his leg it was found that the bones had not united, and he was compelled to undergo several operations in a vain endeavor to secure a union of the bones of his leg. This he was unable to do, and his injury appears to be permanent. He lay in a hospital for many months while undergoing these operations, and suffered intense pain. He was a fruit and melon packer, and in that capacity earned $50 a week. He is not able to do that work any more, because it necessitates his standing on his feet. He has expended more than $4,300 in hospital bills and expenses. The great weight of the evidence tends to establish that the defendant was negligent and that the plaintiff was not guilty of contributory negligence.

Under these circumstances we do not think that it can be said that the verdict of the jury was the result

of passion or prejudice, and so excessive. We are asked to make a comparison with other cases, and have examined many cases with a view of determining whether or not it is excessive, but no useful purpose could be served by reviewing the cases in this opinion.

Especial reliance is placed on the case of *Aluminum Company of North America* v. *Ramsey,* 89 Ark. 522, 117 S. W. 568, where the plaintiff suffered an injury to one of his legs, resulting in amputation and a verdict for $20,000, which was reduced by the court to $12,000. It is true that in that case the injured person was only twenty-two years of age, while in the present case the plaintiff is forty-four years old. The earning capacity of Ramsey was $2.40 per day, while Elvins was capable of earning $50 per week as a fruit-packer. Ramsey's medical bill and hospital fees only amounted to $386.22. Elvins has already spent more than $4,300, and has suffered intense pain throughout a period of many months.

In *Boyle-Farrell Land Co.* v. *Haynes,* 161 Ark. 183, 256 S. W. 43, a laborer 35 years old, earning $2.25 a day, sustained permanent injuries by his leg being shortened and its use almost totally impaired, and in addition will continue to suffer pain and be disfigured for life, and a verdict for $18,500 was held not to be excessive.

In *Zumwalt* v. *Chicago & A. R. Rd. Co.* (Mo.), 266 S. W. 717, the Supreme Court of Missouri upheld a verdict for $18,500 damages for a compound fracture of the leg, which, evidence indicated, might never heal properly.

In *Gulf, C. & S. F. Ry. Co.* v. *Crow* (Tex. Civ. App.), 220 S. W. 237, the Court of Civil Appeals of Texas upheld a verdict for $18,000 to a railroad engineer, where he was thirty-two years of age, the injury consisting of an oblique fracture of the thigh bone resulting in a shortening of the leg.

In *Hurst* v. *Chicago, B. & Q. R. Co.,* 280 Mo. 566, 219 S. W. 566, 10 A. L. R. 174, the Supreme Court of Missouri held not to be excessive a verdict of $15,000 to a railroad

conductor for the loss of his leg below the knee by an accident which caused him great pain and suffering, and where his earning capacity was reduced from $150 to $20 per month.

In this connection it may be also stated that the jury may consider to some extent that money today has much less purchasing power than it had twenty or even fifteen years ago. This is a matter of common knowledge to all, of which courts and juries may take judicial notice. On this point see notes to 18 A. L. R. 564, 10 A. L. R. 179, and 3 A. L. R. 610.

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

SMITH, J., dissents.

ANDERSON v. SOUTHERN REALTY COMPANY.

Opinion delivered March 26, 1928.

1. FIXTURES—INTENTION OF PARTIES.—Where an intention is shown on the part of the parties interested to make articles of personalty permanent parts of the building in which they are installed, and such articles serve a distinct and permanent purpose, intimately and necessarily related to the use and purpose for which the building is constructed, they become a part of the realty, and the title thereto passes by a sale of the building.
2. FIXTURES—KITCHEN CABINETS, REFRIGERATORS, AND GAS STOVES.—Kitchen cabinets, refrigerators, and gas stoves in an apartment, placed therein after execution of a mortgage under which the building was sold, *held* not fixtures, in the absence of evidence showing an intention that such unattached articles would constitute fixtures therein.
3. FIXTURES—GAS STOVE.—The fact that a gas cooking stove in an apartment building was fastened to the gas supply pipe by a screw which could be detached by any one by merely unscrewing it, without damaging the building, *held* not to operate to make a fixture of such stove, contrary to the intention of the parties.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; reversed in part.

Buzbee, Pugh & Harrison, for appellant.

John L. Carter and *Utley & Hammock,* for appellee.

SMITH, J. This suit was brought to restrain appellee from removing from an apartment building certain kitchen cabinets, kitchen stoves and refrigerators, the title to which was claimed by appellant apartment company, which company had bought certain lots in the city of Little Rock on which there was an apartment building, consisting of twenty apartments, at a commissioner's sale. In each apartment there was a kitchen cabinet, a refrigerator, and a gas kitchen cooking stove, which articles were alleged to be fixtures which were acquired under the commissioner's deed. The sale by the commissioner was under a decree foreclosing a mortgage on the lots, but the alleged fixtures here involved were bought and placed in the building some months after the execution of the mortgage.

The defendant filed an answer, in which it admitted that plaintiff had bought the apartment building, in which the articles alleged to be fixtures were located, at a commissioner's sale, and that it was the owner of the record legal title to the lots on which the apartment building stood, and that it had, as alleged in the complaint, executed a quitclaim deed to these lots to the plaintiff. It appears, however, that the quitclaim deed was executed after a conference for the purpose only of clearing up the title conveyed by the commissioner under the decree foreclosing the mortgage and to clear up a controversy which had arisen as to the payment of a premium on a fire insurance policy on the building, and that no question was made at the time of the execution of the quitclaim deed about conveying the stoves, etc., as fixtures, and that the grantor in this quitclaim deed had no such intention. Defendant asserted ownership of the alleged fixtures, in its answer, for the reason that they were no part of the apartment building, and were not embraced or included in the quitclaim deed.

The architect who erected the apartment building, and who owned an interest therein at the time of its erection, testified that the contract for the erection of the building did not include the stoves, etc., and that, when a building contract included such articles as fixtures, they were shown on the plans of the building, and the alleged fixtures here involved were not included in the plans.

V. N. Carter, who at one time owned the building, and who installed the stoves, etc., testified that it was not a fact that all apartment buildings have the equipment here involved, and that he rented one apartment in this building to a tenant who furnished his own stove, and that he himself occupied one of the apartments for a time, during which he also furnished his own stove.

By stipulation signed by the parties the value of the equipment here in litigation was agreed upon.

The court found for the plaintiff for the stoves and for the defendant for all the other property, and the plaintiff appealed, and the defendant has perfected a cross-appeal.

It appears that the stoves were fastened to the gas-supply pipes by a screw, which could be detached by any one by merely unscrewing it, and that doing this would inflict no damage whatever to the building, and would, in fact, leave no evidence that it had been done. The other articles were not in any manner attached to the floor or walls of the building. There appears therefore no distinction in regard to the ownership of the equipment, except that the stoves were screwed to the gas-supply pipes and that the other articles were not in any manner attached to the building.

We are of the opinion that this circumstance is not sufficient to distinguish the ownership of the stoves from the other articles. In other words, the plaintiff acquired all the property here involved by the commissioner's deed or none of it, and the title to all of it depends upon

the intention of the parties at the time of its installation in the building.

The law appears to be that, where an intention is shown on the part of the parties interested to make articles of personalty permanent parts of the building in which they are installed, and where those articles serve a distinct and particular purpose, intimately and necessarily related to the use and purpose for which the building was constructed, they become a part of the realty, and the title thereto passes by a sale of the building. The law on the subject was discussed and the authorities reviewed in the recent case of *Stone* v. *Suckle,* 145 Ark. 387, 224 S. W. 735. No useful purpose would be served by again reviewing these authorities.

The case of *Hanson* v. *Vose,* 144 Minn. 264, 175 Minn. 113, 7 A. L. R. 1573, contains an annotator's note on the specific subject of "Gas Range as Fixture," and it is there said that: "The rule adopted in a majority of the decisions is that a gas range, when installed in a dwelling and connected with a supply-pipe, does not thereby become a fixture, although it may become such by agreement between the parties." The annotator's note reviews a number of cases on the subject. A more extended note on the same subject is found appended to the case of *Gauche Realty Co.* v. *Janssen,* 158 La. 379, 104 So. 132, 39 A. L. R. 1042.

The testimony shows that the equipment had not been installed when the mortgage was executed through and under the foreclosure of which the plaintiff claims, and that the quitclaim deed was executed for the purpose only of clearing the title acquired at that sale and of adjusting the matter of the insurance premium.

The court below evidently found the fact to be that there was no intention that the unattached articles should become fixtures, and this finding does not appear to be contrary to the preponderance of the evidence, but that the stoves had become fixtures because of their attachment to the gas-supply pipes. As we have said, this

attachment would not operate to make a fixture of the stoves if such was not the intention of the parties. The law is so declared in the annotator's notes in the cases cited.

It follows therefore that the decree of the court below will be affirmed on the direct appeal and reversed on the cross-appeal, and the bill seeking to enjoin the appellee from removing the equipment will be dismissed as being without equity.

BRIDGES v. STATE.

Opinion delivered March 26, 1928.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to sustain a conviction of murder in the second degree.
2. CRIMINAL LAW—OPENING STATEMENT OF PROSECUTING ATTORNEY.—In a prosecution for murder, the opening statement of the prosecuting attorney that defendant's father told deceased that defendant would kill him, not subsequently supported by testimony, was not prejudicial where no ruling was asked concerning the statement and defendant was convicted of murder in the second degree only.
3. HOMICIDE—EVIDENCE OF CONVICTION OF DECEASED FOR ASSAULT.—In a prosecution for murder, in which defendant claimed that he acted in self-defense, it was not error to exclude the certified copy of the record offered to prove deceased's conviction for assault by shooting, as it involved a specific act of violence and not a mere general reputation of deceased.
4. HOMICIDE—REPUTATION OF DECEASED.—Where the testimony leaves it in doubt as to who was the aggressor, defendant may show deceased's reputation for peace and quietude, but he may not prove the evidence of specific acts of bad conduct on deceased's part.
5. CRIMINAL LAW—ADMISSIBILITY OF SPECIFIC ACTS OF BAD CONDUCT.—Where, in the murder prosecution, the witness failed to testify as to deceased's general reputation as to peace and quietude, but was called to prove only a specific act which was incompetent, cross-examination by the prosecuting attorney did not render admissible such rejected testimony of the witness, since there was no occasion to test the credibility of the witness.

Appeal from Miller Circuit Court; *James H. McColbum,* Judge; affirmed.

Will Steel, Dexter Bush and *John N. Cook,* for appellant.

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

SMITH, J. Appellant, Kenneth Bridges, was tried under an indictment charging him with the crime of murder in the first degree, alleged to have been committed by shooting and killing one Hiram Kirby. He was found guilty of murder in the second degree, and given a sentence of twenty-one years in the penitentiary.

L. R. Bridges, appellant's father, had been engaged in the mercantile business, and deceased owed him a small account. In an effort to collect this account L. R. Bridges went to the home of Kirby, who became incensed at Bridges, who is an old man and a cripple, and struck Bridges a blow with a rock, which rendered Bridges insensible. Robert Vogel accompanied Bridges to the Kirby home, to which place they drove in an automobile. After striking Bridges, Kirby went hurriedly on towards his home, and Vogel, thinking Kirby had gone after a gun, drove rapidly away without waiting to turn his car in the direction they wished to go.

Appellant was advised, about eleven o'clock that night, of what had happened, by Paul Hastings. Prentice Smith spent the night with appellant, and the next morning appellant, after furnishing Smith a shotgun, went to his father's home, where he procured a rifle. According to the testimony in appellant's behalf, he and Smith, who is a young man about nineteen years old, planned to go hunting, and they had their guns for this purpose, but appellant decided he would first go to Kirby's home and find out Kirby's version of the trouble with appellant's father. The two walked to the Kirby home, and were there told that Kirby had gone to the home of a Mr. Pate, who lived a mile and a half away. They started to Pate's home, and had gone about half a mile, when they met Kirby. No one saw the shooting or

heard what immediately preceded the killing, except appellant and Smith, and, according to their version, appellant asked Kirby why he had struck appellant's father. Kirby became angered, and dropped a sack of potatoes which he had in his hand, and ran his hand into the side of his overalls as if he intended to draw a weapon, and started towards appellant. Smith immediately fired both barrels of his shotgun, but, as Kirby did not fall, and kept advancing, appellant fired three shots with his rifle. Several persons heard the shooting, and one witness placed the number of shots as high as ten. When Kirby was found he had no weapons of any kind on his person.

The testimony is therefore amply sufficient to sustain the verdict returned by the jury.

In the opening statement the prosecuting attorney stated that "old man Bridges (appellant's father) told Hiram Kirby that his son Kenneth would kill him." An objection to this statement was overruled, and that action is assigned as error. The testimony did not show that this statement was made, but the attention of the court was not called to that fact, and no additional ruling was made or called for concerning the statement of the prosecuting attorney. Evidently the purpose of this statement was to show that there had been deliberation and premeditation, and that the homicide had thereby been raised to the grade of murder in the first degree. The statement is not one which would have been incompetent under any and all circumstances, and appellant was not convicted of murder in the first degree. It may be said here, as was said in the case of *Ragsdale* v. *State,* 132 Ark. 210, 200 S. W. 802, that: "It is true the statement contained matter not subsequently proved, but there is nothing to show that it was made in bad faith. The matters set forth in the statement were not foreign to the issue, and might have been offered in proof. There was no manifest abuse in the exercise of the court's discretion in permitting the statement."

Appellant offered testimony to the effect that deceased was a turbulent and dangerous man, and on the cross-examination of the witnesses who gave this testimony the prosecuting attorney asked if these witnesses had ever known deceased to shoot or kill any one, and they answered that they had not. Appellant then offered to prove that deceased had been charged and convicted on April 6, 1927, in the municipal court of Texarkana, of an assault by shooting at a woman, and a certified copy of the record of that court was offered in evidence. The court excluded this testimony, and that ruling is assigned as error.

There was no error in this ruling, as the reputation of the deceased was a collateral matter, which could be shown only as a circumstance bearing on the question as to who was the probable aggressor in the fatal encounter, for it is as much a violation of the law to kill a bad man as it is to kill a good one. But, where the testimony leaves in doubt the question as to who was the aggressor, defendant may show the reputation of the deceased for peace and quietude as a circumstance having some probative value as to who was probably the aggressor when the killing involved at the trial occurred; but this proof must be made by showing the general reputation of the deceased in this respect, and not by proof of specific acts of bad conduct. Underhill on Criminal Evidence (3 ed.), § 504; *Jett* v. *State,* 151 Ark. 439, 236 S. W. 621; *Pope* v. *State,* 172 Ark. 61, 287 S. W. 747.

It is argued that the cross-examination by the prosecuting attorney of the witnesses made the rejected testimony both admissible and necessary, as the character witnesses knew only the deceased's general reputation without knowing anything about specific acts of violence. We do not think so. The witness who offered in evidence the record of conviction of deceased in the municipal court did not testify as to the general reputation of the deceased, but was called to prove only a specific act of violence, and such testimony is not competent.

In the case of *Woodard* v. *State,* 143 Ark. 404, 226 S. W. 124, it was said:

"The rule applicable to the cross-examination of witnesses who testify as to reputation is stated in 3 Enc. of Ev., p. 49, as follows: 'It is generally held that such a witness may be asked on cross-examination as to an existence of particular facts, vices, or associations of the other persons inconsistent with the reputation attributed to him by the witness, not for the purpose of establishing the truth of such acts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony.'"

But, as we have said, this witness who was asked about the conviction in the municipal court did not offer to testify as to deceased's general reputation, and there was therefore no occasion to cross-examine him as to specific acts for the purpose of testing his credibility, and the offered testimony was therefore incompetent, and no error was committed in excluding it.

The court gave what might be called the usual charge in homicide cases, consisting of eighteen separate instructions, to all of which appellant objected, except instructions numbered 7 and 14. Instruction numbered 7 told the jury that appellant, to be justified, must have fired the fatal shot through fear of impending danger, and not in a spirit of revenge, and instruction numbered 14 defined a reasonable doubt as that term had been employed in other instructions.

Appellant requested twenty-six instructions, of which ten were given as requested and four were given as modified. To discuss the instructions given to which objection was made and those refused would require a restatement of the law of homicide in this State, which we think would serve no useful purpose, as all the questions discussed in the briefs have long been settled by numerous decisions of this court.

It must suffice to say that we have carefully reviewed these instructions, both those given and those refused, and we find that the court submitted appellant's theory

of self-defense under instructions which would have resulted in his acquittal had his version of the killing been accepted by the jury as true.

Upon a consideration of the whole case we find no error in the record, and the judgment will therefore be affirmed.

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

Opinion delivered March 26, 1928.

1. RAILROADS—CONSTRUCTION OF SHEDS ALONG TRACKS.—Under Acts 1921, c. 124, §§ 3, 4, conferring jurisdiction on the Railroad Commission in all matters relating to the regulation and operation of common carriers and requiring public service corporations to provide adequate and suitable facilities for operation of business and convenience and safety of the public, the Railroad Commission had jurisdiction to require railroads to construct sheds along their tracks for convenience of the traveling public in going to and from trains.

2. RAILROADS—CONSTRUCTION OF SHEDS.—An order of the Railroad Commission requiring railroads to construct sheds over their platforms for the use of passengers discharged from trains approximately 150 yards from the depot, *held* not arbitrary and unreasonable.

3. RAILROADS—RIGHT TO REQUIRE CONSTRUCTION OF SHEDS.—The fact that two railroads at their junction had established a union depot for the protection of passengers does not deprive the Railroad Commission of authority to order construction of sheds for the use of passengers in going to and from the trains where the trains stopped approximately 150 yards from the depot.

4. CONSTITUTIONAL LAW—DUE PROCESS.—An order of the Railroad Commission requiring two railroads to construct sheds along their tracks for the use of passengers in going to and from the trains, *held* not a taking of property without due process in violation of the Fourteenth Amendment.

5. COMMERCE—BURDEN OF INTERSTATE COMMERCE.—An order of the Railroad Commission requiring railroads to construct sheds along their tracks for the use of passengers in going to and from trains, *held* not void as constituting a burden on interstate commerce, where the order did not fix the cost of the sheds, but left the matter open for determination of expense by the railroads on approval of the Railroad Commission.

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

Thomas B. Pryor, Harvey G. Combs, E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

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

HUMPHREYS, J. This is an appeal from an order of the circuit court of Pulaski County, Second Division, affirming an order of the Railroad Commission requiring appellants to erect umbrella sheds along the tracks of each of the railroads at Hoxie, where they intersect, from the depot jointly used by them to the place where the trains stop to discharge and receive passengers. Certain passenger trains on each road stop before crossing the track of the other, about 410 feet from the depot, for passengers to get on and off the train. The necessity for the Frisco trains to stop north of the Missouri Pacific tracks and for the Missouri Pacific trains to stop east of the Frisco tracks is to enable them to make one stop to use the water crane for taking water and to load and unload passengers at the same time. Otherwise certain of the trains would have to make two stops, one to take water and the other at the depot to receive and discharge passengers. The order of the circuit court appealed from is in part as follows:

"Certain citizens of the town of Hoxie filed a petition with the Arkansas Railroad Commission to require the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company to construct sheds along the tracks of each of the railroads for the convenience of the traveling public in going to and from trains. Testimony was heard as to the necessity of such sheds. After a hearing, the Arkansas Railroad Commission entered an order requiring each of the said railroads to construct sheds aggregating in length one thousand feet, the plans for the sheds, however, to be subsequently filed with the

Railroad Commission for its approval. The railroads have appealed from this decision.

"The order of the Railroad Commission, being a separate branch of the State Government, will not be set aside or disturbed unless it appears unreasonable or arbitrary.

"The two railroads intersect at Hoxie, and passengers leave the trains of each railroad before the train crosses the track of the other, or reaches the station. Consequently passengers going to and from the station to the trains are of necessity required to walk quite a distance. Under the circumstances of this peculiar case, in the opinion of this court, the order of the Arkansas Railroad Commission does not appear unreasonable or arbitrary. It is claimed that the construction of sheds at Hoxie would require an unreasonable outlay by the railroads, considering the results to be obtained. The matter of expense is to be determined by the railroad companies on the approval of the Railroad Commission. Considering the whole case, this court is of the opinion that the order of the Arkansas Railroad Commission is not arbitrary or unreasonable, and will therefore be affirmed."

The order of the Railroad Commission and the order of the circuit court affirming said order are assailed upon the grounds: first, that authority was not conferred upon the Railroad Commission by statute to order railroads to construct umbrella sheds over their platforms, or, to put it differently, that the Railroad Commission was without jurisdiction to order appellants to build sheds over their platforms from the depot to where they stopped certain of their trains to receive and discharge passengers; second, that the order was arbitrary and unreasonable, there being no necessity shown for the construction of the sheds; third, that the facilities already furnished are adequate; fourth, that the order of the Commission will deprive the railroads of their property without due process of law and in violation of § 1, article 14, of the Federal Constitution; fifth, that the order for the

construction of these sheds is a burden on interstate commerce, and void.

(1) Section 3 of act 124 of the Acts of the General Assembly of 1921 confers jurisdiction upon the Railroad Commission in all matters relating to the regulation and operation of common carriers and railroads; and one of the requirements in § 4 of the same act is that public service corporations shall provide and maintain adequate and suitable facilities for the operation of the business, and for the reasonable convenience and safety of the public. The sections referred to are broad enough to and do confer jurisdiction upon the Railroad Commission to require public carriers to provide such protection and convenience for its passengers.

(2) The contention that no reasonable necessity was shown by the testimony for the construction of the sheds is without merit. The distance between the depot and places where certain of the passenger trains stop to receive and discharge travelers is one hundred and fifty yards or more, and too great a distance to expect passengers to go during inclement weather. Their health and comfort are involved, and must necessarily be considered in arriving at the reasonableness or unreasonableness of the order. The testimony reflects that Hoxie is a junction of the two systems of railways, where many passengers change trains and where there are many incoming and outgoing passengers. Hoxie has about 1,500 inhabitants, and the large number of passengers debarking and embarking should have protection from rain and snow.

(3) It is true that the testimony reflects that a union depot has been built at this point, modern and adequate for the protection of passengers when once in it. The argument that adequate facilities have been furnished because such a depot has been constructed does not meet the situation at Hoxie. It would, if the trains all stopped beside or near the depot where the passengers could reach it without exposing themselves to inclement weather. The depot, however, can furnish no protection

to passengers who are compelled to go a distance of one hundred and fifty yards before they can board a train, or go that distance after debarking to reach the depot. The protection required against the elements is protection afforded at the place of getting on and off trains. We think it the clear and reasonable duty of appellants to stop their trains at the depot, or else build umbrella sheds for the protection of the passengers, who are compelled to come and go one hundred and fifty yards in order to board the trains or reach the depot.

(4) We do not understand that the requirement that public carriers build depots of ample facilities for the protection of its passengers at the place where they are received and discharged in any way conflicts with the provision of the Constitution inhibiting the taking of property without due process of law. We think the peculiar situation at Hoxie makes it just as necessary to construct the umbrella sheds as it does to construct depots. It is one of the necessary facilities to protect the passengers. The requirement of the construction of necessary facilities in the operation of the business of a public carrier is in no sense taking its property without due process of law.

(5) The contention that the order to build the sheds will unnecessarily burden interstate commerce is without foundation in fact. The argument is made that the cost of building the sheds will amount to $16 per lineal foot, or a total of $15,000, without benefiting any one. The order does not fix the cost of the umbrella sheds to be built. That matter is left open. The expense is to be determined by appellants, on approval of the Railroad Commission. Certainly the Railroad Commission will not require that an unreasonable amount be expended in the construction of the sheds. We cannot agree that there is no necessity for the sheds. The record reflects the necessity for them in order to protect passengers from the elements, because appellants stop certain of their passenger trains an unreasonable distance from the depot for the reception and discharge of passengers. The size of the town,

together with the fact that Hoxie is the junction of the two systems, indicates that the traffic is sufficient to justify the construction of the sheds for the protection of the passengers against the elements.

No error appearing, the judgment is affirmed.

BARNETT v. BANK OF MALVERN.

Opinion delivered March 26, 1928.

1. APPEAL AND ERROR—REVIEW OF ORDER DIRECTING VERDICT.—On review of the action of the circuit court in directing a verdict in defendant's favor, the testimony tending to support plaintiff's cause of action will be given its highest probative value.

2. MORTGAGES—PENALTY FOR FAILURE TO SATISFY MORTGAGE.—In a suit to recover the penalty under Crawford & Moses' Dig., § 7396, for a failure to enter satisfaction of a mortgage as provided by § 7395, it is no defense that the plaintiff had the intent to sue for the penalty at the time he made demand for satisfaction of the mortgage.

3. MORTGAGES—RIGHT TO DEMAND ENTRY OF SATISFACTION.—The purchaser of mortgaged property requesting that satisfaction of the mortgage be entered as provided by Crawford & Moses' Dig., § 7395, is an interested party and entitled to demand that the mortgagee enter satisfaction.

4. MORTGAGES—SETTLEMENT OF DEBT.—Where the assignee of a mortgagee accepted the sum tendered as full payment of the balance due on the mortgage, when the duty to satisfy the mortgage arose, the fact that the assignee voluntarily elected to accept in full payment a smaller sum than the amount actually due would be no defense in an action for damages for failure to enter satisfaction of the mortgage.

5. MORTGAGES—DEMAND FOR ENTRY OF SATISFACTION.—A demand to satisfy a mortgage as provided by Crawford & Moses' Dig., § 7395, either oral or written, is sufficient where it calls attention of the mortgagee to the fact that the indebtedness secured by the mortgage has been paid and requests that satisfaction of the mortgage be made.

6. MORTGAGES—ACKNOWLEDGMENT OF SATISFACTION.—In a suit under Crawford & Moses' Dig., § 7396, for failure to satisfy a mortgage as provided by § 7395, the fact that the attorney for the mortgagee indorsed upon a decree of the chancery court payment in

full of the indebtedness secured by the mortgage, *held* not to comply with the requirements of § 7395.

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

Oscar Barnett, for appellant.

Glover, Glover & Glover, for appellee.

SMITH, J. This appeal comes from a judgment in appellee's favor which was rendered upon a verdict which the court directed the jury to return. In testing the correctness of the action of the court in directing a verdict in appellee's favor we must give to the testimony tending to support appellant's cause of action its highest probative value, and the facts may therefore be stated as follows.

The suit was brought to recover damages under §§ 7395 and 7396, C. & M. Digest. These statutes read as follows:

"Section 7395. If any mortgagee, his executor, administrator or assignee shall receive full satisfaction for the amount due on any mortgage, he shall, at the request of the person making satisfaction, acknowledge satisfaction thereof on the margin of the record in which such mortgage is recorded.

"Section 7396. If any person thus receiving satisfaction do not, within sixty days after being requested, acknowledge satisfaction as aforesaid, he shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money, to be recovered by civil action in any court of competent jurisdiction."

Appellant alleged and offered testimony tending to show that, immediately after the affirmance of the decree of the Hot Spring Chancery Court in the case of *Barnett* v. *Bank of Malvern* (an unreported case), he applied to the cashier of the bank to pay the indebtedness secured by the mortgage, which we held in that case to be an outstanding lien on the land, which appellant had purchased subject to the bank's mortgage. The decree there appealed from had directed the foreclosure of this mort-

gage. Appellant testified that the cashier demanded a sum $11 in excess of the amount due the bank and secured by the mortgage, and that he then applied to the clerk of the chancery court for a statement of the correct amount due under the decree, including the costs and the interest, and that the clerk advised him that the amount due the bank was $519.40, which sum he tendered and paid to the attorney of record for the bank, after giving separate checks for the costs of the suit. The bank's attorney thereupon entered upon the margin of the records of the chancery court the following indorsement: "This judgment is satisfied in full, this 9th day of March, 1927. D. D. Glover, attorney for plaintiff."

Thereafter appellant requested the cashier of the bank to enter satisfaction of the mortgage upon the margin of the record thereof, and, after waiting sixty days for this to be done, his request not having been complied with, he brought this suit to recover damages, under the sections of the statute quoted above.

Appellant testified that he negotiated a sale of the property described in the mortgage, which he was unable to consummate because of the failure of the bank to satisfy the mortgage of record. On the day after the institution of this suit the cashier of the bank properly satisfied the mortgage record.

Appellee insists that the judgment of the court below should be affirmed for the following reasons:

(1) That the suit was not brought in good faith, as the testimony shows that appellant called a witness to whom he privately gave directions to make a note of the date upon which the request to satisfy the mortgage was made. This witness testified that he was present when appellant made this request of the cashier of the bank, and that the witness made a note of the date upon which this demand was made. (2) That the payment made by appellant to the clerk was $2.21 less than the amount actually due the bank. (3) That the notice was insufficient. (4) That the satisfaction of the decree of fore-

closure was a substantial compliance with the statute, inasmuch as the mortgage lien was merged in the lien of the decree.

The testimony does show an apparent intent on appellant's part to sue for the penalty at the time he made the demand for the satisfaction of the mortgage, and that he brought this suit at the earliest date possible. But that fact does not constitute a defense to this suit. It is the duty of the mortgagee, or his assignee, at the request of the person making satisfaction, to acknowledge satisfaction thereof on the margin of the record in which such mortgage is recorded, and, if this is not done, a cause of action arises, because the statute gives it, and it is no defense thereto that the person making the satisfaction was prompted by a mercenary motive. In this connection it may be said that appellant was the proper person to make this request, although he was not the mortgagor, as he had bought the property subject to the mortgage. In the case of *Johns* v. *Rollison,* 152 Ark. 52, 237 S. W. 448, in construing the statute above quoted, it was said: "In other words, our statute penalizes the ones receiving satisfaction for not satisfying the record, upon the request of those making satisfaction. The statute, of course, means interested parties, not volunteers. Appellant was an interested party, and not a volunteer, and the bank was fully advised of that fact and the nature of appellant's interest through the previous litigation involving this mortgage.

Appellee insists that appellant did not pay the sum due the bank and secured by the mortgage. It is, of course, essential that the mortgagee be paid the full amount due under and secured by the mortgage before a cause of action could arise under the statutes quoted. However, if the bank, or its authorized agent, accepted the sum tendered as full payment of the balance due, then the duty to satisfy the mortgage arose, and it would be no defense to say that the tender was insufficient, there being no contention that appellant had deceived the bank

in this respect. In other words, if the bank voluntarily elected to accept in full payment of the mortgage indebtedness a smaller sum than the amount actually due, it could not thereafter be heard to say that the indebtedness had not been paid.

Upon the question of the form of demand which should be made upon the mortgagee, it may be said that the statute does not prescribe how the demand shall be made, as it provides only that satisfaction shall be made "at the request of the person making satisfaction." In the case of *Johns* v. *Rollison, supra,* the request to satisfy was made "through the medium of a letter," and this was treated, without discussion of the subject, as a sufficient demand to comply with the statute. We are therefore of the opinion that a demand to satisfy is sufficient which calls to the attention of the mortgagee the fact that the indebtedness secured by the mortgage has been paid, and requests, in consideration of that payment, that satisfaction of the mortgage be made. The statute does not require a written notice, but makes a "request" sufficient, and this request may be either oral or written.

It is true the attorney for the bank indorsed upon the margin of the decree of the chancery court the payment in full of the indebtedness secured by the mortgage the foreclosure of which was there decreed, and it is true also that this indorsement could have been shown in bar of any action on the part of the bank to foreclose or otherwise proceed under that decree. But that indorsement did not comply with the requirements of the statute quoted. The purpose of the statute was to require that the record showing the mortgage of record should show also its satisfaction, so that one examining the records might be advised that the lien of the mortgage had been satisfied.

At § 354 of the chapter on Mortgages, in 19 R. C. L., 548, it is said: "Although there is some conflict on the question, the weight of authority favors the doctrine that a decree of foreclosure does not merge the lien of the

mortgage until it has been consummated by sale and satisfaction. This is in harmony with settled general rules, because a mortgage lien is extinguished only by payment or release." Among the cases cited in the note to the text quoted is that of *Ford* v. *Harrison,* 69 Ark. 205, 62 S. W. 59, 86 Am. St. Rep. 192, in which case the syllabus reads as follows: "While the general lien of a decree continues in force as to the judgment debtor's land only three years from the date of the decree, unless revived, the lien of a mortgage on land, enforced by decree, does not lapse after three years from the date of the decree."

The indorsement of the satisfaction of the decree of foreclosure would, of course, prevent the bank from proceeding thereunder, but the payment of the indebtedness, without this indorsement, could also be pleaded in bar of any action on the part of the bank to sell the land. But the statute contemplates that the record which shows the existence of the mortgage shall also show its satisfaction, and that this evidence of satisfaction shall be indorsed upon the margin of the mortgage record. The satisfaction of the decree of foreclosure was not a compliance with this statute, as the mortgagor was entitled to have the mortgage record satisfied.

We conclude therefore that the court was in error in directing a verdict in appellee's favor, and the judgment of the court below must therefore be reversed, and it is is so ordered.

WHITNEY v. STATE.

Opinion delivered March 26, 1928.

1. HOMICIDE—VARIANCE AS TO NAME OF PERSON KILLED.—In an appeal from a conviction of voluntary manslaughter, a variance between the indictment and the proof as to the name of the person alleged to have been killed could not be raised on appeal when not called to the trial court's attention.
2. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of voluntary manslaughter.

3. CRIMINAL LAW—DUTY OF COURT TO ADMONISH JURY.—In a murder trial the court's failure to admonish the jury that they could consider evidence as to whether defendant had previously killed another man only as to defendant's credibility *held* not error, where the court had previously so instructed the jury on similar evidence, and no request was made for a second instruction, and defendant had contented himself with a general objection and exception to such question and answer.

4. CRIMINAL LAW—INSTRUCTION AS TO REASONABLE DOUBT.—In a prosecution for murder, refusal of a requested instruction which in effect told the jury that they should not convict defendant unless his guilt had been established to the exclusion of every other reasonable hypothesis of his innocence, was not error where the jury had been instructed on the burden of proof and reasonable doubt.

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

Pratt P. Bacon and *Jones & Jones,* for appellant.

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

HUMPHREYS, J. Appellant was indicted for murder in the first degree in the circuit court of Miller County, for shooting and killing Sam Warren. Upon a trial of the cause he was convicted of voluntary manslaughter, and, as a punishment therefor, was adjudged to serve a term of seven years in the State Penitentiary, from which is this appeal.

The first assignment of error is an alleged variance between the indictment and proof with reference to the person killed. The indictment charged that appellant killed Sam Warren, whereas the proof showed that he killed Son Warren. No question was raised in the trial of the cause as to the identity of the person murdered. All witnesses referred to the person killed as "Son Warren" or "Son Morris." Appellant did not claim in the trial that the person he killed was a different man from the man he was charged with killing. He did not ask any instruction on the issue of variance, nor set out the variance between the indictment and proof in his motion for a new trial. The issue of variance raised for the first time on this appeal was one of fact for the jury,

under the rule announced by this court in the cases of *Bennett* v. *State,* 84 Ark. 97, 104 S. W. 928; *Woods* v. *State,* 123 Ark. 111, 184 S. W. 409, Ann. Cas. 1918A, 348; *Sutton* v. *State,* 67 Ark. 155, 53 S. W. 890. It is too late to raise this question for the first time on appeal. *Clayton* v. *State,* 159 Ark. 592, 252 S. W. 589; *Anderson* v. *State,* 162 Ark. 14, 257 S. W. 365.

The second assignment of error is that the evidence is insufficient to support the verdict and judgment for voluntary manslaughter. According to the testimony of the State, briefly stated, appellant and Melvin Knighton got into a fight in one of the front rooms in Plato Perkins' house, where several negroes had been gambling. They fought back into the kitchen. After they entered the kitchen, and while the fight was in progress, Son Warren, with an open knife in his hand, pushed his way into the room. During the fight appellant received a knife wound on the cheek. Appellant retired from the conflict, going through the back door of the kitchen. After he left, Knighton and Son Warren went out to the car in which they, with appellant and others, had come to the Perkins home. After they had got into the car for the purpose of driving away, appellant returned with a shotgun, approached the car, and asked for Knighton. Knighton had taken refuge behind the car, and, when Son Warren stepped out on the running-board, appellant shot him. Son Warren died in a short time after, from the effect of the wound. The evidence introduced by the State was contradicted, but the jury accepted it as true. It is sufficient to support the verdict and judgment.

The third assignment of error is that the court did not admonish the jury that the testimony of appellant, on cross-examination, to the effect that he had killed another man, could only be considered by them in passing on his credibility as a witness. Immediately before this question was asked and answered in the affirmative, a similar one had been asked and answered, at which time the court did instruct the jury that they should only consider the evidence in passing on appellant's credibility as a wit-

ness, and not as any evidence of his guilt. It was unnecessary for the court to instruct the jury a second time upon the point, even though the question was asked and answered a second time. When asked and answered the second time, the jury necessarily understood for what purpose they might consider it. Besides, appellant did not request that the jury be instructed a second time on the point. He contented himself with a general objection and exception to the question and answer.

The last assignment of error is that the court erred in refusing to give a number of instructions requested by him. It would unduly extend this opinion to set out each instruction and show that it was fully covered by some other instruction or instructions given by the court, which is the case, except as to requested instruction No. 6. Requested instruction No. 6 told the jury, in substance, that they should not convict appellant unless his guilt had been established to the exclusion of every other reasonable hypothesis of his innocence. It is not error to refuse such an instruction, if the jury had been correctly instructed on the burden of proof and reasonable doubt, which was done in the instant case. *Bost* v. *State,* 140 Ark. 254, 215 S. W. 615; *Bartlett* v. *State,* 140 Ark. 553, 216 S. W. 33.

No error appearing, the judgment is affirmed.

ARKANSAS-MISSOURI POWER COMPANY *v.* BROWN.

Opinion delivered March 26, 1928.

1. ELECTRICITY—CONTRACT TO FURNISH ELECTRICITY.—Where a city by ordinance grants a franchise to a public service corporation to furnish electricity to its inhabitants on certain rates, terms and conditions, which are accepted in writing by the company, a contract between the parties is constituted by which their rights are to be determined, the terms and conditions becoming binding on the municipality and the company.
2. ELECTRICITY—DUTY TO FURNISH ELECTRICITY.—A public service company, which has accepted a franchise requiring it to fur-

nish electricity to private consumers in the city at a certain rate, cannot justify an absolute refusal to furnish service to a building, on the ground that furnishing the service would be too expensive.

3. APPEAL AND ERROR—RIGHT TO DISMISSAL OF CAUSE.—Though, since a judgment was rendered for damages and injunction against a public service company for refusal to furnish electricity to a building, the territory embracing the building has been detached and excluded from the city limits, an appeal will not on that account be dismissed, the right to affirmance of the judgment for damages not being affected thereby.

Appeal from Randolph Chancery Court; *A. S. Irby,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellees brought this suit to compel appellant to furnish lights, and for damages for failure to do so, under its charter, to his filling station located within the city limits of Pocahontas, but about a mile south of Black River, the improvements in the city being all virtually north of the river.

It was alleged that the appellant company was the assignee of the franchise granted to W. H. Skinner under the ordinance providing therefor, and by its terms was bound to provide consumers in the incorporated town of Pocahontas electrical energy at the price designated, not exceeding 15c per kilowatt hour. That he had repeatedly requested the company to furnish his filling station with electricity for lighting purposes, in accordance with the franchise ordinance, but that the company had neglected, failed and refused to comply with his demand and requests, to his damage in the sum of $250. It was further alleged that appellant company had refused to furnish electricity for lights for the said filling station for the alleged reason that it could not do so at a profit, thereby refusing to comply with the terms of its contract or franchise with the city. Stated further that they were without adequate remedy at law, and prayed a mandatory injunction to compel the company to furnish electricity for lights, in accordance with its franchise.

The appellant company admitted that it had not furnished electricity for lighting the station, because it was situated a mile or more from the main residence section of the city of Pocahontas, across Black River, to the east and south. That the station was located on the public highway, and not on the city streets, there were no other residences or business houses near it, and it would be the only consumer in the vicinity to be served, and that it would cost several thousand dollars to extend a line with necessary equipment to supply lights to the filling station, and that the demand for such service was unreasonable, unfair, and unjust to it, and could not be complied with without great loss, and that such service, under the circumstances, could not have been in contemplation of the parties to whom the franchise was granted by the city at the time of granting it.

Appellees amended their complaint, setting out that J. W. Brown was the owner of the filling station, having purchased the same at a time when the company was furnishing lights and power to the station; that it had ceased furnishing power and lights without any notice of any intention on its part of doing so, and that the said Brown had purchased the filling station relying upon lights and power service being furnished, which was one of the inducements to the purchase.

These allegations were all denied by appellant company.

It appears from the testimony that Brown, one of appellees, was the owner of the lands upon which the filling station was situated, having purchased same in August, 1924; that it was located in the limits of the city of Pocahontas, and, at the time of Brown's purchase, was being furnished with lights by the appellant company, being wired for lights and current at that time. The company ceased furnishing current and lights when it built its high-power lines, and the station rented for $20 per month when lights were furnished, and for only $15 when they were discontinued.

There was testimony tending to show the necessary cost for supplying the lights under present conditions would be about $1,000, and that only a small amount of electricity would be consumed by the filling station, the minimum charge of $1 per month, which could not be served by the company without a great loss, since there were no other probable consumers in the locality of the filling station.

The court rendered judgment for $140 damages, and granted a mandatory injunction requiring appellant to install the lighting service at the filling station, from which judgment this appeal was prosecuted.

A motion to dismiss the cause has been filed here, showing that on May 18, 1927, after the rendition of the decree appealed from, an ordinance was passed by the city council of Pocahontas providing for changing the boundary of the city, and excluding all the territory lying east of Black River from the city limits; that it had been duly submitted to the qualified electors of the city, and voted upon and ratified, and the territory lying east of Black River, upon which was situate the filling station, was detached and excluded from the corporate limits of the city. Prayer that the case be dismissed as to the question of the right to the mandatory injunction as settled by the exclusion of the territory upon which the filling station in situate from the city limits, within which only the lighting company was bound under its charter to furnish lights, and an affirmance only of the judgment for the $140 damages.

A response was filed to this motion, in which it is insisted that the entire judgment should be affirmed, leaving the appellant to further proceedings in a lower court to avoid the effect of the mandatory injunction, if it shall have any right to do so, etc.

H. L. Ponder, for appellant.

John L. Bledsoe and *Schoonover & Schoonover*, for appellee.

KIRBY, J., (after stating the facts). It has long been settled law that, where a municipal corporation by ordinance grants a franchise to a public service corporation to furnish electricity or gas to its inhabitants upon certain rates, terms and conditions, which are accepted in writing by the public service company, a contract between the parties is constituted, by which their rights are to be determined, the terms and conditions becoming binding on the municipality and the company. *Pocahontas* v. *Central Power & Light Co.*, 152 Ark. 276, 244 S. W. 712; *Arkansas Light & Power Co.* v. *Cooley*, 138 Ark. 390, 211 S. W. 664; *Lonoke* v. *Bransford*, 141 Ark. 18, 216 S. W. 38.

In § 2 of the ordinance granting the franchise to W. H. Skinner, of which appellant is now the assignee and owner, it agrees "to furnish to private consumers in said corporate town electrical energy at a rate of not exceeding 15c per kilowatt hour," allowing a minimum charge not to exceed $1 per month.

It is not denied that the filling station of appellee, Brown, where he demanded that power and lights should be installed under the terms of the franchise granted by the city, was situate within the limits of the incorporated town. Neither is it denied that appellant refused to furnish appellee Brown power and lights for consumption at said filling station, attempting to justify its refusal to do so because of the small amount of power and electricity that would be consumed at the filling station and the high cost of supplying it to but one consumer, there being no other business house or residences in the vicinity of the filling station where other probable consumers might be served, and for these reasons alleged that the demand was unreasonable, unfair and unjust, and could not be complied with without great loss and damage to it.

There was no attempt made to disclose the amount of the revenue that was being derived from the entire service to the consumers in the city of Pocahontas, the cost of such service, the value of the property devoted

to the public use, upon which appellant had the right to expect a reasonable return, nor the profit derived from the service rendered, as to whether it yielded a reasonable return or a just compensation to the power company. Neither did the appellant company offer to furnish the service, which it was bound under the terms of its franchise or contract with the city to supply, to appellee's filling station in the corporate limits of the city for a rate which it regarded reasonable, but refused to supply it at all.

It could have applied to the city council for a change of rates for supplying consumers similarly situated, or permission to charge an increased or higher rate, if the rate was regarded unreasonable, but it could not show that the demand for the service under its franchise was so unreasonable as to excuse it from furnishing the service, by proving only the probable expense for the service to be rendered the particular consumer with the revenue to be derived therefrom.

It is also true that appellee could only compel the furnishing of the lighting service to his filling station, under the terms of the franchise held by appellant, while his station was within the corporate limits of the city of Pocahontas. The fact that the territory upon which the filling station is situate has since been regularly detached and duly excluded from the corporate limits of the city, which have been contracted as shown by the motion to dismiss the cause, does not warrant such dismissal here, since appellee is entitled to an affirmance of the judgment for the damages recovered, in any event.

A dismissal of the appeal would still leave the order for a mandatory injunction in force, and while we do not determine whether appellant can be compelled under such injunction to supply the lighting service to appellee's filling station, which is no longer in the corporate limits of the town, we do not find any reversible error in the record, and the judgment is affirmed.

TCHULA COOPERATIVE STORE v. QUATTLEBAUM.

Opinion delivered March 26, 1928.

1. AUTOMOBILES—LIABILITY OF COMPANY HIRING TRUCKS.—Where a plantation manager hired trucks to convey laborers to its plantation under an arrangement that the truck owner would furnish one driver and the manager two, *held* in a suit against the plantation owner for damages caused by the driver of one of the trucks running into another automobile, that the driver of such truck was the servant of the defendant company, though he had been placed in charge of the truck by the driver furnished by the truck owner, such driver being the servant of defendant company.
2. TRIAL—SPECIFIC OBJECTION TO INSTRUCTION.—Objection that an instruction is doubtful in meaning should be raised by specific objection.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict of the jury on conflicting evidence will not be disturbed on appeal.

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

STATEMENT OF FACTS.

This appeal comes from judgments for damages for personal injuries and to an automobile caused by a collision with a truck alleged to have been negligently operated by appellant company and driven on the wrong side of the road at the time of the collision.

It was alleged that the appellant company was a corporation engaged in farming upon the Lake Dick place, about 15 miles from Pine Bluff. That, in order to secure laborers for cotton chopping, it hired from E. W. Hood, the proprietor of a "U-Drive-'Em" establishment, three trucks for carrying its farm hands and laborers from in and near Pine Bluff to its store on said plantation. After the day's work was finished the cotton-choppers were again loaded on the trucks to be returned to Pine Bluff, and, before reaching the city, one of the trucks collided with a Studebaker Special Six automobile, driven by the son of appellee, Quattlebaum, and injured W. W. Nelson, a passenger therein, and almost demolished the automobile. It was alleged that the truck was being driven upon the wrong side of the road, the same side upon which

the car was lawfully proceeding, and at a reckless rate of speed, which caused the injury.

The appellant company denied all the allegations of negligence of the complaint; that the Studebaker car was proceeding at a moderate rate of speed, as alleged, and that the truck was driven upon the same side of the road as the car at the time of the collision; denied that it was upon the wrong side of the road and that the driver did not slacken speed in attempting to avoid the collision; denied that plaintiffs had been damaged in the sums as alleged, or at all; denied that it was operating the truck or responsible for its operation at the time of the collision, or that it had anything to do with causing the damage, if there was any damage; alleged that the driver of the Studebaker car was crippled and physically incapable of controlling or managing an automobile, and that Quattlebaum was negligent in permitting him to drive it, and that the car was being negligently and carelessly operated and driven at an excessive rate of speed, with headlights which were so bright as to blind the operator of the truck at the time of the collision, and pleaded such contributory negligence in bar to recovery.

The complaint of W. W. Nelson, who was riding in in the car with appellee Quattlebaum's son at the time of the injury, contained the same allegations of negligence, and the answers thereto denied the material allegations of the complaint, and alleged contributory negligence of the driver of the wrecked car. The cases were consolidated for trial.

E. W. Hood, who was sued jointly with appellant, answered, denying the material allegations of each complaint, and the suits were later dismissed as to him.

It appears from the testimony that the manager of the plantation for the appellant company, Mr. McKenzie, had employed from Hood, who was operating a "U-Drive-'Em" garage, three trucks for transporting farm laborers from Pine Bluff to Lake Dick plantation, the proprietor of the hiring agency agreeing to send along one driver in order to look after any necessary mechan-

ical repairs and adjustments on the trucks; the other two drivers to be supplied by Mr. McKenzie. On the morning of the day of the collision the three trucks were loaded, and proceeded to carry the laborers down to the farm, Jack Jaggers being the driver supplied by the hiring agency, and Sterling Starks driving another truck, which was in the collision in the evening. Mr. McKenzie accompanied the trucks, riding in his own car with two or three others, either in front or along behind the loaded trucks. When they had proceeded to near Bevo, Jack Jaggers put J. W. Wells in charge as driver of the truck which Sterling Starks had been driving.

McKenzie stated that he had nothing to do with the change of the drivers after they left Pine Bluff, and was not aware that the driver had been changed until the next day after the wreck. Said he was not present at any place along the road where the driver was substituted for Starks, and did not come back with the hands that night, having left the plantation about three o'clock that afternoon. That there was no one else connected with the appellant company or having anything to do with the transportation of the hands or laborers who had authority to change drivers or make any change in the drivers selected by him for the trucks. Did not know Starks until he hired him, the Sunday before, to drive the truck. Said he left town about the same time the trucks did, and they proceeded along pretty well together to the street car crossing called Bevo. That he passed the trucks just out of town, and stopped near the free bridge to see how they were getting along. They were heavily loaded, and he had a heavy load on his Hudson car.

Two or three of the witnesses testified that Mr. McKenzie was there when the change of drivers was made, and others said he was near at the time. One witness who was riding in the car with Mr. McKenzie said she saw the change was made, and another witness said that Starks was driving the truck when they left Bevo, and that after they got to the store she noticed that the

other man was driving. Did not know that Mr. McKenzie noticed the difference, however.

Jim Greer, whose business it was to arrange to hire the hands, take them down to the plantation, and see that the work was done properly, was also along with the trucks, and was given money at the free bridge by Mr. McKenzie to buy a fan belt, the one on the particular truck having broken or come off.

Starks, the driver employed by McKenzie to drive the truck, and who started out with it in the morning, left the plantation in the afternoon and went over to the railroad station, and came back on the train. The driver, Wells, who had been put on the truck after it left Bevo in the morning, started back with it, loaded, in the evening, and near the free bridge collided with the car driven by Quattlebaum, appellee's son, injuring Nelson, and smashing up the car.

The appellant offered to introduce in testimony a statement made by Wells, the substituted driver, about the wreck or occurrence, in testifying in another case, a different suit for damages resulting from the same collision, and excepted to its exclusion from the jury.

The court instructed the jury, and from the judgment on the verdict in favor of Quattlebaum for $500 damages to the car, and in favor of Nelson, who was riding in the Quattlebaum car, for $1,000 for personal injuries, this appeal is prosecuted.

Coleman & Gantt, for appellant.

Jones & Hooker, for appellee.

KIRBY, J., (after stating the facts). It is insisted for reversal that there is no testimony sufficient to support the judgment, and that the court erred in giving certain instructions in which it is claimed the driver of the truck causing the damage in the collision was assumed to be the agent of appellant, instead of leaving the question to be determined by the jury.

It is true that the plantation manager who hired the trucks to be used in the transportation of the hands or laborers from Pine Bluff to the plantation testified that

he employed Starks as the driver of one of them, the one afterward in the collision, and put him in charge thereof, and had no knowledge or information that another driver, Wells, had been substituted for him on the trip to the farm in the morning, and knew nothing about the different driver taking the loaded truck back to Pine Bluff in the evening, until after hearing of the collision and wreck that night; stated, however, that he did come along in his own car near the trucks, when they started out, and had waited for them at the free bridge to inquire how they were proceeding, and had given Jim Greer, the agent of the company, who collected the hands and accompanied them to the plantation in their work there, money to purchase a fan belt for one of the trucks. The change of drivers was made about this time, or had been made before.

Several witnesses testified that Mr. McKenzie, the manager, was present when the change was made. One or two of the witnesses being carried in his car stated they had noticed the driver being changed, and that Wells had been substituted for Starks at the store near the bridge. The testimony also shows that the hands were paid off by the bookkeeper at the store upon the identification of Jim Greer, and that Wells was paid as a truck driver at his suggestion.

The driver, Jack Jaggers, furnished by the hiring agency for one of the trucks, was necessarily the servant of the appellant company, engaged in its business in transporting the hands or laborers to the plantation, and subject to the control and direction of his employer, as was also Jim Greer, whose business it was to collect the hands, assist in getting them to the plantation, and see that they did the work which they were employed to do.

The testimony tends to show that McKenzie, the manager, was present when the change of drivers was made, and one witness said that he knew it was done. In any event, whoever drove this truck taking the laborers to the plantation for cotton chopping, was engaged in the service of the master, whose duty it was to carry

them to and from their place of labor, under the terms of their employment.

The driver of one truck sent along by Hood, from whom the three trucks were hired, was not charged with any duty to Hood, the proprietor of the "U-Drive-'Em" agency, to procure or supply drivers for the other two trucks, nor for their safe operation, being sent along by the hiring agency, so far as the other trucks were concerned, only to keep them in good mechanical condition. He was otherwise the servant of appellant company in the transportation of its laborers to and from the plantation.

If Starks, the driver employed by appellant's manager, had abandoned the truck on the trip without reason or excuse, in the absence of the manager, McKenzie, who had started out with and accompanied the trucks for some distance on the way, and either Greer, who had employed and collected the laborers and was accompanying them to the plantation, or Jaggers, who was the driver hired with one of the trucks for transporting them, had assumed to place another driver in charge of the truck abandoned by Starks for completion of the trip, there is no reason to say that such substituted driver would not have been the servant of the appellant company in such operation. This substitute for Starks drove the truck on down to the plantation, and was paid off by the bookkeeper of appellant company, upon the designation by Jim Greer as a truck driver, when the other laborers were paid for the day's work. He started on back to Pine Bluff, driving the truck, the former driver, Starks, having departed on the afternoon train, transporting and returning the farm laborers to their home in the evening in accordance with their contract of employment, and we hold that he was a servant of the master engaged about the master's business in so doing, and necessarily for whose negligence, so far as the public is concerned, the master must be held to account.

The instructions complained of do not tell the jury that the truck was operated by the agent of the appellant

company, but it is apparent that it was the intention to leave the jury to find from the evidence that it was operated or driven by the agent of the appellant; and if its meaning was regarded doubtful on this point, the error should have been corrected by a specific objection, which was not made.

The jury has found, on conflicting evidence, that the collision with appellee's automobile and its destruction and the injury to appellee Nelson was caused by the negligent operation of appellant's truck in the conduct of its business, and its verdict will not be disturbed.

The assignment that the damages adjudged for personal injury to appellee Nelson are excessive seems to have been abandoned here, but the testimony is sufficient to support the verdict, in any event.

We find no prejudicial error in the record, and the judgments are affirmed.

HICKS v. NORSWORTHY.

Opinion delivered March 26, 1928.

1. CURTESY—BIRTH OF CHILD.—The claim of curtesy by a surviving husband in his wife's land is established by proof of the birth of a child which lived a short time.
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—The findings of the chancery court will not be disturbed unless found to be against the preponderance of the testimony, and this applies to inferences as well as to direct proof.
3. JUDGMENT—CONCLUSIVENESS.—A suit in which a surviving husband claims an estate of curtesy in his deceased wife's land is not a collateral attack on a decree rendered in a prior suit brought by the husband for the purpose of canceling the deed by which the property was conveyed to his wife on the ground that it was made to the wife instead of to the husband through mistake.
4. JUDGMENT—COLLATERAL ATTACK.—The judgment of a court of general jurisdiction is presumed to be valid as against collateral attack.
5. CURTESY—LIABILITY FOR TAXES.—The owner of an estate of curtesy, rather than the remainderman, *held* required to pay the ordinary taxes and the amount required to redeem from a tax sale.

6. CURTESY—LIABILITY FOR PERMANENT IMPROVEMENTS.—Assessments for permanent improvements must be ratably apportioned between the tenant by the curtesy and the remainderman, and a decree requiring the former to pay the entire assessment in an improvement district was erroneous.

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

Mahony, Yocum & Saye, for appellant.

Wilson & Martin and *Compere & Compere,* for appellee.

MEHAFFY, J. The appellee, in April, 1921, filed suit in the Union Chancery Court against John Bradley, and alleged that he, Charles Norsworthy, was the owner in fee of a block of land in section 33, township 17 south, range 15 west, and gave a particular description of said land. That he purchased the land from B. R. and C. O. Braswell on November 11, 1898, and paid for it $12.50, and the improvements on it had cost him more than $1,000, and that he and his wife lived on the same, and he paid taxes for more than 20 years consecutively. That it was his homestead. That his wife, Mandy Norsworthy, died in May, 1918, and left surviving her one son, John Bradley, the defendant in this suit. That Bradley sought to obtain the legal title without having any legal or equitable rights to it. He alleged that, when he purchased the land, the deed was by mistake made to his wife, Mandy Norsworthy. He asked that the deed be canceled, title to said land vested in him, and the title quieted against the said John Bradley.

Bradley filed a disclaimer, alleging that he had conveyed the land to J. W. Hicks. Hicks filed an intervention, denying the allegations of the complaint, alleging that he was an innocent purchaser, and that the record title was in Mandy Norsworthy, the mother of John Bradley, from whom he purchased.

The decree was in favor of the defendant or intervener, and Norsworthy appealed to the Supreme Court. This court, in the case of *Norsworthy* v. *Hicks,* 170 Ark. 877, 281 S. W. 660, affirmed the decree of the chancery

court, and held that the testimony was not sufficient to establish a mistake in the execution of the deed to Mandy instead of Norsworthy; at least, that it was not clear and satisfactory, and, for that reason, affirmed the decree of the chancery court.

In the meantime, and before the decision of the case in this court, J. W. Hicks filed a suit in the Union Circuit Court on May 14, 1921, against Charles Norsworthy and H. O. Lawn, alleging that he was the owner and entitled to the possession of the above described land; that he purchased it from John Bradley, and attached a copy of the deed. He alleged that John Bradley was the son and only heir of Mandy Norsworthy, deceased; that she was, at the time of her death, the owner and in possession of said land; that she was the wife of Charles Norsworthy, and that Charles Norsworthy and Mandy Norsworthy never had any issue born alive by said marriage. Judgment was prayed for possession, and for costs, and for damages for the rental value of the land.

In September, 1924, this case was transferred to the chancery court of Union County, and in October, 1926, this case was dismissed without prejudice.

The decision in the Supreme Court of the case of *Norsworthy* v. *Hicks* was April 5, 1926, and it was in October after that that the case was dismissed without prejudice. The present suit was brought by Norsworthy November 4, 1926, alleging that he was the owner of an estate of curtesy in the lands described, and alleging that he and Mandy Norsworthy, his wife, had children born alive to them as the issue of said marriage; asked the court to make an order restraining Hicks and the sheriff of Union County from interfering with or disturbing Norsworthy's possession, and asked that the court declare that Norsworthy had an estate by curtesy in and to said land.

There was an answer filed, denying the material allegations. Testimony was taken and a decree entered in favor of Charles Norsworthy, after there were amended complaints and amended answers filed.

The first contention of appellant is that the decree is not supported by the evidence, and states that the testimony as to their having children born was too absurd to appeal to intelligent minds or be worthy of any credence whatsoever.

There was very little testimony tending to show that any children were born alive, but Claricy Maryweathers testified that she knew Charles and Mandy Norsworthy; that three children were born to them—two little boys; that two were born dead; that the first one had no life in it at all, and the second had life in it, but did not live, and was not a developed child; that the third one was a girl, and that it lived about three-quarters of an hour. That Charles Norsworthy was a brakeman on the railroad, and was absent from home at the time each of said children was born.

Delia Morgan testified that she was at the home of Charles and Mandy Norsworthy just after two children were born. That one was a boy and the other a girl. That they were breathing, and she heard the little girl whine. That the little girl lived 15 or 20 minutes.

Charles Norsworthy testified that he and Mandy Norsworthy were married in 1895, and lived together until she died; that he was a brakeman on the Iron Mountain Railroad, and was on the road pretty nearly all the time; that he stayed at Gurdon, which was the headquarters, and ran between Gurdon and El Dorado; that sometimes he would be turned around when he got to El Dorado and would not even get to go home; that Mandy lived in El Dorado; that he was never at home at any time when any children were born to him and Mandy; that Mandy had been married before to one Ed Bradley, and had a boy named John.

John Bradley testified that he was the son of Mandy Norsworthy; lived with her until her death, and never knew of any children being born after her marriage to Charles Norsworthy.

Claricy Maryweathers was recalled, and testified that John Bradley was about three or four years old when

Charles Norsworthy and Mandy Norsworthy were married; that he was away from home with his aunt when one of Mandy Norsworthy's children was born.

While the testimony as to children being born to Charles Norsworthy and Mandy Norsworthy is not very strong, yet it is undisputed, and there is no effort made to impeach the witnesses testifying to the facts. And the rule is well settled that the findings of a chancery court will not be disturbed unless we can say that the findings are against the preponderance of the testimony.

This court said in a recent case: "The well settled rule here is that the findings of the chancery court will not be disturbed unless found to be against the preponderance of the testimony, and this applies to inferences as well as to direct proof." *Rainwater* v. *Merchants' National Bank,* 172 Ark. 284, 288 S. W. 388. See also *Farrelly Lake Levee Dist.* v. *McGeorge,* 172 Ark. 460, 289 S. W. 753; *Alexander* v. *Stack,* 172 Ark. 530, 289 S. W. 484; *Pettigrew* v. *Pettigrew,* 172 Ark. 647, 291 S. W. 90.

We cannot say that the finding of the chancellor was against the preponderance of the evidence.

It is next contended by the appellant that this suit is a collateral attack upon the decree rendered by the Union Chancery Court on November 6, 1924, and it is also contended that the decree of November 26 is *res judicata* and a complete bar to appellee's cause of action in this case. We do not agree with appellant that this is a collateral attack upon the decree rendered by the Union Chancery Court on November 6, 1924. That decree was rendered in a case brought for the purpose of canceling a deed which it was alleged was made to Mandy Norsworthy instead of Charles Norsworthy, through mistake. The only issue in the case was whether the deed made to Mandy Norsworthy when the land was purchased by Charles Norsworthy was made to her through mistake and should be canceled. The question of curtesy was not mentioned by either party. If the contention of appellant was correct, he would have had no estate by curtesy. He could not be the owner of the fee and also

have title or right of possession by curtesy. In other words, if the deed had been made to her by mistake and had been canceled, then Norsworthy would have been the owner of the land, and that would be entirely inconsistent with any claim of a right by curtesy. It would not only have been inconsistent, but both parties regarded the suit as involving nothing but the question of the title to the land. The evidence shows that the appellant, on May 14, 1921, while the chancery case was pending, brought a suit in the Union Circuit Court, putting in issue the question involved in this suit—that is, the question of appellee's right of curtesy. The question was whether Charles and Mandy Norsworthy had children born alive. That suit was transferred to the chancery court on September 22, 1924, and remained there without anything being done until Ocotber, 1926.

The decree in the chancery court, which appellant claims to be a bar to this suit, was decided by this court on April 5, 1926, and thereafter, in October following, appellant dismissed the suit without prejudice, the suit that involved the question of Norsworthy's right by curtesy. Of course a judgment of a court of general jurisdiction is presumed valid on collateral attack, but, as we have said, this is not a collateral attack on the judgment.

It is earnestly contended by appellant that it was Norsworthy's duty to interpose in that suit every defense that he had to the intervention, both legal and equitable, and he calls attention to numerous authorities.

We have already stated that a claim of absolute title in himself was inconsistent with the claim that the absolute title was in his wife and that, because of that, he was entitled to curtesy in the property. He could not be the absolute owner, as he claimed in the original suit filed by him, and have any right by curtesy at all.

Appellant calls attention to the case of *Wilson* v. *Pannell,* 157 Ark. 22, 247 S. W. 64, as authority in the contention that it was the duty of Norsworthy to interpose every defense that he had, both legal and equitable. The court, however, in that case said: "A comparison of the

statement of facts made by the court in the suit brought in equity by Wilson against Mrs. Pannell to quiet his title to the lot with the statement of facts in the present case will show that they are in all essential respects the same."

In the instant case the facts are not the same as the facts in the former case. In the first case, Norsworthy claimed to be the owner in fee, and claimed that the deed made to his wife was through mistake, and the suit was for the purpose of canceling that deed. And the question of curtesy was in no way involved, was not raised by the pleadings, and, as we have already said, would have been inconsistent with the position that Norsworthy took that he was the owner in fee.

In the above case of *Wilson* v. *Pannell,* the court also said:

"Therefore, in a suit between the same parties for the same property, under a state of facts essentially the same, the court having held that the equitable title was in Mrs. Pannell, her plea of *res judicata* is fully established. Under our Civil Code a defendant may set forth in his answer as many grounds of defense, whether legal or equitable, as he shall have. * * * Under this provision of the Code it is well settled that the defendant in an action at law must interpose all defenses, legal and equitable." *Wilson* v. *Pannell,* 157 Ark. 22, 247 S. W. 64.

That is true, and if the plea of *res judicata* was made against the person who was defendant in the former suit, he would have had to interpose all the defenses he had in the former suit. But certainly plaintiff was under no obligation to bring a suit alleging that he was entitled by curtesy because his wife owned the property, when his suit was based on the claim that he himself was the owner of the property.

Appellant also calls attention to the case of *Baker* v. *Hudson,* 117 Ark. 492, 176 S. W. 337. The court said in that case, quoting from the case in 96 Ark. (*Fourche, etc.,* v. *Walker*) 540, 132 S. W. 451, which appellant also refers to:

"It is true that a judgment is conclusive, not only upon the question actually determined, but upon all matters which might have been decided in that suit, but this refers to all matters properly belonging to the subject of the controversy and within the scope of the issues. In other words, the defendant must set forth in his answer all grounds of defense that he may have, or he will be held to have waived such defenses as he failed to set out."

Certainly it cannot be contended that the facts or issue as to curtesy properly belonged in a suit where the plaintiff was claiming absolute title in himself. And the question involved in the instant suit was not within the scope of the issues in the former suit.

This court has said:

"These rulings are conclusive of this case, but the contention made by appellee, that appellant was precluded from claiming the homestead in this action on the ground that it was necessarily included within the issues made on the bill to set aside the conveyance for fraud, and therefore *res judicata;* and the contrary contention of appellant, that he was not precluded by that adjudication, but had a right to claim his homestead exemptions until ousted by writ of possession, together with the suggestion that there is a conflict in this particular between the case of *Baker* v. *Hudson,* 117 Ark. 492, 176 S. W. 337, and *Bunch* v. *Keith,* 64 Ark. 654, 44 S. W. 452, moves us to announce that we adhere to the doctrine in *Bunch* v. *Keith, supra,* as a rule of property. It does not follow that the case of *Baker* v. *Hudson, supra,* is overruled. In the latter case the widow and children, in whose names the cause was revived, had been ousted from possession of the property claimed as a homestead by legal proceedings, and, after remaining out of possession for several years, brought suit for the possession thereof. The case of *Baker* v. *Hudson, supra,* was decided right, but it should have been put on the ground that the homestead claimant had been ousted from the homestead by legal proceedings before instituting suit to recover same, and not upon the ground that the homestead right was neces-

sarily involved within the issue presented by the pleadings and evidence in the original suit. * * * A decree of foreclosure in a suit wherein the widow of the mortgagor was made a party will not bar her from afterward claiming dower, unless her right of dower was actually put in issue. * * * If this be true as to the dower right, we can see no good reason why the same rule should not apply to the homestead right." *Gray* v. *Bank of Hartford,* 137 Ark. 232, 208 S. W. 302.

Appellant calls attention to a number of other cases on the question of *res judicata,* and the rule as announced by this court is that a defendant must interpose all the defenses that he may have, but we know of no rule that requires the plaintiff, when he brings a suit claiming absolute title, to undertake to litigate at the same time his right by curtesy, which is inconsistent with the right he might have as absolute owner. It would not be a bar unless the right by curtesy was actually involved in the suit, and in this case it was not, and neither party seemed to believe that it was, because the appellant himself brought a suit while this original suit was pending, raising the question of right by curtesy.

The appellee filed a cross-appeal from the decree of the court requiring him to deposit a sum of money equal to all of the taxes and interest which had been paid by Dr. Hicks. This amount was $219.14. Appellee has prosecuted a cross-appeal, and contends that he should not be required to pay the full amount of assessments in improvement districts. He concedes that he must pay the ordinary taxes. The order for the deposit of the money for the ordinary taxes or redemption from tax sale is correct, but the court should not have required a deposit of the amount paid as assessments in improvement districts. This court has decided the question, but the rule is well stated in R. C. L. as follows:

"Where public improvements are made by the municipality, the liability for the assessment therefor, as between life tenant and remainderman, is usually held to depend upon the character of the improvement, whether

permanent or temporary, and, according to the great weight of authority, a special municipal assessment for the cost of a permanent improvement must, with respect to property subject to a life estate, be ratably and equitably apportioned between the life tenant and the remainderman. There are, however, a few decisions which apparently hold that the entire cost of permanent improvements falls on the remainderman. One method adopted is to apportion the costs in the proportion which the value of the life estate bears to the value of the whole estate; and in some cases the burden has been apportioned by requiring the tenant for life to contribute to the extent of interest during his life, the remainderman to pay the principal. Where, however, the improvement is of a temporary character, requiring repeated renewals during a lifetime, the entire cost thereof falls on the life tenant. Permanent public improvements include the opening, widening or paving of streets, the construction of a sewer or drainage ditch, and, in some jurisdictions, the paving of a sidewalk; but in other States such paving is regarded as an improvement of a temporary character. Obviously, the question whether the life tenant or the remainderman must ultimately bear the cost of a public improvement may be determined by the provisions of the instrument by which the life estate is created." 17 R. C. L. 638.

We hold that the assessments for permanent improvements must be ratably and equitably apportioned between the life tenant and the remainderman. But the evidence in this case is not sufficient to determine what part, if any, of the assessments should be paid by the remainderman. It appears that there were taxes paid for paving districts and sewer districts.

In addition to the rule as stated in R. C. L., this court has decided that the life tenant must pay all the ordinary taxes, and this court said:

"The only questions presented are whether or not the court was correct in rendering a decree in favor of appellees for the recovery of taxes paid and for a pro-

portionate part of the proceeds of the sale of timber and in perpetuating the injunction against appellant concerning the cutting of timber. The proof shows that appellant failed to pay taxes on the land for certain years, as was his duty to do because he was the life tenant and in possession, enjoying the rents and profits." *Ussery* v. *Sweet,* 137 Ark. 140, 208 S. W. 600.

It has been many times held that improvement taxes or assessments for public improvements are not ordinary taxes, and that taxes of this kind must be paid ratably by the life tenant and remainderman, when the improvements are permanent. See 21 C. J. 957.

It appears that there was $130.87 improvement taxes for sewer district tax and paving improvement district tax. In order to determine whether the remainderman should pay any portion of this amount, and, if so, what portion, it will be necessary to take the testimony and for the court to find whether the improvements are permanent, and, if so, what proportion of said taxes should be paid by each, the life tenant and the remainderman.

The case on direct appeal is affirmed, and the decree of the court as to the $130.87 improvement taxes is reversed, and remanded with directions to ascertain whether, under the rules above announced, the remainderman should pay any portion of this, and, if so, what portion. It is so ordered.

SMITH and MCHANEY, JJ., dissent.

CONWAY v. SUMMERS.

Opinion delivered March 26, 1928.

1. HIGHWAYS—METHOD OF ROAD WORKING—REPEAL OF SPECIAL ACT.—Sp. Acts 1911, p. 1015, relating to the working of public roads in cities and towns in Faulkner County, *held* repealed by Sp. Acts 1919, p. 222, the latter act providing a complete scheme for road work in such county.
2. STATUTES—TITLE OF ACT.—While the language of the title of an act is not controlling, it has some force in interpreting the meaning of the lawmakers, when such meaning is otherwise in doubt.

3. HIGHWAYS—DISTRIBUTION OF ROAD FUNDS.—Sp. Acts 1919, p. 222, conferring power on the Faulkner County Court over the expenditure of county funds on public roads and bridges, was repealed by Acts 1927, p. 221, which provides for appropriation of 50 per cent. of the road tax collected on real and personal property situated within cities of the second class for improvement of streets in such cities.

4. HIGHWAYS—DISTRIBUTION OF ROAD FUNDS.—Acts 1927, p. 221, relative to distribution of the road tax collected in cities of the second class, *held* to apply to taxes levied in 1926 and collected for the year 1927, as well as to taxes levied and collected thereafter, in view of § 2, making the act applicable to the year 1927 and future years.

Appeal from Faulkner Chancery Court; *W. E. Atkinson,* Chancellor; reversed.

Geo. F. Hartje, for appellant.

Guy E. Williams, for appellee.

MEHAFFY, J. The appellant, a city of the second class in Faulkner County, Arkansas, brought this suit against the appellee, the sheriff and collector of Faulkner County, and alleged, among other things, that the appellee had in his possession the sum of $6,000, collected within the corporate limits of Conway, and that the city of Conway was entitled to 50 per cent. of the amount.

The defendant filed a demurrer on the ground that, by virtue of the provisions of special act of 1911 and 1919, the provisions of act 81 of 1927 did not apply to the city of Conway, in Faulkner County, in so far as the provision of the three-mill road tax is concerned; and second, that, under the provisions of act 81 of 1927, the 50 per cent. division did not apply to and affect the division of the said road tax levied and collected by the defendant for the year 1927.

Act No. 361 of Acts of 1911 is a special act, and is entitled, "An act to better provide for the working of public roads in cities and towns in Faulkner County," and to that end provided for the expenditure of not less than one-third of the road tax collected in any such city or town on the roads situated in such city or town.

Section 1 of the act provides that not less than one-third of the tax collected on property located in any city or incorporated town in Faulkner County, Arkansas, under the provisions of an act of the General Assembly of Arkansas approved May 8, 1897, entitled "An act to provide for levying a road tax for working roads and highways, repairing and building bridges, and for other purposes," shall be expended in working and making public roads and buildings and repairing public bridges located within said city or town, respectively. And it shall be the duty of the county court of said county, upon the examination and approval of the annual report and settlement of the tax collector, to determine the amount of road tax that has been paid on property located in any city or town in said county, and to appropriate and set apart not less than one-third of the amount of said tax collected in such city or town, to be expended on the roads and bridges in such city or town."

Under the provisions of this act the city of Conway, the appellant, would be entitled to not less than one-third of the tax collected on property located in said city.

One of the questions to be determined by this court is whether this act was repealed by act 143 of the Acts of 1919. Act 143 is entitled, "An act to change the method of working public roads in Faulkner County, Arkansas." And § 1 provides that the county court shall have power to provide, by proper order of said court, for the expenditure of funds of the county and funds arising from the levy of the three-mill tax in said county, in any road district or on any public road or bridge or culvert of said county, regardless of the district in which said tax has been or shall be paid.

While the writer does not believe that the act of 1919 repeals the act of 1911, a majority of the judges are of opinion that it does, for the reason that the act of 1911 is an act to provide for the working of public roads in cities and towns in Faulkner County, and the act of 1919, as expressed in its title, is an act to change

the method of working the roads in Faulkner County, Arkansas, and the act of 1919 provides a complete scheme for working the roads and highways and collecting and distributing the road fund in said county. And the act of 1919 covers the entire subject of working roads in Faulkner County.

This court said in a recent case:

"There are certain well settled rules to determine whether or not a former statute has been repealed by a later one, but there is always some difficulty, in applying these rules, in determining whether or not a repeal has been effected in a given instance. It is a rule of universal application that implied repeals are not favored, and yet it is equally well settled that there is an implied repeal where there is found irreconcilable repugnance between the two statutes, and also when the Legislature appears to have taken up the whole subject anew and covered the entire ground of the subject-matter of the former statute. In a recent decision we undertook to cover this subject in the following statement: 'It is a principle of universal recognition that the repeal of a law merely by implication is not favored, and that the repeal will not be allowed unless the implication is clear and irresistible; but there are two familiar rules or classifications applicable in determining whether or not there has been such repeal. One is that, where the provisions of two statutes are in irreconcilable conflict with each other, there is an implied repeal by the later one which governs the subject, so far as relates to the conflicting provisions, and to that extent only. * * * The other one is that a repeal by implication is accomplished where the Legislature takes up the whole subject anew and covers the entire ground of the subject-matter of a former statute, and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new'." *State* v. *White,* 170 Ark. 880, 281 S. W. 678.

The above case cites a number of cases in the application of the above principle, and proceeds:

"Applying those tests to the statute now under consideration, we are of the opinion that, in enacting the last statute, the Legislature took up the whole subject anew as a substitute for the former legislation on the subject, and that it operated as a repeal of the former statute."

It is therefore the opinion of the court that, under the authority of the case last cited, the act of 1919 repealed the act of 1911; that it was a substitute, a change of the method of working public roads in Faulkner County, and, being a substitute, repeals the act of 1911.

It will be observed that the title of the act of 1911 is, "To better provide for the working of public roads," etc., and the title of the act of 1919 is, "To change the method of working public roads in Faulkner County." While the language of the title of an act is not controlling, as was said in the case of *State* v. *White,* it has some force in interpreting the meaning of the lawmakers when otherwise in doubt, and the language of this caption leads to the conclusion that the lawmakers intended it as a substitute for former legislation, and the caption, as we have said, recites that it is an act to change the method of working public roads in Faulkner County, Arkansas.

The next question is whether act 81 of the Acts of 1927 repealed act 143 of the Acts of 1919. The title of act 81 of 1927 is as follows: "An act to appropriate 50 per cent. of the road tax collected on real and personal property situated in cities of the second class for improvement of the streets in such cities."

Section 3 of act 81 of 1927 is as follows: "That the provisions of this act shall not rescind, repeal or otherwise amend any special law now in force which governs the division of similar road taxes in any city of the second class, within the purview of this statute."

The act of 1919 does not govern the division of the road taxes. It merely provides that the county court of Faulkner County shall have power to provide, by proper order of said court, for the expenditure of the funds of

the county and funds arising from the levy of the three-mill tax in said county in any road district or upon any public road or bridge or culvert in said county, regardless of the district in which said tax has been or shall be paid. But it does not provide for a division, and the act does not govern the division of road taxes. It simply leaves the question of the expenditure of the road fund to the county court as it was prior to the act of 1911.

The city of Conway, in Faulkner County, is therefore entitled to 50 per cent. of all road taxes collected by the tax collector in Faulkner County on property situated within the corporate limits of the city of Conway.

It is earnestly contended that, even if the provisions of act 81 of 1927 are applicable to the city of Conway, said provisions do not apply for the year 1926, as the road tax for the year 1927 will not be due until the year 1928. The act of 1927 was approved March 4, and § 2 of said act is as follows:

"That the provisions of this act shall apply to the road-tax collections on property within the corporate limits of said cities of the second class in this State for the year 1927 as well as for future years."

We think that this section means taxes collected in the year 1927. That seems to have been the intention of the Legislature as contained in § 2 of the act. And the Legislature, of course, had the right to enact this statute, and we therefore conclude that the provisions of the act apply to collections for the year 1927; that this means taxes collected in 1927, and not road taxes levied in 1927.

The decree of the chancery court is reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

MISSOURI PACIFIC RAILROAD COMPANY v. BENNETT.

Opinion delivered March 26, 1928.

1. CARRIERS—LIABILITY FOR DEATH OF CATTLE.—Under allegations that a carrier accepted cattle for shipment knowing that part of them were weak and thin, and which should have been kept separate from bulls and steers, but that the carrier carelessly turned the cattle together, causing the death of 24 cows, evidence *held* to sustain a finding that the injury to the cattle resulted from the railroad's negligence.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by substantial evidence is conclusive on appeal.
3. CARRIERS—INSTRUCTION AS TO NEGLIGENCE.—Where a shipper alleged that the railroad accepted cattle for shipment knowing that some of them were thin and weak, and that it carelessly turned the weak cattle with bulls and steers, thereby causing the death of 24 cows, defendant's request for instruction that defendant was not required to furnish separate pens for weak and thin cattle, and that, if the jury found from the evidence that the cattle were killed in pens through no carelessness of defendant, the verdict should be for it, was properly modified by adding that, unless the jury found defendant negligently turned strong cattle in with the weak, causing the injury complained of, it would not be liable.
4. TRIAL—REFUSAL OF INSTRUCTION IGNORING ISSUE.—Where a shipper alleged that the railroad accepted cattle for shipment some of which were weak and thin, and that it was necessary to separate them from the bulls and steers, and that, while the cattle were in the railroad's custody, it carelessly turned them together, thereby causing the death of 24 cows, it was proper to refuse defendant's instruction that, under the rules of the experiment station, the railroad was not liable for injury of the stock in quarantine pens while being held to be dipped, and that, if the cattle died in pens while being dipped, it was not liable, such instruction ignoring the question of the railroad's negligence in mixing the weak with the strong cattle.

Appeal from Faulkner Circuit Court; *W. J. Waggoner,* Judge; affirmed.

Thomas B. Pryor and *Harvey G. Combs,* for appellant.

R. W. Robins, for appellee.

MEHAFFY, J. The appellees, plaintiffs below, filed a complaint in the circuit court, alleging the delivery to

the appellant, defendant below, at North Little Rock, of a shipment of 242 head of cattle to be transported by the defendant to East St. Louis, Illinois. That the defendant accepted said cattle for shipment. It is alleged that some of the cattle in said shipment were weak and thin, and it was necessary that they be separated from the bulls and steers, and that the defendant had notice of these facts, but that, on January 8, 1927, the cattle having been delivered on the first of January, while said cattle were in the custody of defendant, it carelessly and negligently turned said cattle together, thereby causing 24 of the said cows to be killed by the bulls and steers. Said cows that were killed were of the average value of $25 each, and, by reason of the negligence of the defendant, plaintiff prays judgment for $600.

Defendant filed answer, denying specifically each material allegation in the complaint.

There was a jury trial, and a verdict in favor of the plaintiff for $350, and judgment for that amount, from which this appeal is prosecuted.

The plaintiff's testimony tended to show that the cattle were delivered to and accepted by the defendant on the first day of January; that they were all right, and none crippled; that the bulls and steers were put to themselves, and the yearlings and small cows to themselves; that when Bennett, the plaintiff, was in North Little Rock, on the 8th or 9th of January, they were all mixed up, and a portion of them dead. Some of them trampled to death, some were hooked, and some of them had lost their calves. They were crippled up in every way they could be. That plaintiff arranged for six pens, and paid $15 per pen. That it was arranged with the stock foreman to keep the thin cattle separate. It is not good practice to put bulls and steers in a close pen with calves and weak cows. That 24 of them died as a result of injuries. The cattle were dipped, and none died from dipping. When they were unloaded they were all put in pens together, but were cut out as quickly as plaintiff

could cut them out. The average pen holds a car of cattle. The steers and bulls were loaded together. There was a load of small yearlings in the shipment. Some of them were thin and weak. The weather was cold at the time of dipping, and the cattle were held for two dippings. Some of them might have died from dipping, but those that were trampled, smashed, did not. Twenty-six were crippled. The cattle came from Louisiana, a tick-infested area. The shipper signed the usual shipper's uniform contract. The contract signed was the one prescribed by the Interstate Commerce Commission. The contract was here introduced, and plaintiff Bennett admitted that he signed it, and admitted making the affidavit required by the provisions of the Arkansas rules and regulations and the supplemental regulations issued by the Department of Agriculture for the movement of cattle from tick-infested areas.

After the cattle were unloaded they immediately cut out the weak, thin cattle, and put them to themselves. Did not rent any pens, but understood they were to have six pens. They had six carloads of cattle. The railroad company does not dip them, but they are dipped by the government. Witness later found them in four pens. One pen had weak cattle, and in the others they were all mixed up.

Another witness testified that the cause of the death of the 24 cattle was fighting and being ridden by big males. They were getting along all right until they were turned together. Does not think they died from dipping, and testified that the average cost of cattle was around $26. They shipped the big and the strong and the weak all together. They were unloaded together, and, after unloaded, the stock foreman was requested to separate the cattle, or permission was requested from him to separate the cattle, and he directed them to go ahead and do it. It is not true that most of the cattle that died were weak.

On the day after they came to North Little Rock the weak ones were separated from the steers and bulls. There was evidence of the cattle having been trampled. The evidence on behalf of the defendant tended to show that this was a mixed load of cattle, some big ones and some weak and poor. It was just a mixed shipment. That they were held for two dippings, from seven to twelve days. A government inspector does the dipping. The railroad company has nothing to do with it. They furnish the pens, and the shipper pays for the feed. After they had been there a day or two, the shipper asked if he could get pens to separate the cattle. Witness told him it was all right, but they would probably have some heavy shipments on Saturday, and if they did, they would have to put them back together, so they could have the pens for other stock. They were separated in seven or eight and sometimes nine pens. When they were separated, the weakest ones out of each car were put in a pen by themselves. They wouldn't get anything to eat when with the other cattle. Some of the cattle in that pen died after the first and before the second dipping. It was cold and rainy. The cattle came on the first of January, and they were taken out on the 12th. They were dipped the second time on the 10th. On the night of the 7th six carloads of other cattle arrived there, and twelve loads on the morning of the 8th, for dipping. Defendant has 20 quarantine pens with sheds, and four open. After the cattle are dipped, they must be put in a covered pen. Every shipper of live stock signs a uniform live stock contract, the one introduced here. The pens are locked, and the railroad employees keep the keys, but they are under the jurisdiction of Federal officers. Railroad employees transferred the cattle.

The testimony of the plaintiff in rebuttal was to the effect that the cattle were in four pens after they were rearranged by the railroad company. One pen contained, as nearly as they could pick them out, the weakest. The hurt and crippled ones were in another pen. They were

shipped all together. They were getting along all right before the railroad company changed them up, and they didn't die from those injuries. Some of the cattle died from being trampled.

The person who fed them testified that he found the cattle trampled up and crowded pretty bad. It appears that there were too many in the pens. The bulls and steers were mixed up generally with the weak and thin cattle. The cattle that were down appeared to have been trampled and gored. Some of the cattle were weak and thin. One pen of weak thin cattle were put together and kept together until morning, when they were all mixed up. It was not big steers that were killed. One of the steers died. At one time, while witness was feeding them, they were in as high as seven pens.

Appellant insists for reversal of this case on the ground that the defendant acted as a person of ordinary prudence would have acted under the circumstances, and we think that the only question for this court to determine is whether there was any substantial evidence upon which the jury might have found that the injury to the cattle resulted from the negligence of the defendant. If there is such evidence of negligence, this would justify the jury in finding a verdict in favor of the plaintiff.

The plaintiff introduced testimony to show that, when they delivered the cattle to the railroad company, they were all right, and none of them crippled, and that the bulls and steers were picked out and put to themselves and the yearlings and small cows put to themselves, and that on the 8th or 9th they were all mixed up, and a portion of them dead. The testimony shows that it is not safe to put the bulls and steers with the weak cattle and calves, and that, after they were delivered to the defendant, they were all mixed up, and there is no testimony tending to show that, even when the railroad company had to have some of its pens, the bulls and steers which caused the injury might not still have been kept to themselves, and not mixed up with the weak cattle.

Whether or not there was any negligence in this respect was a question of fact for the jury, and its finding is conclusive on this court.

The evidence of negligence is rather meager, but that is not a question for this court, if there is any substantial evidence to support the verdict, and we think there is some substantial evidence upon which the verdict of the jury could be based.

It is next contended that the court erred in its refusal to give instruction No. 1, requested by the defendant. That instruction is as follows. "The court instructs you that the defendant is not required to furnish separate pens to separate the weak and thin cattle from the strong; and if you find from the evidence in this case that the cattle were killed in the pens in North Little Rock through no carelessness or negligence on the part of the defendant, its agents or employees, then your verdict must be for the defendant."

The court refused to give the instruction as above set out and as requested by the defendant, but added, "unless you further find that the defendant negligently turned the strong cattle in with the weak, causing the damage complained of." We think the instruction as given by the court was correct. Whether the defendant was required to furnish separate pens to separate the weak from the strong or not, if it did do that, and then negligently turned the strong cattle in with the weak, causing the damage complained of, it would be liable, and there was no error in the modification of the instruction.

It is also contended that the court erred in its refusal to give instruction No. 2 requested by the defendant, which is as follows: "The court instructs you that, under the law and rules promulgated by the Board of Control of Agricultural Experiment Stations, the railroad company is not liable for damages where stock is injured and dies in quarantine pens in North Little Rock, through no carelessness or negligence of the defendant, its agents or employees, while being held to be dipped,

and if you find from the evidence in this case that the cattle died in said quarantine pens, while being held to be dipped, then your verdict must be for the defendant."

The above instruction ignores the question of negligence, which defendant denies, the latter part of the instruction stating to them that, if they died in the pens while being held to be dipped, the defendant was not liable. That would be true if there was no negligence which caused the injury. But if they were separated, and the defendant afterwards negligently put them together, and this negligence caused the injury and damages, the defendant would be liable.

Instruction No. 1, given at the request of the plaintiff, was as follows: "The court instructs the jury that, under the law, it was the duty of the defendant to use reasonable care in the handling of the cattle belonging to the plaintiff, and if it failed to use reasonable care in the handling of said cattle, and they were injured as a result thereof, then you should return a verdict in favor of the plaintiff."

That submits the question squarely to the jury, and directs them, if the injury was caused by the negligence of the defendant, to find for the plaintiff; no matter what their duty was with reference to furnishing pens or keeping cattle to be dipped, if they were guilty of negligence in mixing the cattle as they did, and that negligence caused the injury, they would be liable. If it was not guilty of negligence, there would be no liability. But, having undertaken to keep the cattle, and having been notified that the bulls and steers must be kept separate or injury would result, then if, after that notice, the defendant's employees negligently or carelessly mixed the cattle, and that negligence or carelessness caused the injury, the carrier would be liable. And in all of the instructions given by the court the jury are told that, if the defendant was negligent, plaintiff could recover, and it was made perfectly clear to them that the defendant was entitled to a verdict in its favor unless the proof

showed negligence on the part of the defendant that caused the injury. They were properly instructed as to what constituted negligence, and in fact there is no controversy between the parties as to what constitutes negligence, both parties agreeing that, if the defendant failed to exercise the care and diligence that an ordinarily prudent man would exercise under the circumstances or under similar circumstances, they would be negligent.

The jury were properly instructed. It was made perfectly clear to the jury that, before the plaintiff could recover, the evidence must show that the defendant was guilty of negligence which caused the injury, and that if the evidence did not show negligence on the part of the defendant, plaintiff could not recover. And, as we have already said, the question of whether or not the defendant was guilty of negligence was a question of fact, and we think the evidence is sufficient to support the verdict, and the case is therefore affirmed.

ANDREWS v. JENKINS.

Opinion delivered March 26, 1928.

INSURANCE—AGENT'S COMMISSIONS.—Where an insurance agent was entitled, under his contract, to a commission on premiums actually collected and accounted for in cash, he was not entitled to commissions on applications procured until the notes received in payment of premiums were actually paid in cash.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; reversed.

Thomas B. Pryor, Jr., and *Robert H. Harper,* for appellant.

O. O. Jenkins and *Dobbs & Young,* for appellee.

McHANEY, J. Appellant is engaged in the life insurance business, being the manager of the Guardian Life Insurance Company. He employed appellee, Jenkins, as an agent to solicit applications for life insurance for said

company as a subagent under him. He required said Jenkins to give a bond, conditioned as follows:

"If the agent shall faithfully discharge the duties as agent of the company, under present appointment or any future appointment, or in any other capacity in which he may hereafter be employed by the company, and shall, upon demand, pay over and account for all moneys and other property belonging to the manager or to the company, including any advances or other indebtedness, and shall at all times have and keep the manager and company harmless from any loss or damage growing out of collections made by the agent or his agents, or out of any misconduct or violation of any of the terms of said contract, then this obligation shall be null and void; otherwise to remain in full force and virtue. And it is expressly understood and agreed that the duties and emoluments of the agent may be altered or varied, or he may be reappointed, or be employed in any other capacity from time to time without notice to us or any of us."

This bond was executed by Jenkins as principal and appellee, McCord, as surety. This arrangement began in the early part of 1924 and continued until the fall of that year, when Jenkins ceased working for appellant. Appellant brought this suit against appellees to recover the sum of $220.98, being the amount of moneys advanced appellee, Jenkins, from time to time, less commissions earned. Appellee admitted that he had been advanced the sum of $270 by appellant, but claimed that the commissions earned by him on policies written amounted to $275.36, which was more than sufficient to cover the advances made. The only controversy with reference to the account appears to arise because of notes taken for the Frank Schonebeck policy, on which the commission, if paid, would amount to $164.20, and the Elgin L. Byrnes policy, the commission on which amounted to $22.44, for both of which notes appear to have been given. With reference to the Byrnes policy, appellant charged appellee with $22.44, and on August 11, 1924, credited his account by note from Byrnes in the sum of $22.44. This

appears to be a cross entry, and by reason thereof appellee has not been credited with any commission on this policy. We are unable to tell from the evidence whether this note was paid, and, if so, we do not find any further credit in appellee's account for the commission thereon.

With reference to the Schonebeck notes, none of them were ever paid, and appellant charged in his account against appellee $36.95 as the net amount paid the company for the time the policy was in force. However, it dismissed this item from its account, and is not claiming that it has the right to charge appellee therewith.

We do not think appellee is entitled to any commission on the Schonebeck policy, as the notes were never paid. The contract between them plainly provides that a commission is to be paid only on premiums actually collected and accounted for in cash, paragraph eight of the contract being as follows: "The principal will pay the agent, in full compensation for all his services, commissions as shown by the following schedule, on premiums actually collected and accounted for in cash by him, to the principal, during the continuance of this appointment, on policies issued upon applications effected by the agent in said territory."

While it is true that the Schonebeck notes were taken by reason of the authority of appellant, yet this did not have the effect to change the commission agreement, as above set out. True, he was authorized to write the Schonebeck application for a policy, and to accept notes for the premium, but nowhere in the evidence do we find that appellant agreed that such notes should be treated as cash and that appellee's commission should be paid, regardless of whether the notes were collected. This being true, we are of the opinion that the written provision in the contract of employment providing for the payment of commissions, is controlling, and that appellee, Jenkins, would not be entitled to a commission until such notes were actually paid.

The court therefore erred in giving instructions Nos. 1, 2 and 3 at the request of appellee. For the errors indicated the judgment will be reversed, and the cause remanded for a new trial.

BROADWAY BANK OF KANSAS CITY v. MASON.

Opinion delivered March 26, 1928.

1. BILLS AND NOTES—DEFENSE AGAINST INNOCENT PURCHASER.—In an action to recover on notes by one who acquired them in due course for value and before maturity, the defense of a failure of consideration was not available, though such matter might have been successfully pleaded as between maker and payee.
2. BILLS AND NOTES—SALE OF PATENTED ARTICLES.—Under Crawford & Moses' Dig., §§ 7956-7958, requiring negotiable instruments in payment of patented machine, implement, substance, or instrument to show on its face that it was executed for such consideration, notes executed as part payment for emergency medicine cases bearing a registered trade-mark need not show their consideration, since a registered trade-mark does not constitute a patented article within the meaning of the statute.
3. BILLS AND NOTES—STATUTE AS TO SALE OF PATENTED ARTICLES.—Crawford & Moses' Dig., §§ 7956-7958, relating to the sale of patented articles, being both penal and criminal, must be strictly construed.
4. BILLS AND NOTES—STATUTE AS TO SALE OF PATENTED ARTICLES.—Crawford & Moses' Dig., §§ 7956-7958, requiring negotiable instruments executed as consideration for patented articles to show such fact on their face, *held* inapplicable to notes given for patent right territory; it being the sale of specific articles or things that is prohibited by the statute under the condition named.

Appeal from Faulkner Circuit Court; *W. J. Waggoner,* Judge; reversed.

George F. Hartje, for appellant.

R. W. Robins, for appellee.

McHANEY, J. Appellant brought this action against appellee to recover on four promissory notes of $200 each, two dated April 21, 1925, payable three and five months after date, and two dated April 30, 1925, payable

six and seven months after date, at the Farmers' State Bank, Conway, Arkansas, with 10 per cent. interest from date until paid. These notes were made payable to A. D. Harmon, an employee or salesman for the Home Sales Company, a Missouri corporation, and by him indorsed and delivered to J. F. Cox, president of the Home Sales Company, who in turn transferred them to appellant before maturity, in due course, as security for a loan by appellant to Cox. The consideration for the notes was the payment of $1 each upon 800 "Home Emergency Cases," consisting of a small wooden cabinet and a quantity of medicine contained in a number of bottles, with the initials on each bottle "H.E.C.," presumably representing the words "Home Emergency Case," and on each bottle is "Registered U. S. Patent Office." Appellee at the same time entered into a contract with the Home Sales Company through said Harmon, the pertinent parts of which are as follows:

"In consideration of the payment and advance of one dollar each upon eight hundred home emergency cases, the receipt of which is hereby acknowledged, the Home Sales Company agrees to furnish to the undersigned special dealer that number of home emergency cases, at $5 each, f. o. b. cars Kansas City, Missouri, during a period of one year from May 25, 1925, as they shall be ordered by him or his authorized agents, in any quantity desired, not to exceed the number specified above, upon payment of the balance of four dollars for each case ordered; the said dealer shall not be bound to pay this four dollars upon any case until he orders it delivered to him. The home emergency cases herein contracted for shall be sold by said dealer or his representatives in the following district: County, Lonoke; State, Arkansas. Number of cases, 800. We agree during the specified period not to place the home emergency cases on sale with any other dealer in the said district, and the said dealer on his part agrees not to offer them for sale outside this district without our written consent."

He was able to sell only six of the home emergency cases, for which he paid the balance due of $4 on each case. There is practically no dispute in the evidence. The proof on the part of appellant shows that it acquired the notes for value, before maturity, and without notice of any defects or infirmities therein, or of any defense the maker of said notes might have against the payee. Appellant had taken other notes from Cox under similar conditions, and these notes had been paid by the makers. The Home Sales Company was not a customer of appellant bank, and it had no business dealings with it, neither was Harmon a customer thereof, but Cox had been a customer of said bank for some two years, and was known to appellant as a reputable, responsible business man. Neither the cases nor the medicine therein was patented, but the trade-mark on the bottles, "H.E.C." had been registered in the U. S. Patent Office as a trade-mark. Appellee testified that, at the time he gave Harmon the notes, Cox was with him, and showed him how much money he could make out of the deal; that he understood that he was to give the notes and pay the company $4 per case for the medicine as he sold it, and had the exclusive right to sell same in Lonoke County; that Harmon agreed to help him sell the medicine, and he was to pay the notes out of the proceeds of the sales thereof; that he told Harmon he was no salesman, and he said he would help him sell it, but that he has not seen Harmon since; that he has not made any money out of the contract. On August 21, 1925, appellee wrote appellant that his agreement with Harmon was that he was to sell the medicine before he paid all the notes, and that he had not sold any of the medicine yet, but he believed he could sell it later in the crop season, and said: "Now if you will have patience will pay when I can. I have got me a new car, and I am going to start out to try again to sell it soon."

The case was submitted to the jury, and a verdict was returned in appellee's favor.

We think the court erred in submitting the case to the jury at all. Appellant requested the court to instruct the jury to find for it, which the court refused to do, and this is assigned as error. In our view of the case, appellant acquired the notes in due course for value and before maturity, without notice of any defects or infirmities therein. Section 52 of the Negotiable Instrument Law, § 7818, C. & M. Digest, defines a holder in due course as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

This was the law in this State prior to the Negotiable Instrument Act. *Bothwell* v. *Fletcher,* 94 Ark. 100, 125 S. W. 645; *Holland Banking Co.* v. *Booth,* 121 Ark. 171, 180 S. W. 978. Section 56 of the Negotiable Instrument Act, being § 7822 of C. & M. Digest, provides what is necessary to constitute notice of defect as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." This was likewise the law in this State prior to the Negotiable Instrument Act.

We have examined the testimony carefully, and fail to find anything therein that brings to appellant actual knowledge of any infirmity in the instrument, or defect in the title of Cox thereto, or knowledge of any such facts on the part of appellant that would constitute his action in taking the instrument bad faith. Undoubtedly, as between appellee and Harmon and Cox, failure of consideration might have been successfully pleaded, as well

as fraud and misrepresentation in the procurement thereof. But, as between appellant and appellee, there must be actual knowledge of the defective title or infirmities in the instrument as defined by the statute, or knowledge of such facts as would put him on notice. It is true that appellant had taken other similar notes from Cox in the course of its business dealings with him, but it is shown that such other notes had been satisfactorily taken care of.

The principal defense relied on by appellee is that the notes were given for the purchase of a patented article or patent right territory, and are void because the notes did not show on their face that they were executed for such consideration, and it is claimed that they are void as being in violation of §§ 7956-7958, C. & M. Digest, which are as follows:

"Section 7956. Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void.

"Section 7957. The foregoing section shall also apply to vendors of patent rights, and family rights to use any patented thing of any character whatever.

"Section 7958. Any vendor of any patented thing of any character, or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of § 7956,

shall, upon conviction, be punished by a fine of not more than three hundred dollars."

These sections have no application to the notes in controversy, for the reason that they were not given for "any patented machine, implement, substance, or instrument of any kind or character whatever." The most that can be said of the home emergency cases, for which the notes in controversy were given, is that the bottles contained in the case had a trade-mark on them which had been registered in the U. S. Patent Office. An article bearing a trade-mark which has been registered in the patent office is not a patented article, within the meaning of the aforesaid statute, and we do not feel that we can extend the provisions of the statute to cover a case not clearly included within the language of the legislative enactment.

In the recent case of *Green* v. *Jones,* 168 Ark. 423, 270 S. W. 515, the court held that the above sections of the statute did not apply to the lease of a patented article, and that the statutes are both penal and criminal, and must be strictly construed. It is there said:

"The statute is both penal and criminal. For its violation the penalty of the forfeiture of the agreed purchase price of the article sold is imposed, and the note or notes executed for the purchase price which do not conform to the requirements of the statute are rendered void in the hands of an innocent purchaser, and, in addition, a fine of $300 may be imposed for a violation of the statute. As the statute is penal and criminal, it must, for both reasons, be strictly construed."

The court, in that case, quoted from Black on Interpretation of Laws, § 114, page 286, in support of its construction that the statute must be construed strictly. However, we are of the opinion that it does not require a strict construction of the statute to say that an article bearing a trade-mark which has been registered in the U. S. Patent Office does not come within the provisions of the above statute, and has no application thereto. Neither does the statute cover notes given for the pur-

chase of patent-right territory. It is the sale of a specific article or thing which has been patented that is prohibited by the statute under the conditions named.

We therefore conclude that the court erred in submitting the case to the jury, and that appellant's request for a peremptory instruction should have been given. The judgment of the circuit court is therefore reversed, and judgment will be entered here for appellant for the amount of the notes and interest.

MOREHART v. A. B. BEELER LUMBER COMPANY.

Opinion delivered March 26, 1928.

1. MECHANICS' LIENS—NECESSITY FOR CONTRACT WITH OWNER.—Where the owner of a lot did not contract for material ordered by her husband for use in constructing a building thereon, in the absence of a showing of authority of the husband to act as agent for his wife, a materialman was not entitled to a lien under Crawford & Moses' Dig., § 6906, requiring that the lien of material furnisher or laborer must be under or by virtue of contract with owner or agent.
2. MECHANICS' LIENS—NOTICE OF LIEN.—Failure of a materialman to serve the ten-day notice required by Crawford & Moses' Dig., § 6917, on the owner of a lot is a complete defense to a suit to foreclose a materialman's lien.
3. MECHANICS' LIENS—WAIVER OF DEFENSE AS TO NOTICE.—A question as to a materialman's failure to give ten days' notice before filing the lien as required by Crawford & Moses' Dig., § 6917, is waived unless raised in the trial court.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; reversed.

Terry & Morrow, for appellant.

John D. Shackleford, for appellee.

McHANEY, J. This is a suit by appellee to foreclose a materialman's lien on lot 17, block 1, Riffel & Rhoton's Forest Park Highlands Addition to the city of Little Rock, the property of appellant, Mable Morehart. She was jointly sued with her husband, B. F. Morehart, but she alone is prosecuting this appeal.

On or about the 18th day of February, 1926, B. F. Morehart, who was not at the time living with his wife, Mable Morehart, purchased a bill of lumber from appellee with which to build a house on the above described lot, without any authority from his wife so to do. The material was charged to B. F. Morehart, and was sold and delivered to him, without any consultation with her, and without her knowledge and consent. A short time before the lien expired the agent of appellee asked her for a description of the property, and she gave it to him, and the agent testified that he filed a lien on the lot without giving any notice to her, as provided in the lien statute.

Another agent of appellee testified that, after about 20 months after the sale of the material, and after suit had been filed and judgment entered against the defendants, he went to appellant and offered to sell the property back to her for $50 cash and the balance on monthly payments, and that she offered $5 a week. Appellant testified that she was the owner of the property in her own right, and that she and her husband were not living together at the time the lumber was purchased; that the first she knew of the lumber being purchased was on returning home from work, she saw the lumber on the lot; she got in touch with her husband, and was advised that he had bought the lumber; that she told him she didn't want a house on her property, and he said that it didn't make any difference what she wanted—that he was going to build a house, and that he would pay for it. She also testified that she telephoned the office of appellee and directed them to get the lumber off of her lot, that she didn't want a house there. She later moved into the house with her husband, where she lived for about three months, and separated again, and has not lived in the house since; that it is worth about $50; that she didn't want it, but wanted the lumber company to move it. She also testified that she was not served with a notice before the lien was filed, and that she had never given her husband authority to have a house built, or to improve her property in any way.

The court entered a decree foreclosing the lien in the sum of $137.63, directed the property to be sold, and same has been sold, at which sale appellee became the purchaser.

We think the decree of the chancery court is wrong. In the first place, there was no contract between appellee and the owner of the lot, or her agent, for the purchase of said material, as provided by § 6906, C. & M. Digest. In order for a material furnisher or laborer to have a lien upon the property, it must be "under or by virtue of any contract with the owner or proprietor thereof, or his agent," etc. This is the plain language of the statute. It is admitted that appellee had no contract with appellant for the furnishing of this material. It is undisputed that the contract was with the husband of appellant, and it is nowhere shown that he was the agent of appellant, with authority to bind her in the purchase of this material. The fact that she saw the material on the lot and knew that her husband was building this house is not sufficient to imply a contract on her part to pay therefor, and there is no testimony in the record to show that she ever agreed to pay for it. There is no allegation in the complaint that B. F. Morehart was the agent of appellant, and there was no proof sufficient to establish this agency.

In the case of *Hoffman* v. *McFadden,* 56 Ark. 202, 19 S. W. 753, 35 Am. St. Rep. 101, this court decided the exact questions now under consideration against the contentions of appellee here. It was there held that, under the statute creating a lien for work done or materials furnished in making improvements on real property, the lien exists only where the labor is performed or materials furnished under a contract, express or implied, with the owner of the land, or with his agent, trustee, contractor or subcontractor, and that the husband has no power to make a contract to improve his wife's property so as to create a mechanic's lien thereon, unless he had the power and authority to contract for her as her agent; and it was further held that such authority cannot be implied because of

the relation of husband and wife, or from the fact that he assumes to manage her real estate, nor could the agency be inferred because of her knowledge that he is causing improvements to be erected upon her property. In that case, quoting the language of the court, "the building erected was located only about 40 feet from a house occupied by the defendant and her husband. She witnessed the progress of the work, and gave some directions to the carpenters as to the manner of executing it. Her husband had expressed a desire to have the building so constructed that she would be pleased with it, and one of the witnesses testified that 'she was present every day, and had the work done to suit her.' But it is not shown that she manifested any greater interest in the improvement than a wife would usually take in the building of a house upon land belonging to her husband and put up so near to the place of her residence. Nor does it appear that there was any greater deference to her wishes in the plan of the house than is commonly shown by a husband in causing a similar work to be done at his own expense. The contract for the work was made with the husband, and the labor of the carpenters was all paid for by him. All the materials purchased from the plaintiff and others were procured on the husband's order, and, for aught that appears to the contrary, they were sold entirely on his personal credit. The defendant testified that she objected to the erection of the house for reasons which she states; and in this respect her testimony is supported by that of two other witnesses. She also states that her husband was not authorized to act as her agent, and that she was not consulted about the contract for the improvement, and had no knowledge of its terms."

The facts in the above case are very much stronger against the wife than those in the present case, as will clearly be seen from the statement of facts heretofore made.

In the second place, there was no notice served upon the wife, as provided by § 6917, C. & M. Digest. This statute requires the giving of ten days' notice before

the filing of the lien to the owner or his agent, that he holds a claim against such building or improvement, setting forth the amount and from whom the same is due, and providing that it may be served by any officer authorized by law to serve process in civil actions, or by any person who would be a competent witness. This court has held that this statute must be substantially complied with. (*Conway Lbr. Co.* v. *Hardin,* 119 Ark. 43, 177 S. W. 408), and that the ten days' notice must be given. *Doke* v. *Benton Lbr. Co.,* 114 Ark. 1, 169 S. W. 327, 52 L. R. A. (N. S.) 870. But the question is waived unless raised in the trial court. *Whitcomb* v. *Gans,* 90 Ark. 469, 119 S. W. 676.

In this case, however, the answer raised this defense, and alleged that no notice had been given appellant of appellee's claim of lien. This is a complete defense to the action, even though B. F. Morehart might be said to be the original contractor for his wife in erecting such house. Appellee, not having made any contract with appellant for the furnishing of material, but, with her husband, even conceding him to be his wife's contractor, would be required, under the law, to give the ten days' notice before filing its lien on her property.

For the errors indicated the judgment will be reversed, and the cause remanded, with directions to dismiss the complaint as to appellant, Mable Morehart, for want of equity. It is so ordered.

BUCHANAN *v.* HALPIN.

Opinion delivered April 2, 1928.

1. APPEAL AND ERROR—NECESSITY OF MOTION FOR NEW TRIAL.—A motion for new trial is unnecessary where the error sought to be reviewed appears from the judgment record itself.
2. MANDAMUS—MOTION FOR NEW TRIAL UNNECESSARY WHEN.—Where the complaint and judgment in a mandamus proceeding, constituting the judgment roll, show that defendant street commissioners failed to comply with the requirement of Crawford & Moses' Dig.,

§ 5718, by filing annual statements of receipts and disbursements, no motion for new trial is necessary to present the question for review on appeal from a judgment denying the writ of mandamus, as the error appears from the face of the record.

3. MANDAMUS—NECESSITY OF MOTION FOR NEW TRIAL.—No proof being necessary to establish the allegations of a verified petition for mandamus, error in denying the petition appeared on the face of the record and is reviewable without motion for new trial, though oral testimony was introduced, where the judgment recited that defendants made default, the presumption being in that case that the testimony was introduced in support of the allegations of the petition.

4. MANDAMUS—PARTIES.—The owner of real property within the street improvement district is entitled to a writ of mandamus to enforce performance of duty of commissioners under Crawford & Moses' Dig., § 5718, to file annual statements of money received and paid out, but the proceeding must be in the name of the State.

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

STATEMENT OF FACTS.

S. A. Buchanan filed a petition for writ of mandamus in the circuit court against B. E. Halpin, C. J. Horner and C. Welcher, commissioners of Street Improvement District No. 70 of the city of Hot Springs, Arkansas, to compel them to file with the city clerk a statement showing all collections and money received and paid out, with proper vouchers for all such payments, as required by the provisions of § 5718 of Crawford & Moses' Digest. S. A. Buchanan alleges that he owns certain real estate situated within the boundaries of said improvement district, which is specifically described in his petition. He alleges that said commissioners have failed and refused to comply with the provisions of said § 5718. He alleges that, as an owner of property within the district, he had demanded compliance by the commissioners with said section of the statute, and caused written notice to be served upon them that he would make application to the circuit court for a writ of mandamus to compel them to comply with the statute. S. A. Buchanan has duly verified his petition.

The judgment of the circuit court recites that S. A. Buchanan appeared in person and by attorney, but that the defendants, who are specifically named, came not, but made default. The judgment further recites that the defendants were adjudged by the court to be in default, and that notice had been served upon them as required by law. The judgment further recites that the case is submitted to the court on the duly verified petition of S. A. Buchanan, upon the written notice showing service thereof, and upon oral testimony. It was considered, ordered and adjudged by the court that the petition of S. A. Buchanan for a writ of mandamus should be denied. From the judgment rendered S. A. Buchanan has duly prosecuted an appeal to this court.

Appellant pro se.

Murphy & Wood, for appellee.

HART, C. J., (after stating the facts). It is sought to uphold the judgment of the circuit court upon the ground that Buchanan did not file any motion for a new trial, and that there is therefore nothing presented for review here, under our rules of practice. We cannot agree with counsel for the defendants in this contention. This court has held that neither a motion for a new trial nor a bill of exceptions is necessary where the error sought to be reviewed appears from the judgment record itself. *Burns* v. *Harrington,* 162 Ark. 162, 257 S. W. 729. In *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002, it was held that, where there was no motion for a new trial in an action for mandamus, the consideration on appeal will be limited to errors on the face of the record.

In the case at bar the record itself recites that the defendants, although duly served with notice as required by the statute, wholly made default, and the case was submitted on the verified petition of the plaintiff. The plaintiff alleged that the defendants, commissioners of the street improvement district, had wholly failed to file with the city clerk a statement showing all collections and money received and paid out, with proper vouchers

for all such payments, as required under the provisions of § 5718 of Crawford & Moses' Digest. This court has held that, under this section of the statute, boards of commissioners in municipal improvement districts are required to file annual statements with the city clerk in which city such improvements have been ordered made, showing all collections and money received and paid out, with proper vouchers for all such payments. *Boullioun* v. *Little Rock, ante,* p. 489. The complaint of the plaintiff and the judgment itself constitute the judgment roll, and show that the defendants failed to comply with the mandatory duty provided by the statute. Therefore the error appears from the face of the record, and no motion for a new trial was necessary.

In so holding, we are not unmindful that oral testimony was introduced. As we have already seen, it also recites that the defendants made default. Hence the only reasonable presumption is that the oral testimony was introduced by the plaintiff in support of the allegations of his petition. The petition shows that it was duly verified by the plaintiff. Hence proof was not necessary to establish its allegations. It would be unreasonable to hold that oral proof introduced by the plaintiff was for any other purpose than to establish the allegations of his complaint, and, no proof being necessary for that purpose, the oral evidence had no place in the case; and the case stands here as if there had been judgment upon the complaint after the defendants had made default. In this state of the record, the error complained of appears upon the face of the record itself, and no motion for a new trial was necessary.

In this connection it may be stated that the plaintiff alleged that he was the owner of real property within the district, and had a right to enforce the performance of the duty required of the defendants under the statute. In *Moses* v. *Kearney, Clerk,* 31 Ark. 261, it was held that, where the writ of mandamus is sought for the enforcement of a public right, common to the whole community,

it is not necessary that the relator should have a special interest in the matter, or be a public officer; the statute, however, requires that the proceeding shall be in the name of the State.

The result of our views is that the circuit court erred in not granting to the plaintiff the writ of mandamus as prayed for, and the judgment will be reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

ALLISON v. COOPER.

Opinion delivered April 2, 1928.

BANKRUPTCY—FRAUDULENT REPRESENTATIONS.—Under Bankruptcy Act, § 17, subd. 2, liabilities for obtaining property by false pretenses or false representations are not discharged by bankruptcy.

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

STATEMENT OF FACTS.

This was a proceeding by *scire facias* by S. G. Allison against J. F. Cooper to revive a judgment. Cooper defended on the ground that he had been discharged in bankruptcy in the Federal court after the judgment had been obtained. Allison filed a response, alleging that the judgment sought to be revived was excepted from the discharge in bankruptcy under the bankruptcy statute.

Allison introduced in evidence the judgment sought to be revived, as well as the pleadings in that case. Cooper appealed from the judgment of the circuit court to this court, and the judgment was affirmed. The action was one for damages for fraudulent representations of Cooper in pretending to secure a purchaser of exchange property at a stipulated price as a consideration for the exchange of lands. The opinion was delivered on May 17, 1920. *Cooper* v. *Allison*, 144 Ark. 82, 221 S. W. 477.

On May 12, 1921, the Federal Court in Bankruptcy rendered a judgment discharging J. F. Cooper from all debts and claims which were provable under the bankruptcy act against his estate existing on the 26th day of August, 1920, excepting such debts as by law were excepted from the operation of a discharge in bankruptcy.

The circuit court dismissed the petition of Allison to revive the judgment, and the case is here on appeal.

O. H. Sumpter and *Berry H. Randolph,* for appellant.

HART, C. J., (after stating the facts). Under the Federal Bankruptcy Act, certain debts that are provable are nevertheless excepted from the operation of the discharge decree. Remington on Bankruptcy, 3d ed., vol. 7, § 3533. Under § 3537 it is said that liabilities for obtaining property by false pretenses or false representations are excepted from the operation of discharge. The author adds that this exception was added by the amendment of 1903, and took the place of the former provision that read: "Judgments for fraud or for obtaining property by false pretenses or false representations."

Upon the same subject we quote from Collier on Bankruptcy, 13 ed., vol. 1, page 613, the following:

"Liabilities for fraud, false pretenses and false representation. Before the amendment of 1903, a bankrupt might have been released from a debt contracted in fraud, unless the fraud had been determined and a judgment therefor had been rendered. As the law now stands, the frauds which will bar discharge are those connected with the obtaining of property by 'false pretenses or false representations.' 'Property' as here used has the meaning usually accorded to the word in similar statutes; it means something of substance; it includes money, but does not include services."

In *Forsythe* v. *Vehmeyer,* 177 U. S. 177, 20 S. Ct. 623, 44 L. ed. 723, it was held that a representation as to a fact, made knowingly, falsely and fraudulently, for the purpose of obtaining money from another, and by means of which

such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong, and such debt is not discharged by a discharge in bankruptcy.

In *Bullis* v. *O'Beirne,* 195 U. S. 606, 25 S. Ct. 118, 49 L. ed. 340, it was held that on writ of error to a State court, reviewing its refusal to cancel a judgment after discharge of the debtor in bankruptcy, on the ground that the judgment was in action for fraud, the Federal question is not whether the complaint sufficiently charged fraud to warrant the judgment, but whether the action was for fraud; and if there are facts charged and found to the effect that false and fraudulent representations were made and relied on which, in the State court, were sufficient to warrant relief on the ground of fraud, the judgment comes within the exception of § 17 of the bankrupt act, and will not be canceled, although the suit may originally have been brought in equity for specific performance instead of for money judgment. A statement made fraudulently with knowledge of its falsity must necessarily be intended to deceive.

In the same case it was said that, whether the complaint specifically charged fraud to warrant the judgment given, was not a Federal question. The court further said that the question for it was whether the judgment rendered by the said court was in an action for fraud, and that, if so, it was excepted from the effect of a discharge in bankruptcy.

The question therefore presented in this case is, was the judgment in favor of Allison in *Allison* v. *Cooper,* in the circuit court, as finally decided in this court, one within the meaning of the second exception to the bankruptcy act above referred to? We think an examination of the record in that case, as well as the interpretation of the pleadings and judgment by the opinion of this court in the case referred to, in 144 Ark. 82, 221 S. W. 477, shows that the relief was granted on the ground of false representations by Cooper which induced Allison to make the exchange of lands. Under the principles of law above

decided, in order to bring the case within the operation of the bankruptcy statute and prevent the discharge of the bankrupt, it should be made to appear that the money or property was obtained by fraudulent representations, and that it was not therefore released by the discharge in bankruptcy.

The object of the statute is to prevent the bankrupt from retaining the benefits of property acquired or money secured by fraudulent representations. In *Cooper* v. *Allison,* 144 Ark. 82, 221 S. W. 477, the court said:

"There is enough evidence, we think, to warrant the conclusion that the purchase by Parnell, and appellant's (appellee here) representations as to the opportunity to resell the property to Parnell, were not made in good faith, but were collusive between appellant and Parnell, and that those facts constituted actionable deceit practiced by appellant upon appellee, which induced the latter to enter into a contract for exchange of properties."

As thus interpreted, we are of the opinion that the judgment in question was based upon the fraudulent representations of Cooper, and the judgment sought to be revived in this case is, in our opinion, in an action for fraud within the meaning of subdivision 2 of provable claims excepted from a discharge in bankruptcy in the Federal court.

It follows that the judgment will be reversed, and the cause will be remanded with directions to the circuit court to issue the writ of *scire facias* and revive the judgment in accordance with the petition of S. G. Allison, and for further proceedings according to law and not inconsistent with this opinion.

COCHRAN v. PEOPLE'S EXCHANGE BANK.

Opinion delivered April 2, 1928.

1. SALES—FRAUDULENT REPRESENTATIONS.—In order to vitiate a contract of sale on the ground of fraudulent representations, they must relate to an existing fact material to the contract upon which the other party has a right to rely and did rely to his injury.
2. SALES—FRAUDULENT REPRESENTATIONS—MEANS OF INFORMATION. If the means of information as to the matters alleged to be misrepresented in a sale are equally accessible to both parties, they will be presumed to have informed themselves, and, if they have not done so, they must abide by consequences of their own carelessness.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—Where the evidence is evenly poised, or so nearly so that the Supreme Court is unable to determine in whose favor the preponderance lies, the chancellor's findings of fact are conclusive on appeal.
4. SALES—FRAUDULENT REPRESENTATIONS.—In a suit to recover the price of mill machinery and to foreclose a mortgage thereon, evidence that defendants agreed to furnish the machinery as viewed by them at the place to which it had been hauled from the country, *held* to justify the chancellor's finding that they were not induced to purchase by representations as to the value and character of the parts, which they knew were missing when they purchased.

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

STATEMENT OF FACTS.

Appellee brought this suit in equity against appellants to recover judgment for an amount alleged to be due them and to foreclose a mortgage on lands and machinery given to secure said indebtedness. Appellants defended the suit on the ground that the mortgage was given to secure the purchase price of certain mill machinery purchased by them from appellee, and that the sale had been induced by fraudulent representations.

L. B. McClure, vice president and manager of appellee bank, was a witness for it. According to his testimony, in May, 1923, R. H. and J. P. Cochran procured a loan from his bank in the sum of $800, and gave a

mortgage on certain mill machinery and real estate situated in Pope County, Arkansas, to secure it. Six hundred dollars of the amount borrowed was to be applied in payment of a sawmill upon which appellee had a second mortgage, and the remaining $200 was to be used in operating expenses of the sawmill. B. F. Harris had a first mortgage on the sawmill outfit, which belonged to B. F. Roof. The Cochrans came to the witness, and told him they were interested in the purchase of the sawmill. McClure sent him to Harris, who had charge of the Roof mill at that time. Roof had turned the mill over to Harris to sell for him. Harris had hauled the mill from its location near Gum Log, in Pope County, to his place on the north side of Russellville. McClure told Cochran to go and look at the mill before he purchased it. Cochran did so, and agreed to pay $600 for the mill if appellee would let him have $200 additional for operating expenses. Appellants gave appellee a mortgage on the sawmill they were purchasing and on one in operation, and also on a tract of land which they had purchased from W. P. Ferguson, on which they owed $477.50. Appellee subsequently paid off the amount due Ferguson on the mortgaged land.

B. F. Harris was also a witness for appellee. According to his testimony, he had a first mortgage on the mill machinery owned by Roof, and appellee had a second mortgage. Roof asked Harris to sell the machinery for the purpose of paying off the mortgage to the bank. The machinery was at Moreland, in Pope County, Arkansas, and was so located that Harris was unable to sell it. After talking with L. B. McClure, Harris had the machinery hauled to his place near Russellville for $20. The Cochrans came out there to look at the machinery, and asked Harris what it was worth. Harris told them it was worth $600, but that whatever they could do with McClure was all right with him. Harris told the Cochrans that he was selling the machinery to them just as they saw it. He told them that if there were any addi-

tional parts of the machinery at Moreland, he would get them for them, but that he was only selling them what they saw. He turned over to them all the saws, belts and pulleys which he showed them. They did not haul the machinery away for two or three months after they bought it.

According to the testimony of B. F. Roof, he authorized B. F. Harris, who held the first mortgage on the machinery, to sell it for him. Harris made the sale of the machinery, and was paid a commission for selling it.

According to the testimony of R. H. Cochran, he purchased the machinery from L. B. McClure, and McClure represented to him that he had a complete sawmill outfit, but that Harris only showed him the engine and part of a saw rig and a boiler. The governor, steam gauge, lubricator, lead pipes, lead-pipe fittings and flanges were not there. These parts were a material inducement for making the purchase, and they were never turned over to the witness. Two members of the Cochran family testified to substantially the same state of facts. Two other members of the same family testified that they were employed by appellants to haul the machinery for them, and that the governor, steam gauge, certain belts and lead pipes could not be found, and were not hauled and delivered by them to appellants.

The chancellor found the issues in favor of appellee, who was plaintiff in the court below; and from a decree in appellee's favor the appellants, defendants and cross-complainants in the court below, have duly prosecuted this appeal.

Strait & Strait, for appellant.

Ward & Caudle, for appellee.

HART, C. J., (after stating the facts). Counsel for appellants seek to reverse the decree upon the ground that the sale of the machinery to appellants was procured by the false representations of L. B. McClure, vice president and manager of appellee bank. In order to vitiate a contract of sale on the ground of fraudulent

representations, such representations must relate to an existing fact material to the contract, and upon which the other party had a right to rely, and did rely to his injury. If the means of information as to the matters alleged to be misrepresented are equally accessible to both parties, they will be presumed to have informed themselves; and if they have not done so, they must abide by the consequences of their own carelessness. *Bankers' Utilities Co., Inc.,* v. *Cotton Belt Savings & Trust Co.,* 152 Ark. 135, 237 S. W. 707; and *Manzil* v. *White,* 161 Ark. 1, 255 S. W. 567.

Thus it will be seen that the issue raised by the appeal is entirely one of fact; and, in determining issues of fact in chancery cases, where the evidence is evenly poised, or so nearly so that we are unable to determine in whose favor the preponderance lies, the findings of fact by the chancellor are persuasive. In short, the findings of fact by the chancery court stand upon appeal, unless they are clearly against the preponderance of the evidence. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160.

In the application of this rule to the facts in the record, viewed in the light of the attendant circumstances, it cannot be said that the findings of fact made by the chancellor are clearly against the weight of the evidence. Appellants were experienced sawmill men, and were shown the sawmill outfit before they purchased it. Harris and McClure both testified that they agreed to purchase the sawmill outfit as viewed by them. The machinery composing the sawmill outfit had been hauled from its location in the country and stored at the residence of the witness Harris, who held a first mortgage on it. Appellants saw the outfit before they purchased it. They now claim that certain parts were missing when they hauled it away. They claim that they asked about the missing parts, and that Harris promised to get them up. Appellants knew the missing parts were not with the other parts and that the parts examined by them had been hauled into town from their location somewhere

in the country. It is not reasonable to think that they were induced to make the purchase by the representations of Harris and McClure as to the value and character of the parts which they now claim are missing. They saw the most valuable parts of the sawmill outfit, and it is more in accordance with reason and human experience that they purchased the machinery relying upon the value of the parts which were shown to them and which they examined before making the purchase. In addition they secured the sum of $200, which they claim they were to use in operating expenses.

We think the chancellor was justified in finding that the facts of the case bring it within the principles of law above announced, and it follows that the decree should be affirmed. It is so ordered.

SMITH v. GARRETSON.

Opinion delivered April 2, 1928.

1. EQUITY—EXHIBITS TO COMPLAINT.—In suits in equity exhibits to the complaint will be looked to on demurrer for the purpose of testing the sufficiency of allegations of the complaint.
2. CONSTITUTIONAL LAW—RIGHT TO QUESTION VALIDITY OF STATUTE.—In a suit to restrain levying of an assessment of benefits within a levee district against plaintiff's lands, which were brought into the district under a county court's order under the same notice and procedure prescribed for creating a new levee district, plaintiff was not entitled to contend that the lands were embraced within the district without notice, and that Crawford & Moses' Dig., § 6813, was unconstitutional in providing that a change of boundary of the district should be made without notice.
3. CONSTITUTIONAL LAW—NECESSITY OF DECISION ON CONSTITUTIONALITY.—As a general rule, the court will not pass on a constitutional question unless a decision on that very point is necessary to determination of the case.
4. LEVEES—ASSESSMENT OF LAND ADDED TO DISTRICT.—Crawford & Moses' Dig., § 6813, *held* to authorize assessment of levee district benefits against land added to an existing district by changing its boundary.

5. LEVEES—AUTHORITY TO ASSESS BENEFITS TO LANDS ADDED TO DISTRICT.—The board of assessors of a levee district, if not expressly authorized to assess the benefits to additional lands brought into an existing district by change of boundaries, has such authority by necessary implication under Crawford & Moses' Dig., § 6823.
6. LEVEES—INCIDENTAL POWERS OF DISTRICT.—In the construction of statutes governing levee improvement districts, the grant of powers by the statute includes the incidental powers reasonably proper and necessary for carrying into execution the powers specifically granted.

Appeal from White Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

C. E. Yingling, for appellant.

Brundidge & Neelly, for appellee.

WOOD, J. On January 2, 1928, a petition was presented to the White County Court asking that the boundary lines of Levee District No. 1 be changed and that certain territory described in the petition be added to the district "for the purpose of constructing and maintaining a levee for the protection" of the lands described in the petition and all the lands which had already been included in Little Red River District No. 1. At the regular January term of the White County Court the court found that notice was given to the resident landowners in the territory described in the petition more than ten days before the application for the change in the boundary lines by posting written notices in three public places in the limits of the district and the proposed addition thereto. The court further found that an election had been duly and regularly held for the purpose of electing one director and assessor for the Little Red River District No. 1, and that one George Akers was elected director and Walter Heathcock was elected assessor.

This action was instituted in the White Chancery Court by L. A. Smith against T. H. Garretson, Swan Garretson and George Akers, as directors, and Walter Heathcock, L. A. Pryor and J. M. Garretson as assessors, of Little Red River District No. 1. The plaintiff alleged that he was a landowner and taxpayer of the district,

and that an order was made annexing certain territory to the district, which order is set out and made an exhibit to his complaint, and the alleged annexed territory is described in the exhibit. He further alleged that the court ordered an election, after due notice, for the purpose of electing a director and also an assessor to fill vacancies in those respective offices, and that at the election so held one George Akers was elected director and Walter Heathcock was elected assessor. He alleged that the directors and assessors were threatening to assess his lands and other lands in the district and to issue additional bonds to repair the levee, which was damaged by overflows, and that there was no provision under the law whereby the lands can be assessed and no right or authority in the assessors to assess the lands which had been annexed to Little Red River District No. 1. The plaintiff prayed that the defendants be enjoined from levying an assessment of benefits on his land.

The defendants filed a general demurrer to the complaint. The cause was submitted upon the complaint with its exhibits and the demurrer of the defendants. The court sustained the demurrer, and the plaintiff stood on his complaint and exhibits. The court entered a decree dismissing the complaint for want of equity, from which is this appeal.

1. It will be observed that the cause was heard on the demurrer to the complaint. In actions in equity exhibits to the complaint will be looked to, on demurrer, for the purpose of testing the sufficiency of the allegations of the complaint. See *Evans* v. *Pettus*, 112 Ark. 572, 166 S. W. 955; *Moore* v. *Exelby*, 170 Ark. 908, 181 S. W. 671. The complaint alleges that the county court of White County made an order annexing certain territory in which the plaintiff owned lands, and that the county court made an order directing that an election be held for the purpose of electing a director of Levee District No. 1 and also to elect an assessor, and that the election was duly held, all of which was shown by an order

of the county court, which was attached and made an exhibit to the complaint. When the recitals of the order of the county court are examined, it will be observed that the court, in making the alleged order of annexation and for the election of a director and an assessor, followed the procedure prescribed by the statute with reference to the formation of new or original districts as regards notice and election of directors and assessors. See §§ 6814-6819 of Crawford & Moses' Digest. While the recitals of the order designate it as a petition for the annexation of territory and a change in boundary lines, these recitals further declare that the petition was presented asking that the boundary be changed and the territory described therein added "for the purpose of constructing and maintaining a levee for the protection of the above described lands, as well as all the lands included in said Little Red River District No. 1, to the end that all said lands shall be protected from overflow."

The recitals of the order of the county court upon which the appellant predicates his alleged right to enjoin the appellees from levying an assessment of benefits on his land, and which recitals must explain and control any allegations of the complaint, really make it uncertain whether the purpose of the county court of White County was simply to lay off and form a new levee district with the same name and including the same territory as that embraced in Little Red River District No. 1 and also the additional territory as that described in the order of the county court, or whether the purpose of the court was to change the boundary lines of the district already existing so as to include therein new territory. However this may be, it is certain that the appellant's lands have been brought into the district under an order of the county court under the same notice and procedure which would have been followed if the county court had been really creating a new levee district instead of merely changing the boundaries of one already existing. Such being the state of the record, the trial court was not

called upon to pass upon the constitutionality of the act of March 20, 1879, as amended by the act of March 1, 1889, as set forth in § 6813 of Crawford & Moses' Digest. Certainly the appellant is not in an attitude to contend that his lands were embraced in the district without notice to him, and that the act of March 1, 1889, is for that reason unconstitutional and void.

In *Ry. Co.* v. *Smith,* 60 Ark. 221-240, 29 S. W. 752-754, Judge BATTLE, speaking for the court, quoted from Judge Cooley on Constitutional Limitations, p. 231, paragraph 2, as follows: "Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both proper and more respectful to a coordinate department to discuss constitutional questions only when that is the very *lis mota.* Thus presented and determined, the decision carries a weight with it to which no extrajudicial disquisition is entitled. In any case therefore where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable." Such has been the unvarying practice of this court. See also *Martin* v. *State,* 79 Ark. 236, 96 S. W. 372; *Sturdivant* v. *Tollett,* 84 Ark. 412, 105 S. W. 1073; *Road Imp. Dist. No. 1* v. *Glover,* 86 Ark. 231, 110 S. W. 1031.

2. But learned counsel for the appellant contends that no express authority is contained in the statute, §

6813, for the assessing of benefits against any land that may be added to an existing levee district by a change in the boundary of such district. We cannot concur in this view. The act of March 20, 1879, authorizing the creation of levee districts, provides for a board of three assessors for such districts, whose duty it is, under the statute, to assess the benefits to accrue to the lands *in such districts* by reason of the levees to be constructed and maintained. This language, "*shall assess the value of lands in said district * * * and shall assess the value thereof,*" *i. e.,* the benefit of the work or improvement made, is sufficiently comprehensive to include all the lands that may be embraced in any levee district that may exist as originally formed, and also any lands that may be subsequently added by a change in the boundaries of such district. The Legislature of 1889, in § 1 of the act approved March 1, 1889, after amending the act of 1879 so as to authorize the county court to lay off levee districts or change or order the boundaries of existing levee districts, further provided, in § 2 of the act, "that the said board of assessors shall make an assessment of the cost of said work upon the land situated *in said district benefited by said work,*" etc. The Legislature of 1897 amended § 2 of the act of March 1, 1889, so as to read as follows: "Said board of assessors shall make an assessment upon the cost of said work upon the lands situated in said district benefited by said work and reported at said meeting of landowners," etc. Then follow certain changes in the section not necessary to set out. See §§ 4365, 4367, 4375 of Mansfield's Digest, and 4709 of S. & H. Digest, all brought forward and digested in §§ 6813, 6815, 6823 and 6830 of Crawford & Moses' Digest. When these provisions of our statutes pertaining to levees are considered, it is clear that the assessors of all levee districts are expressly authorized to assess the benefits to accrue to all the lands included in the district by the building and maintaining of the levee. A review of the statutes set forth above convinces us that the Legislature used the words "levee district"

intending that they should be applied to all the lands embraced in such districts, whether as at first formed or created, or as such districts might exist should their boundaries be afterwards changed.

Furthermore, even if the board of assessors were not expressly authorized to assess the benefits to the additional lands brought into the existing levee districts by change of boundaries, they would have such authority by necessary implication, because it is their duty, under § 6823 of C. & M. Digest, *supra,* to assess the value of the benefits to accrue to the lands by reason of the levee. This necessarily includes all the lands that may be embraced in any existing levee district. Any other construction would cast an unjust and discriminatory burden upon some of the lands in the district and defeat the purpose of the law in the creation of such improvements.

In *West* v. *Cotton Belt District No. 1,* 116 Ark. 538, 173 S. W. 403 (a levee district case) we held: "In the construction of statutes governing improvement districts, the grant of powers by the statute includes the incidental powers reasonably proper and necessary for carrying into execution the powers specifically granted." That doctrine applies here.

The decree is correct. Let it be affirmed.

BLAKE v. THOMPSON.

Opinion delivered April 2, 1928.

ABATEMENT AND REVIVAL—WHEN REVIVAL BARRED.—Where a suit to cancel a trustee's deed and for an accounting of rents and benefits was improperly revived against the executor of the grantee on the latter's death in 1922, and the heirs were not made parties until 1927, *held* under Crawford & Moses' Dig., §§ 1063, 1065, the cause of action was barred.

Appeal from Woodruff Chancery Court, Central District; *A. L. Hutchins,* Chancellor; affirmed.

Jonas F. Dyson, for appellant.

W. J. Dungan, for appellee.

SMITH, J. The heirs of George Washington, Jr., brought suit to cancel a trustee's deed which had been executed under a power of sale contained in a deed of trust executed by their ancestor to W. H. Gray, as trustee for Thompson & Gregory, and for an accounting of the rents and profits of the lands, and for the value of certain timber cut by Thompson from the lands. The deed of the trustee was to Thompson. Before the final submission of the cause Thompson, the grantee in the trustee's deed, died, and the cause was revived in the name of his executor. Upon the final submission of the cause the relief prayed was granted, the trustee's deed was canceled, and a judgment was rendered against Thompson's estate for the amount of the rents in excess of the debt secured by the deed of trust and for the value of the timber cut by Thompson.

An appeal was duly prosecuted from this decree, and it was held by this court, on the submission of that appeal, that, as the action was one to recover lands, the cause should have been revived in the name of Thompson's heirs, and not against his executor, and the decree of the court below was reversed and the cause dismissed. *Thompson* v. *Lee,* 174 Ark. 868, 296 S. W. 706. Thereafter, on August 2, 1927, the heirs of Washington brought a new suit, in which the heirs of Thompson were made parties, and the complaint recited the facts above stated, and which are set out in detail in the former opinion.

A demurrer to this complaint was sustained, upon the ground that the original cause of action had not been brought within the time allowed by law after the death of Thompson, which, as the former opinion recited, occurred on May 12, 1924. The complaint in the present case alleges that Thompson died March 28, 1922.

The opinion on the former appeal is decisive of the present case. It was there said: "The heirs were nec-

essary parties to the suit, after his death, it being an action affecting the title to and for the recovery of real property, and the revivor should have been made against and in the name of his heirs. Section 1063, C. & M. Digest; *Ex parte Gilbert*, 93 Ark. 307, 124 S. W. 762; and *Dupree* v. *Smith*, 150 Ark. 80, 233 S. W. 812. The court proceeded to a hearing of the cause without revivor against the heirs or devisees of M. D. Thompson or treating them as proper or necessary parties, and the cause could not have been revived against them without their consent, after the expiration of one year from the time the order of revival might have first been made. Section 1065, C. & M. Digest.

The sections of the statute there referred to read as follows:

"Section 1063. Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both, and an order therefor may be forthwith made in the manner directed in the preceding sections."

"Section 1065. An order to revive an action against the representatives or successors of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made."

In addition to the cases cited in the former opinion, see also *Anglin* v. *Cravens*, 76 Ark. 122, 88 S. W. 833.

As it appears from the face of the complaint, to which a demurrer was sustained, that Thompson died in 1922, and that this suit was improperly revived against his executor, and not against his heirs, and that the heirs were not made parties until 1927, the cause of action was barred by the statutes quoted, and the demurrer was therefore properly sustained.

The decree of the court below will therefore be affirmed.

FORD *v.* TAYLOR.

Opinion delivered April 2, 1928.

1. BANKS AND BANKING—DUTY OF DIRECTORS.—While bank directors are liable to stockholders as well as creditors for failure to exercise diligence and good faith in managing the affairs of the bank, the mere exercise of poor judgment is not sufficient to form a basis for liability.
2. BANKS AND BANKING—LIABILITY OF DIRECTORS.—Where directors of a bank met regularly and kept their records properly and were unaware of the precarious condition of the bank before examination by a bank examiner, they are not liable, on the bank's insolvency, for losses sustained as a result of bad loans and depreciation in values, notwithstanding the exercise of bad judgment in making loans.
3. BANKS AND BANKING—DUTY OF DIRECTORS.—Where the report of a bank examiner disclosed that a bank was in a precarious condition at the time such report was filed, the directors were required to give closer attention to the bank's affairs than they had previously done.
4. BANKS AND BANKING—LIABILITY OF DIRECTORS.—On a bank's insolvency its directors *held* not liable for worthless loans made by way of renewal of loans given at a time when the directors were not aware of the bank's precarious condition, or for money borrowed from correspondent banks without the directors' knowledge, where the original loans resulted from bad judgment only, and the bank received the benefit of money obtained from correspondent banks, though such money was obtained by use in part of forged collaterals as part of the cashier's mismanagement of the bank's affairs.
5. BANKS AND BANKING—LIABILITY OF DIRECTORS.—Bank directors, when informed by the report of the bank examiner of the precarious condition of the bank, who nevertheless failed to appoint a discount or loan committee or to supervise loans made by the cashier or to require reduction of excessive liability of officers to the bank, *held* liable for worthless loans subsequently made by the cashier and for aditional loan to the bank's president, since such losses were due to the failure of the directors to exercise diligence in managing the bank's affairs.

Appeal from Franklin Chancery Court, Ozark District; *J. V. Bourland,* Chancellor; reversed.

Webb Covington, J. D. Benson and *G. C. Carter,* for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

SMITH, J. This suit was brought by the State Bank Commissioner against the directors of the People's Bank of Ozark. The complaint alleged that the bank had become insolvent, and that the plaintiff commissioner had taken over its affairs, and, through a partial liquidation of its assets, had paid a dividend of ten per cent. to its creditors, and that the bank had become insolvent through the failure of the defendant directors to discharge the duties imposed upon them by law as directors.

The complaint alleged that the directors failed and neglected to discharge their duties in the following respects: At the first meeting of the board in January, 1925, the directors ordered that the policy of the bank should be to make no further loans except small loans to regular customers in the due course of business, and the directors so instructed F. E. Stockton, the cashier. This order was made because the bank at the time was in a badly extended condition, with a large amount of frozen assets and past due paper, but, notwithstanding this condition, the directors, through lack of ordinary care and prudence, permitted the cashier to make many new loans, several of them being in large amounts, and without adequate collateral, and to irresponsible persons. A list of these loans, aggregating $42,695.02, was set out. It was further alleged that a number of these alleged loans were evidenced by notes to which the names of the makers had been forged by the cashier, and that this practice could not have proceeded far if the directors had discharged their duty by examining the notes.

That on February 12, 1925, the board of directors adopted a resolution authorizing the cashier and other officers of the bank to borrow money from the City National Bank of St. Louis, the Merchants' National Bank of Fort Smith, and the Bankers' Trust Company of Little Rock, and to pledge the notes held by the bank as collateral therefor, but, instead of this resolution being correctly entered upon the minutes of the meeting of the directors, the cashier entered a resolution giving him authority to rediscount notes held by the bank as

security for loans made by it with any of the correspondent banks, and, by reason of the failure of the directors to see that this resolution was properly entered, the cashier was enabled to obtain large sums of money, which he dissipated in reckless and unauthorized loans. At the time of the trial of this cause in the court below litigation was pending in which liability to the St. Louis bank was denied on account of notes rediscounted to the St. Louis bank, but that case was recently determined by this court in favor of the St. Louis bank. *Grand National Bank of St. Louis* v. *Taylor,* 176 Ark. 1, 1 S. W. (2d) 818. That the cashier of the bank erected a business house in Ozark in 1925, and paid the contractor for his work by permitting the contractor to overdraw his building account, and that these overdrafts were carried as bills receivable on the books of the bank, and in this manner the bank sustained a loss of $9,673.07. That the directors were negligent in permitting and approving loans to the president of the bank and to a brother and a son of the president, and testimony was offered tending to show that all these loans were in fact loans to the president, but were made to the president's brother and son to prevent it from appearing that the loan limit to any one person had been exceeded.

In response to a motion to make the complaint more definite and certain, an amendment to the complaint was filed, in which it was alleged that the nominal assets which came into the hands of the Bank Commissioner amounted to $550,000, but included in this amount was $67,072.38 of old notes which had been previously charged off as being of no value, and $150,000 of other assets which were without value, and $30,000 in duplicated notes, leaving total assets of $302,927.61, of which $90,000 had been collected, and it was estimated that $90,000 more would be collected. The actual liabilities of the bank were alleged to be $480,499, and the contingent liabilities were $150,000.

A demurrer to the complaint was overruled, as was also an additional motion to make the complaint more definite and certain.

The answer filed by the defendant directors denied that they had failed to exercise ordinary care in the matter of seeing that the directions given by them to the cashier were obeyed in the matter of making new loans, and they alleged the fact to be that the cashier was a man in whom they and all others had implicit faith and confidence, and whose good character was unquestioned either for business capacity or integrity. That the cashier had forged the resolution increasing his authority to obtain money from the correspondent banks, and had kept the books of the bank, including the note register, in such manner that they did not know of the unauthorized loans or the forged notes which had been used as collateral to borrow money. They were not aware that the cashier of the bank was using the funds of the bank in an unauthorized way in the construction of a business house, and could not by ordinary care have discovered that fact. The loans to the president of the bank were alleged to have been made at a time when his solvency was not questioned, and it was further alleged that he was solvent, and that the loans to the brother and son of the president were made in good faith and in the exercise of an honest judgment as to the solvency of these parties. The testimony appears, however, to show that the president of the bank is not solvent, at least the Bank Commissioner has been unable to collect from him the amount due the bank.

All the allegations of the complaint were put in issue, including the allegations as to the value of the assets which the Bank Commissioner had taken over and those in regard to the actual and contingent liabilities of the bank.

A voluminous record was made at the trial from which this appeal comes, and this opinion would be wearisomely protracted if we were to discuss all the notes

and transactions upon which the liability of the directors is predicated. We will content ourselves therefore with a declaration of the legal principles which should be applied, and the liability of the directors will be accordingly determined.

We have had frequent occasion to consider the liability of directors of banks to stockholders as well as creditors for inattention to their duties and for the mismanagement of the bank's affairs, and a late case is that of *Muller* v. *Planters' Bank & Trust Co.,* 169 Ark. 480, 275 S. W. 750. This case cited and to some extent reviewed the leading cases in this State on this subject, and in the syllabus in that case it is said: "While bank directors are liable to stockholders as well as creditors for failure to exercise diligence and good faith in managing the affairs of the bank, the mere exercise of poor judgment is not sufficient to form a basis of liability."

In the body of the opinion in that case it was said:

"The statute, however, in broad terms, as we have seen, places the 'stock, property, affairs and business of such corporations' under the care of their board of directors, to be managed by them. The statute creates a relation and confers a power which necessarily carry with them corresponding duties and liabilities, independent of any statute specifically defining or limiting those duties and liabilities; and in the absence of any statute they must be ascertained and controlled by common-law rules applicable generally to such relations and powers.' The court then adopted the rule announced by Mr. Justice Harlan in the case of *Briggs* v. *Spaulding,* 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662, as follows: 'Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its officers. They have something more to do than, from time to time, to elect officers of the bank, and to make declarations of dividends. That which

they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known, in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business. * * * A rule no less stringent should be applied as between a banking association and directors representing the interests of stockholders and depositors.' The substance therefore of the test laid down in that case of the responsibility of directors to stockholders as well as to creditors, is good faith and diligence."

Testing the liability of the directors by these rules, we find that they were grossly negligent in the performance of their duties as directors from and after the first of January, 1925.

The testimony shows that an examination of the bank was made about that time by an examiner of the State Banking Department, and it was a mere matter of indulgence on the part of the examiner that the bank was permitted to continue in business. Copies of this report were filed with both the Bank Commissioner and the directors of the bank, and the most casual examination of this report would have shown that the bank was then in a most critical condition.

With a capital of only $25,000, the president of the bank was liable to it upon two notes totaling $11,020.17, and as an indorser upon the note of his brother for $3,405.15, and the maker of this note testified that the cashier told him that the bank was carrying the president for more than the bank rules would permit. "He asked me if I would take part of it. That is how I took it." The officers and employees of the bank were carrying loans with the bank, including their indorsement, of $24,899.27. The total loans of the bank, as shown by the examiner's report, amounted to $276,675.10, and included therein were 569 past due notes totaling $165,-853.56, and $16,928.83 in notes were carried as cash items, and there was a deficit in the reserve of 11.5 per cent. The report called attention to the fact that the

practice of permitting overdrafts appeared to be habitual, and that these were carried as cash items, and the attention of the directors was also called to the fact that the bank's other paper was not fairly or sufficiently liquid.

Notwithstanding these facts, we are of the opinion that the directors of the bank are not liable for any losses sustained by transactions occurring before this examination by the bank examiner. Prior to that time the directors were not aware of the precarious condition of the bank; they had met regularly, and had kept their records properly, and had a discount committee which had functioned, and the directors had made an audit of the bank's affairs in the year 1924. The honesty of the directors themselves is not called in question, and it is charged only that they were grossly inattentive to their duties. Most of the loans then existing were renewals of old loans made in more prosperous times and to persons who were regarded as good when these loans were made. A crushing depreciation in values had occurred, which rendered many persons unable to pay whose paper had been previously regarded as good. The directors had evidently used poor judgment in making many of these loans, but, as was said in the Muller case, *supra,* "the mere exercise of poor judgment is not sufficient to form a basis of liability, for, when directors are selected by the stockholders, the latter assume the risk of losses occurring on account of mere defects in judgment, and in acceptance of the office by the director he merely assumes the obligation to manage the affairs of the institution with diligence and good faith."

But, as we have said, the directors must have known from the report of the bank examiner, if not otherwise, that the bank was in a precarious condition when the examiner's report was filed with them on January 4, 1925, and under these circumstances diligence and good faith required them to give closer attention to the bank's affairs than they had previously done.

In discharge of this duty the directors, at their meeting in January, 1925, directed the cashier to make no new loans except small ones to regular customers in the ordinary course of business. It appears, however, that no intelligent or serious effort was made to enforce this rule. It may be said, in this connection, that the record does not show any criminal conduct on the part of the cashier prior to 1925, and that the directors and the community generally had implicit confidence in the cashier's integrity prior to that time. But with the beginning of this year the cashier commenced a systematic misuse of the bank's funds. He purchased an eighty-acre tract of land in the city limits, and he erected a house costing five or six thousand dollars, and he erected a ten-thousand-dollar business house on one of the principal streets. In addition to this, he engaged in oil ventures; he operated a coal mine; he invested in a diamond cave, and assisted in promoting a vineyard company and a life insurance company, and in aid of these projects he made large and unauthorized loans to himself and to the persons associated with him. In the erection of his business house he directed the contractor to draw against a small account the contractor had with the bank, and these overdrafts were carried as cash items. The directors admitted knowing that the cashier was erecting the building, but they testified that they supposed the money for this purpose had been derived from a loan obtained from a building and loan company, which, however, was not the fact.

The directors made no audit of the bank's affairs during the year 1925, and had no discount or loan committee. The directors testified that the entire board acted as a discount or loan committee, but it appears that the cashier made no report on loans until they had been made, and the directors testified that they would have authorized such loans as were reported to them had application therefor been previously submitted to them. Most of the important loans, however, were never sub-

mitted to the directors, and the cashier's practice was to conceal questionable and unauthorized loans by giving them the same numbers possessed by smaller and unimportant loans made to persons to whom the directors would have made loans had they been requested so to do.

The cashier commenced the practice and continued it throughout the year 1925 of forging notes to the order of the bank, which he rediscounted with the correspondent banks, which transactions were without the knowledge of the directors. The practice of the cashier in this respect was detailed in the opinion of this court in the case of *Grand National Bank of St. Louis* v. *Taylor, Bank Commissioner, supra,* in which case we held that the bank was liable for the rediscounts so made. It appears, however, that the bank actually received the proceeds of these rediscounts, so that no liability could be predicated upon the transactions themselves. The liability, if any, arises out of the disposition of the funds thus obtained.

It appears that the directors not only did not make an audit of the bank's affairs during the year 1925, as the rules of the Banking Department required them to do, but no director ever made any examination of the notes taken by the bank; indeed, they did not even examine the note register, but contented themselves by listening to the cashier read from a prepared statement a list of the loans he had made. The directors failed entirely to hold one monthly meeting, and no minutes of any meeting after September were ever written up, or approved or signed by the board or its officers.

The directors appeared to have made no effort to require the president of the bank to reduce his own indebtedness to the bank, but actually permitted him to increase his liability from January to September by three thousand dollars.

The directors insist that no supervision on their part would have enabled them to know the corrupt and criminal practices of the cashier, as he was falsifying his

records and forging paper. But it may be said, in answer to this contention, that the cashier's criminality did not consist of a single or only a few transactions and entries, but was a systematic course of conduct which he no doubt felt free to pursue without fear of detection by the directors through their failure to discharge the functions of their office. The peculations of the cashier were so open that detection must have resulted from any reasonable attempt at supervision. Had the directors exercised good faith and reasonable diligence, the cashier would soon have been detected in his practice of making unauthorized loans and rediscounting forged notes with correspondent banks.

We do not hold that the directors were insurers of the honesty or good faith of the cashier, or that they became liable for his fraudulent conduct simply because they were directors, for such is not the law as announced in the prior decisions of this court, cited in the Muller case, *supra*. But we do hold them liable for their lack of diligence and good faith in supervising the affairs of the bank. Their inattention to the bank's affairs furnished the cashier assurance that the boldest and most flagrant conduct on his part would escape their detection and give the cashier an opportunity to loot the bank systematically.

The court below made a finding in favor of the Bank Commissioner on each count of the complaint, including a count added at the conclusion of the testimony, which was added to conform to the testimony, and a judgment was rendered against the directors accordingly.

The decree must be reversed, because the court held the directors liable for certain worthless loans made by way of renewal of loans made prior to 1925, and also for certain money borrowed from the correspondent banks without the knowledge of the directors. We think the decree must be reversed in these respects because the loans made prior to 1925 and the renewals of such loans appear to have resulted from bad judgment only, and the

money obtained from the correspondent banks was credited to the account of the bank on the books of the bank. In other words, the bank received the benefit of the money obtained from the correspondent banks, although that money was obtained by the use, in part, of forged collaterals.

Without discussing in detail the various transactions through which the bank sustained losses and for which the Bank Commissioner seeks to hold the directors liable, we announce our conclusion to be that the directors should be held liable only for the loans made after January 1, 1925, to the cashier and his associates in their enterprises, including the overdrafts of the contractor incurred in the erection of the business building, and the three thousand dollars increase in the president's indebtedness after the beginning of 1925. These losses would not have been sustained had the directors, in good faith and in the exercise of ordinary diligence, enforced the resolution adopted in January, 1925, which was intended to prevent just such loans being made. This liability should, of course, be credited with any collections made on account of these loans.

The decree of the court below will therefore be reversed, and the cause remanded with directions to enter a decree fixing the liability of the directors and ascertaining the amounts thereof, in accordance with this opinion.

HUDSON v. BRADLEY.

Opinion delivered April 2, 1928.

1. GIFTS—SUFFICIENCY OF DELIVERY.—Where a father took out time certificates payable to the order of himself or his son with money which he had saved, this did not constitute a gift to the son of the certificates or the money represented by them, where the certificates were never delivered to the son and remained in the father's possession until his death.

2. DOWER—ANTENUPTIAL CONTRACT.—A finding that a wife, unable to read or write, signed an antenuptial contract waiving her right to dower in her future husband's estate or that she authorized its execution, *held* contrary to the weight of evidence in a suit involving the question of recovery of dower interest after the husband's death.

Appeal from Monroe Chancery Court; *S. H. Mann,* Special Judge; reversed.

C. F. Greenlee, for appellant.

Bogle & Sharp, for appellee.

HUMPHREYS, J. Two questions are presented by this appeal and cross-appeal for determination. The first question to be determined is whether Joe Hudson is entitled to $6,000 on deposit in the Bank of Brinkley and $1,000 on deposit in the Monroe County Bank, or whether W. T. Hudson was seized and possessed of said money at the time of his death in 1926. The certificates of deposit are as follows:

"Certificate of Deposit.

"Brinkley, Ark., Sept. 6, 1925. No. 1787.

"Bank of Brinkley.

"W. T. Hudson has deposited in this bank exactly six thousand no/100 dollars ($6,000), payable to the order of himself or Joe Hudson, his son, in current funds, on the return of this certificate, properly indorsed, twelve months after date, with interest at 4 per cent. per annum. No interest after maturity.

"Not subject to check.

"L. H. Bradley, Cashier."

"Certificate of Deposit.

"Not subject to check.

"Monroe County Bank 81-190—No. 994.

"Brinkley, Ark. 5-21-26.

"This certifies that W. T. Hudson or Joe Hudson has deposited in this bank exactly one thousand dollars ($1,000), payable to his or either own order 12 months after date, with interest to maturity only at the rate of 4 per cent. per annum on return of this certificate.

"No interest after maturity. Non-negotiable.

"L. W. Brown, Cashier."

These certificates of deposit were found in the trunk of the deceased after his burial, at the home of himself and appellant. Joe Hudson, a son of the deceased, obtained the key to the trunk from appellant, and found the certificate of deposit therein. He claimed the money as a gift *inter vivos* from his father. He testified relative to the gifts as follows:

"My father told me that this money was placed in bank so that no one could touch it, only himself and me, and at his death I would have full possession of it; that the rest of the outfit had done got all that was coming to them, and that this money belongs to me. My father told me that if Mrs. Hudson was left any money she would throw it away, therefore he did not want her to have any money; I refer you to marriage contract on file. My father told me about the money being a joint account at the time I visited him in the spring of 1924."

Joe Hudson insists that he is the sole owner of the money, whereas the widow and other heirs, who are grandchildren of the deceased, and nieces and nephews of Joe Hudson, and the administrator of the estate of W. T. Hudson, deceased, insist that the money belongs to his estate and is subject to division among them according to the statute of descent and distribution.

In the case of *Lowe* v. *Hart,* 93 Ark. 549, 125 S. W. 1030, this court defined gifts *inter vivos* in substance as follows: To constitute a gift a donor must actually deliver the property to a donee with intent to pass the title immediately, and the donee must accept the same. See also *Stifft* v. *W. B. Worthen Co., ante,* p. 585.

The evidence in the instant case does not meet the requirements of this rule. The time certificates of deposit were in the joint names of W. T. Hudson and Joe Hudson, and were not subject to check. The money constituted the savings of W. T. Hudson, and the certificates themselves were never delivered to Joe Hudson, but were retained under lock and key by W. T. Hudson. There was no actual delivery and acceptance of either the certificate or the money they represented in such manner

that W. T. Hudson surrendered dominion over them. W. T. Hudson could at any time during his life have presented the certificates and got the money out of the bank, without the consent or permission of Joe Hudson. Joe Hudson could not have presented the certificates and got the money, because he never had possession of them. There was no intention in the acts of the parties to pass the title to the certificates or money. The evidence is insufficient to support a gift.

In addition to claiming the money as a gift, Joe Hudson interposed the further defense to appellant's claim for dower that she entered into an antenuptial contract with his father, waiving her right of dower in and to his estate. The contract is as follows:

"This agreement made and entered into this the 2d day of December, by and between W. T. Hudson and S. B. Hudson, is as follows: That whereas we, the said W. T. Hudson and S. B. Hudson desire and have decided to be remarried again, and become as husband and wife, and now before said marriage it is hereby agreed and fully understood, and in consideration of this agreement and of said marriage, and the further consideration that we have once divided our property between each other mutually and agreeably to each of us, it is now hereby agreed and understood by and between each of us that I, the said S. B. Hudson, do hereby agree and waive all my right or possibility and future claims or any and all dower or financial claims that would come to me or be allowed to me under the matrimonial laws of the State of Arkansas. To make it more explicit, I, S. B. Hudson, waive all right to a dower or other claims in or to said W. T. Hudson's estate either during his natural life or after his death, and our property to be kept separate and distinct apart and in each other's name and control as separate individuals do, with no future claims of dower or curtesy whatever. And it is hereby understood and agreed that, in case of any disagreement between us that would result in separation as husband and wife, each one

of us to take the individual property owned by us individually, and that to be the final settlement between us as herein agreed and made binding between us.

"Witness our hands and seals this the second day of December, 1916.

"W. T. Hudson
her
"Mrs. S. B. (x) Hudson
mark

"Witness, R. M. Henderson.

"Witness to mark, R. M. Henderson."

"State of Arkansas, county of Monroe.

"On this the 2d day of December, 1916, appeared before me, R. M. Henderson, a justice of the peace, duly commissioned and acting, Mrs. S. B. Hudson, to me well known, and acknowledged that she had signed the foregoing transfer, for the consideration and purposes therein mentioned, of her own free will and accord.

"Witness my hand as such justice of the peace, on this the 2d day of December, 1916. R. M. Henderson, J. P."

Certificate of Record.

"State of Arkansas, County of Monroe.

"I, R. A. Holloway, circuit clerk and ex-officio recorder of the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed in my office on 1st day of December, 1917, at 2:30 o'clock P. M., and that the same is now duly recorded with the acknowledgments and certificates thereon in record book 21, page 46.

"In witness whereof I have hereunto set my hand and affixed the seal of said court this 13th day of December, 1917. R. A. Holloway, circuit clerk and ex-officio recorder. By....." (Seal).

Appellant denied signing the contract or authorizing any one to sign it for her. She said her husband proposed entering into such a contract before their second marriage, but that she declined to do so, and that she

never heard of nor saw the purported contract until it was shown to her by Mr. Milwee after her husband's death. Appellant could neither read nor write. Appellant's second initial is V, and it will be observed that it appeared as B on the contract. Counsel for appellee argue that the contract had been on record for nearly ten years. We do not see how that fact can help them, unless they had shown that appellant knew of the existence of the contract and that same had been recorded.

The trial court's finding to the effect that appellant signed the antenuptial contract was contrary to the weight of the evidence.

The trial court's finding against a gift of money by W. T. Hudson to Joe Hudson is in accordance with the weight of the evidence.

The judgment on the cross-appeal is affirmed, but the judgment on the direct appeal is reversed and the cause is remanded, with directions to allow the widow one-third of the money and to divide the balance between the heirs according to the statute of descent and distribution.

HERBERT v. HERBERT.

Opinion delivered April 2, 1928.

1. PARENT AND CHILD—PREFERENTIAL RIGHTS OF PARENTS.—Where not detrimental to the welfare of children, the law recognizes the preferential rights of parents to the custody of their children over relatives and strangers.
2. PARENT AND CHILD—CUSTODY OF CHILD.—The parents of a child which had been cared for by an uncle and aunt for the period of about two years because of the mother's illness, *held* entitled to the child's custody as against such uncle and aunt, both families being fit persons to have custody and able to support and maintain the child.

Certiorari to Crittenden Circuit Court; *G. E. Keck*, Judge; affirmed.

C. T. Carpenter, for appellant.

Berry & Berry, for appellee.

HUMPHREYS, J. This is a contest over the custody of Lee Donald Herbert, a child two years of age, between his father and mother on one side and his uncle and aunt on the other.

The child was brought before Judge Keck, circuit judge of the Second Judicial District, on a writ of habeas corpus. After hearing the evidence, the judge awarded the custody of the child to its parents, and appellants contend for a reversal of the order, upon the authority of the case of *Verser* v. *Ford,* 37 Ark. 27. In that case it was said:

"As against strangers, the father, however poor and humble, if of good moral character and able to support the child in his own style of life, cannot be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interest of the child alone, and, as between father and mother, or other near relations of the child, where sympathies of the tenderest nature may be relied on, the father is generally to be preferred."

The court however made an exception to this general rule in that case, because the infant was motherless and needed the care of the grandmother, in whose custody the father had placed it when the mother died. In the instant case the infant was not motherless.

The record reflects that H. E. Herbert and R. T. Herbert are brothers, and that, on account of the illness of Mary Herbert, the mother of the child, for about six months after its birth, the uncle and aunt offered and were allowed to take care of the infant. The father and mother had three other children to care for, and the necessity of the situation demanded that temporary disposition be made of the infant. The uncle and aunt offered to nurture and care for the child, and were permitted to do so. They retained the custody of it for about two years, and during that period furnished food and raiment

for it. The father and mother paid little or no attention to the child during that time. At the expiration of two years the father and mother requested the return of the child, which request was refused on account of the affection which the parents had permitted to grow up between the uncle and aunt and the child. Both families were fit persons to have the custody of the child, and were able to support and maintain it.

The instant case is not parallel to and ruled by the case of *Verser* v. *Ford, supra.* The child will receive the tender care of its own mother under the order of the court. Every attention which could be bestowed upon it by the aunt can be and will be bestowed upon it by its mother. Where not detrimental to the welfare of children, the law recognizes the preferential rights of parents to them over relatives and strangers. Paramount rights of parents will be respected, unless the special circumstances demand that such rights be ignored. In the instant case the child is yet a mere infant, not having arrived at the age of discretion enabling it to intelligently consider its future welfare. It is true that it had learned to call the uncle and aunt father and mother, but its affection for them has not been allowed to root too deeply by lapse of time. The relationship has not been allowed to exist for such a period of time that it can be reasonably said that a severance thereof would be detrimental to the child and a rank injustice to the uncle and aunt. It is better that the ties be severed now than to permit them to grow stronger and then attempt to sever them.

No error appearing, the judgment is affirmed.

GILLER v. HOLLYFIELD.

Opinion delivered April 2, 1928.

MINES AND MINERALS—OPERATION OF LEASE.—In a suit by a lessee of oil and gas property, who was entitled to use the surface for agricultural and other purposes, to restrain the lessor from constructing a dam at the junction of creeks for the purpose of establishing a pick-up station to catch waste oil, evidence *held* to sustain the chancellor's finding that the construction of the dam would interfere with the effective operation of the lease.

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

Patterson & Rector, for appellant.

Powell, Smead & Knox, for appellee.

HUMPHREYS, J. Appellants were enjoined by decree of the chancery court of Union County, Second Division, from constructing a dam at the junction of two small creeks near the southeast corner of the northwest quarter of the southwest quarter, section 11, township 16 north, range 15 west, in said county, for the purpose of establishing a pick-up station to catch waste oil running into said creeks from oil wells on lands other than the 40-acre tract described and the 40-acre tract immediately west of it, said 80-acre tract having been leased by appellants to appellees for development of oil and gas for commercial purposes. An appeal has been duly prosecuted to this court from the decree.

There is no dispute between the parties as to the law applicable to the facts under the terms and provisions of the oil and gas lease made between the parties. It is an ordinary commercial oil and gas lease, known as the producers' 88 form, in use in the Arkansas oil fields, except that it required the lessees to begin drilling within a month from the date thereof, to pay a portion of the consideration out of the proceeds of oil and gas produced on the lands, and without a provision for extending the lease by payment of rents. The dispute in the case is one of fact and not of law.

The construction of leases of this kind with reference to the use of the surface of the lands leased is that the

lessor and lessee have concurrent possession thereof, the lessee being entitled to such parts thereof as are necessary for developing the oil or gas thereunder for commercial purposes and to market same, and to do everything on the premises necessary to make the operation of the lease effective, without hindrance or interference on the part of the lessor. The lessor is entitled to use all other portions of the surface for agricultural and other purposes, provided, in doing so, he does not interfere with the effective operation of the lease. This is the substance of the rule announced in the case of the *Standard Oil Company of Louisiana* v. *Oil Wells Salvage Company,* 170 Ark. 729, 281 S. W. 360.

Appellants contend for a reversal of the decree upon the alleged ground that the finding of the trial court, to the effect that the construction of the dam will interfere with the effective operation of the lease, was contrary to the weight of the evidence.

The proposed dam was to be 450 feet long and 3 feet high, across the space where the two creeks intersect near the southeast corner of the leased lands. The witnesses introduced by appellants testified that the dam would not cause the water and oil in the creeks above the dam to go any higher than the high water marks along the sides of the creeks, and that the high water in the creeks had never interfered with the effective operation of the lease. They testified that, according to the survey made by them, when the water and oil is raised against the proposed dam, as gauged by the spillways to be made therein, it would not be higher against the dam than two feet above low-water level. Also that the two-foot raise would cause the water to back toward and not closer than within 50 feet of well No. 6 in the southeast corner of said leased lands. Also that the high-water line around well No. 6 coincides with the level of two feet of water in the dam. Also that the construction of the dam would not interfere with the passageway appellees had constructed over the upper creek to go to and come

from wells 5 and 7, in the northeast corner of the leased lands, and would not interfere with the pipe lines used to convey oil from wells 5 and 7. They testified that they were unable to find the pipe lines leading from wells 5 and 7, but that if they were lying on the bottom of the creek they could easily be jacked up after the dam was built to make necessary repairs upon them.

The witnesses introduced by appellee testified that the construction of the proposed dam would back the water over well No. 6 and wash out the foundation under the derrick. Also that the water would back over the walkway across the upper creek and cover the pipe lines lying on the bottom of the creek through which oil was carried from wells Nos. 5 and 7.

The testimony was also conflicting between the two sets of witnesses as to whether the pick-up station made by the construction of the said dam would increase the fire hazard on the leased premises. Eighteen wells had been drilled upon the 80-acre tract which appellants leased to appellees, and fourteen of them were producing oil in commercial quantities when the construction of the dam was commenced.

It may be said, in passing, that the witnesses introduced by the respective parties were men of broad experience in the oil fields. It could serve no useful purpose to set out the substance of the testimony of each. The record is voluminous, and it would extend the opinion to an unusual length to do so. The testimony of each witness has been carefully read and analyzed, and a majority of the court is of opinion that the chancellor's finding to the effect that the construction of the dam will interfere with the effective operation of the lease is correct, and is supported by the weight of the evidence. Mr. Justice WOOD and the writer are of the opinion that the construction of the dam will not interfere with the effective operation of the lease.

The decree is therefore affirmed.

CONTINENTAL GIN COMPANY v. CLEMENT.

Opinion delivered April 2, 1928.

1. FIXTURES—MACHINERY SOLD WITH RESERVATION OF TITLE.—A gin elevator sold under contract retaining title to the seller until payment and expressly providing that it should not be considered a fixture, *held*, as between seller and buyer, not to constitute a fixture, and to authorize the seller to retake the property on failure to pay the purchase price.
2. FIXTURES—DEFINITION.—Fixture is generally understood as property originally a personal chattel which has been affixed to the soil or to some structure legally a part of the soil, and which, being physically attached or affixed to the realty, has become a part thereof.
3. FIXTURES—INTENTION OF PARTIES.—As between seller and buyer of personal property, the intention of the parties is the real test as to whether the property becomes a fixture after sale.
4. FIXTURES—INNOCENT PURCHASER.—In view of the common knowledge that gin machinery is sold in this country on time, with reservation of title, one who purchased real property without inquiry to ascertain whether a gin elevator had been paid for, *held* not an innocent purchaser as respects the right of the seller to retake the elevator under a contract-retaining title.
5. DAMAGES—DETENTION OF GIN ELEVATOR.—The measure of the damages for detention of a gin elevator *held* the usable value of the property.

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

Joe S. Harris and *George A. McConnell*, for appellant.

Rowell & Alexander, for appellee.

MEHAFFY, J. The appellant, who was plaintiff below, filed its complaint in the Jefferson Circuit Court in replevin, alleging that it had sold to J. M. Gracie one 50-inch class C elevator for 4-70 saw gins (except fan and telescope), also a pulley and some belting. It was alleged that Gracie purchased this property and agreed to pay the sum of $750 and the freight, amounting to $63.05. Plaintiff alleged that it retained title to the property until the purchase price should be paid, and that nothing had been paid on purchase price or freight, the plaintiff hav-

ing prepaid the freight. The plaintiff alleged demand for the property and $150 damages for wrongful detention of same, and prayed for the possession of the property, and damages.

An affidavit and bond were filed, and a writ of replevin issued. The New Gascony Investment Company filed a cross bond in the sum of $1,200, and retained possession of the property. Defendants filed an answer, denying the material allegations of the plaintiff's complaint, and stating that Clement had no interest in the litigation, but that the New Gascony Investment Company claimed to be the owner by purchase.

A jury was waived and the case was tried before the court sitting as a jury, and the court rendered judgment for the defendant. Plaintiff filed motion for new trial, which was overruled, exceptions saved, and plaintiff prosecutes this appeal to reverse the judgment of the circuit court.

The undisputed evidence showed that the Continental Gin Company, on the 16th day of July, 1925, sold and delivered to J. M. Gracie the property described, and that the sale was evidenced by a sales contract, wherein the title to said property was retained by the plaintiff until the full purchase price should be paid; that no part of the purchase price had been paid, and the freight had not been paid. The contract contained the following clause:

"It is understood that the title to said machinery shall remain in you and the same shall be your property until payment in full for same is made, and until all other sums herein agreed to be paid are paid, and if default is made in the payment of either of said notes when due, or in payment of any other sum herein agreed to be paid, then you, at your option, may enter upon the premises where said machinery is, take possession of and remove the same, without being liable to account for any sum or sums paid thereon, the sum or sums to be paid to be in payment for the use of said machinery. Said

machinery shall not become or be considered a fixture to the real property whereon the same is situated."

The undisputed proof also was that plaintiff demanded possession of machinery before suit, and that defendants retained possession of the property. The testimony showed a fair rental value to be $150 for the season.

The elevator purchased by Gracie is a complete outfit, but he did not purchase the fan or the telescope, which is a part of the elevator, and the elevator cannot run without the distributor being connected with the line shaft, or without a fan. The elevator is used to elevate cotton from the wagon to the feeder, driving cotton to the feeder and feeding same to the gin.

The property sued for was not actually attached to the gin stands, but was placed directly over them, and held in position by joists resting upon the floor and nailed and screwed to the building housing the gin. The property sued for could be removed without physical damage to the gin stands and without material damage to the building.

J. M. Gracie, who purchased the machinery, had owned the land, but he had by warranty deed conveyed to his daughter, Sallie E. Gracie, on December 10, 1924, the land on which this gin was situated, for the consideration of $1. The land conveyed contained 960 acres, in Jefferson County, Arkansas. On December 13, 1924, three days after the land was conveyed to Sallie E. Gracie by her father, she executed a note and mortgage to secure the payment of $32,000. Then on June 3, 1925, Sallie E. Rose, who was before her marriage Sallie E. Gracie, executed a deed of trust to secure $5,000 indebtedness to W. C. Hudson and R. Carnahan. On January 6, 1926, Sallie E. Gracie, by special warranty deed, conveyed to W. C. Hudson and R. Carnahan the said 960 acres for the consideration of $5,000 and the assumption by the purchasers of the $32,000 debt above mentioned. At the time Miss Gracie executed the deed of trust above

mentioned, her father, J. M. Gracie, was managing the property. This was in January, 1925.

The testimony tended to show that the gin could not be operated without the elevator, but that the elevator could be removed without material damage to the gin stands or the building. The testimony shows that the defendant purchased the property without any knowledge that said property was placed in the building by the plaintiff, and without knowledge that plaintiff retained title to property. After Hudson and Carnahan purchased the property, they conveyed the same to the New Gascony Investment Company, a corporation, whose stockholders are Carnahan, Hudson, Clement and McGeorge.

The court found the value of the property at the time of the trial was $600, and the usable value for the season was $150. But the court held that the property sold by plaintiff to J. M. Gracie became a fixture, and passed with the conveyance of the realty.

The only question for our consideration is whether the appellee, the New Gascony Investment Company, is an innocent purchaser. As between the vendor of the property involved and the purchaser of said property it was not a fixture, and the vendor, having retained title, had the right, as against the original purchaser, to retake the property upon Gracie's failure to pay the purchase price.

The term "fixture," as generally understood, is property, originally a personal chattel, which has been affixed to the soil or to some structure legally a part of the soil, and which, being physically attached or affixed to the realty, has become a part of the realty. It is annexed to the freehold for use in connection therewith and so arranged that it cannot be removed without injury to the freehold.

It is sometimes said also that the intention of the party making the annexation is the chief test, and that in case of doubt the intention has a controlling influ-

ence. But in the instant case there is no dispute as to the character of the property as between the original vendor and original purchaser. They agreed that they should not be fixtures, but it is contended by the appellee that, while title was retained to the property until paid for, it was sold to J. M. Gracie, who was a tenant, and it is urged that the court has decided many times that if a landlord was ignorant of such reservation of title and the machinery was of such character that, when attached, it could not be removed without injury to the freehold, then it would become a fixture, and the vendor was not entitled to recover.

Attention is called to a number of decisions of this court which, it is claimed, support the contention of appellee.

The first case cited and relied on is the case of *Peck-Hammond Co.* v. *Walnut Ridge School District,* 93 Ark. 77, 123 S. W. 771.

The facts in that case were that a school board entered into a contract with one J. S. Park for the construction of a schoolhouse. The plans and specifications, which were a part of the contract, provided for the installing of a heating plant. Peck-Hammond Company furnished the material and installed the heating apparatus under a contract with Park. The title to the material furnished was to remain in the vendor until paid for. The board paid out more than the contract price to erect the building, and knew nothing of the terms of the contract between Park and Peck-Hammond Company, and Park failed to pay, and the vendor brought suit in replevin to recover the property. The evidence was conflicting as to whether the material could be removed without defacing and otherwise injuring the building. The lower court dismissed the complaint, and plaintiff appealed. This court said the judgment was right, and that the cases cited by appellant are cases where the contract reserving title in the chattels was made with the owner of the land, and have no application to the facts

of this case, and said further that the case of Peck-Hammond against the stockholders was ruled by the principle announced in *Brannon* v. *Vaughan,* 66 Ark. 87, 48 S. W. 909.

In the case in the 93 Arkansas the proof tended to show that the material could not be removed without defacing and injuring the building, but also it was shown that the directors had no knowledge of the conditions of the contract for material furnished.

This court has held that a house built upon land and not attached to the land, except by its own weight, was not a fixture, under the agreement of the parties. It was held, however, that another room built onto the original one, without any notice to the vendor until afterwards, was a fixture, since it was attached to the main building, and could not be detached without great injury and damage to such building, evidently meaning that, if could be removed without injury, it would not be held a fixture. *Brannon* v. *Vaughan,* 66 Ark. 87, 48 S. W. 909.

Appellee next calls attention to the case of *Thomas Cox & Son Machinery Company* v. *Blue Trap Rock Company,* 159 Ark. 209, 251 S. W. 699. In that case the court held that the lower court had erred in declaring as a matter of law that the articles sued for were fixtures, and further held that, if title was reserved and appellant knew at the time Fulton intended to attach it to the realty of the company, and if appellant knew that the same was of a character that, when attached, would become a fixture, and could not be removed without injury to the freehold, and if the company was ignorant of the fact that the appellant had reserved title to machinery for which the notes in controversy were executed, then the appellant would not be entitled to recover. But the appellee contends that the case of *Hachmeister* v. *Power Mfg. Co.,* 165 Ark. 469, 264 S. W. 976, is controlling in this case. The court said:

"It was wholly beyond the power of the makers of the deeds of trust or the mortgagees to pass title to

or to place a mortgage lien upon chattels which they did not own at the time the deeds of trust were executed and the title to which they did not have at the time these chattels were attached to the freehold embraced in the mortgages." And the court quoted with approval the following language:

"When a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of condition."

The court then cites numerous Arkansas cases to the same effect.

Appellee next calls attention to the annotation to the case of *Lawton Press Brick & Tile Company* v. *Ross Heifman T. P. M. Co.*, in 49 L. R. A. (N. S.), at page 396. The court said in the case last above mentioned:

"We think there is evidence reasonably tending to show that the machinery did not become part of the buildings constructed to shelter it; the removal thereof would not take away or destroy that which is essential to the support of such buildings, foundations, walls, or other parts of the real estate to which it was attached; that it would not destroy or of necessity injure the machinery itself. So the limitation hereinbefore stated does not apply. Hence we conclude that the agreement between the vendor and brick company, fully expressing their distinct purpose that the annexation of the machinery should not make it part of the real estate, was sufficient to that effect, without any concurring intention on the part of the subsequent purchaser of the land."

Most of the annotations or notes to which appellee calls attention are from cases where the facts show the property could not be removed without injury to the realty. It is also held in the cases referred to in the notes that a purchaser with notice of the rights of the

seller of fixtures cannot retain the fixtures in a suit for same by the vendor.

The appellee calls attention to numerous other authorities, but it would serve no useful purpose to discuss those authorities or to review the cases to which attention has been called by counsel.

The principles of law governing this case have been many times discussed by this court, and are well settled. And it has been repeatedly held by this court that, as between the vendor and purchaser of articles, the intention of the parties is the real test. *Thompson* v. *Lewis,* 120 Ark. 252, 179 S. W. 343; *Bache* v. *Central Coke & Coal Company,* 127 Ark. 397, 192 S. W. 225, Ann. Cas. 1918B, 198; *National Bank of Wichita* v. *Spot Cash Coal Company,* 98 Ark. 597, 136 S. W. 953.

But the chief thing relied on by appellee in this case is that it was an innocent purchaser, although, as between the original vendor and vendee of the property in controversy, the property remained a chattel, it purchased the property without notice, and that it was an innocent purchaser, and therefore as to it the property is a fixture, and cannot be removed by the plaintiff.

This court has said:

"This instruction excludes the idea that it was the duty of appellant, in order to bring himself within the doctrine of innocent purchaser, to make inquiry concerning the ownership of fixtures of this character, even though substantially fastened into the soil. It is true appellant testified that he inquired from his vendor concerning the ownership of the fixtures, and was informed that they were a part of the real estate. He was an interested party, and facts established by his testimony alone cannot be said to be established by the undisputed evidence." *Salmon* v. *Boyer,* 139 Ark. 236, 213 S. W. 383.

In the instant case appellee does not seem to have made inquiry of any one. It is a matter of common knowledge that property of the character of that involved in this suit is purchased in this country on time, and that

contracts for this kind of property are constantly made wherein the title is retained until paid for. And in purchasing property under the circumstances existing in this case it was the duty of the appellee to make inquiry and ascertain whether this property belonged to the vendor of the real estate.

Hudson and Carnahan knew that the owners were indebted, and that the property was mortgaged for $32,000.

J. M. Gracie, on December 10, 1924, conveyed the property to his daughter, Sallie E. Gracie, for the consideration of $1. Then on December 13, 1924, three days later, Sallie E. Gracie mortgaged the property to secure payment for $32,000. On June 3, 1925, Hudson and Carnahan loaned Sallie E. Rose, formerly Sallie E. Gracie, $5,000, and of course they knew of the $32,000 indebtedness. After they had loaned the $5,000 on July 16, 1925, the appellant sold the property involved in this suit to J. M. Gracie. It is true that they testify that when they purchased the property they took into consideration this property and its value, but when they loaned the $5,000 this property had not yet been purchased. They loaned the $5,000 before this property was installed there, when they knew that there was indebtedness against it for $32,000, and when they finally purchased the place they gave $5,000 and assumed the payment of the $32,000 debt. The knowledge that the parties must have had of all these facts required them to at least inquire of the parties who sold this property before they could bring themselves within the doctrine of innocent purchaser.

From the evidence in this case we have reached the conclusion that the property was not a fixture, and that the appellee was not an innocent purchaser. The case is therefore reversed, and remanded with directions to enter judgment for the Continental Gin Company for the property or its value, which the court found to be $600, and for the damages for the wrongful detention of said property. The damages for detention would be the usable value of the property. It is so ordered.

CATE v. CRAWFORD COUNTY.

Opinion delivered April 2, 1928.

1. EMINENT DOMAIN—DAMAGES FOR TAKING LAND FOR HIGHWAY.—In determining the damages for taking land for a public highway in a proceeding under Crawford & Moses' Dig., § 5249, the value of benefits received by the landowner will be taken into consideration, since § 5231 has no application, and Const., art. 12, § 9, forbidding the appropriation of property without full compensation, applies only to private corporations, and art. 2, § 22, relates entirely to the owner's right to compensation but not to a remedy therefor.
2. EMINENT DOMAIN—SET-OFF OF SPECIAL BENEFITS.—The increase in value to a landowner's property by reason of a public road being established adjacent to his land constitutes a special benefit which may be offset against damages for land taken in a proceeding under Crawford & Moses' Dig., § 5249.

Appeal from Crawford Circuit Court; *J. O. Kincannon,* Judge; affirmed.

Starbird & Starbird, for appellee.

McHANEY, J. Appellant is the owner of a tract of land in Crawford County, Arkansas, through which, by order of the county court, a public highway was laid out and constructed, and in doing so 3½ acres of his land were taken. He presented his claim in apt time to the county court for damages in the sum of $1,350 caused by the taking of said land and for damages to the remaining land. The county court disallowed his claim, and an appeal was taken to the circuit court, where it was tried before the court without a jury. The court found "that the plaintiff had been damaged by the opening of the road complained of, by the taking of the land used for the road, by the irregular shape and isolated position of the smaller piece of land cut off from the larger, and by the unfenced condition in which the land was left after the opening of the road. That the plaintiff's land was benefited by the building of the road in the particulars set forth in the testimony of defendant's witnesses. That the benefits so testified by defendant's witnesses are special and peculiar benefits as a matter of

law, and that the defendant has a right to have such benefits set-off against the value of the land as well as against the damage to the land not taken. That the damage to the land not taken plus the value of the land taken exceed benefits to the remaining land by the sum of $250," for which amount judgment was entered in appellant's favor.

The proof shows that the road was laid out through appellant's farm so as to cut off a three-acre triangular piece on the south side of the road, and a one-half acre triangular piece on the north side, and that the value of these two separate pieces of land has been reduced by virtue of being detached from the main body of land one-half its original value, and the proof on the part of appellant was to the effect that the value of the bottom land, of which the three-acre tract was a part, was $135 or $140 per acre, whereas the upland was worth about $50 an acre.

The proof on the part of appellee tended to show that the building of this road through the farm had materially increased the value of the farm. One witness stated that the increased value of the land by reason of the building of the highway was from $500 to $1,000 more than it was before; that this land was peculiarly benefited in that it made it a mile and one-half nearer to Alma, both because of the highway and the new bridge across the creek adjacent to the farm. The witnesses on behalf of appellee testified that the whole country was benefited by reason of the construction of the highway, but that the property adjacent to the highway was specially benefited thereby. Counsel for appellee has not favored us with a brief in its behalf.

It is the contention of counsel for appellant that the circuit court erred in offsetting the increased value of the land by reason of the improvement against the damages suffered by reason of the land actually taken, and it is urged that § 5231 of C. & M. Digest prescribes the rule in this regard, that is, that the damages shall be ascertained without deduction for benefits to the property of the owner. This section reads as follows:

"On presentation of the petition and proof of notice of publication as aforesaid, and the county court being satisfied that proper notice has been given in accordance with the provisions of said act, said court shall appoint three disinterested citizens of the county as viewers, who shall also be a jury to assess and determine the compensation to be paid in money for the property sought to be appropriated, without deduction for benefits to any property of the owners; and they shall also assess and determine what damages each owner of the lands over which the road is to run shall suffer by the opening and constructing of said road."

It will be noticed that this section applies to the old system in effect prior to act of May 31, 1911, now § 5249, C. & M. Digest. We think § 5231 has no application to this case, as it is not the system resorted to in the laying out and establishing this highway, or any change therein. The county court made the opening order of this road under § 5249, C. & M. Digest, and the claim was filed in pursuance of the provisions of such section, and the appeal to the circuit court was prosecuted by authority thereof. It will therefore be seen that, even though both statutes exist, and that either method of procedure might have been resorted to, the procedure provided by the later statute was followed by both parties, and the method of determining the damages provided by § 5231 can have no application here. The act of 1911 does not prohibit the court from taking into consideration, in determining the landowner's damages, the value of the benefits received by such owner from the improvement. In this respect it differs from § 5231 and also with the eminent domain statute fixing the measure of damages for rights-of-way for railroads and other corporations, as, by § 3998, C. & M. Digest, the damages shall be determined and assessed irrespective of any benefit such owner may receive from the improvement.

Section 9 of article 12 of our Constitution provides that: "No property, nor right-of-way, shall be appro-

priated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit of any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

And § 22 of article 2 of the Constitution prohibits the taking of private property for public use without just compensation. It will therefore be seen that the acquisition of property for right-of-way or other purposes cannot be taken by a private corporation, such as a railroad company, without payment therefor in money, and that benefits by reason of the construction of the improvement cannot be considered.

This court has held that the word "corporation," as used in § 9, article 12, refers to private corporations, and that when land is appropriated for the use of the public it is not "appropriated to the use of any corporation," as set out in the above section. *Paragould* v. *Milner,* 114 Ark. 334, 170 S. W. 78. In that case the city of Paragould, a municipal corporation, sought to condemn a strip of land, privately owned, for the purpose of widening a street. It was stipulated that witnesses would testify, if permitted to do so, that the benefits to the property left after the strip was condemned would exceed the value of the property appropriated by $300. The court refused to permit such offered testimony, and it also instructed the jury, over the city's objection, that they "should not take into consideration any betterment that may accrue to the defendant by reason of this proposed improvement," and that "you cannot pay a man for his property in betterment," etc. This court reversed the case, and held to the effect, as already stated, that the word "corporations," as used in the section of the Constitution, did not apply to a municipal corporation, and that, quoting the first syllabus, "where the public use for which a portion of a landowner's land is taken

so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner will be held in such case to have received just compensation in benefits." It was further held in that case that the benefits to be considered must be those which are local, peculiar, and special to the owner's land.

It was further held, in *Dickerson* v. *Tri-County Drainage District,* 138 Ark. 471, 212 S. W. 334, that § 22 of article 2 of the Constitution, providing that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor," relates entirely to the owner's right to compensation, but not to the remedy therefor. And that a drainage district may take private property for its right-of-way under the State's right of eminent domain, and that it may exercise such right without notice to the owner, and without giving a hearing upon that question. See also *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260.

In *Cribbs* v. *Benedict,* 64 Ark. 555-559, 44 S. W. 707, 708, this court said:

"Where the Constitution is silent upon the subject, the decisions of the courts present diverse views upon the right to consider, by way of compensation for a portion of his land taken for public use, the benefits thereby accruing to the remainder. Lewis, Em. Dom., § 465. The view which seems to us to accord with reason, and which is supported by high authority, is that, where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits. And the benefits which will be thus considered must be those which are local, peculiar, and special to the owner's land, who has been required to yield a portion *pro bono publico.*"

This case was cited and quoted from with approval in *Paragould* v. *Milner, supra,* and in the more recent case of *Weidemeyer* v. *Little Rock,* 157 Ark. 5, 247 S. W.

62, where a strip of Weidemeyer's land had been condemned by the city of Little Rock for the opening of Broadway Street. It was again held that the benefit accruing to the remaining portion of Weidemeyer's land exceeded the value of the strip taken, and compensation was properly denied. In that case the lower court directed a verdict for the city, on the ground that the benefit to be derived by the improvement to be made exceeded the value of the property taken for such improvement, and this court sustained such instructed verdict. We are unable to make any distinction between that case and the one now before us as to the principle of law now under consideration. If it applies to the opening of a city street through city property, why should the same rule not apply to the opening or laying out of a rural road through rural property?

The Constitution and statutory provisions of this State with reference to the taking of private property by railroads and other private corporations, as well as the decisions of this court relating thereto, are wholly different from the statute now under consideration. There is no provision either in the Constitution or the statute prohibiting the offsetting of benefits against damages in cases of this kind, and we therefore conclude that the circuit court did not err in taking these special, local and peculiar benefits to this tract of land into consideration in arriving at the judgment in this case.

It is next insisted by counsel for appellant that the benefits testified to by the witnesses for appellee were all such benefits as accrued to the general public, and were therefore not special, local or peculiar to this particular land, and therefore cannot be taken into consideration in the reduction of damages. We cannot agree with counsel in this contention. The proof shows that the value of appellant's land has been greatly increased by reason of this road lying adjacent to his land, and that his farm in its present condition is worth from $500 to $1,000 more than it was before the construction of

this road. Under the rule announced in *Weidemeyer* v. *Little Rock, supra,* these benefits may be offset against the damages. The circuit court found that the damage to the land not taken plus the value of the land taken exceed the benefits to the remaining land by the sum of $250. There is substantial testimony to support this finding of the court, and, under the rule above announced, the judgment must be affirmed.

MEHAFFY, J., dissents.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* RAYMOND.

Opinion delivered April 2, 1928.

1. INSURANCE — BURDEN OF ESTABLISHING SUICIDE.—Where the defense to an action on a policy of life insurance is suicide, the insurer has the burden of establishing such defense by a preponderance of the evidence.
2. INSURANCE—JURY QUESTION.—In an action on a life insurance policy where the defense was suicide, and the evidence showed insured was comparatively young, was living happily with his wife and children, holding a position of honor and trust, and where there was no showing of a motive for suicide, and where there was no evidence to show how insured was killed, the question whether he committed suicide was for the jury.
3. EVIDENCE—PRESUMPTION AGAINST SUICIDE.—There is a presumption of law against a man's taking his own life intentionally, even where it is shown that he came to his death at his own hands; the law presuming that the death was accidental rather than suicidal.
4. INSURANCE—TESTIMONY TENDING TO REBUT SUICIDE.—In an action for the death of the insured, where the defense was suicide, testimony of the insured's wife as to a conversation with the insured regarding the payment of premiums on his life insurance, which tended to show that insured was not contemplating suicide, but was expecting to live at least past the next premium period, before which death occurred, *held* competent evidence.
5. TRIAL—INSTRUCTION AS TO SUFFICIENCY OF EVIDENCE.—In an action on a policy of insurance where the defense was suicide, an instruction that, for the jury to be justified in finding that the insured

committed suicide, there must be evidence from which the conclusion would be reasonable and probable and not merely speculative or conjectural, *held* not error.

6. TRIAL—INSTRUCTION—WEIGHT OF EVIDENCE.—In an action on a policy of insurance, where the defense is that insured committed suicide, an instruction that the jury had a right to consider insured's conduct prior to the shooting and any facts and circumstances which took place during his last illness tending to explain any motive, *held* not erroneous as being upon the weight of evidence.

Appeal from Woodruff Circuit Court, Central District; *W. D. Davenport,* Judge; affirmed.

Owens & Ehrman and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Roy D. Campbell, for appellee.

McHANEY, J. Appellees are the widow and two daughters of George O. Raymond, deceased. On June 4, 1925, each of the appellants issued to said George O. Raymond a policy of life insurance in the sum of $1,000, with a double indemnity clause covering death by bodily injury through "external, violent and accidental means." The policy issued by the appellant, Mutual Life Insurance Company, designated appellee, Alice M. Raymond, as the beneficiary, and the policy of the Ætna Life Insurance Company designated the appellees, Mary F. and Johnnie E. Raymond, as his beneficiaries. On April 26, 1926, George O. Raymond came to his death from a pistol-shot wound, which all parties admit was self-inflicted, but they differ as to whether his death was by suicide or by accident—whether intentional or unintentional. Suicide, whether sane or insane, within one year after the date of said policies, was not a risk assumed by the appellants. Appellants having denied liability after proof of death, separate suits were instituted against them, but, the defense being the same, they were consolidated, tried together, separate judgments of $2,000 each, under the double indemnity clause, had, and they jointly prosecute this appeal to reverse such judgments.

Suicide being the defense relied upon by appellants, the law places upon them the burden of establishing this

fact by a preponderance of the evidence, which they undertook to do. The facts developed are substantially as follows:

The insured was a deputy for the county clerk and the circuit clerk, and had been during the year 1925, and up until the time of his death in 1926, his office being in the rear of the Bank of McCrory, McCrory being one of the county sites of Woodruff County. For two or three months prior to his death he had been drinking somewhat, but none of the witnesses testified that he had been drinking to excess. Some complaint had been made against him by one or two persons on his bond to the clerks that he was neglecting his duties by remaining away from his office too much, and on the morning of his death both the county and circuit clerks came to McCrory for the purpose of talking to him about these matters, and of checking over his accounts. Mr. Raymond was at home, ill. He had been suffering with what his physician thought was influenza for about two weeks, and on the morning in question, April 26, after the arrival of the clerks, one of his bondsmen called him on the telephone and advised him that the two clerks were there for a conference with him, and to check over his accounts, and requested him to come to his office, if he was able to do so, which he agreed to do. It appears that he had been taking medicine during the night, which necessitated his going to the toilet, a small wooden structure to the back of his house, twice before his death, being accompanied on both occasions by his wife. He had borrowed a pistol from a friend in McCrory, who had requested the return of same, and he had been cleaning the pistol with a handkerchief. Shortly after the telephone call he took the pistol, got in his car, and started to his office, but, after going a short distance, he returned, got out of his car, and again went to the toilet, in response to a call of nature, apparently, and a short time thereafter a shot was heard in the toilet, and a scream of pain was heard by his wife, who was at the time in the garden

near the toilet. His brother, Jack Raymond, and two other gentlemen immediately responded, being the first ones to him, and they found him sitting on the toilet with his trousers down, as if in the act of responding to a call of nature, slumped over, with this borrowed pistol and the handkerchief he had used in cleaning it lying between his feet. They found that he had been shot through the left breast, the bullet entering, according to the doctor, right under the heart and passed through his back, going through the body, whether straight through or not the doctor did not know. He was taken into his house, where he died shortly after the arrival of the physician. No powder-burns were found on his clothes. The toilet on which he was sitting had a metal lid, which had been elevated, and the bullet from his body passed through this lid near the top, and through the wall of the toilet, the bullet-hole in the seat covering being 13 inches above the seat, and in the wall one inch lower, which would tend to show that the bullet ranged slightly downward.

It was further shown that, during his illness, he got out his insurance policies, which he kept in the dresser drawer, and examined them. His wife stated that he and she read the policies together, including the suicide clause, and that he was familiar with this clause, and knew it was in the policies. Other members of the family saw him reading the policies and heard him discuss them with his wife. On cross-examination of Mrs. Raymond she was asked this question, and permitted to give the following answer, over appellants' objections and exceptions: "Q. I want you to tell the jury what, if anything, was said by your husband, when he was examining these policies, about paying the next premiums that came due? A. He told me that he was very sick, he was feeling awfully bad, and he didn't think he would ever be able to work any more, and he wanted his premiums to be kept up. He said, 'Wife, if I haven't the money when they come due, I have a friend who will help you out. They must

be kept up'." This conversation occurred three days before his death.

The undertaker who took charge of his body found two notes in his clothing which he wore at the time, both of which had been destroyed or been misplaced; one to J. C. McCrory, and the other to Senator Walter W. Raney, the undertaker. The note to McCrory, in substance, read: "Dear J. C. You have been good to me and my family. Good luck." In the note to Senator Raney he stated that he was sick, did not know whether he would get well, and, if not, for him to take charge of his body. Both McCrory and Raney were warm personal friends of the deceased, McCrory having loaned him money to send his two girls away to school.

It is also shown that he was overdrawn in a small amount at the bank. An examination of his accounts at the office of the county and circuit clerk disclosed no shortage, and nothing of a criminal nature. It was developed that some warrants of duplicate numbers had been issued, but on examination thereof by the county judge they were held to be valid, and were reissued.

Under the above state of facts, the appellants insist that the court should have directed a verdict in their favor. We do not agree with counsel in this contention. There is little or no dispute about the facts. As was said in *Grand Lodge A. O. U. W.* v. *Banister,* 80 Ark. 190, 96 S. W. 742: "The only disputed question is whether the shot was accidental or an act of intentional self destruction. The burden of proving suicide was upon the defendant. It alleged that fact as a defense to the action, and must prove it, for, until that fact is established, liability of the defendant for the amount of the policy is clear.

"There is no dispute about the facts, which were susceptible of direct proof, but the case turns upon the conclusion to be drawn therefrom—whether or not they establish suicide indisputably. For, if the facts are such that men of reasonable intelligence may honestly draw

therefrom different conclusions on the question in dispute, then they were properly submitted to the jury for determination. Judges should not, under that state of the case, substitute their judgment for that of the jury." And, as was further said in the same case: "After careful consideration of the evidence we are of the opinion that this question was properly submitted to the jury, and that there was evidence sufficient to support the verdict. Conceding that the theory of death by suicide finds more rational support in the facts established by direct proof than the theory of death by accident—that there is greater probability from the evidence that death resulted from a suicidal act than an accident—still we cannot say that death by suicide is the only reasonable conclusion to be drawn from the evidence. The proof does not exclude with reasonable certainty death from accidental shooting, and, the burden being upon the defendant to establish the defense by proof, it was properly left to the jury to say whether or not it was a case of suicide."

In that case the universal rule was again announced that there is a presumption of law against a man's taking his own life intentionally, even where it is shown that he came to his death at his own hands. The law presumes rather that the death was accidental instead of suicidal. This presumption of law is strengthened in the case at bar by the fact that he was a comparatively young man, 42 years of age, living happily with his wife and children, holding a position of honor and trust, being a deputy for two of the county's officials; that, while he was suffering from an illness prior to the day of his death, he had discussed with his family his insurance policies, and his desire the keep the premiums paid; that, in response to the telephone call, he had started to his office to consult with his employers, taking with him the borrowed pistol, when he was overcome by a call of nature, and suddenly returned to his home to answer it; the seating of himself and so arranging his clothes to answer such

call, no doubt taking the pistol out of his pocket in order to prevent it from falling on the floor while sitting upon the toilet. No one knows just how the fatal shot happened to be inflicted, whether he was again polishing the gun with the handkerchief he had formerly used, and accidentally discharged it, or whether it might have fallen on the floor and was discharged in such a manner as to receive the bullet in his breast, where it was deflected by a bone and passed straight through his body, or whether he deliberately shot himself, no one can tell. It would seem unreasonable to believe, or at least it would be improbable, that he would take his life intentionally in the place where he was and in the undressed condition in which he was found. It was therefore not impossible, nor even improbable, that the shooting of himself was accidental. We fail to find in the evidence any motive for suicide. The notes that were found in his clothing may be explained without reference to suicide. Taking into consideration his condition of health, his idea that he might not get well, might not be able to work any more, and all the facts and circumstances surrounding him at the time, we are unable to say that men of reasonable intelligence might not honestly draw therefrom different conclusions on whether his death was suicidal or otherwise.

The facts in this case are wholly different from those in *New York Life Ins. Co.* v. *Watters,* 154 Ark. 569, 243 S. W. 831; *Ætna Life Ins. Co.* v. *Alsobrook,* 175 Ark. 523, 299 S. W. 744; and *Fidelity Mutual Life Ins. Co.* v. *Wilson,* 175 Ark. 1094, 2 S. W. (2d) 80, in which cases it was held that the undisputed facts unmistakably pointed to suicide, and the death could not be accounted for upon any other reasonable hypothesis than that of suicide.

It is next insisted that the court erred in permitting Mrs. Raymond to testify, as above set out, regarding her conversation with the deceased about the payment of premiums. It is said that this testimony is hearsay, and for that reason inadmissible, and, being highly prej-

udicial, calls for a reversal of the case. We cannot agree with this contention, for the reason that it seems to us that any testimony which tends to throw light upon the question at issue, that is, whether the deceased committed suicide, or came to his death by accidental means, is relevant and competent. His statements regarding the payment of premiums on these policies to his wife tended to show that at that time he was not contemplating suicide, but, on the contrary, was expecting to live at least past the next premium period, which was June 4 following, and was therefore competent for this purpose.

In the case of *Scott* v. *Sovereign Camp W. O. W.*, 149 Ia. 562, 129 N. W. 302, the Supreme Court of Iowa held that, on the issue whether a member of a fraternal beneficiary association committed suicide, evidence of his conversation over the telephone with his daughter, shortly before his death, to the effect that he would return home soon, in time to keep an engagement, that there were some clients in his office at the time, was admissible, as bearing on his apparent state of mind, contradicting the theory of suicide. And in an extensive note to *Rosman* v. *Travelers' Ins. Co.*, 127 Md. 689, 96 A. 875, Ann. Cas. 1918C, p. 1050, it is said:

"In like manner declarations of an insured shortly before his death have been held in recent cases to be admissible to refute an inference that he committed suicide. Thus, in *Woodmen of World* v. *Wright*, 7 Ala. App. 255, 60 So. 1006, declarations made by the insured, who had shot himself, manifesting a hope or desire to recover, were held to be admissible 'for the purpose of showing whether or not the act was intentional.' So in *Messersmith* v. *Supreme Lodge, etc.*, 31 N. D. 163, 153 N. W. 989, proof that, shortly before his death, the insured stated that he was going to the house to fix the fire and would then come back for his wife and baby, was held to be admissible to rebut evidence of suicide."

In *Brawner* v. *Royal Indemnity Co.* (C. C. A.), 246 Fed. 637, it was held that statements of the insured tend-

ing to show a disposition to commit suicide made some months before his death were held to be admissible. The court said:

"The fact that threats or intimations of suicide were made some time prior to the death in question does not make evidence of them inadmissible, when it is fairly inferable from circumstances disclosed that, immediately prior to the death, the deceased was subjected to a depressing influence which was the same as or similar to the one by which he was affected when, not very long before, the incidents testified to occurred. As above stated, it was inferable from other evidence adduced in the instant case that the cause of the gloomy and despondent mood or state of mind, as to manifestations of which the witness referred to testified, had not ceased to exist at the time of Brawner's death. This being so, the conclusion is that those incidents are not to be regarded as being too far removed in point of time and sequence from his death to justify the consideration of them in connection with other circumstances throwing light upon the question of his death being accidental or suicidal."

And in the case of *Benjamin* v. *District Grand Lodge No. 4,* 171 Cal. 260, 152 Pac. 731, statements of the deceased showing intent to commit suicide, made seven months before the time of death, were held to be admissible. The court held that their remoteness went to their weight and not to their admissibility. An examination of the authorities discloses that the tendency of courts, in recent times at least, is to hold that any evidence, including statements of the deceased, which tends to throw light upon the question of whether the deceased came to his death by suicide or not, is competent. We therefore hold that there was no error in permitting Mrs. Raymond to testify as above set out.

It is next said that instruction No. 3, given at the request of the appellees, was improper. It is as follows:

"In attempting to determine whether or not the said George Raymond committed suicide, you would be

authorized to take into consideration all of the proved facts and circumstances which have been testified to in this case. Before you would be justified in finding that he did commit suicide, there must be evidence from which a conclusion would be reasonable and probable, and not merely speculative or conjectural. If you find from a consideration of all the evidence in this case that it is merely speculative or conjectural as to whether the said George Raymond committed suicide, your verdict should be for the plaintiffs."

It is objected to because it contains the words "speculative" and "conjectural," and the court was asked to strike this clause from the instruction. It is said that the instruction is erroneous because it permits the jury to apply a test of law, which is the proper function of the court. This same instruction was used and similarly criticised in the case of *Benefit Association of Railway Employees* v. *Jacklin,* 173 Ark. 937, 294 S. W. 353, and the court there held it to be a proper instruction. It would serve no useful purpose to make the same argument again, and we therefore overrule appellants' contention in this regard.

It is finally contended that instruction No. 8 was erroneous. It follows:

"In passing upon the question of whether or not the deceased, George Raymond, shot himself accidentally or intentionally, you have a right to consider all the facts and circumstances leading up to and surrounding the fatal shooting. You have a right to consider the conduct of the deceased prior to the shooting, any facts and circumstances which took place during his last illness which may tend to explain any motive in his mind, that might or might not explain the shooting, and you are to pass upon the facts and circumstances in the light of reason and common sense."

It is said that the last clause in this instruction particularly emphasizes certain portions of the testimony, and for that reason is an instruction upon the

weight of the evidence, which trial courts may not give. We do not think this instruction is open to this criticism. What we have already said relative to the assignment of error relating to the testimony of Mrs. Raymond has some application here. The court did not tell the jury to take into consideration any particular testimony in the case, but, in effect, told the jury to take into consideration all of the facts and circumstances surrounding his death, and those during his last illness, any facts which might or might not tend to explain the shooting. We think this was a correct instruction, and was no more than instruction No. 8 given at the request of appellants, by which the jury was told that, "in determining whether or not the insured committed suicide, you will consider all the facts and circumstances surrounding Raymond's death; the nature of the wound, the position of the body, and all the circumstances which might explain the cause of his death." It appears to us that this last instruction is more nearly subject to the criticism appellants have made of the other instruction. However, we regard them both as correct statements of law for the jury's guidance.

We find no error, and the judgment is affirmed.

MILLER v. STATE, USE WOODRUFF COUNTY.

Opinion delivered January 23, 1928.

1. COUNTIES—WARRANTS ISSUED IN EXCESS OF REVENUE.—Under Amend. 11 to the Constitution (Acts 1925, p. 1086), county warrants issued in excess of revenues for the fiscal year are void.
2. COUNTIES—VALIDITY OF WARRANTS.—Warrants issued for existing indebtedness of the county, at a time when there was insufficient money in the county treasury to redeem them in the year of their issuance, are not on that account invalid, since the inhibition of the Const. Amend. 11 is that expenditures shall not exceed the revenues, and it is a violation of the inhibition which renders the allowance of warrants invalid.
3. COUNTIES—WARRANTS ISSUED FOR OUTSTANDING INDEBTEDNESS.—While a county cannot increase the amount of its existing indebt-

edness by incurring debts in excess of its current revenue, it is not an increase of indebtedness within Amend. 11, where a county, which cannot redeem all outstanding indebtedness, at the beginning of a fiscal year issues warrants which cannot be redeemed through lack of funds, but which, when issued, are not in excess of indebtedness outstanding at the end of the prior fiscal year.

4. COUNTIES—REDEMPTION OF WARRANTS.—County warrants issued in any year which did not exceed the revenue of the county for that year are redeemable in the ensuing year, though payment thereof makes it impossible to redeem warrants issued that year, and hence where the revenues of a county for 1927 were $29,-738.20 and the expenditures $21,196.48, the county treasurer should be allowed credit for redemption of $19,441 of outstanding warrants, though a sufficient sum did not remain in the treasury to redeem the warrants issued in 1927.

Appeal from Woodruff Circuit Court, Northern District; *W. D. Davenport,* Judge; reversed.

W. J. Dungan and *J. F. Summers,* for appellant.

Roy D. Campbell, for appellee.

SMITH, J. Appellant became the county treasurer of Woodruff County on January 1, 1926, and is now acting in that capacity. Notice was served on him that, on October 10, 1927, his quarterly settlements previously filed and approved in the year 1927 would be examined for errors in allowing improper credits in said settlements. The county court found that the treasurer had been improperly allowed credits for certain warrants, most of which had been paid him by the collector on account of the collection of the 1926 taxes. From this order an appeal was duly prosecuted to the circuit court, where the court found that certain warrants, which had been issued in the years 1925 and 1926, but which had been reissued in May, 1927, under an order of the county court calling in outstanding warrants for reissuance, had been received by the county treasurer in satisfaction of demands in favor of the county aggregating $19,441; that, having received these warrants, there did not remain in the treasury enough money to redeem other warrants which had been issued in payment of the county's expenses for the fiscal year 1927.

It was shown in the trial below that the revenues of the county for the year 1927 were $29,738.20, and that the expenditures for that year were $21,196.48, but, as the treasurer had received $19,441 of warrants outstanding at the beginning of the year 1927, there did not remain in the county treasury enough money to redeem all the warrants issued in the year 1927, and the court held that this must first be done before the treasurer would be authorized to receive for any purpose any warrant outstanding at the beginning of that year, and, upon this theory, adjudged that the county treasurer had been improperly allowed credit for such warrants. In other words, the warrants issued in 1925 and 1926, and which were reissued in 1927, were valid warrants, but, by receiving and redeeming them, there was not left sufficient funds to redeem all the warrants issued in 1927, and it was held by the circuit court that such warrants could not be redeemed until all the expenses of 1927 had first been paid.

Counsel review the recent decisions of this court construing the amendment to the Constitution commonly referred to as Amendment No. 11, and it is insisted that the opinion in the case of *McGregor* v. *Miller,* 173 Ark. 459, 293 S. W. 30, decided April 4, 1927, and the opinion on rehearing in the same case, delivered April 25, 1927, are controlling here, and support the finding of the court below.

We have here, however, a different state of facts. There a certain warrant which had been issued in 1926 was, together with other warrants which had been previously issued in that year, slightly in excess of the total revenues of the county for that year, and we held that, to the extent of this excess, the warrant was void, but that it might be reissued in an amount which, in connection with other warrants previously issued, did not exceed the total revenues of that year. Certain other warrants were issued in 1926 on demands which arose in the prior fiscal year of 1925 and which, when issued, were in excess

of the 1926 revenues. In elucidating the original opinion we said, in the opinion on the rehearing, that:

"We think we have made it plain that a county cannot incur any obligation in any year which exceeds the revenues of that year, and, if this is done, such obligations are void, and cannot be paid out of the revenues of a succeeding year. If this could be done, obligations could thus be carried from one year to another. The revenues of one year would be applied to the discharge of obligations of a previous year, and one of the purposes of the amendment was to prevent this from being done."

We there further said:

"Those warrants are valid which, at the time of their issuance, do not exceed the revenues. All others are void. The holder of a valid warrant may, by an appropriate action, compel the receipt and payment of his warrant to the exclusion of an invalid warrant, and he may, if necessary, enjoin the redemption of an invalid warrant. More than that, the invalid warrant cannot be received by any collecting officer of the county, and the officer who does receive it does so at his peril, and is not entitled to take credit for it in any settlement of his accounts, because the warrant is void. It is issued without authority, and the action of a collecting officer in receiving it cannot give it validity."

We were, of course, there speaking of void warrants, and the thing which made them void was that they were in excess of the revenues for the year in which they were issued.

For the same reason the claim involved in the case of the *Dixie Culvert Co.* v. *Perry County,* 174 Ark. 107, 294 S. W. 381, was held void. The county court had contracted an obligation which, in conjunction with other obligations previously contracted, was in excess of the county's revenue for the year in which the obligation was incurred, and we held the contract void for that reason.

We have here a wholly different case. The warrants were not invalid at the time of their issuance; at

least they are not shown to have been so. There was not enough money in the county treasury to redeem them in the year of their issuance, but they were not invalid on that account. The inhibition of the amendment is that expenditures shall not exceed revenues, and it is a violation of this inhibition which renders the allowance invalid.

In the case of *Nelson* v. *Walker,* 170 Ark. 170, 279 S. W. 11, we quoted from the prior case of *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389, 41 A. L. R. 782, as follows:

"We think the amendment means just this: That, if a county, city or town avails itself of the provisions authorizing the taking up of its outstanding indebtedness, it shall not thereafter draw warrants upon the treasurer for an amount in excess of its annual revenues. It must stay out of debt. It means, further, that, if a city, county or town has any outstanding unpaid warrants which it does not take up by issuing bonds as authorized by the amendment, it must not add to its existing indebtedness by issuing more warrants than can be paid out of the revenues of the current year."

A county, whether it issued bonds or not, cannot increase the amount of its existing indebtedness; but it is not an increase of indebtedness if a county, which cannot redeem all its outstanding warrants, issues others which cannot be redeemed through lack of funds, but which, when issued, are not in excess of the indebtedness outstanding at the end of the prior fiscal year. To illustrate: If a county has an outstanding indebtedness of $19,441, as Woodruff County had at the beginning of the fiscal year, it may, during that year, issue warrants which, while they cannot be redeemed, do not exceed the indebtedness existing at the beginning of that year. The amendment does not prohibit this. The prohibition of the amendment is against increasing the amount of the indebtedness.

The case of *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S. W. 1002, delivered October 17, 1927, is directly in point. There allowances were made by the county

court in the year 1925 which did not equal the revenues of that year, but the redemption of valid outstanding warrants out of the revenues of that year made it impossible to redeem all the claims contracted and allowed that year. This was true also in the year 1926, so that there remained outstanding warrants which could not be redeemed. It was held that these facts did not prevent the county from contracting necessary obligations which could be paid only by the issuance of warrants which could not be redeemed out of the revenues of 1926, and that such obligations might be paid out of the revenues of a subsequent year. This was true because these last obligations, which were paid by warrants which could not be redeemed in the year of their issuance, were not expenditures in excess of revenues. The county did not, in issuing those warrants, which could not be redeemed in the year of their issuance, increase the county's indebtedness.

We held, in the cases of *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389, 41 A. L. R. 782; *Ivy* v. *Edwards,* 174 Ark. 1167, 298 S. W. 1006, and *Lake* v. *Tatum,* 175 Ark. 90, 1 S. W. (2d) 554, that a county may build a courthouse, although its cost could not be paid out of the revenues of the year in which its construction was authorized, but that this could be done only when it had been ascertained that, by distributing the payment of the cost over a period of years, these installments of cost would not, in connection with the other essential expenses of government, exceed the revenues of the county for the years in which such payments were to be made. In the last of those cases, that of *Lake* v. *Tatum,* we said that: "In other words the limit of the amount for which a county may contract for in any one fiscal year is the difference between the amount of its necessary governmental expenses or fixed charges in running its government and the total county revenue which can be derived from levying and collecting county taxes in any one year"; and that, if a county makes a contract which requires payments over a period of years, these payments must be taken into account in

determining what other expenses may be incurred, and that the total expenditures, including such payments, shall not exceed the revenues.

But here, as in the case of *Polk County* v. *Mena Star Co., supra*, expenditures have not exceeded revenues. The receipt by the collector and the redemption by the treasurer of valid warrants, which those officers could not refuse when tendered in payment of any demand due the county, made it impossible to redeem all the warrants issued in the year 1927, but those unredeemed in the year of their issuance may be redeemed, as was said in that case, out of the revenues of a subsequent year, and this is true because, in so doing, the indebtedness of the county is not increased.

The original order of the county court allowing the treasurer credit for these valid outstanding warrants was correct, and the later order of the county court and that of the circuit court on appeal were erroneous, and the judgment here appealed from will be reversed, and the cause remanded, and the circuit court will direct the county court to allow the treasurer credit therefor.

SCHOOLEY v. STATE.

Opinion delivered January 23, 1928.

1. SEDUCTION—CORROBORATION OF PROSECUTRIX.—Where accused, in a prosecution for seduction, admitted having intercourse with the prosecutrix, there was no necessity for corroboration of her testimony as to such fact.
2. WITNESSES—CROSS-EXAMINATION.—On cross-examination, a witness can be asked any questions bearing on his character tending to throw light on matters affecting his credibility for purposes of impeachment, and may be asked whether he has committed particular wrongful or immoral acts, if the commission of such acts affects his credibility.
3. WITNESSES—CROSS-EXAMINATION OF WITNESS.—In a prosecution for seduction, refusal to permit cross-examination of the sister of prosecutrix, as for purposes of impeachment, as to whether she had not had improper relations with a certain man and whether she had not been intoxicated on certain occasions, *held* error.

4. WITNESSES—IMPEACHMENT ON CROSS-EXAMINATION.—On cross-examination, a witness cannot be asked questions as to the conduct and declarations of others for purposes of impeaching his credibility as a witness, but the question must be confined to his own conduct.

5. WITNESSES—CROSS-EXAMINATION—CONCLUSIVENESS OF ANSWER.—On cross-examination of a witness as to particular facts for the purpose of impeaching his testimony, his answers conclude the party asking the questions and cannot be contradicted.

6. CRIMINAL LAW—STATEMENT OF ATTORNEY REGARDING EXCLUDED QUESTION.—Where the question whether a witness had not had illicit relations with a certain man, asked by defendant on cross-examination of the sister of the prosecutrix in a seduction case, was excluded, the statement of defendant's attorney that he expected to prove the facts suggested in the question sufficiently showed what the answer of the witness would have been in order to show whether prejudice resulted from its exclusion.

7. CRIMINAL LAW—EXCLUSION OF TESTIMONY—PREJUDICE.—In a prosecution for seduction, in which the State relied largely on the testimony of the sister of prosecutrix to corroborate her testimony respecting the promise of marriage, exclusion of a question as to whether the witness had not been drinking liquor or was intoxicated on a certain occasion, asked on cross-examination to affect her credibility, *held* prejudicial error.

8. CRIMINAL LAW—WAIVER OF OBJECTION.—Where, after the court refused to permit defendant's attorney to cross-examine a witness concerning whether she had been intoxicated on a certain occasion, defendant's attorney stated that "at present we will not pursue it further," *held* that he did not thereby abandon the question or any rights that he might have by reason of his objection and exception.

9. CRIMINAL LAW—HEARSAY EVIDENCE.—In a prosecution for seduction, the court erred in permitting the State to prove a conversation between the father of prosecutrix and the father of defendant, in which the former stated that his daughter had told him that defendant had promised to marry prosecutrix, where defendant had no opportunity to reply to such statement.

10. SEDUCTION—CHASTITY OF PROSECUTRIX.—In a prosecution for seduction, an instruction that, if the prosecutrix was chaste at the time of the promise of marriage but became unchaste thereafter, they should acquit defendant, was properly refused, since, if she were chaste at the time of the promise of marriage and when defendant committed the crime, her subsequent conduct would not affect his guilt or innocence.

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

Luke Monroe and *Feazel & Steel,* for appellant.

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

MEHAFFY, J. Appellant was indicted, tried and convicted in the Howard Circuit Court on a charge of seduction, and his punishment fixed at one year in the penitentiary and a fine of one hundred dollars. Appellant filed motion for new trial, which was overruled, exceptions saved, and appeal prosecuted.

The proof shows that appellant, who was about twenty years old, had intercourse with the prosecuting witness, Dura Stone, a girl about eighteen years old. Appellant admitted having intercourse with her.

Dura Stone testified that appellant promised to marry her.

Several men testified that they had had intercourse with Dura Stone, some of them fixing the date at which they had intercourse with her at a time prior to the time she says appellant promised to marry her. She denied having intercourse with any one except appellant, either before or after the time she says appellant promised to marry her.

Since appellant admitted having intercourse with the prosecutrix, there was no necessity for other corroboration of her testimony as to intercourse. There was some evidence corroborating the statements of prosecutrix as to promise of marriage.

Appellant's first contention is that the court erred in not permitting the defendant to question Vee Stone, on cross-examination, with reference to her past conduct. On cross-examination Vee Stone, sister of Dura Stone, was asked: "I will ask you if it isn't true on that occasion Max Dyer had intercourse with you?"

This question was objected to, and the court said: "That is improper," and defendant's counsel said, "We offer to show that." Objection was made to the ruling of the court, and exceptions saved. Witness was then

asked: "Do you remember going to a dance at Hunter's in the fall of 1925?" She answered: "I do not remember. I went to several dances there, but do not remember when."

The court then said: "What is the purpose of that?"

The attorney for the defendant said: "We offer it as affecting her credibility. We offer to show by the witness that she attended a dance at Abb Hunter's, in the fall of 1925, and in returning she was overtaken by Sam Schooley and Hilton Keath, and that she and Dura rode home with these men. That at that time she and her sister were under the influence of liquor, and that she drove the car into a telephone post."

Thereupon the court said: "You can ask Dura that, because she is the prosecutrix. You can ask that so far as it applies to the prosecuting witness, but not as to her."

Defendant's attorney said: "At present we will not pursue it further," and saved exceptions to the court's ruling.

A witness may always be asked, on cross-examination, questions bearing on his or her character which tend to throw light on matters which are proper for the purpose of impeachment. She may be asked about particular acts which affect her credibility for the purpose of impeachment, and may be asked whether he or she has committed particular wrongful or immoral acts if the commission of such acts would affect the credibility of the witness.

The court therefore erred in not permitting the defendant to ask Vee Stone the questions about her conduct.

This court, in a recent case, said:

"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 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. * * * 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." *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937.

In the last cited case many of the authorities are cited and reviewed, and we deem it unnecessary to set them out here. The well-established rule in this State is that the witness, on cross-examination, may be asked any question that affects the credibility of the witness. A witness, however, cannot be asked questions as to the conduct and declarations of others, but the question must be confined to his own conduct. And where witnesses are asked, on cross-examination, as to particular facts, as in this case, for the purpose of impeaching the witness, the answer of the witness concludes the party asking the question, and cannot be contradicted by other evidence.

The State, however, contends that there is nothing in the court's ruling on these questions that would justify this court in reversing the judgment of the lower court, and states that this case comes well within the rule of this court that, where a question is excluded on cross-examination and exceptions saved thereto, in order to show that prejudice resulted, the record must show what the answer of that witness would have been, and cites the recent case of *Williams* v. *State,* 175 Ark. 752, 2 S. W. (2d.) 36, delivered December 12, 1927. In that case the court said:

"At the outset it may be stated that the questions asked the witness on cross-examination by counsel for defendant were proper, under *Hughes* v. *State,* 70 Ark. 420, 68 S. W. 676, and *Martin* v. *State,* 161 Ark. 177, 255 S. W. 1094."

The court also said in that case: "In this connection it may be stated, however, that it is a settled rule of this court not to reverse judgments except for errors

that are prejudicial to the rights of the defendant;" and cited a number of cases.

The court further said in the last case mentioned:

"So it will be seen that, if Miss Williams had answered the question in the negative, this would have ended the matter. If she had answered it in the affirmative, the answer would have been allowed to go to the jury for what they considered it worth as affecting her credibility. She did not answer it at all, and a majority of the court are of opinion that this brings the case within the general rule that, where evidence is ruled out as being incompetent, there must be set out in the record what the answer of the witnesses would have been. Otherwise the court would not know whether or not there had been any prejudicial error committed."

The witness in the case of *Williams* v. *State, supra,* as stated by the court, did not answer the question and the defendant did not state what the answer would have been. But, in the case at bar, the attorney for the defendant, after asking the question and the court stating that it was improper, stated, "We offer to show that." Whether he meant by that that we offer to show what we have asked, or we offer to show by this witness that the facts suggested in the question are true, may not be very clear, but it certainly appears, from the question and answer and statements of counsel, that they expected to prove the facts suggested in the question by this witness. And if this witness would testify to that, it would certainly affect her credibility.

As to the next question, the one with reference to drinking whiskey and being intoxicated, or under the influence of liquor, the court would not permit the attorneys to ask the question nor the witness to answer it, and the attorney for the defendant said: "We offer it as affecting her credibility. We offer to show by the witness that she attended a dance at Abb Hunter's in the fall of 1925, and, in returning, she was overtaken by Sam Schooley and Hilton Keath, and that she and Dura rode home with these men. That at that time she and her

sister were under the influence of liquor, and that she drove the car into a telephone post." Here the attorney says that he will show that by this witness. We think this is equivalent to saying that this witness will testify to that. That is the only way he could show it by this witness.

The court said this would be a proper question to ask Dura, the prosecuting witness, but not this witness. In this the court was in error. The State contends, however, that, because Mr. Steele said, "At present we will not pursue it further," he is not entitled now to a reversal because of this error. What the attorney meant by not pursuing it further it is impossible to tell, but that he did not intend to abandon this question nor any rights that he might have is clearly shown by the fact that he objected to the ruling of the court, and saved his exceptions. He very probably meant, by not pursuing it further, that he did not intend to ask this witness about any other of her conduct or acts. At any rate, it is perfectly clear that he told the court that he could prove by this witness that she had been under the influence of liquor at the time mentioned, and, when the court did not permit him to ask the question nor the witness to answer it, proper exceptions were saved.

We think that it not only shows what the answer would have been, but the exclusion of this testimony was prejudicial. It was especially important in this case that the defendant be permitted to cross-examine this witness and bring out or develop facts that would affect her credibility, because the State relies largely, if not solely, on her testimony as corroborating the testimony of the prosecutrix that a promise of marriage was made. The State was required to prove the promise, the prosecutrix testified to the promise, and this witness corroborated her. It was therefore important that the defendant be permitted to impeach this witness by asking these questions on cross-examination.

The authorities supporting the views herein expressed with reference to impeaching the witness on

cross-examination are cited in the briefs of counsel, and need not be reviewed here.

It is next contended that the court erred in permitting the State to prove a conversation the father of the prosecutrix and the father of the defendant had. It was not proper to admit in evidence this conversation. In the first place, the father of the prosecuting witness stated that his daughters had told him that Herbert had promised to marry her. The defendant had no opportunity to say anything, because at this time his father made the statement referred to, and we do not think there was anything said that would require the defendant to reply. In fact, it seems he did not have any opportunity to reply.

It is next contended that the court erred in excluding the testimony of Eldridge Ross. We think this testimony was properly excluded. It would have had no tendency to show whether the girl was chaste or not. It would not even have a tendency to show her conduct, and what was said does not indicate what her conduct was. It is what might have been said to any chaste, pure girl, under the circumstances, and her answers are what such a girl might have made. The court should have required the State to use Ed Webb, if it desired to use him at all, before the defendant was required to offer his evidence.

It is next contended by the appellant that the court erred in refusing to give instructions numbers one, four and five. Instruction number one tells the jury, in effect, that, although Dura Stone was chaste at the time of the promise of marriage, but thereafter, and before they were to be married, became unchaste, they should acquit the defendant. If she was chaste at the time of the promise of marriage, and the defendant committed the crime, nothing that she may have done thereafter would affect his guilt or innocence. He either committed the crime at that time or he did not, and, if he did, her conduct thereafter, while it might be offered in evidence as affecting her credibility, would not affect his guilt or inno-

cence. The same may be said of the other instructions refused by the court.

We think the court properly instructed the jury, but, for the errors above mentioned, the case is reversed, and remanded for a new trial.

NEVIUS v. REED.

Opinion delivered April 9, 1928.

1. HIGHWAYS—LAYING OUT ROAD—CONSENT OF LANDOWNER.—Where a road laid out by viewers was approved by the county court on petition, but notice was not given to the landowner as required by Crawford & Moses' Dig., § 5234, the county court had no authority to approve the action of the viewers in laying out the road without the landowner's consent.
2. HIGHWAYS—RIGHT TO NOTICE—WAIVER BY LANDOWNER.—The fact that a landowner filed exceptions to the report of viewers who were laying out a road on his land was not a waiver of the right to notice, as required by Crawford & Moses' Dig., § 5234.

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

STATEMENT BY THE COURT.

On the 23d day of March, 1927, J. H. P. Reed and forty other persons filed in the office of the clerk of the county court of Baxter County a petition praying for the alteration of a part of a public road in said county. Roy Nevius and other persons filed a remonstrance to said petition on the 4th day of April, 1927.

The record shows that on October 30, 1926, Roy Nevius and others filed in the county court of Baxter County a petition for an order to vacate a certain part of a public road and to open up and establish a new road in the place of that sought to be vacated. Notice of the application was given as required by the statute, and viewers were duly appointed. J. H. P. Reed and the other persons who signed the petition with him in the present case filed a remonstrance to the petition of Roy Nevius and others. The old road was vacated, and

the new road established as prayed for in the petition of Roy Nevius. J. H. P. Reed appealed to the circuit court. On the 11th day of March, 1927, being a day of the March term of the circuit court, J. H. P. Reed dismissed his appeal at his own cost.

On March 23, 1927, the present petition was filed in the county court, and the record shows that the petitioners are seeking to vacate the identical part of the public road which was opened and laid out on the petition of Roy Nevius, and to establish in its stead that part of the old road that had been vacated on the petition of said Roy Nevius. Notice was given by J. H. P. Reed by publication as required by § 5230 of Crawford & Moses' Digest. Proof of publication of the notice was filed with it in the county court on April 5, 1927. On April 19, 1927, a day of the April term of the Baxter County Court, three viewers were appointed and made their report, recommending the vacation of the old road and the establishment of the new one as prayed for in the petition of said J. H. P. Reed and others. No notice was given Roy Nevius, as required by § 5234 of Crawford & Moses' Digest. The court approved the finding of the viewers, and it was ordered that the change in the road be made as petitioned for and as recommended by the viewers.

Roy Nevius had filed exceptions to the report of the viewers, and moved to quash the assessment on the ground that the court was without jurisdiction to proceed in the matter. One of the grounds was that no notice had been given as required by § 5234 of Crawford & Moses' Digest. Another ground is that the matter was *res judicata,* because the parties were concluded by the former order of the county court, when J. H. P. Reed dismissed his appeal.

The circuit court on appeal heard the case *de novo* on the record, as stated above, and affirmed the judgment of the county court vacating the road and establishing the new road over the land of Roy Nevius, as prayed

by J. H. P. Reed and others. Roy Nevius filed a motion for a new trial, which was overruled by the circuit court. He has duly prosecuted an appeal to this court from the judgment of the circuit court.

Dyer & Dyer, for appellant.

HART, C. J., (after stating the facts). The road laid out by the county court on the petition of J. H. P. Reed and other persons was opened and laid out on the land of Roy Nevius and others. Viewers were appointed, but no notice, as required by § 5234 of Crawford & Moses' Digest, was given by the petitioners to Roy Nevius, through whose land said road was proposed to be laid out and established. This fact was shown by the undisputed evidence in the record, and no attempt was made to prove that the notice required by the statute of the viewers' meeting was given or that Nevius waived the notice. Therefore the county court had no right to approve the action of the viewers in laying the road over the land of Roy Nevius without his consent, and the action of the county court in approving the report of the viewers was erroneous. The circuit court heard the case upon the same record as presented to the county court and affirmed the judgment of the county court. This constitutes reversible error.

The case is here on appeal, and is not like the cases of *Lonoke County* v. *Lee,* 98 Ark. 345, 135 S. W. 833, and *Polk* v. *Road Imp. Dist. No. 2 of Lincoln County,* 123 Ark. 334, 185 S. W. 453, where it was held that the fact that a landowner had no notice of the meeting of the viewers for the assessment of damages is an irregularity and does not affect the jurisdiction of the county court, and does not render such judgment void. In each of these cases the relief was denied the landowner because he had not appealed from the order of the county court, but had attempted to quash the order by certiorari on the ground that it was absolutely void. In each of these cases, however, the court recognized and upheld the rule laid down in *Beck* v. *Biggers,* 66 Ark. 292, 50 S. W. 514,

to the effect that the notice required by § 5234 of Crawford & Moses' Digest is essential, and that the failure to give it constitutes error calling for a reversal of the judgment of the county court establishing the road, where the statutory notice is not given.

Nevius did not have any notice of the meeting of the viewers, and took no part whatever in the proceedings to lay the road over his land. The exceptions filed by him to the report of the viewers did not constitute a waiver of the notice required by the statute. *Beck* v. *Biggers,* 66 Ark. 292, 50 S. W. 514.

The result of our views is that the judgment of the circuit court was erroneous because the notice required by § 5234 of Crawford & Moses' Digest was not given, and the cause will be remanded, with instructions to remand the case to the county court for further proceedings according to law and not inconsistent with this opinion.

It is so ordered.

SOUTHERN LUMBER COMPANY *v.* ARKANSAS LUMBER COMPANY.

Opinion delivered April 9, 1928.

1. ADVERSE POSSESSION—PAYMENT OF TAXES ON UNIMPROVED LAND.—Crawford & Moses' Dig., § 6943, providing that unimproved and uninclosed land shall be deemed to be in possession of the person paying taxes thereon, if he have the color of title, and providing that one paying taxes for seven years can invoke the benefit of the act, is not in itself a statute of limitations, but only makes the payment of taxes under the conditions named in the act a constructive possession, and it is only by applying thereto the general statute of limitations that such possession can ripen into a title by limitation.
2. LOGS AND LOGGING—CONVEYANCE OF GROWING TREES.—A conveyance of growing trees is a conveyance of an interest in the land itself, since growing trees constitute a part of the realty.
3. TAXATION—GROWING TREES.—Under Crawford & Moses' Dig., § 9855, after conveyance of growing trees separating timber from

the land so that the landowner and timber owner had separate estates, such growing trees became property subject to taxation apart from the land.

4. ADVERSE POSSESSION—PAYMENT OF TAXES.—Where a timber deed was executed to plaintiff in 1905, and he paid taxes on the timber thereon under Crawford & Moses' Dig., § 9855, and thereafter defendant purchased the lands at a tax sale and had a tax deed, and paid the taxes on the land for seven successive years, *held* that such payments did not give defendant any right or title to the growing trees under § 6943, relating to the payment of taxes under color of title as possession.

5. LOGS AND LOGGING—TITLE TO GROWING TREES.—Where a grantor acquired no title to timber on the lands by paying taxes on the lands as wild and unimproved lands under Crawford & Moses' Dig., § 6943, one who acquired the grantor's title had no better title than his grantor.

6. TAXATION—EFFECT OF PAYMENT OF TAXES.—The payment of taxes by one not in the chain of title inured to the benefit of the owner by extinguishing the State's tax lien on the land.

7. ADVERSE POSSESSION—CONTINUOUS PAYMENT OF TAXES.—One who paid taxes on lands as wild and unimproved lands cannot claim to have acquired title under Crawford & Moses' Dig., § 6943, by payment of taxes under color of title, where such payment was not continuous for seven successive years.

8. ADVERSE POSSESSION—PAYMENT OF TAXES.—Where the owner of land paid taxes for certain years, payment of taxes by him extinguished the lien of the State, and a subsequent payment of taxes by another could not give to the latter title to the land by continuous payment of taxes under color of title for seven years, under Crawford & Moses' Dig., § 6943.

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

STATEMENT OF THE COURT.

Southern Lumber Company brought this suit in equity against Arkansas Lumber Company for an accounting for the value of certain timber belonging to the plaintiff which was wrongfully cut by the defendant and converted to its own use.

Arkansas Lumber Company filed an answer, in which it denied that the timber in question belonged to the plaintiff, and asserted title by virtue of a conveyance of the lands on which the timber was grown from the

Bradley Lumber Company to it. A cross-complaint was also filed by the Arkansas Lumber Company, asking that the Bradley Lumber Company be made a party defendant to the suit, and that the Arkansas Lumber Company have judgment against the Bradley Lumber Company in the event of a recovery against it by the Southern Lumber Company.

Bradley Lumber Company filed an answer, setting up, among other things, that it and its grantors had obtained title to the timber in question by payment of taxes under color of title for the statutory period on the lands on which the timber was growing, and which lands were wild and unimproved.

The lands involved in the suit comprise 70 acres, and the parties have exhibited a map of the lands on which they are designated by certain colors, which, for convenience, will be used by us in the opinion. The timber deeds to the plaintiff are exhibited with its complaint. Two of these timber deeds were executed by D. V. Stanley and wife to the Southern Lumber Company on June 24, 1905, and were duly acknowledged and filed for record on August 3, 1905.

We shall only set out the description of the lands on which the timber involved in this suit was located. The lands in the two timber deeds are described as being in section 17, township 16 south, range 10 west, in Bradley County, Arkansas. Of these lands the west half of the southeast quarter of the northwest quarter of said section is colored on the map red. The south half of the southwest quarter of the northwest quarter of said section is also colored red. The west half of the northeast quarter of the southwest quarter of said section is also described in the timber deed, but the northwest quarter of the northeast quarter of the southwest quarter alone is involved in this suit, and is colored blue on the map.

On December 13, 1924, C. C. Sharp and wife executed a timber deed to the Southern Lumber Company, which

was duly acknowledged and filed for record on the same day. Among the lands described in this timber deed was the northwest quarter of the southwest quarter of said section 17. This description includes the northwest quarter of the northwest quarter of the southwest quarter of said section, which is colored yellow on the map. It also includes the northeast quarter of the northwest quarter of the southwest quarter of said section, which is colored black. It also includes the west half of the northeast quarter of the southwest quarter, colored blue on the map.

The record shows that the Arkansas Lumber Company claimed title to the above described lands by conveyance from the Bradley Lumber Company. The Bradley Lumber Company claimed title to said land by payment of taxes under color of title for the statutory period. The remaining facts necessary to a decision of the issues raised by the pleadings will be stated and referred to under appropriate headings in the opinion.

The chancellor found that the timber cut from the northwest quarter of the northeast quarter of the southwest quarter of section 17, being the lands colored blue on the map, belonged to the Southern Lumber Company, and that it was entitled to judgment against the Arkansas Lumber Company for the market value of 23,501 feet of pine timber which had been wrongfully cut from this land by the Arkansas Lumber Company. The chancellor also found that the Arkansas Lumber Company was entitled to judgment against the Bradley Lumber Company on its warranty in a sum equal to the amount recovered against it by the Southern Lumber Company. The chancellor also found that the Arkansas Lumber Company was the legal owner of the timber standing on the south half of the southwest quarter of the northwest quarter lying south of Halfway Creek, and the west half of the southeast quarter of the northwest quarter, being the lands colored red on the map, and the north half of the northwest quarter of

the southwest quarter of said section, being the land colored yellow and black on the map, belonged to the Arkansas Lumber Company, and the Southern Lumber Company was not entitled to an accounting for the timber cut on these lands. A decree was entered of record in the chancery court in accordance with the findings of the chancellor, and all parties to the suit prayed and were granted an appeal to this court.

Fred L. Purcell, for appellant.

David A. Bradham, J. G. Williamson, Lamar Williamson and *Adrian Williamson,* for appellee.

HART, C. J. Counsel for appellees seek to uphold the decision of the chancery court as to the lands colored red on the map under our statute making payment of taxes under color of title for seven years constructive adverse possession of wild and unimproved lands. The Legislature of 1899 passed the following act:

"Unimproved and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession, and not less than three of such payments must be made subsequent to the passage of this act." (Crawford & Moses' Digest, § 6943).

This statute has been frequently construed by this court, and it has been held that, under the statute, limitations commence to run from the date of the first payment of taxes, and the statutory bar is complete at the end of seven years from that date, provided seven payments have been made in succession, and three of them subsequent to the passage of the act. *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark. 154, 103 S. W. 606; *Taylor* v. *Leonard,* 94 Ark. 122, 126 S. W. 387; and *Greer* v. *Vaughan,* 96 Ark. 524, 132 S. W. 456.

The Bradley Lumber Company purchased these lands at tax sale and received a tax title thereto. It is

conceded that the tax deed is void, but it is claimed that it gave the Bradley Lumber Company color of title, and that it acquired title under the statute above set out by payment of taxes under color of title on the land for seven successive years, the same being wild and unimproved. This would be true if there was nothing else in the case.

The record, however, shows that the Southern Lumber Company purchased the timber on said land from D. V. Stanley, who had the paper title to the lands at that time; and on June 24, 1905, D. V. Stanley and wife executed a timber deed to the Southern Lumber Company to the pine timber on said lands. The payment of taxes by the Bradley Lumber Company was made after the execution of the timber deed by D. V. Stanley and wife to the Southern Lumber Company, and the record shows that the Southern Lumber Company had paid taxes on the timber embraced in its timber deed ever since the execution of said deed. This prevented the Bradley Lumber Company from acquiring title under the act of 1899 above set forth. This court has said that the statute in itself is not a statute of limitations. It only declares that the land shall be deemed to be in possession of the person paying taxes thereon under color of title. It only makes the payment of taxes under the conditions named in the act a constructive possession; and it is only by applying thereto the general statute of limitations that such possession, like actual possession, can ripen into title by limitation. *Taylor* v. *Leonard,* 94 Ark. 122, 126 S. W. 387.

In *Greer* v. *Vaughan,* 96 Ark. 524, 132 S. W. 456, it was said that a compliance with the provisions of this statute constitutes in such person paying said taxes upon such character of land mentioned therein a constructive possession which, like adverse possession, ripens into a perfect title and creates in such person a complete investiture of the title thereto.

The record shows that D. V. Stanley was the owner of the record or paper title of the land colored red on

the map, and, on June 24, 1905, executed a timber deed to the Southern Lumber Company to the pine timber growing on said land. The growing trees constituted a part of the realty, and their conveyance by Stanley to the Southern Lumber Company was a conveyance of an interest in the land itself. *Graysonia-Nashville Lumber Company* v. *Saline Development Company,* 118 Ark. 192, 176 S. W. 129, and cases cited; and *Chicago Land & Timber Company* v. *Dorris,* 139 Ark. 333, 213 S. W. 759.

It is well settled in this State that growing trees may be severed from the land itself, and that the severance is accomplished by a conveyance of the timber, or by a conveyance of the land with a reservation or exception as to the timber. The ownership of the growing trees, after severance, is to all intents and purposes the same as the ownership of land, and this ownership is attended with all the attributes peculiar thereto. In recognition of this rule, the Legislature of 1905 passed an act for the assessment of timber which has been sold separately and apart from the land on which it stands. Crawford & Moses' Digest, § 9855. By the execution of the timber deed from Stanley to the Southern Lumber Company, two separate and distinct estates were created. There was no community of interest between the Southern Lumber Company, which became the owner of the timber, and D. V. Stanley, who remained the owner of the land. Each had a separate estate, and each was separately subject to taxation. After the severance from the land by the timber deed, the growing trees became property subject to taxation under art. 16, § 5, of our Constitution, and the Southern Lumber Company assessed them under § 9855 of Crawford & Moses' Digest, and thereafter paid taxes on them. Thereafter the Bradley Lumber Company purchased the lands at a void tax sale and began paying taxes on them as wild and unimproved lands. It acquired title to the land itself by the payment of the taxes on it under color of title for seven consecutive years, under the principles of law announced in

the cases above cited; but, there being no community of interest between the owner of the land and the owner of the growing trees, the payment of taxes on the land for seven successive years did not give the person paying such taxes any right to or title in the growing trees. The reason is that the owner of the trees under the timber deed and the person paying taxes on the land itself under color of title were paying taxes on separate estates, because each was the subject of ownership and taxation.

By analogy, this principle has been applied in the case of minerals in place. This court, following the general rule, has held that a conveyance of oil or gas in place is a conveyance of an interest in land. *Watts* v. *England,* 168 Ark. 213, 269 S. W. 585. In a note to 140 Am. St. Rep., at page 952, it is said that, after severance, the surface and minerals are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance. Each may be conveyed by deed or pass by inheritance, and has all of the attributes and incidents peculiar to the ownership of land. *Ames* v. *Ames,* 160 Ill. 599, 43 N. E. 592; *New Jersey Zinc Co.* v. *New Jersey Franklinite Co.,* 13 N. J. Eq. 322; *West Point Iron Co.* v. *Reymert,* 45 N. Y. 703; *Gill* v. *Fletcher,* 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; *Lillibridge* v. *Lackawanna, etc. Co.,* 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 10 L. R. A. 627; *Hutchinson* v. *Kline,* 111 Pa. 564, 49 Atl. 312.

By analogy, the same rule would apply here, and we are of the opinion that the Bradley Lumber Company acquired no title to the timber on the lands colored red on the map by the payment of the taxes on the lands themselves as wild and unimproved lands after the execution of the timber deed by Stanley to the Southern Lumber Company; and of course the Arkansas Lumber Company acquired no better title than its grantor, Bradley Lumber Company.

This brings us to a consideration of the lands colored black and yellow on the map. The Southern Lumber

Company acquired title to the growing pine trees on these lands by a timber deed from C. C. Sharp and wife on December 13, 1924. C. C. Sharp at that time had the record or paper title to these lands. These lands were wild and unimproved, and it is claimed that the Bradley Lumber Company had acquired title thereto by the payment of taxes on the lands under color of title for seven successive years before the timber was conveyed by Sharp to the Southern Lumber Company. We have examined the record, and do not think it bears out the contention of counsel for appellees. The record shows that the taxes for 1904 were paid by M. L. Gardner, Jr., who was not in the chain of title, and his payment inured to the benefit of the owner by extinguishing the State's tax lien on the land. *France* v. *Butcher,* 165 Ark. 312, 264 S. W. 931. For the years 1905, 1906, 1907, 1908, 1909 and 1910 the record shows that the Bradley Lumber Company paid the taxes. In 1911, however, H. L. Sharp paid the taxes, and this prevented the payment by the Bradley Lumber Company for seven years in succession. The tax claimant can only invoke the statute where the payment has been continuous for seven successive years. After that time the taxes appeared to have been paid for the years 1912 to 1925, inclusive, by the owner of the land, and also by the Bradley Lumber Company. The owner of the land appears first as having paid the taxes, and the payment by him extinguished the tax lien of the State; and in no sense could it be said that the payment by the Bradley Lumber Company, after the taxes had been paid by the owner of the land, gave it title to the land by continuous payment of taxes under color of title for seven consecutive years, under the act of 1899 above set out, which is § 6943 of Crawford & Moses' Digest. The Arkansas Lumber Company acquired title to these lands by warranty deed from the Bradley Lumber Company, and, so far as the Arkansas Lumber Company is concerned, it had no greater rights than those possessed by its grantor.

We now come to a consideration of the land colored blue on the map. The chancellor found the title to the timber on this land to be in the Southern Lumber Company. An examination of the record will show that these lands are wild and unimproved, and that the Bradley Lumber Company commenced paying taxes on them in 1905, but there was a break in the payment after three years. Thus it will be seen that the Bradley Lumber Company had not acquired title to this land by a continuous payment of taxes under color of title for seven consecutive years, under the provisions of § 6943 of the Digest. The Southern Lumber Company acquired title to this timber by a deed from C. C. Sharp on the 13th day of December, 1924. He and his grantors had the paper title to the lands, and the record does not show seven years' continuous payment of taxes in succession by the Bradley Lumber Company, or by any one else, prior to the execution of the timber deed on December 13, 1924. Since the execution of that deed the Southern Lumber Company has paid the taxes on the timber under an assessment made under § 9855 of the Digest.

The result of our views is that the decree of the chancery court giving the Southern Lumber Company a judgment for the value of the timber cut by the Arkansas Lumber Company on the lands colored blue should be affirmed; and, in so far as the timber on the rest of the lands involved is concerned, the decree of the chancellor should have been in favor of the Southern Lumber Company for all the pine timber cut by the Arkansas Lumber Company and judgment should have been rendered in favor of the Arkansas Lumber Company against the Bradley Lumber Company on its warranty for the amount recovered by the Southern Lumber Company against the Arkansas Lumber Company. It follows that the decree must be reversed, and the cause will be remanded with directions to enter a decree in favor of the Southern Lumber Company against the Arkansas Lumber Company for the market value of all the growing

pine timber cut by it on the lands described in the complaint, and that the Arkansas Lumber Company should have judgment over against the Bradley Lumber Company for the same amount, and for further proceedings in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

ADAMS v. STATE.

Opinion delivered April 9, 1928.

1. HOMICIDE—ISSUE AS TO MURDER IN FIRST DEGREE.—In a prosecution for murder, evidence *held* to justify submitting the issue as to defendant's guilt on a charge of murder in the first degree.
2. CRIMINAL LAW—DISCRETION AS TO CONTINUANCE.—Ruling of the trial court in granting a continuance or postponement will not be reversed unless it clearly appears that the trial court abused its discretion, and that the ruling operated as a denial of justice.
3. CRIMINAL LAW—RIGHT TO BE HEARD BY COUNSEL.—The constitutional right of accused to be heard by his counsel under Const., art. 2, § 10, does not contemplate that he shall be heard at all times by all of the counsel that he may see proper to employ.
4. CRIMINAL LAW—REFUSAL OF POSTPONEMENT.—Where defendant had eight attorneys and ample time intervened for taking depositions before the conclusion of the trial, refusal of the court to continue or postpone the cause for the taking of depositions was not error, where the court gave defendants opportunity to take the depositions of such witnesses in an adjoining county to be read before the close of the trial.
5. CRIMINAL LAW—ABSENCE OF NON-RESIDENT WITNESSES.—It was not an abuse of discretion to overrule a motion of continuance on the account of absence of non-resident witnesses, who are beyond the court's jurisdiction.
6. CRIMINAL LAW—REFUSAL OF CONTINUANCE.—It was not an abuse of discretion to refuse a continuance to secure the testimony of witnesses living about 35 miles distant and beyond the State line, notwithstanding the sheriff's testimony that he could probably catch the witnesses during one of their frequent visits into the State, where a large number of witnesses were required to be in attendance by reason of change of venue, and delay would cause inconvenience and expense.

7. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—In a prosecution for murder, an instruction that defendant could not justify a killing in self-defense, if he could reasonably have withdrawn from or avoided the difficulty with safety to himself after it began and failed to do so, *held* proper under the evidence and not objectionable as invading the jury's province.

8. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—It was not error to refuse instructions fully covered by instructions given.

9. CRIMINAL LAW—INCOMPLETE AND ARGUMENTATIVE INSTRUCTIONS.—It was not error to refuse requested instructions which were incomplete and argumentative in form, where they unduly stressed particular phases of the testimony.

10. CRIMINAL LAW—INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE.—In a prosecution for murder in which proof of guilt depended upon direct testimony, a requested instruction that, in case there were two reasonable views of evidence leading to conclusions of guilt or innocence, the jury should acquit, *held* properly refused where the court had properly instructed as to the credibility of witnesses, weight of evidence and presumption of innocence and reasonable doubt; the requested instruction being erroneous unless the case depended wholly on circumstantial evidence.

11. CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER.—An instruction that the evidence of defendant's good character is substantive evidence in his favor was properly refused.

12. CRIMINAL LAW—ARGUMENT OF COUNSEL.—Trial courts are vested with wide discretion in determining whether the remarks of counsel in argument are within their legitimate scope.

13. CRIMINAL LAW—DUTY OF PROSECUTING ATTORNEY.—The prosecuting attorney is a public officer whose duty it is to use fair means to secure the conviction of the guilty without appealing to prejudice or perverting the testimony or making statements of facts to the jury which have not been proved.

14. CRIMINAL LAW—REMARKS OF PROSECUTING ATTORNEY.—Statements of one of the prosecuting attorneys in a murder prosecution deploring the fact that some of defendant's counsel were enlisted in behalf of the murderer in spite of their previous opposition to crime and remarks concerning their efforts to procure evidence, though improper, did not require a reversal where the jury were admonished not to consider such remarks.

15. CRIMINAL LAW—ARGUMENT OF COUNSEL.—While the Supreme Court will always reverse where counsel go beyond the record to state facts that are prejudicial to defendant, unless the trial court by its ruling has removed the prejudice, it will not reverse for mere expression of opinion of counsel in their argument, unless so flagrant as to arouse passion and prejudice and necessarily having that effect.

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

Allen Hamiter, Jim Landes, Searcy & Searcy, Luke Monroe, J. D. Head and *Carter & Carter,* for appellant.

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

WOOD, J. This is the second appeal in this case. 173 Ark. 714, 293 S. W. 19. On the first appeal the cause was reversed, and remanded for a new trial because of the error of the trial court in refusing certain prayers of the appellant for instructions.

The facts were stated on the former appeal as follows: "In October, 1925, appellant, who had previously served as chief of police of the city of Texarkana, and Virgil Grigson, who was at the time constable of the township in which that city is located, were engaged in the retail meat and grocery business in Texarkana. Grigson had invested about $3,000 in the business and appellant about $160. They had disagreed and had quarreled, and, on and prior to the day on which Smith was killed, both had been drinking heavily. On the morning of the killing appellant went to the home of Osborne Carpenter to get a large pistol, which he had previously exchanged with Carpenter for a smaller one, and, in examining the pistol to ascertain whether it was loaded, it was accidentally discharged. Appellant told Carpenter he wanted the pistol to shoot beeves with, as he had only a single-action one, and on one occasion he had shot a beef with a smaller gun, and the bullet glanced off the head of the beef and came near hitting the man who was employed to help appellant butcher the beef. In addition to this pistol, Grigson had a Winchester rifle, which was kept at the store for the same purpose. Grigson and appellant had a quarrel in the store, and appellant and his sons took Grigson's pistol away from him. Appellant offered several times that day to fight Grigson, but the challenge was not accepted. Grigson attempted to telephone the police from the

store, but appellant refused to permit him to use the telephone. Grigson directed his son to call the police, but the sons of appellant refused to permit him to do so. Grigson went to his car, but appellant took the key out of the car, and would not permit Grigson to leave in it. Grigson then went to a filling station a block away from the store, and attempted to call the police headquarters, but got no response. Grigson then called the sheriff's office, and requested the sheriff to come to the filling station where he then was. In a short time Lish Barber, the sheriff of the county, and Bob Smith, his deputy, drove up to the filling station in separate cars. Grigson told the officers about the difficulty he had had with appellant, whereupon the sheriff, his deputy and Grigson drove to the store. It was admitted that appellant and his sons knew that Grigson had gone to call the officers. When the party reached the store they walked in, Grigson leading, the sheriff next, and Smith behind, and, as they came into the store, Wallace Adams, a son of appellant, remarked, 'Daddy, there is Lish Barber,' and appellant replied, 'Damn Lish Barber—nobody is going to arrest me.'

"The State's testimony is to the effect that Allen Adams, a younger son of the appellant, was also in the store when the officers came in, and that Adams and his sons placed themselves as follows: Wallace Adams was behind a counter, near the front door, armed with his father's pistol; Allen Adams, the younger son, was in another corner of the store, armed with the Winchester rifle; and appellant was near the center of the store, behind a small counter, armed with a knife. Ruth Shumaker, a young lady whose home was near appellant's store, testified that she saw Barber get out of his car, and that he spoke to her, and smiled. Barber walked near the center of the store, and in a friendly way said, 'Hello, Hendricks.' The testimony is sharply conflicting as to what then occurred, and the State's version was not developed until after the appellant had put on

his testimony, and one of the errors assigned is the order in which the State was permitted to develop its case. We state this testimony at this time to preserve the proper chronology. According to appellant and his sons, who testified in their father's behalf, Barber's first remark was to inquire, 'What is the matter with you and the big Irishman?' meaning Grigson. Appellant answered, 'The big son-of-a-bitch was trying to run me out of my business, and nobody can do that.' Appellant testified that, when he said this, Grigson jumped back and began to curse, and, as appellant turned towards Grigson, Barber shot appellant, the ball going through appellant's arm, penetrating his body and lodging in his lung. Appellant further testified, that as soon as Barber shot him, Wallace Adams seized Barber's pistol, and a scuffle for its possession ensued, and that Barber struck Wallace over the head with the pistol. Appellant then took the rifle from the hands of his younger son, Allen, and, as he did so, Barber threw Wallace from him and started towards appellant with his pistol drawn on him, whereupon appellant shot Barber with the rifle. Barber then turned and ran through the screen door, and this was the last appellant saw of Barber.

"Grigson, who was called in rebuttal, and whose testimony was objected to upon the ground that his testimony was not rebuttal, stated that, when Barber entered the store, Adams came from behind the counter with the knife in his hand, and advanced on Barber, who slowly retreated, pushing appellant back, and telling appellant to drop his knife, but appellant advanced, and struck at Barber with his knife, cutting Barber's hand and left wrist to the bone, and, when Barber drew his pistol, Allen Adams and Barber both fired, and Wallace Adams shot Smith, inflicting a slight flesh wound. All three shots were fired so near together that you could not tell who fired first. Grigson fell down behind the counter, and went out the back door. The shot fired by Allen

Adams knocked Grigson's hat off his head. Appellant denied cutting Barber, and denied that Barber was cut, but several witnesses, including the undertaker who prepared Barber's body for burial, testified to the existence of the knife wounds.

"Grigson testified that Smith and Barber left the store, and appellant followed them, and while Barber, who had got into the street, was backing away, appellant shot Barber just above the heart, and Barber died in a few minutes. Just as this fatal shot was fired, Smith, who was about two-thirds across the street, fired two or three shots at appellant as appellant was advancing on Barber. Smith then passed behind an automobile parked on the side of the street, and from there he went along the walk to the house of a man named Whitney, through whose yard he walked, coming out at the rear of Whitney's lot. Smith then went to the store of J. H. Scott, and appellant saw Smith enter the store. Appellant admitted that, after shooting Barber, he went back into the store, but, in a short time, he came out again and started for Scott's store with the rifle under his arm. Some boys who saw appellant coming remarked, 'Yonder he comes, and he will kill all of us.' Smith and Scott heard this remark, and they came to the door of Scott's store, and Smith cried out to appellant, 'Henry, I give up, I throw my gun away,' and as he said this he drew his pistol from his holster and pitched it in the street, six or eight feet beyond the sidewalk. Appellant called Smith a vile name and said, 'Yes, give your soul to God,' and shot Smith. Appellant denied hearing the remark Smith made about giving up, but two witnesses, who were further from Smith than appellant was, testified that they heard the remark. Smith ran out of the store, and, as he was passing out the rear door, appellant again shot Smith, who died the following day. Scott remonstrated with appellant, who said, 'I'll kill every damn one of them.' "

At the last trial a witness for the defendant by the name of Wead testified that he saw Bob Smith go across

the street from Mrs. Shumaker's house. He turned right down toward Grigson's store, went about thirty feet in that direction, then turned around and started back toward old man Scott's store.

Mrs. Jenkins, a witness for the defendant, testified that she saw Bob Smith come out of the back of Scott's store and run. She heard a lot of shooting—couldn't say that she heard a shot just as he came out. He didn't fall, but ran awfully fast. He ran down by the side of Mrs. Edwards' house and on into Jackson Street, near the welding shop. He didn't run like he was hurt. Witness didn't hear him holler when he came out of the back door. She was close enough to have heard him holler if he had done so.

Clyde Hicks, a witness for the defendant, testified that he took Smith to the hospital after he was shot. Smith told him that Henry Adams shot him, and that he (Smith) emptied his gun at Adams. Witness was holding Smith up in the automobile at the time. Smith said that he thought he was dying.

Dr. Hunt, witness for the defendant, testified that he was called to see Bob Smith after he was brought to the hospital. He heard Smith make a statement just before he was operated on. Smith stated that he emptied his gun.

Virgil Grigson, a witness for the State, testified that he called Lish Barber, the sheriff, over the telephone, and told him that he and Henry Adams had had some trouble, and he wanted him to come over there. When Barber came into Burrow's store, witness told him about the difficulty he had with Henry Adams. Witness was then asked what Barber said he would do, and answered, "I don't remember exactly what he did say—he said he would go up there and settle it—something—he said he would go up there and talk with him—something like that." Just the exact words he used the witness couldn't say.

It is conceded by counsel for the appellant that, with the above exceptions, the testimony at the last trial

was substantially the same as it was at the former trial. On the former appeal, after stating the facts, we said: "We are of the opinion that the testimony recited fully justified the court in submitting to the jury the question whether the appellant was guilty of murder as charged, and that the testimony is legally sufficient to support the verdict rendered." After the above additional testimony developed at the last trial, we are still convinced, after a careful consideration of all the testimony in the record, that it was an issue for the jury to determine whether the appellant was guilty of murder in the first degree as charged. Indeed, learned counsel for the appellant do not contend in their brief on this appeal that there was no testimony to sustain the verdict. The only grounds they urge for reversal on this appeal are the following, which we will now consider.

1. That the court erred in overruling appellant's motion for a continuance of the cause until a subsequent term to give the appellant an opportunity to have his witnesses, George Shumaker and Lloyd Jones, present at the trial, and erred in overruling the appellant's motion for a postponement of the trial until the appellant could have an opportunity of obtaining the depositions of these witnesses to be read at the present trial.

The appellant had George Shumaker and Lloyd Jones subpoenaed as witnesses. They were served with process, and failed to appear on the day the case was set for trial. Appellant asked and obtained an attachment for them.

Ruth Shumaker, a witness for the State, testified, in substance, that "she was in the front part of her yard when Barber and Smith drove up to the Adams & Grigson store, and that Barber spoke to her, and smiled; that she then was looking for a gas connection under the front part of her house, and heard the first shot, and that she raised up and saw Barber out in the middle of the street, and saw Adams fire at him, and then saw Barber throw his hand to his breast, and turn to go north

across the street, and fall; that she saw deceased, Smith, when he reached the sidewalk in front of her house, and saw him come into her yard and go behind her house, and then saw him come back into the street and cross over it and go in the direction of Scott's store, and enter Scott's store; and that, while Smith was crossing the street and going to Scott's store, she saw Adams follow him down the street, and that Adams was reloading his gun, and then saw Adams shoot at Smith in Scott's store door, and heard Smith holler, "Oh, oh," and then saw Adams go into Scott's store and shoot again, and when Adams came out of Scott's store she saw him look around at the back end of Scott's store, and shoot again at Smith as he ran off."

In his motion for a continuance the appellant set up that George Shumaker and Lloyd Jones would testify, in substance, that, about a week or ten days after Smith was killed by Henry Adams, they were present at the home of Ruth Shumaker, when she and her mother, Mrs. Cornelia Shumaker, were discussing the shooting of Smith and what they knew concerning the same; that in this conversation Ruth Shumaker stated that she was under the back end of her house, getting a stove connection, when the first shot was fired, and that she ran into the back of the house through the kitchen, and did not see any of the shooting; that Mrs. Cornelia Shumaker said, in Ruth's presence, that Ruth did not know anything about the shooting; that Ruth was out at the back end of the house looking for a connection for a gas stove, and that she ran into the back end of the house through the kitchen up to where Mrs. Shumaker was in the front part of the house; that Ruth didn't see any of it; that Ruth acknowledged that that was true; that George Shumaker testified that he was the uncle of Ruth Shumaker, and that, after the trial at the former term of the court, some time in the spring of 1927, he was visiting Mrs. Cornelia Shumaker, when Ruth Shumaker was present; that at that time she asked witness to buy her

a pair of stockings, and told him that Mrs. Lillie Barber, the wife of Lish Barber, had not paid her yet, and that if she could get the death sentence of defendant Henry Adams, she, Ruth Shumaker, would be able to buy George Shumaker some socks.

The motion set up that George Shumaker lived at Nash, Texas, five miles from Texarkana; that he frequently visited the city of Texarkana, and worked there as a common laborer; that his wife was at that time in a hospital at Texarkana for an operation, and that witness was in attendance at the hospital, and could be served with process and compelled to come to court if the case were postponed for a reasonable time, and, if not, the court ought to grant a postponement for the purpose of allowing his deposition to be taken; that said deposition would have been taken but for the fact that the witness faithfully promised that he would be present in response to the subpoena that had been served upon him, and defendant believed that he would have been present but for the untimely illness of his wife; that Lloyd Jones, the other witness, also lived at Nash, Texas, and was often in the city of Texarkana, and had faithfully promised the defendant that he also would be present at the trial; that, in the event he could not be reached by the attachment which had been issued for him, the court should grant a continuance or a postponement of the trial, to the end that his testimony might be had.

On the hearing of the motion, the sheriff of Miller County testified that the attachment for these absent witnesses was placed in his hands on the morning after the court convened, October 31, 1927; that it was thirty miles from Lewisville to Texarkana; that he reached Texarkana about one o'clock on the day the attachment was placed in his hands, but could not find the witnesses Shumaker and Jones. He believed, if he were given more time, he could catch both of them in Texarkana; that people who lived close to Texarkana, whether in Arkan-

sas or Texas, and who came there to trade, almost necessarily go from one State to the other while there, and, if given a reasonable time, he could in all probability catch both Shumaker and Jones in Miller County, Arkansas. He learned that Shumaker had been in Texarkana on the day he went there to serve the attachment, but had taken his wife home that morning from the hospital.

Judge Carter, one of the attorneys for the appellant, and who was sworn as a witness, stated that the defendant did not receive information about what the witnesses Shumaker and Jones would testify until about a month after the first of September, 1927, when the defendant had the subpoena issued for his witnesses, and, when the defendant first received information about what the witnesses Shumaker and Jones would testify, they immediately had an extra subpoena issued and served by the sheriff on these witnesses in Miller County, Arkansas.

As soon as the testimony of Judge Carter was completed, the court announced that the attorneys for the defendant might take the depositions of these witnesses in or out of the State, and that the depositions would be read, if they could be had before the close of the trial. Thereupon J. D. Head, one of the attorneys for the defendant, requested the court to specify the time for the defendant to have an opportunity to take the depositions, and that the attorneys be relieved from their duties in the case and the cause adjourned over, to the end that the attorneys might go and take the depositions of these witnesses. The court thereupon announced as follows: "There are several attorneys representing the defendant in this case, and either one of the attorneys may go out any time he chooses to take the depositions of these witnesses, if they desire to do so." The court thereupon overruled the motion to continue or to postpone, to which ruling the appellant duly excepted.

It has been the unvarying practice of this court since its origin not to reverse the ruling of the trial court in granting or refusing such motions unless it clearly

appears that the trial court has abused its discretion in making the ruling and that such ruling manifestly operates as a denial of justice. As early as *Burriss* v. *Wise & Hind*, 2 Ark. 33, we said: "This court would not reverse a decision or judgment below for merely granting or refusing a continuance, unless it clearly and positively appears from the face of the record that the court who decided the cause had been guilty of a palpable and manifest violation of public duty seriously prejudicing the rights of the parties complaining." And in *Price* v. *State*, 57 Ark. 165-167, 20 S. W. 1091, 1092, we said: "The continuance of causes in criminal and civil cases is in the sound discretion of the trial court, and its refusal to grant a continuance is never ground for a new trial, unless it clearly appears to have been an abuse of such discretion and manifestly operates as a denial of justice." See cases there cited. See also *Bruder* v. *State*, 110 Ark. 402, 116 S. W. 1067; *Wood* v. *State*, 159 Ark. 671, 252 S. W. 897; *McDonald* v. *State*, 160 Ark. 185, 254 S. W. 549. All cases so holding are too numerous to cite here, as there is no uncertainty about the rule of practice. The difficulty always is to determine whether the trial court abused its discretion after applying the rule to the particular facts in any given case that were considered by the trial court in making its ruling.

Learned counsel for the appellant contend in their brief, and have likewise earnestly insisted in oral argument, that, under the facts as above set forth, the trial court abused its discretion in overruling their motion for a continuance, or at least for a postponement of trial of the cause, to give them an opportunity to take the depositions of witnesses Shumaker and Jones. There are at least two sound reasons why this contention of counsel cannot be sustained. In the first place, it appears from the record that eight attorneys were counsel for the appellant. When the motion for a continuance, or for a postponement, was being considered, the court announced that there were several attorneys, and that

either one of them, upon notice to the attorney for the State, might go out any time to take the depositions of these witnesses, if they desired to do so, and that such depositions would be read before the end of the trial. The trial was set in the Lafayette Circuit Court on change of venue from the Miller Circuit Court, and was to begin October 31, 1927. The actual trial before the jury began on November 1, 1927, and was concluded November 4, 1927. The distance between Lewisville, the county seat of Lafayette County, where the trial was being conducted, and Texarkana, Miller County, and the place in Texas where witnesses Shumaker and Jones lived, was not over thirty-five miles. It is obvious therefore, from the facts which appellant alleged he could prove by these witnesses, that the depositions could have been quickly and easily taken and in ample time to have returned to the Lafayette court before the trial was concluded. All of this could have been done without depriving the appellant of his constitutional right to be heard by counsel. While the Constitution guarantees to the accused the right to be heard by his counsel (§ 10, art. 2, Constitution of 1874), this provision does not contemplate that he is deprived of any constitutional right unless he is heard at all times by all of the counsel that he may see proper to employ. Therefore, under the liberal offer of the court to have the depositions of these witnesses taken and read at any time the defendant might desire to do so before the close of the testimony, it would appear that the trial court did not abuse its discretion in refusing to continue the cause to a subsequent term, nor in refusing to postpone the trial of the cause to a future day in the term. What the court actually did was tantamount to granting the appellant an opportunity to take the depositions of these witnesses and producing such testimony by deposition. The appellant did not therefore exercise due diligence to procure and produce the alleged testimony of the witnesses Shumaker and Jones, as set forth in his motion for a continuance.

In the second place, this court has heretofore always ruled that a trial court does not abuse its discretion in overruling a motion for continuance on account of the absence of witnesses where it is shown that such witnesses are nonresidents of the State and thus beyond the jurisdiction of the court. This, for the obvious reason that the court has no power through any of its process to compel the attendance of such witnesses. In *Bruder* v. *State, supra,* we held, quoting syllabus: "It is not an abuse of the trial court's discretion to refuse a continuance of a criminal trial on account of the absence of nonresident witnesses." See also *Turner* v. *State,* 135 Ark. 381-383, 205 S. W. 659, and cases there cited; also *Freeman* v. *State,* 150 Ark. 387-389, 234 S. W. 267, and cases there cited; *Hayes* v. *State,* 156 Ark. 180, 245 S. W. 309, and cases there cited; and *McDonald* v. *State, supra.*

But counsel for appellant urge that all of these cases can, and should, be differentiated from the case at bar on the facts, which are bottomed mainly on the testimony of the sheriff to the effect that, if given a reasonable time, he could, in all probability, catch both Shumaker and Jones in Miller County, Arkansas, because they lived in close proximity thereto, and frequently were at Texarkana, the county seat of that county. Now, the record shows that this cause had been set as early as August 15, 1927, for trial on Monday, October 31, 1927. On account of the large number of witnesses residing in Miller County who had to be in attendance by reason of the change of venue and the magnitude of the cause and the length of time that would necessarily be consumed in the trial of the case, it involved large costs both to the State and county, as well as great inconvenience and considerable expense to the individuals connected therewith. Certainly the trial court was justified in taking all these circumstances into consideration in determining whether or not he should end the cause at that term or continue same to a subsequent term. The trial court

doubtless concluded that the probability of compelling the attendance of witnesses Shumaker and Jones would, at least, be no greater at a subsequent term of the court than it then was. An attachment had been placed in the hands of the sheriff for them, and he had attempted to serve the same, but had been unable to do so. If these witnesses, who resided beyond the jurisdiction of the court, were then avoiding the court's process by remaining beyond the jurisdiction of the court, they could at all future times when the court was in session so escape its process. Thus the court has no more than a *probability* that, if the cause were continued, the attendance of the witnesses might possibly be had at a subsequent term. Under these circumstances we are convinced that the trial court not only did not abuse its discretion but that its discretion was in all respects wisely and correctly exercised.

2. Counsel complain of the alleged errors of the court in granting the State's prayer for instruction No. 18 and in refusing to grant appellant's prayers for instructions Nos. 7 and 7a, 18, 19, 20 and 21. (See footnote). It would unduly extend this opinion and would serve no useful purpose as a precedent to set out and discuss in detail all of the assignments of error in the rulings of the court in the granting and refusing prayers for instructions. We have examined them all carefully, and do not find that there was any error prejudicial to the appellant in any of the court's rulings in this respect. Let it suffice to say that the State's prayer for instruction No. 18 (see footnote) does not invade the province of the jury, was based upon the testimony, and is not susceptible of the construction which counsel for appellant claim.

Appellant's prayer for instruction No. 7 and likewise No. 7a were fully covered by appellant's prayers for instructions Nos. 7b and No. 8, which the court granted

(See footnote)*. Instruction No. 7b and No. 8 were given in the identical language of instruction No. 7b and No. 8, which were asked at the last trial and refused. This court on the former appeal held that the trial court erred in refusing appellant's prayers for instruction No. 7b and No. 8, and reversed the judgment and remanded the cause for a new trial because of such error. On the trial from which this appeal comes these prayers were

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*NOTE: No. 18, for the State: "If the jury believes from the evidence, beyond a reasonable doubt, that the defendant could have, at any time from the beginning of the difficulty, if you find that there was a prior difficulty, to the ending of the meeting between himself and the deceased, when the deceased was killed, if you find beyond a reasonable doubt that he was killed by defendant at the ending of said last meeting between them, reasonably withdrawn from or avoided the difficulty, with safety to himself, but failed to do so, he could not justify the killing on the ground of self-defense."

"No. 7. You are instructed that neither the sheriff nor his deputy, as such, had any authority, by virtue of their office, to settle or attempt to settle any dispute between Grigson and Adams, and if they went to said store where Adams was for the purpose of settling or attempting to settle any such dispute, then you are instructed that, in so doing, they were acting wholly without their official duties and solely in their capacities as individuals.

"No. 7a. You are instructed that there is no evidence that Sheriff Barber and / or his deputy were or was acting in an official capacity when they went to the store where the shooting occurred, nor is there any proof that they or either of them were attempting to arrest the defendant; hence you are instructed that, in considering this case, you must look at it in the same way as if Lish Barber and Bob Smith were not officers.

"No. 7b. You are instructed that, if you find from the evidence that the sheriff and / or his deputy did not go into the store for the purpose of arresting the defendant for a felony, then you are instructed that the sheriff and / or his deputy had no other or better rights in said store at the time than any private individual.

"No. 8. You are instructed that the sheriff and his deputy had no right, under the law, to attempt to arrest the defendant for any disturbance or row the defendant may have had with Grigson prior to the time of the arrival of the sheriff or his deputy at the store where the shooting occurred, unless you find they had a warrant for him, and if they or either of them attempted to do so without a warrant, then you are instructed that in such attempt they were acting in violation of the law, and in violation of the rights of the defendant."

granted. The idea which these prayers were intended to cover, as stated in the former opinion, is as follows: "If the sheriff and his deputy were not acting in the capacity of officers of the law, with the right to so act, no account should be taken of the fact that they were officers. In other words, the fact that Barber and Smith were officers of the law was not a circumstance to be considered by the jury, unless the officers had the right to act in that capacity and were so acting." In thus granting appellant's prayers for instructions No. 7b and No. 8 at the last trial, the court fully and correctly covered the testimony adduced bearing upon that subject, and did not err in refusing appellant's prayers No. 7 and No. 7a, which concerned the same subject. Moreover, appellant's prayers for instructions Nos. 7 and 7a on the last trial were not correct either in form or substance. They were incomplete, and were argumentative in form because they unduly stressed particular phases of the testimony.

Appellant's prayer for instruction No. 18 is as follows:

"You are instructed that, in the event you find from the evidence there are two equally reasonable views of the evidence which may be adopted by the jury, one of which leads to the conclusion of guilt and one of which leads to the conclusion of innocence, and that the testimony tending to show each of said theories is of equal probability or truth, then you are instructed that it is your duty to adopt that view of the evidence that leads to the conclusion of innocence, and acquit the defendant."

Appellant's prayer for instruction No. 19 embodied the same idea and theory, and we therefore do not set it out.

Even if it could be said that this was a case depending wholly upon circumstantial evidence, nevertheless the court did not err in refusing to grant appellant's prayers for instructions Nos. 18 and 19, because the court had already fully and correctly instructed the jury on the

credibility of witnesses, the weight of evidence, the presumption of innocence, and reasonable doubt. In *Barton* v. *State,* 175 Ark. 120, 298 S. W. 867, we said, referring to the refusal of the trial court to give a similar instruction:

"We have held, however, that it is not improper to refuse to give such an instruction, even in cases where conviction was asked wholly upon circumstantial evidence, where the jury was properly instructed as to the burden of proof resting on the State to establish the guilt of the accused beyond a reasonable doubt, and where reasonable doubt was properly defined. *Rogers* v. *State,* 163 Ark. 252, 260 S. W. 23; *Bost* v. *State,* 140 Ark. 254, 215 S. W. 615; *Cooper* v. *State,* 145 Ark. 403, 224 S. W. 726; *Cummins* v. *State,* 163 Ark. 24, 258 S. W. 622; *Barker* v. *State,* 135 Ark. 404, 205 S. W. 805; *Garrett* v. *State,* 171 Ark. 297, 284 S. W. 734; *Rogers* v. *State,* 163 Ark. 252, 260 S. W. 23."

The above correctly declares the law, and it is not in conflict with any of our previous decisions.

But the case at bar does not depend wholly, if indeed at all, upon circumstantial evidence. We regard it rather as a case where the guilt or innocence of the defendant depended upon the direct testimony of witnesses as to facts related by them and the weight and credibility to be given by the jury to the testimony of such witnesses. If we are correct in this conclusion, it would have been positive affirmative error for the trial court to give instructions Nos. 18 and 19. These instructions are wholly improper and erroneous, except in cases depending wholly upon circumstantial evidence, where the jury is to draw its conclusions only from circumstances and not from the direct evidence of eye-witnesses. The prayers for instructions Nos. 18 and 19, if granted in the case at bar, would have been argumentative, and calculated to confuse and mislead the jury. Therefore the court did not err in refusing them. The ruling of the court in refusing these prayers for instructions is in perfect accord with the doctrine of our cases as announced

in *Wacaster* v. *State,* 172 Ark. 983, 291 S. W. 85; *Garrett* v. *State,* 171 Ark. 297, 284 S. W. 734; *Cooper* v. *State,* 145 Ark. 403, 224 S. W. 726; *DeShazo* v. *State,* 120 Ark. 495, 179 S. W. 1012; *Rogers* v. *State,* 163 Ark. 252, 260 S. W. 23; *Cummins* v. *State,* 163 Ark. 24, 258 S. W. 622; *Barker* v. *State,* 135 Ark. 405, 205 S. W. 805—commented upon in brief of counsel for appellant. Indeed, we do not consider that the case of *Barton* v. *State, supra,* is out of harmony with our other cases when the facts of all these cases are differentiated and the law applicable thereto correctly apprehended. It is certain that appellant's prayers for instructions Nos. 18 and 19 are not applicable to the facts of this record, and the trial court did not err in refusing them.

Appellant's prayers for instructions Nos. 20 and 21 are as follows:

"20. You are instructed that evidence of good character, where introduced, is evidence in favor of the party possessing it, and, if believed by the jury, it goes to augment the presumption of innocence which the law raises on behalf of the defendant.

"21. You are instructed that defendant has introduced testimony tending to show he has, in the community in which he lives, a good reputation as a peaceable, quiet, law-abiding citizen (and that this evidence is substantive proof in defendant's favor), and must be considered by you in connection with all the other testimony in arriving at a conclusion as to the guilt or innocence of defendant."

These instructions are erroneous, and the court ruled correctly in refusing them. The court modified appellant's prayer for instruction No. 21 by striking out the words contained in the parentheses, and gave the instruction as thus modified, which ruling was according to the doctrine of this court as announced in *Eady* v. *State,* 168 Ark. 731, 271 S. W. 338.

3. The last contention of counsel for appellant is that the court made remarks during the trial, while the

testimony was being adduced, that were erroneous and prejudicial to appellant, and also that the court erred in allowing Congressman Tillman Parks, especially employed counsel for the prosecution, in the closing argument for the State, to make remarks concerning appellant's counsel and other remarks that were highly prejudicial to the appellant, and did not by its ruling remove from the minds of the jury the prejudicial effect of such remarks. We deem it unnecessary to catalogue and comment upon all the remarks that were made by the court and counsel. It is a complete answer to this assignment of error to say that the court told the jury, in express terms, not to consider at all any remarks made by the court during the taking of the testimony to which counsel had objected. These remarks, at least, were not of such a flagrant character as to produce any lasting impression in the minds of the jury prejudicial to the appellant. If they were calculated to prejudice appellant at all, the ruling of the court telling the jury not to consider them was sufficient to eliminate that prejudice.

Certain remarks were made by Parks concerning Jim Landis, counsel for the appellant, to the effect that the speaker had known him as a follower of the lowly Nazarene, and deploring the fact that, "on the threshold of a new career, he was enlisted in behalf of a man who was a murderer." Likewise Mr. Parks referred to Judge Carter's career on the circuit bench—how he then thundered against crime *et cetera,* but now he too was found on the side of one who had violated the law, as the speaker would have the jury infer. Mr. Parks alluded to an effort being made by the attorneys for the defendant, before Barber's body was placed in the ground, seeking evidence in his behalf. Among other things, Mr. Parks said that what took Bob Smith down to the Grigson & Adams store on the fatal day was, "O, the beckoning hand of duty, the silver hand of duty," and other similar remarks, which we deem it unnecessary to set forth and comment upon in detail. As soon as any objection was made to any of these remarks, the court

promptly admonished counsel that they were improper, and, in effect, to confine himself to the record, and instructed the jury not to consider these remarks.

Trial courts, in the very nature of the case, must be, and are, vested with wide discretion in determining whether the remarks of counsel in argument are within their legitimate scope, or whether they transcend the bounds set for them by the well established rules of practice which this court has so often announced to govern and guide trial courts in the matter of passing upon the arguments of counsel. Perhaps the rule has never been better stated by any court than was stated by the Supreme Court of Wisconsin in *Broum* v. *Swineford,* 44 Wis. 282, 28 Am. Rep. 582, through its Chief Justice Ryan, and adopted by our own court in *Little Rock & Ft. Smith Ry. Co.* v. *Caveness,* 48 Ark. 106, 2 S. W. 505, and quoted by Judge BATTLE, speaking for the court in that case, as follows:

"The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at the best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him, but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels outside of his client's case and assumes to supply its deficiencies. Therefore is it that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client, but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more

sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudice against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, *dehors* the very case he has to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts, in jury trials, to interfere in all proper cases of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal of the court."

The same great judge again voiced the unanimous opinion of this court in his own strong and lucid language, when he declared the proper practice for trial courts to follow in such cases in *Kansas City & C. R. Co.* v. *Sokal,* 61 Ark. 137, 32 S. W. 497. Again, Judge BATTLE, speaking for the court in *Holder* v. *State,* 58 Ark. 473, 25 S. W. 279, 281, at page 481, declares the rule and duty, particularly with reference to prosecuting attorneys, as follows:

"A prosecuting attorney is a public officer 'acting in a *quasi*-judicial capacity.' It is his duty to use all fair, honorable, reasonable and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal

to prejudice, to pervert the testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose."

See *Vaughan* v. *State,* 58 Ark. 353, at page 368, 24 S. W. 885, where the rule is also announced. *Doran* v. *State,* 141 Ark. 442, at page 447, 217 S. W. 485. These rules have never been departed from. See *Kansas City Southern Ry. Co.* v. *Murphy,* 74 Ark. 256, 85 S. W. 428, where Chief Justice HILL, speaking for the court, clearly and cogently states the rules concerning remarks of counsel as they had been announced by this court in previous decisions to that date (1905), and in the opinion he collates all of our cases upon the subject. Again we may say here that there is no controversy or uncertainty as to the rules themselves, but the difficulty always is in their application to the facts of each particular case. That is the matter here which has given us very grave concern.

Now, it is sufficient to say of all the above and other similar remarks of Mr. Parks that they constituted improper argument; but, after he was so told by the court, it is exceedingly doubtful whether they had any effect on the minds of the jury prejudicial to the appellant. If so, we are convinced that the rulings of the court declaring them improper and directing the jury not to consider same removed all possible prejudice from their minds. The *ad captandum, ad hominem,* remarks of the Congressman, in which he turned from the facts and the law of the case to express his opinion of Mr. Landis and Judge Carter, of counsel for the defendant, because they had accepted employment to defend the accused, were, of course, highly improper, because his purpose was to

appeal to the passion and prejudice of the jury. But the court admonished counsel that such argument was improper, and that he should not make it. When the remarks themselves are analyzed, we discover nothing in them derogatory to the character of Mr. Landis or Judge Carter. These gentlemen were both doubtless as well known to the jury as they were to Mr. Parks. The jurors, as sensible men, would understand the relation that a lawyer sustains to his client and the duty he owes his client. No doubt a sensible, fair-minded jury would be quick to resent any remark which they regarded as a reflection on the character of these gentlemen, and especially upon the integrity and the eminent public service of their former circuit judge. They perhaps would regard as wicked and slanderous any remarks which they considered an aspersion upon Judge Carter and Mr. Landis, and would say, in answer to the offender, "his mischief shall return upon his own head and his unfair dealings shall come down upon his own pate," and he shall reap no benefit therefrom by our verdict.

When we consider therefore that the remarks concerning Judge Carter and Mr. Landis were but tantamount to the expression of an opinion, and that they were not derogatory in character, but rather the reverse, and that the attorney making them was admonished by the court that such an argument was improper, it is problematical whether such remarks, if they had any effect at all, did not in fact tend to influence the jury in favor of the appellant instead of against him. We have therefore reached the conclusion that the remarks of a personal nature, under the circumstances, had no prejudicial effect whatever upon appellant's rights. This court will always reverse where counsel go beyond the record to state facts that are prejudicial to the opposite party, unless the trial court, by its ruling, has removed the prejudice. *Hughes* v. *State,* 154 Ark. 621, 243 S. W. 70; *Hayes* v. *State,* 169 Ark. 1173, 278 S. W. 15; *Sanders* v. *State,* 175 Ark. 61, 296 S. W. 70. But this court does not reverse for the mere expression of opinion of counsel

in their argument before juries, unless so flagrant as to arouse passion and prejudice, made for that purpose, and necessarily having that effect.

After careful consideration of the whole record we find no error for which the judgment should be reversed. The same is therefore affirmed.

BASKIN v. MOSAIC TEMPLARS OF AMERICA.

Opinion delivered April 9, 1928.

JUDGMENT—INJUNCTION—MERITORIOUS DEFENSE.—An insurance society could not enjoin enforcement of a judgment recovered against it in a justice of the peace court on the ground that the judgment was rendered without proper service, where it did not allege that it had a valid defense on which the judgment was rendered.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; reversed.

Andrew J. Gilmer, for appellant.

Scipio A. Jones and *Thomas J. Price,* for appellee.

SMITH, J. Appellee, a fraternal insurance society, brought this suit to enjoin the enforcement of a judgment recovered against it in the court of a justice of the peace in Conway County, upon the ground that the judgment was rendered without proper service being first had.

The complaint recited facts which, it is alleged, show that there had been no proper service of summons before the rendition of the judgment, but the complaint did not allege that there was a valid defense to the claim upon which the judgment was rendered. A demurrer to the complaint was overruled, and, as the judgment creditors stood on the demurrer and refused to plead further, the relief prayed was granted and the enforcement of the judgment was enjoined, and this appeal is from that decree.

The case of *Rotan* v. *Springer,* 52 Ark. 80, 12 S. W. 156, was one in which the enforcement of a judgment was

sought to be enjoined upon the ground that it had been rendered without notice, and it was there said: "The plaintiff offered no suggestion of a defense to the claim upon which the judgment which he sought to enjoin was based. His complaint therefore stated no cause of action (*State* v. *Hill,* 50 Ark. 458, 8 S. W. 401), and the court did not err in sustaining the demurrer.

The doctrine of that case has been followed many times since. *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905; *McDonald Land Co.* v. *Shapleigh Hdw. Co.,* 163 Ark. 524, 260 S. W. 445; *Derringer* v. *Stevens,* 145 Ark. 293, 225 S. W. 14; *Renfroe* v. *Parmelee,* 143 Ark. 547, 220 S. W. 816; *Williams* v. *Alexander,* 140 Ark. 442, 215 S. W. 721; *Baxter County Bank* v. *Davis,* 137 Ark. 459, 208 S. W. 797; *Sovereign Camp W. O. W.* v. *Wilson,* 136 Ark. 546, 207 S. W. 45; *Osborne* v. *Lawrence,* 123 Ark. 447, 185 S. W. 774; *Robinson* v. *Ark. Loan & Trust Co.,* 74 Ark. 292, 85 S. W. 413.

The demurrer to the complaint should therefore have been sustained, and the decree of the court below will be reversed, and the cause remanded with directions to sustain the demurrer.

WINFREY *v.* PEOPLE'S SAVINGS BANK.

Opinion delivered April 9, 1928.

1. EXECUTION—SALE OF LAND SUBJECT TO HOMESTEAD.—In a partition of a lot to secure a half interest alleged to be owned by reason of the sale of an undivided half interest under the judgment in an attachment suit, rendered by default, where the lot was occupied as homestead by the judgment debtor's mother, who was not made a party to the attachment suit, *held* that the homestead right was not affected, but that the interest of the judgment debtor subject to the right of homestead passed.
2. JUDGMENT—IDENTITY OF PARTY.—In a partition of a lot brought to secure an interest alleged to have been acquired under sale of the judgment-debtor's interest, where it was insisted that the judgment-debtor had not been sued on the note as Fred A. Williams, but as F. A. Williams, and that the note sued on was signed "Fred

A. Williams," *held* that it will be presumed on this collateral attack that the court ascertained that F. A. Williams and Fred A. Williams were the same person.

3. JUDGMENT—PRESUMPTION ON COLLATERAL ATTACK.—Where, in collateral attack on a judgment, it was contended that defendant was not properly served with process in the suit resulting in the sale, *held* that it will be presumed that the circuit court found to the contrary, and that finding is not subject to collateral attack.

4. JUDGMENT—PRESUMPTION ON COLLATERAL ATTACK.—Where a judgment in an attachment proceeding was attacked collaterally on a ground that no affidavit for attachment was made, and that it was not shown that the defendant's personal property was insufficient to pay the judgment, it will be conclusively presumed on collateral attack that the court below, before sustaining the attachment, ascertained that the attachment had been properly issued.

5. APPEAL AND ERROR—MATTERS NOT CONSIDERED BELOW.—Where an attack in the court below was made on a sale and an attachment proceeding on the ground that the sale had never been approved in the attachment proceeding, an order of the circuit court in such proceeding confirming the sale, copied by opposing counsel in their brief on appeal, will not be considered where it was not considered in the court below.

6. EXECUTION—PRESUMPTION OF REGULARITY OF SALE—Under Crawford & Moses' Dig., § 1534, providing that a sheriff's deed shall be evidence of the legality and regularity of sale of land, a deed to land duly executed and acknowledged by the sheriff and recorded is evidence that the sale was regularly made, without proof that the sale was confirmed by the court.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

M. R. Perry and *B. G. Clanton,* for appellant.

Roscoe R. Lynn and *June P. Wooten,* for appellee.

SMITH, J. Appellee, as administrator of the estate of H. G. Pottebaum, brought this suit, in conjunction with the widow of the said Pottebaum, who alleged that she had acquired the interest of the heirs of her husband in his estate, to partition a lot in the city of Little Rock, a half interest in which was alleged to be owned by the intestate, and from a decree granting the relief prayed is this appeal.

The question presented on the appeal is that of the validity of a judgment of the Pulaski Circuit Court,

whereunder it was alleged that appellee's intestate had acquired an undivided one-half interest.

Some years ago Pottebaum brought suit upon a note executed to his order by one Fred A. Williams, who, at the time, was a resident of the city of Chicago and an employee of the postoffice in that city. Judgment was rendered by default for the amount of the note, and an attachment was sustained and the lot ordered sold, and, pursuant to this judgment, an execution was levied upon Williams' undivided half interest, and that interest was sold, and later an execution deed was issued to Pottebaum by the sheriff who made the sale.

It was alleged that the judgment against Williams was void for the following reasons:

The lot levied upon had been owned by Williams' father, who, upon his death, was survived by his widow and two children, and the lot was then occupied by Williams' mother as her homestead. It is therefore insisted that, as the lot was a homestead, it was not subject to sale. In reply to this contention it suffices to say that the widow was not a party to the attachment suit, and her homestead right was not affected by it. The defendant had an interest in the lot, which was, of course, subject to his mother's right of homestead, and it was upon this interest that the attachment was levied. The homestead estate of the widow terminated by her death in 1925, before the institution of this suit.

It is next insisted that defendant should have been sued as Fred A. Williams, and not as F. A. Williams, as was done, inasmuch as the note sued on was signed "Fred A. Williams." It must be presumed, in this collateral attack on the judgment of the circuit court, that that court ascertained that the Fred A. Williams who signed the note and the F. A. Williams who was sued as the maker thereof were one and the same person. Indeed, the testimony heard at the trial from which this appeal comes shows that such was the fact.

It is insisted that the defendant was not properly advised of the pendency of the suit by the attorney appointed by the clerk to represent the nonresident defendant. Upon rendering judgment sustaining the attachment the circuit court presumably found to the contrary, and that finding is not subject to the collateral attack here made upon it. It may be said, however, that a letter written by Williams, which was offered in evidence at the trial from which this appeal comes, shows that he was in fact aware of the levy of the attachment.

It is next insisted that there was no affidavit for the attachment, nor was any showing made that the defendant's personal property was not sufficient to satisfy the plaintiff's demand without making a levy upon his interest in the land. In support of this allegation it is shown that no affidavit for the attachment was found, when this case was tried in the court below, among the files of the clerk in the original attachment suit. In answer to this collateral attack, it may be said that it will be conclusively presumed that the court below, before sustaining the attachment, ascertained that the attachment had been properly issued.

It is finally insisted that it was not shown that the sale under the execution was ever approved, and that a suit for partition cannot be maintained upon a title acquired through an unconfirmed sale.

Counsel for appellee set out in their brief an order of the circuit court confirming the sale; but, inasmuch as this order was not offered in evidence in the court below, it cannot be considered here. But appellee offered in evidence in the court below an execution deed duly executed and acknowledged by the sheriff who made the sale, and this deed was duly recorded, and its recitals conform to the requirements of § 4334, C. & M. Digest.

Section 8390, C. & M. Digest, provides that: "A sheriff's or auditor's deed, given in the usual form, without witnesses, shall be taken and considered by said court as sufficient evidence of the authority under which said

sale was made, the description of the land, and the price at which it was purchased."

Section 1534, C. & M. Digest, provides that: "All deeds of conveyance made by administrators, executors, guardians and commissioners in chancery, and deeds made and executed by sheriffs of real estate sold under executions duly made and executed, acknowledged and recorded as required by law, and purporting to convey real estate, shall vest in the grantee, his heirs and assigns, a good and valid title, both in law and in equity, and shall be evidence of the facts therein recited and of the legality and regularity of the sale of the lands so conveyed until the contrary is made to appear."

It is not made to appear that the execution deed was not executed under authority of law, and the fact alone that the affidavit for the attachment was not found in the files of the original attachment suit does not prove that there was in fact no affidavit for the attachment. The court found that the attachment was properly issued, and the attachment was sustained as having been properly levied upon the lot which the judgment directed should be sold in satisfaction of the indebtedness there adjudged to be due the plaintiff.

In 15 R. C. L., page 891, § 370 of the chapter "Judgments," it is said: "If a statute requires a certain affidavit to be filed prior to the rendition of judgment, it will be presumed, in support of the judgment of a court of general jurisdiction, in the absence of any statement or showing upon the subject, that such affidavit was filed. Thus it may be presumed that a writ of attachment, regular upon its face, on which a judgment has been based, was properly issued after execution of a proper affidavit required in such cases."

Upon a consideration of the whole record we conclude that it was not made to appear that the judgment of the circuit court was void through failure to comply with the law in the rendition of the judgment through which Pottebaum's title was acquired. *Huggins* v. *Dabbs,* 57 Ark.

628, 22 S. W. 563; *Collins* v. *Paepcke-Leicht Lbr. Co.,* 74 Ark. 81, 84 S. W. 1044; *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614; *Sovereign Camp W. O. W.* v. *Wilson,* 136 Ark. 546, 207 S. W. 45; *Baxter County Bank* v. *Davis,* 137 Ark. 459, 208 S. W. 797; *Shaw* v. *Polk,* 152 Ark. 18, 237 S. W. 703; *St. L. S. F. R. Co.* v. *Wardell,* 157 Ark. 557, 249 S. W. 17.

This being true, the relief by way of partition was properly granted, and that decree is affirmed.

HOSPITAL & BENEVOLENT ASSOCIATION *v.* ARKANSAS BAPTIST STATE CONVENTION.

Opinion delivered April 9, 1928.

1. LOST INSTRUMENTS—BURDEN OF PROOF.—One who claims title under an alleged lost instrument must establish the execution, contents and loss of such instrument by the clearest, most conclusive, and satisfactory proof.
2. LOST INSTRUMENTS—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to prove the execution and delivery of a lost deed to land, and to prove the contents and sufficiency of such instrument of conveyance.
3. CHARITIES—TRANSFER OF PROPERTY.—Execution of a deed conveying a hospital and property by the officers of the hospital charitable association, *held* within the power of the association where it tended to perpetuate and promote the purposes of such association, where the association could no longer maintain the hospital, while the transferee organization agreed to do so.
4. CHARITIES—RATIFICATION OF DEED.—Evidence *held* sufficient to show a ratification by a hospital association of the transfer of its property by deed to an organization which agreed to carry on the hospital work, though execution of the deed was authorized at a called meeting not provided for in the constitution of the association, where, for several years after the transfer, the association made no attempt to set aside or alter the effect of such deed.
5. GIFTS—TRANSACTION HELD TO BE SALE.—Where a hospital association deeded its property to another on the consideration that the grantee would assume burdensome obligations of the grantor and the grantee expended large sums in improving the property, *held* that the transaction was a sale and not a gift.

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

E. W. Brockman, Palmer Danaher and *M. Danaher,* for appellant.

W. B. Sorrels, for appellee.

SMITH, J. Appellant brought this suit in ejectment against the Arkansas Baptist State Convention, hereinafter referred to as the convention, to recover possession of a hospital and the adjacent grounds located in the city of Pine Bluff. The defendant convention filed an answer, alleging its possession and ownership of the property under a deed from the plaintiff, which was alleged to have been lost, and, by way of cross-complaint, the defendant prayed that its lost deed be restored and held valid, and that its title be quieted against the plaintiffs. In an answer to the cross-complaint the plaintiffs denied the execution of the deed or their power to execute it.

From the testimony offered at the trial from which this appeal comes, it appears that seventy ladies, residents of Pine Bluff, were incorporated by order of the Jefferson Circuit Court, July 6, 1895, as the Hospital & Benevolent Association, for the purpose of raising funds to establish and maintain a hospital in the city of Pine Bluff. Funds for this purpose were to be raised by annual dues to be collected from each member of the association, amounting to $1 a year, and by donations, legacies and subscriptions from charitably disposed persons.

The constitution of the association provided for an annual meeting on the first Friday of October in each year, at which time a president, three vice presidents, a secretary and a treasurer should be elected, who should hold office for one year and until their successors were elected and qualified. It was provided in the constitution that ten members should constitute a quorum for the transaction of business. Mrs. J. W. Crawford was elected president, Mrs. O. J. Taylor was secretary, and Dr. Lil-

lian G. Higginbotham assistant secretary, and the organization began to function by erecting and operating a hospital. To raise necessary funds, a mortgage of $4,000 was placed on the property, and other indebtedness was incurred. The enterprise was not a success, and the hospital was finally closed, and, after it had been closed for four or five months, its managing officers and friends began to cast about to devise means whereby it might be reopened and operated. Overtures were made to the convention to take over the hospital, and at a regular meeting of the hospital association on October 7, 1919, an amendment to the charter was adopted authorizing a lease of the property for ninety-nine years. A proposition was submitted to the hospital committee of the convention to lease the property, but this offer was declined, and a counter proposition was made to take over the property, repair it, pay the outstanding indebtedness, enlarge the hospital, and operate it, provided a deed was made to the convention.

A called meeting of the plaintiff hospital association was held on October 10, 1919, to consider this counter-proposition, at which seventeen members of the association and two non-member friends were present. At this meeting the following resolution was unanimously adopted:

"Whereas, the Davis Hospital has been closed for several months for lack of sufficient funds to repair, reopen and run it; and whereas, the Baptists have undertaken to raise large sums for hospital purposes, and the Arkansas Baptist State Convention has offered to take a deed to the property and in consideration thereof agreed to maintain and run the hospital and from time to time enlarge it, as the demands for enlargement come and the necessities require, in the judgment of the board of said convention; and whereas, they have agreed to keep the name, Davis Hospital, for the institution perpetually, and to accept a deed requiring such perpetuation of the name and containing a stipulation that, if they fail

to perpetuate the name, or if they or their assigns or successors should fail to keep the property in reasonably good repair, or should fail or cease to maintain and run the institution as a hospital, then in any such event the title to the property shall at once revert to the grantor; now therefore be it by the Davis Hospital Benevolent Association in meeting assembled, resolved, that the president and secretary, or assistant secretary, of this association be, and they are, hereby authorized and empowered to make a deed to said Arkansas Baptist State Convention, or to such trustee as they may name, conveying to it or them the following described land, lying in Jefferson County, State of Arkansas, to-wit: Lots one and two, in block seventy-six, in Tannehill & Owens' addition to the city of Pine Bluff, for the consideration and purposes and containing the stipulations required by the foregoing preamble; and, for the same consideration and purposes, to include in said deed the furniture and hospital appliances on said land. Only the land and building and the furniture and appliances shall be conveyed. The Davis Hospital Benevolent Association shall reserve to itself such funds, devises and legacies as it now owns, and such devises and legacies as are provided for in wills already made to it or Davis Hospital."

Pursuant to this resolution, a deed was prepared from the hospital association to the convention, which was duly acknowledged by the president and the assistant secretary of the association. This deed was delivered to a member of the hospital committee of the convention, but was lost without having been recorded.

The cause was tried in the court below, by consent, without a jury, and the court found the fact to be that this deed was executed and delivered and that the title to the property there described passed to the convention, and judgment was rendered accordingly, and from that judgment is this appeal.

The plaintiff association—the appellant here—states in its brief that "the only issue before the court for deter-

mination is whether the deed claimed by defendant to have been made was in fact made, and, if so, whether it was legally made so as to be a valid deed."

"The rule is well established in this State, as well as by the authorities generally, that the burden is upon one who claims title under the alleged lost instrument to establish the execution, contents, and loss of such instrument by the clearest, most conclusive, and satisfactory proof." *Erwin* v. *Kerrin,* 169 Ark. 183, 274 S. W. 2, and cases there cited.

The first question for decision is therefore whether the proof tending to establish the alleged lost deed from the hospital association to the convention meets this test.

We think it does, and the court below so found. By collaboration of the persons interested in the preparation, execution, and examination of the lost deed it has been restored, and these persons testified that the restored deed is substantially identical with the lost deed. Among the witnesses who testified as to the execution and contents of the lost deed was J. W. Crawford, an attorney at Pine Bluff, whose wife was the president of the hospital association. He testified that his wife had devoted much of her time to the work of the hospital association, and was much concerned about reopening the hospital. He prepared the lost deed, and in a general way remembered its recitals, although he had not kept a copy of it, and testified that the restored deed was substantially identical with the one he had prepared. After the deed had been executed and acknowledged, he transmitted it to a member of the hospital committee of the convention. He had also prepared the resolution for adoption by the hospital association authorizing the sale of the property to the convention. He had kept a copy of this resolution, and identified the resolution set out above appearing in the restored deed as identical with the one which he had prepared for adoption by the association at the called meeting held on October 10, 1919.

H. T. Allcott testified that he was a notary public, and that, as such, he had taken the acknowledgments of the president and the assistant secretary of the hospital association to the deed. He stated in detail the circumstances under which the acknowledgments had been taken.

After the execution and delivery of the deed to the hospital committee of the convention it was submitted for examination and approval to Judge W. R. Donham of Little Rock, a practicing attorney and a member of the hospital committee. Judge Donham testified that he made a careful examination of the deed to determine its sufficiency, and in connection with this examination made copious notes as to its recitals. These notes he had preserved, but the deed itself was lost, and he was unable to find it, after a most exhaustive search. He had not surrendered the possession of the deed to any one, and when he last saw the deed it was in his possession. He testified that the restored deed is substantially identical with the one given him for examination.

The deed was executed to R. Carnahan, H. C. Fox and J. P. Runyan, as trustees, for the use and benefit of the Arkansas Baptist State Convention. Mr. Carnahan was a resident of Pine Bluff, and was one of the visitors who attended the meeting of the hospital association of October 10, and was instrumental in inducing the convention to take over the hospital. He also testified as to the execution of the deed, and it was he who delivered it to the hospital committee of the convention.

The hospital property was accurately described in the deed which conveyed that property to the trustees named, on the conditions and limitations set out in the resolution of the hospital association adopted on October 10, and which was incorporated in the deed.

Several members of the hospital association testified that they were not advised of the meeting held on October 10, and knew nothing of the action taken at that meeting in regard to the sale of the property. They were

advised of the meeting held on October 7, at which time a resolution was adopted which authorized a lease of the property for ninety-nine years, and, while they knew the property had been taken over and was being operated by the convention, they supposed this was done under the authority of the resolution adopted October 7.

The assistant secretary of the association, whose name was signed to the deed, denied having signed or executed it; but, without setting out the testimony in this respect, we announce our conclusion to be that this good lady had merely forgotten the incident. The high character of all the witnesses who have testified is such that the case presents no question of veracity of any of the witnesses. We are sure all testified truthfully, so far as they remembered the facts about which they testified; but, while this is true, we are of opinion that the testimony measures up to the requirements announced in the case of *Erwin* v. *Kerrin, supra,* to prove the execution and delivery of the lost deed and the contents and sufficiency of that instrument.

It is further insisted that, although the execution, contents and delivery of the deed have been sufficiently proved to establish it as a lost instrument, it was not valid as a conveyance, for the reason that it was an *ultra vires* act on the part of the officers of the association who executed the deed, and the case of *Fordyce* v. *Woman's Christian National Library Assn.,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485, is cited in support of that contention. In that case it was held that the property of a charity cannot be sold under an execution on a judgment rendered for the nonfeasance, misfeasance or malfeasance of its agents or trustees, for the reason that a charitable trust cannot be destroyed through the wrongful acts of the trustees, and it is insisted that the officers of the hospital association have, through the execution of the deed, wrongfully destroyed the trust committed to their management.

We do not concur in this view. On the contrary, the purpose of the trust has not been destroyed. The undis-

puted testimony shows that the hospital association had come to the end of its resources, and the trust was about to fail through lack of support. The hospital had been closed, and the property was deteriorating in value, and the debts of the association were unpaid. The deed to the convention required that body to maintain and run the hospital, and from time to time enlarge it as the necessity therefor required, and the conveyance was valid as such so long only as these conditions were complied with. That these conditions have been fully complied with will be later herein shown.

We conclude therefore that the execution of the deed by the officers of the hospital association was not an act which was beyond the power of the corporation itself to authorize, as it tended to perpetuate and promote the purposes of that organization.

It is insisted that the execution of this deed was authorized at a called meeting, which was not provided for in the constitution of the hospital association, and that the body of the members were not notified of the meeting, and that the execution of the deed was therefore unauthorized, and that the members of the association will not be held to have ratified this conveyance through the subsequent action of the convention, for the reason that the members of the hospital association had the right to assume that the possession and occupancy of the hospital by the convention was referable to the resolution adopted at the regular meeting on October 7 authorizing a lease of the property.

We think, however, that it must be held that the hospital association has in fact ratified this deed, even though its execution was not authorized. More than a quorum of the members attended the meeting at which the resolution was adopted authorizing the sale of the property, and the transaction was a sale, and not a gift, as is contended by appellant. The deed was executed upon the consideration of the assumption of burdensome obligations by the convention. It is not intimated that the

meeting of October 10 was surreptitiously called, and there is no reason to even suspect that the action then taken was concealed. All parties appear to have been actuated by the most laudable motives. The resolution then adopted directing the sale of the property was in a form which, if otherwise authorized, would have conferred the power to sell the property. There was nothing to indicate to the convention that it would not take by the deed tendered to it the title which that instrument purported to convey, and there is no reason to doubt that the members who did not attend the meeting of October 10 might, with but slight inquiry, have ascertained the terms and conditions upon which the convention took over the hospital.

The undisputed testimony shows that, after the delivery of the deed, the convention expended $20,000 to put the hospital in condition to be operated, and altogether expenditures aggregating $33,000 were made, including enlargement and equipment, and the institution has been raised to a grade A hospital, and is now being operated as such. In other words, the conditions upon which the deed was executed have been fully complied with, and have been since the date of that deed, which was October 31, 1919. This suit was not filed questioning the title of the convention to the property until June 15, 1925.

The case of *Merchants' & Farmers' Bank* v. *Harris Lbr. Co.*, 103 Ark. 283, 146 S. W. 508, Ann. Cas. 1914B, 713, was one in which the right of the secretary and treasurer of a corporation to execute a chattel mortgage upon the corporate property was questioned, and, in holding the stockholders had ratified that action, the court quoted with approval from 2 Morawetz on Private Corporations (2 ed.), § 623, as follows:

"In 2 Morawetz on Private Corporations (2 ed.), § 623, it is said: 'If the shareholders who constitute the corporate association unanimously acquiesce in or ratify an act performed by an agent or board on behalf of the corporation, no further question as to the extent of the

powers delegated to the agent or board can arise. Ratification by all the shareholders would not cure the illegality of an act which is prohibited by the common law or statute; but it would remove any defect of authority in an agent performing the act as between himself and the company. After such ratification, the company would become chargeable with the act to the same extent as if it had originally authorized it to be done'."

In the same case it was there further said:

"All the shareholders of a corporation may waive the necessity for a meeting of its board of directors, and may, without such meeting, either authorize acts done by its agents within the scope of the powers of such corporation, or ratify those acts which have been done, and, by such authorization or ratification, bind the corporation itself. The rule that the members of the board of directors have the authority to act only when convened in a board meeting is for the benefit of the shareholders. The shareholders own the assets, and in fact constitute the corporation. All the shareholders may therefore waive the necessity for the meeting of all the members of the board of directors in the transaction of any business that is not beyond the powers of the corporation to enter into."

In the case of *American Bonding Co.* v. *Laigle Stave & Lbr. Co.*, 111 Ark. 151, 163 S. W. 167, the question was raised as to the power of an agent of a corporation to execute accommodation paper in the name of the corporation, and, after holding that such right was not within the real or apparent scope of the agent's authority, the court held that such action might be ratified. It was there said:

"In 2 Thompson on Corporations (2 ed.), § 2019, the rule of acquiescence in or ratification of an unauthorized act of the officers or agents of a corporation is stated as follows: 'Acquiescence for a considerable time by a corporation, through its efficient agencies and the body of its stockholders, in a state of facts, after knowledge or

after such a length of time and such a condition of circumstances that a knowledge is to be inferred, will operate as a ratification. * * * Ratification of this character may rest on the principle of equitable estoppel, on the theory that one man, though innocent, ought not to allow another innocent man to rest in the belief that a voidable engagement is valid until the latter has changed his position. It also rests on the moral consideration that the former, after allowing the hopes of the latter to be raised for a considerable length of time, in respect of whatever benefits may accrue or may have accrued from the engagement, ought not to be allowed to disappoint those hopes. The rule therefore is that, where the agents of a corporation exceed their powers, their principal must, as in the case of a natural person, disaffirm promptly, or at least within a reasonable time, having regard to the circumstances of each case'."

The case of *Common Sense Mining & Milling Co.* v. *Taylor,* 152 S. W. 5, was one in which the president and secretary of the corporation had, without authority, sold the assets of the corporation, and their grantee, under the unauthorized conveyance, expended a large amount of money on the property conveyed. For a period of five months the stockholders remained inert, and, when finally they called the conveyance in question, the court held that, by their inaction, they had ratified the unauthorized act. In so holding, the Supreme Court of Missouri, through Graves, P. J., said:

"'Judge Thompson, in 10 Cyc., p. 1065, says: 'Subject to exceptions in case of municipal or governmental corporations, which are held to a strict exercise of their powers, the general rule is that corporations quite as much as individuals are held to a careful adherence to truth in their dealings with mankind, and cannot, by representations or by silence, involve others in onerous engagements and then defeat the just expectations which their conduct has superinduced. A round statement of this doctrine is that estoppels *in pais* operate against cor-

porations in like manner as against natural persons.' And further discussing the doctrine of estoppel as applicable to corporations, at page 1066 of the same volume, says: 'As more fully explained later, the same principle validates the voidable acts of corporations, on the theory of a ratification by the acquiescence of all the shareholders, so that, after a long delay, in which time other rights have supervened or expectations have been founded, upon the faith of an existing state of facts, the shareholders will be precluded from maintaining actions in equity to undo what has been done by the directors or officers without their authority.' The same writer, in his work on Corporations (2 Thompson on Corporations, 2 ed., par. 1960, p. 1048), says: 'In the law of agency there is a rule that, if one accepts the benefits of an unauthorized contract made in his behalf by another, he is bound by its terms the same as if he had entered into the contract in person or had expressly ratified it, provided, of course, that he had full knowledge of all the facts, and he is thereby estopped from repudiating the contract without restoring the benefits and putting the other party *in statu quo*. This principle is applicable, in its fullest sense, to corporations which, from their nature, can act only through the instrumentality of agents. If therefore an officer of a corporation, or other person, assuming to have power to bind the corporation, by a given contract enters into the contract for the corporation, and the corporation receives the fruits of the contract, and retains them after acquiring knowledge of the circumstances attending the making of the contract, it will thereby become estopped from afterwards rescinding or undoing the contract. In other words, by retaining the fruits of the unauthorized contract, with knowledge of the circumstances which entitle it to its election either to affirm or disaffirm it, the corporation ratifies the contract and makes it good by adoption.' In the same volume, at page 1056, it is further said: 'It is not strictly necessary to the proper application of the principle of

estoppel that the corporation should have received a benefit from the contract, but it is sufficient that the other party has acted on the faith of it to his disadvantage, as where he has expended money on the faith of it. The reason of the rule is that honesty and fair dealing are the highest public policy, and that a private corporation, which is a mere collection of individuals, is no more privileged to repudiate its engagements and act dishonestly than a single individual is'."

The court below expressly found the fact to be that the members of the hospital association, whose relation to that organization is not dissimilar to that of shareholders in the ordinary private corporation, had, by their inaction, ratified the sale of the property to the convention, and it is our opinion that the testimony sustains that finding.

The judgment of the court below must therefore be affirmed, and it is so ordered.

ARKADELPHIA MILLING COMPANY v. GODDARD.

Opinion delivered April 9, 1928.

1. APPEAL AND ERROR—ORDER DIRECTING VERDICT.—On appeal from the judgment on a directed verdict for defendants, the court will give the testimony tending to support plaintiff's cause of action its highest probative value.
2. GUARANTY—CONSTRUCTION OF GUARANTY BOND.—Where the execution of a guaranty bond was the only condition precedent to placing a contract for the sale of merchandise to the principal in full force and effect, such bond should be treated as contemporaneous with the contract, though bearing a different date.
3. GUARANTY—NOTICE OF ACCEPTANCE.—Where there has been a precedent request for a guaranty, notice of its acceptance need not be given to the guarantor.
4. GUARANTY—LIABILITY FOR "SHORTAGE."—A guaranty bond binding sureties for any shortage in the principal's accounts, *held* not to mean that only a fidelity bond was executed and that the guarantors became liable only for money collected and not accounted for by the principal, where the latter's contract permitted him to sell

merchandise for his own account, to whom he pleased, at his own price, without reporting the purchasers' names, quantity sold, or price, to the consignor; the word "shortage" meaning only the balance due after allowance of credits for remittances to the consignor.

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

Barber & Henry, Troy W. Lewis and *Clayton Freeman,* for appellant.

Ben F. Reinberger and *J. A. Tellier,* for appellee.

SMITH, J. Appellant brought this suit in the Pulaski Circuit Court to recover a sum alleged to be due it on account of merchandise sold and shipped to one Jack Goddard, under a written contract of continuing guaranty which Goddard's co-defendants had executed. Service was not had upon Goddard, but the other defendants, the alleged guarantors, filed an answer, in which they denied liability, upon the grounds that the instrument sued upon was a mere offer of guaranty, of the acceptance of which by the guarantee they had not been advised, and that the alleged guaranty was in fact a mere fidelity bond whereby, if liable at all, they were liable only for such sums of money as Goddard might collect and fail to account for.

The court below upheld both of these contentions, and, under this view, directed the jury to return a verdict in favor of the defendants, which was done. We must therefore give to the testimony tending to support plaintiff's cause of action its highest probative value.

The bond sued upon reads as follows:

"Personal Indemnity Bond.

"Know all men by these presents:

"That we, the undersigned,..... acknowledge ourselves indebted to the Arkadelphia Milling Company, of Arkadelphia, Arkansas, in the sum of five thousand and no/100 ($5,000) dollars, same to be void upon the following terms and conditions.

"Whereas Jack Goddard, of 1201 Marshall Street, Little Rock, Arkansas, has been appointed the city rep-

resentative of Little Rock and North Little Rock, Arkansas, to handle and sell the products of the said Arkadelphia Milling Company: now if the said Jack Goddard shall faithfully perform the terms of the said contract and account to the said Arkadelphia Milling Company for all money coming into his hands through and by reason of the said contract, then and in that event this instrument shall be null and void, but for any shortage that might occur in his accounts we consider and acknowledge ourselves bound.

"Witness our hands and seals on this first day of June, 1923.

"F. L. Brown, Atty., 414 A. O. U. W. Bldg.
"A. W. D. Overton, 423 Ferry St.
"F. J. Donahue, 2617 W. 14th St.
"Albert McMahon, Salesman Am. Gro. Co., 1522 Oak St.
"Wm. Riley, Contr., 519 Cumberland St."

So much of the contract referred to in the bond appointing Goddard as city representative of the plaintiff milling company as need be here considered reads as follows:

"This contract, made this 12th day of June, 1923, by and between Arkadelphia Milling Company, hereinafter called the consignor, and Jack Goddard, hereinafter called the consignee, witnesseth: That the consignor has delivered to the consignee on consignment certain merchandise, the description and present market price of which f. o. b. cars Little Rock, Arkansas, is as follows, to-wit: Flour, feed and meal.

"The consignee is to (pay freight) on said merchandise from Arkadelphia, Arkansas, to Little Rock, and is also to pay all drayage and storage charges. * * * The consignee shall have the right to sell the said merchandise in the due course of business for not less than the market price on the day of sale, and the consignee shall receive as commission all amounts for which the said goods are sold in excess of the market price and interest,

and the proceeds of any and all sales of said merchandise, less the said commission, shall be remitted to the consignor by postoffice money order or cashier's check, weekly, or deposited in Exchange National Bank to the credit of Arkadelphia Milling Company."

The contract provided the manner in which Goddard might return and receive credit for any merchandise found to be unsatisfactory.

The first transaction under this contract occurred June 21, 1923, at which time merchandise amounting to $970.09 was shipped to Goddard, and thereafter other shipments were made, the last being March 31, 1924. An itemized statement of the account was exhibited and shown to be correct by the accounting officers of the appellant company, from which it appeared that merchandise of the total value of $11,314.98 was shipped to Goddard, and that credits amounting to $9,111.09 were received, leaving a net balance, with interest, of $2,203.89, for which amount judgment was prayed.

The contract—which we have not copied in full—contains no restrictions or directions in regard to sales which Goddard might make, except that the merchandise should not be sold at less than the purchase price, and he was at liberty to sell to whom he pleased. The accounting officers of the plaintiff company who testified concerning the balance due on the account did not know to whom sales had been made, nor what amounts were due Goddard by his customers to whom he had sold merchandise. It did not therefore appear whether Goddard had remitted to the plaintiff company all collections made by him.

The court instructed the jury that the defendant guarantors were not liable, for two reasons: "One is, the bond was executed prior to the execution of the contract, and it is an obligation to pay certain amounts, if any, that may accrue from Goddard, the principal. When that bond was signed the contract had not been signed, and the bond was forwarded to the plaintiff, and the plaintiff subsequently, on the 12th day of June, the date

of the signing of the contract, and the bond was signed on the first day of June, signed the contract, but plaintiff did not notify these defendants that the contract had been signed by the plaintiff, and that any liability would accrue under the bond." The court further charged the jury that the word "shortage" appearing in the bond "means the defalcation of moneys coming into his hands through the operation of the contract, and there is no proof in the case that there has been any defalcation of moneys or goods, but, so far as the proof is concerned, it may be uncollected debts from the resale of the produce delivered to the principal in the case." For both these reasons the court directed the jury to return a verdict in favor of the defendant guarantors.

The testimony on the part of the plaintiff was to the effect that Goddard was promised a contract, such as was later executed, upon furnishing a satisfactory bond, and that both instruments were treated as having been simultaneously executed, although they bore different dates, and that no goods were furnished under the contract until after its execution and approval by the home office of the company.

Appellees insist that the court below was correct in construing the bond as a mere offer of guaranty, and that, as such, they were entitled to notice of its acceptance before any liability could accrue against them. On the other hand, appellant contends that the writing was a direct promise of guaranty, and not a mere offer of guaranty, and that notice of its acceptance was not essential to the accrual of liability thereunder.

Under the plaintiff's testimony the jury might have found that the execution of the bond by satisfactory and sufficient sureties was the only condition precedent to placing the contract for the sale of the merchandise into full force and effect, regardless of the date of the bond or the contract, and, if so, they should be treated as contemporaneous instruments, although they bore different dates.

In 12 R. C. L., page 1072, § 23 of the chapter on "Guaranty," it is said: "A written guaranty to pay a debt the proof of which rests in parol evidence, is legal and enforceable. Even if the principal obligation is evidenced by a writing, it need not be completely executed and delivered at the time the guaranty is entered into."

At § 43 of the chapter on "Guaranty" in 28 C. J., page 913, it is said: "A contract of guaranty may be executed contemporaneously with the principal contract or after it is executed, and the fact that the guaranty is executed before the principal contract is executed is immaterial, where they are delivered simultaneously, or where the guarantee acts on the faith of such guaranty, in entering into the principal contract."

In the case of *Hudson Trading Co.* v. *Durand,* 194 App. Div. 248, 185 N. Y. Supp. 187, it was held by the Supreme Court that, where a guarantor signs an agreement to become jointly liable with a buyer in the performance of a sales contract, in consideration of the seller entering into such sales contract, and where such guaranty is an inducement to the seller to enter into the contract, the guarantor is liable for the buyer's nonperformance, without executing a guaranty subsequent to the execution of the sales contract.

The case of *Rosenwasser* v. *Amusement Enterprises, Inc.,* 88 Misc. Rep. 57, 150 N. Y. Supp. 561, decided by the same court, is to the same effect.

In the case of *J. R. Watkins Medical Co.* v. *Brand,* 143 Ky. 468, 136 S. W. 867, 33 L. R. A. (N. S.) 960, it was held by the Supreme Court of Kentucky (to quote the syllabus in that case) that: "Notification of acceptance of the guaranty is not necessary to bind persons who sign an agreement to be responsible for the faithful performance of his contract by one about to be reappointed as salesman for the obligee for another year, since the guaranty is absolute, and not conditional, and it is immaterial that the contract has not been signed by either employer or employee when the sureties put their names to the guaranty which is attached to it."

In the annotator's note to this case it is said: "So, where the terms of a proposed guaranty contemplate acceptance by the delivery of merchandise on credit to a third person, the offer can be accepted by the furnishing of merchandise pursuant to the terms of the guaranty, the contract becomes complete when credit is actually so furnished, and no notice of acceptance is necessary where not called for by the offer."

In the case of *Falls City Construction Co.* v. *Boardman,* 111 Ark. 415, 163 S. W. 1134, appears this statement:

"In 20 Cyc. p. 1407, III, it is said: 'Both the English and American cases hold generally that the rule requiring notice by the guarantee of his acceptance of the guaranty applies only where the guaranty is, in legal effect, an offer or proposal. Where the transaction is not merely an offer to guarantee the payment of debts, and amounts to a direct promise of guaranty, all that is necessary to make the promise binding is that the promisee should act upon it; he need not notify the promisor of his acceptance, and at page 1409 it is said: 'Where there has been a precedent request for the guaranty, notice of its acceptance need not be given to the guarantor.' See *Stewart* v. *Sharp County Bank,* 71 Ark. 585-589, 76 S. W. 1064; *Davis* v. *Wells,* 104 U. S. 159, 26 L. ed. 686."

Under the plaintiff's testimony there was a precedent request for the guaranty, in that the plaintiff was proposing to sell Goddard merchandise upon the condition that Goddard secure satisfactory guarantors, and, in signing this bond, the defendant guarantors must necessarily have known that the plaintiff milling company would sell merchandise to Goddard if the milling company satisfied itself that the guaranty was sufficient, that is, that the guarantors were responsible for the amount of the bond. Moreover, the bond, by its terms, is not a mere offer to guarantee, but is a direct and unconditional promise to pay $5,000, to be void upon

the condition that Goddard should faithfully perform the terms of the contract and account to the milling company for all money coming into his hands under the contract.

See also *Davis Sewing Machine Co.* v. *Richards,* 115 U. S. 524, 6 S. Ct. 173, 29 L. ed. 480; *McCarroll* v. *Red Diamond Clothing Co.,* 105 Ark. 443, 151 S. W. 1012, 43 L. R. A. (N. S.) 475; *Beeson* v. *LaVasque,* 144 Ark. 522, 223 S. W. 355; *First National Bank* v. *Solomon,* 170 Ark. 555, 280 S. W. 659; *Ouachita Valley Bank* v. *DeMotte,* 173 Ark. 52, 291 S. W. 984.

We are of the opinion also that the court was in error in construing the word "shortage" to mean that only a fidelity bond had been executed, and that the guarantors became liable only for such money as Goddard collected and failed to account for.

The contract did not authorize Goddard to sell merchandise for the account of the plaintiff. He sold for his own account and to whom he pleased, with the right to fix his own price, keeping for himself any excess over the market price at which he himself bought the merchandise. He was not required to report the names of persons to whom he sold, or the quantity sold, or the price of the sale. He exercised his own discretion in these matters, and this the milling company allowed him to do because of the indemnity or guaranty of the bond to the extent of $5,000 that Goddard "shall faithfully perform the terms of the said contract," and Goddard's contract required him to pay for merchandise which he bought from the plaintiff milling company. It was obviously not the purpose of the bond to permit Goddard to make indiscriminate sales of which he was required to make no report and over which the milling company had no supervision or control, nor for Goddard to be liable only for such sums of money as he might collect. Under such a contract Goddard would have had everything to gain and nothing to lose, and would have been under no constraint to use discretion in making sales.

If this was the contract, he could have sold to anyone willing to buy and have taken the chance, at the milling company's expense, and without risk to himself, that the purchasers would pay.

The bond is somewhat ambiguous, but, when read in the light of the contract the performance of which it guaranteed, we think that the proper construction of it is that the word "shortage" meant such balance as was due after credits had been allowed for such remittances as were made to the consignor "by postoffice money order or cashier's check weekly, or deposited in Exchange National Bank to the credit of the Arkadelphia Milling Company."

The judgment of the court below will therefore be reversed, and the cause remanded.

DIERKS LUMBER & COAL COMPANY v. KULL.

Opinion delivered April 9, 1928.

1. EVIDENCE—ADMISSION OF TELEGRAMS AND LETTERS.—Where the authenticity of telegrams and a letter purporting to come from defendant or its agent was not denied, and the office from which the telegrams were sent and in which the letter was written were outside of the court's jurisdiction, and the letter was written on defendant's letterhead and received by mail in due course, *held* that the authenticity of telegrams and letters was sufficiently established to be admitted in evidence.
2. EVIDENCE—TELEGRAMS AND LETTERS.—In an action for a balance due for goods, letters and telegrams passing between the attorney handling the account for collection and defendant's agent for adjustment of the account were properly admitted.
3. CORPORATIONS—LIABILITY FOR INDEBTEDNESS OF SUBSIDIARY CORPORATION.—In an action for a balance due for goods delivered to an alleged subsidiary corporation of defendant, testimony as to an adjustment by defendant of an account between such subsidiary corporation and another was admissible as tending to show that defendant was backing such subsidiary corporation.
4. TRIAL—INSTRUCTION ASSUMING FACT.—In an action for a balance due for goods delivered to an alleged subsidiary corporation of defendant, an instruction that if the jury find that the sub-

sidiary corporation purchased merchandise for defendant without the latter's authority, but that the latter ratified such act, the verdict should be for plaintiff, *held* not objectionable as assuming that the subsidiary corporation purchased the goods with authority from defendant; the instruction submitting the issue of authority only as preliminary to the issue of ratification.

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

Collins & Collins and *Lake, Lake & Carlton,* for appellant.

June R. Morrell, for appellee.

HUMPHREYS, J. Appellee sued appellant for a balance of $4,924.09 alleged to be due him by it for baskets and crates delivered to Dierks Lines Growers' Association, an alleged subsidiary corporation, sponsored by appellant for the purpose of encouraging the growing of fruits, vegetables and other agricultural products. The baskets and crates were used by the Dierks Lines Growers' Association for the shipment of tomatoes and cantaloupes.

Appellant filed an answer, denying liability on the account.

The cause was submitted upon the pleadings, the testimony introduced by the respective parties and the instructions of the court, which resulted in a verdict and consequent judgment against appellant for $3,852.07, from which is this appeal.

Appellee recovered the judgment appealed from upon the theory that, in purchasing the baskets and crates, the Dierks Lines Growers' Association was the agent in fact for appellant. Appellant contends for a reversal of the judgment upon the alleged ground that there is no evidence in the record tending to show the agency. After the baskets and crates had been delivered and used, appellee sent a telegram to appellant calling its attention to the account for which this suit was afterwards brought. He received a telegram in response as follows:

"Kansas City, Mo., 10:05 a. m. Dec. 13, 1926.
"Horatio Basket Co., Horatio, Ark.

"Your account being looked after by Southerland, and he is out of city; will be back in two or three days, and immediately upon his return matter will have prompt attention.

"11:25 a. m. Dierks Lumber & Coal Co."

In response to telegrams or letters, appellee received the following telegrams and letter:

"Kansas City, Mo., 2:43 p.m., Dec. 22, 1926.
"Horatio Basket Co., Horatio, Ark.

"On your bill recently rendered you stated interest due as per agreement. We were not familiar with any agreement as to interest, and were compelled to refer to Murrah, and have not heard from him as yet.

"3:45 p.m. R. Southerland."

"Kansas City, Mo., 9:32 a.m., Jan. 12, 1927.
"Horatio Basket Co., Horatio, Ark.

"Please refer to our wire of yesterday. Mr. Southerland is out of town; however plans to be down at Horatio to see Mr. Kull early part of next week.

"10:30 a. m. Dierks Lumber & Coal Co."

"Kansas City, Mo., 11:53 a. m., Jan. 20, 1927.
"Horatio Basket Co., Horatio, Ark.

"Southerland confined home account illness; feels will be able get down next Tuesday sure. He has complete charge of this matter. We are very anxious get this straightened up, but it will be necessary for him personally handle it, as he is familiar with all details.

"1:23 p.m. Dierks Lumber & Coal Co."

"Dierks Lumber & Coal Company
Manufacturers of Yellow Pine & Hardwood Lumber
1006 Grand Avenue.

"Kansas City, Mo., Jan. 27, 1927.
"Horatio Basket Co., Horatio, Ark.

"Gentlemen: We have your wire of January 20 and 21. The writer is now dictating from his home and is ill, for which you, of course, don't give a damn. I am

confident of that because you say in your wire you wouldn't be out anything if I die, but I think that I will make the grade and you will be that much ahead at least.

"For your information, I have charge of this matter and will be down there and straighten it out as soon as I get well enough.

"You may be sure that your kindly solicitude as to my death is going to greatly hasten my recovery.

"Yours very truly,
"Dierks Lumber & Coal Coal Co.
"By R. Southerland."

These telegrams and letter purported to come from appellant or R. Southerland, the one mentioned in the messages as the party looking after the account in question. Neither appellant nor Southerland denied the authenticity of the telegrams and letter. Appellant objected to the introduction of the telegrams and letter upon the ground that the telegrams were signed by typewriter and the name "R. Southerland" by stamp. The office from which the telegrams were sent is beyond the jurisdiction of the court. The rule with reference to the introduction of telegrams is laid down in Ruling Case Law, vol. 10, page 1151, § 354, and is as follows:

"A telegram delivered by the transmitting company is admissible in evidence where the original and the office from which it is sent are beyond the jurisdiction of the court. The authenticity of telegrams may be found from the fact that the alleged sender does not deny that he sent them, and that he knew their contents, and acted in accordance with instructions contained in them."

The letter introduced was written on the letterhead of appellant, and bore its typewritten signature, "By R. Southerland," in stamp. The letter was received by mail in due course. The office in which it was written is out of the jurisdiction of the court.

Under the principle quoted in this opinion from Ruling Case Law, the authenticity of the telegrams and letter were sufficiently established to be admitted in evi-

dence. When the telegrams and letter are read together they practically admit initial liability on the part of appellant. Nowhere in the telegrams or the letter is it intimated that the account was an independent obligation of the Dierks Lines Growers' Association. It is clearly inferable from the contents of the telegrams and letter that appellant knew all about the account. If appellant did not want to be bound by the contents of the telegrams and letter, it should have introduced proof to the effect that they were not authorized. Appellant also objected to the introduction of certain correspondence, in the nature of telegrams and letters, between June R. Morrell, an attorney in whose hands the account was placed for collection, and R. Southerland, for the same reason that it objected to the introduction of the other telegrams and letter. We think this correspondence was admissible, as the other telegrams designated R. Southerland as appellant's agent for the adjustment of the account in question.

Appellant also objected to the introduction of an adjustment by appellant of an account between the Dierks Lines Growers' Association with A. P. Steel, trustee for the Cannon estate. According to the testimony of A. P. Steel, appellant deducted one account from the other and paid the difference. We think this was admissible as a circumstance tending to show that appellant was backing the Dierks Lines Growers' Association.

There is ample evidence of a substantial nature in the record to support the verdict and judgment. The court did not err in refusing to give appellant's instruction for a directed verdict.

Appellant also contends for a reversal of the judgment because the court gave appellee's requested instruction No. 2, which is as follows:

"If you find from a preponderance of the evidence that the Dierks Lines Growers' Association purchased the merchandise in question for the Dierks Lumber & Coal Company without authority from the said Dierks Lumber & Coal Company to do so, yet if you find

that the Dierks Lumber & Coal Company later ratified the act of the Dierks Lines Growers' Association, then your verdict should be for the plaintiff as against the Dierks Lumber & Coal Company."

The objection made to the instruction is that it assumes that the Dierks Lines Growers' Association purchased the merchandise in question for the Dierks Lumber & Coal Company, and submitted to the jury only the question as to whether or not the purchase was made with or without authority from appellant. The instruction does submit the issue of authority to the jury, but only as preliminary to the issue of ratification. It does not assume that the Dierks Lines Growers' Association purchased the merchandise with authority from appellant.

No error appearing, the judgment is affirmed.

HALBERT & SON v. BAKER.

Opinion delivered March 26, 1928.

1. MECHANICS' LIENS—NECESSITY OF ITEMIZED ACCOUNT.—It is not necessary that one claiming a mechanic's lien should file an itemized account in order to make his lien effectual, and such rule applies where the lien is sought to be enforced by one with a contract direct with the owner and by a subcontractor.
2. MECHANICS' LIENS—VALUE OF MATERIALS FURNISHED.—Where, by an agreement between a contractor and owner, the inside painting and screening of a porch were to be charged as extras, the contractor was entitled to a mechanic's lien for the reasonable value of materials furnished, even though he did not file an itemized account of such items.

Appeal from Baxter Chancery Court; *A. S. Irby*, Chancellor; reversed.

STATEMENT OF FACTS.

B. S. Halbert & Son brought this suit in equity against Leo F. Baker and Ruth Baker, his wife, to foreclose a mechanic's and materialman's lien for the sum of $181.30, the balance alleged to be due them for the erection of a house for the defendants. The defend-

ants filed an answer and cross-complaint, in which they denied that they were indebted to the plaintiffs in the sum of $181.30, and, by way of cross-complaint, they sought to recover the sum of $305 damages for the alleged breach of the building contract by the plaintiffs.

The record shows that the plaintiffs entered into a contract with the defendants to erect a house for the sum of $1,500. Subsequently a change in the plans was agreed upon, and the contract price was increased to $1,575. The plaintiffs introduced evidence tending to show that they were entitled to extras in the sum sued for.

The chancellor found that certain items, amounting to $64.30, were due the plaintiffs as extras, in addition to the sum of $25 due them on the contract price. This made a total of $89.30 due the plaintiffs. The chancellor disallowed two items claimed by the plaintiffs, one being for $80 for inside painting and the other for $12 for screening the porch. The chancellor further found that the defendants were entitled to recover on their cross-complaint for certain items which the plaintiffs failed to furnish under their contract, which amounted in the aggregate to $90. Wherefore judgment was entered in favor of the plaintiffs against the defendants for $89.30, and that amount was declared a lien on the real estate described in the complaint, and judgment was rendered in favor of the defendants against the plaintiffs for $90. These amounts were set-off against each other, which resulted in a judgment in favor of the defendants for $21.70. The case is here on appeal.

H. J. Denton and *Kent K. Jackson,* for appellant.

HART, C. J., (after stating the facts). It is insisted by counsel for the plaintiffs that the court erred in refusing to allow the items of $80 for inside painting and $12 for screening the porch. These two items amounted to $92, and should have been allowed by the chancery court. The proof shows that it was not a part of the contract for the erection of the house that the plaintiffs should do the inside painting or should screen

the porch. By agreement between the parties these two items were to be charged as extras. The proof shows that the inside painting together with the materials furnished were reasonably worth $80, and that the materials and labor for screening the porch were worth $12. It is true there was no itemized account of these items, but this court has held that it is not necessary that a claimant file an itemized account in order to make his lien effectual. The rule is the same where the lien is sought to be enforced by one with a contract direct with the owner and by a subcontractor. *Terry* v. *Klein,* 133 Ark. 366, 201 S. W. 801.

In that case it is also held that, where labor and material are placed in the construction of a house as a completed job, the contractor is entitled to a lien, not as for labor, but as for the price of material furnished in the place to be used. To the same effect see *Shaw* v. *Rackensack Apartment Corporation,* 174 Ark. 492, 295 S. W. 966.

In the case at bar the plaintiffs were entitled to a lien in the sum of $80 for the price of the paint for the inside of the house and for $12 for the price of the screen placed on the porch, these items totaling $92.

The result of our views is that the decree must be reversed, and the cause will be remanded with directions to the chancery court to allow the plaintiffs the sum of $92, and a lien for this amount.

The decree will be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion, and for further proceedings according to the principles of equity. It is so ordered.

FOSTER v. ELSWICK.

Opinion delivered April 9, 1928.

1. VENDOR AND PURCHASER—REASONABLE TIME TO PERFECT TITLE.—Where, in an agreement for the sale and purchase of real estate, no definite agreement was entered into with regard to time in which the vendor should perfect title, he is allowed a reasonable time.
2. ESCROWS—LOSS OF ESCROW DEPOSIT.—Where, under an escrow agreement, a vendor had no right to money for the sale of land until she perfected her title, and while she was attempting to do so, and without unreasonable delay, the bank in which the escrow deposit was made failed, the loss fell upon the purchasers, and not upon the vendor.

Appeal from Washington Chancery Court; *Lee Seamster,* Chancellor; affirmed.

G. T. Sullins, for appellant.

John N. Tillman, W. A. Dickson and *Price Dickson,* for appellee.

HUMPHREYS, J. Appellants instituted suit against appellee in the chancery court of Washington County to enforce the specific performance of a contract of sale and purchase of appellee's farm, located in said county. It was alleged that appellants contracted to buy said farm for $3,000 from appellee, and that the consideration, together with a warranty deed from her, describing the land, were placed in the First National Bank of Lincoln, Arkansas, under an escrow agreement to the effect that, when appellee furnished an abstract showing a merchantable title to the lands in herself, the consideration of $3,000 should be paid to her and the deed delivered to appellant. It was also alleged that when the abstract was presented it contained defects, but that appellants offered to waive the defects and accept the deed to the land, the possession thereof having been surrendered to them at the time the escrow agreement was entered into.

Appellee filed an answer, admitting the escrow agreement but denying that she delivered possession of more than three rooms of her home to appellants, which the escrow agreement provided she should do, or that

appellants offered to waive the defects in the title and accept the deed until after the bank had mingled the escrow deposit of $3,000 with its other funds and its doors had been closed on account of insolvency. She prayed for the return of her deed and the possession of the farm.

The cause was submitted upon the issue joined by the pleadings and the testimony adduced by the respective parties, which resulted in a decree dismissing appellants' complaint for want of equity, and adjudging a return of the deed, together with possession of the farm, to appellee, from which an appeal has been duly prosecuted to this court.

The escrow agreement was entered into on the 18th day of December, 1926, and it, together with a warranty deed from appellee to appellants and the consideration of $3,000, were placed in escrow in the First National Bank of Lincoln, Arkansas. The agreement provided that, when appellee should furnish an abstract showing a merchantable title to the land in herself, the consideration of $3,000 should be delivered to her and the deed to appellants. Pending the preparation of the abstract, appellee allowed appellants to take possession of three rooms in her residence. When the abstract was furnished, on or about the 12th day of January, 1927, appellant, Walter Foster, refused to accept it, on account of alleged defects in the title, and demanded that his money be returned to him and appellee's deed to her. Appellee would not consent, and, in an effort to cure the alleged defects shown by the abstract, brought suit in the chancery court of Washington County to quiet her title. During the pendency of the suit, appellee went to Oklahoma to visit her daughter. The bank failed on February 2, 1927. The escrow money deposited by appellants had been mingled with the other funds of the bank, and there was only $300 in cash in the bank at the time of the failure. After the failure, appellants insisted that appellee present the claim for the escrow money to the

receiver and that the escrow deed be delivered to them. Appellee refused to accept the claim against the bank in payment for her land, and the suit for specific performance followed.

The question presented by this appeal for determination is whether funds deposited in escrow pending procurement of title belong to the vendor or the vendee. The escrow agreement provided that the money and deed should remain in the bank until appellee could furnish an abstract showing a merchantable title to the land in appellee. It also provided that, when appellants accepted the abstract, the bank should turn the money over to appellee. When the abstract was furnished, on January 12, 1927, appellants claimed it showed a defective title, and demanded a return of their money, but appellee insisted upon carrying the contract out and having further time to perfect the title. As no time was specified in the agreement for perfecting the title, appellee had a reasonable time within which to do so. Under the escrow agreement she had no right to the money until she perfected her title. She was attempting to do this, and without unreasonable delay, at the time the bank failed. During such period the money was the property of the vendee and not of the vendor. Of course, if the money had been lost on account of an unreasonable delay on the part of appellee in perfecting her title, the loss should have been charged to her. Appellants should have waived the defects in the title before the bank failed, instead of waiting until after that event had happened. If they had waived the defects, the escrow agreement would have been performed. The undisputed fact is that they did not waive or attempt to waive the defects until after the money had been lost.

The decree of the trial court was correct, and should be and is affirmed.

HARDIN v. MARSHALL.

Opinion delivered April 9, 1928.

1. SALES—SEPARATE CONTRACTS—RESERVATION OF TITLE.—Separate contracts for different purchases of furniture at different times, neither of which furnished a consideration for any other, cannot be regarded as an entire contract entitling the seller to repossess all the property at any time before payment of the entire purchase price, notwithstanding the same reservation of title in each contract.
2. SALES—RETENTION OF TITLE.—Where conditional sale contracts expressly retained title to all the property described therein until full payment of the entire price, the title to all the property described in each contract remained in the vendor so long as any part of the purchase price for the whole amount remained unpaid, though different articles purchased were listed with prices designated to be paid for each.
3. SALES—CONVERSION BY SELLER—DAMAGES.—The buyer of property under a conditional sale contract *held* not entitled to the rental value thereof from the date of conversion by the seller, in addition to the value of property converted at the time of conversion, with interest, as damages.

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

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment for damages rendered against appellant for the wrongful conversion of certain articles of furniture and household furnishings sold by him to appellee under contracts retaining the title until full payment of the purchase price.

The complaint alleged that appellee was the owner and in possession of the property described in the complaint, and that, on or about May 15, she stored with the appellant certain of the property, setting forth the items thereof, of the value of $336; that afterwards she left the city of Pine Bluff for the summer, and did not return until November 16, 1925; that during her absence appellant, without her consent or knowledge, acquired the property described in her complaint, and wrongfully converted it to his own use, and also that the property con-

sisted of household goods which had been in use by the plaintiff, and appellant knew, at the time of his conversion thereof, the reasonable rental value of same was $20 per month.

Appellant denied the material allegations of the complaint and that he had wrongfully converted the property, that it had any reasonable rental value at the time of the alleged conversion, and that he had any property whatever belonging to appellee. Alleged that on October 14, 1925, the constable of the township, under an order from the municipal court, duly made in a suit between appellant furniture company against appellee and one H. B. Davis, took possession of the property; and, further, that it had been delivered by him to the appellee under a written contract of purchase, in which it was expressly provided that the title thereto should remain in him until the purchase price had been fully paid. That appellee had failed to pay for the property according to the contract, and, after demand made for the return thereof was refused, he instituted suit for its recovery in the municipal court in the city of Pine Bluff, and especially pleaded the order of the municipal court delivering certain property to him as a bar to any right of recovery against him herein.

It appears from the testimony that appellant made three different sales of furniture and furnishings to appellee, the articles sold at each time being itemized in a written contract of sale and purchase made by him, in which the title was retained in the vendor until the full payment of the purchase price.

Appellee testified, and read a list of the property purchased to the jury, and also a list of the furniture which she had stored with the appellant, totaling $179 in value, which she said was included in the first bill of furniture purchased, and for part of which she owed and for part of which she had settled. That she had left certain of the other property in the possession of Mr. Davis, in her dwelling. This was also described, giving

the value of each article and the total value as $157, all of which had been paid for, she said, and it was included in the first bill purchased. That she had sold Mr. Davis, upon leaving Pine Bluff, $55 worth of the property, with the consent of appellant, who had written up a contract allowing Davis to make payments on this lot of furniture at $10 per month. She said it was understood that these payments would take care of all payments during her absence from the city, and that she had written appellant from each place she visited while away, and also gave the wife of Mr. Davis her address, so they would know where she was, if necessary. That she had written appellant from Arkansas City on September 16, 1925, that she was coming home as soon as possible, and asking him to take care of everything, and she would make it all right when she returned. When she returned she went to appellant to make payment on her furniture, and was told it had already been sold in October. She then visited his attorney, to ascertain what had been done, and made a demand for the property, and brought suit for its conversion. Stated that the aggregate amount of the first lot of furniture purchased was about $175; the first items did not amount to $366.50. She admitted signing the contracts for the purchase, in which the title was retained by the seller until paid for. It seems that the witness purchased about one-half of the first bill of goods before dinner on one day, and was given a pink slip therefor, and selected the rest of it later in the evening, signing the contract then for the entire purchase.

The proceedings in the municipal court in the case for repossession of the property were introduced in evidence, with the judgment rendered against H. B. Davis, the cause having been dismissed upon motion of the plaintiffs against appellee.

Appellant testified about the sale of the furniture to appellee, that she selected about one-half of the first bill one morning and the rest of it after 6 o'clock in the evening, when she was able to leave her work at the store.

The first bill amounted to $366.50, upon which she made a payment of $50, and signed the original contract for the whole amount upon its being delivered to her. The contract was dated March 24, 1923. Another contract for a small bill of goods, $14.25, was introduced in evidence, as were the other contracts for all goods purchased at different times by appellee. He stated that his ledger showed five different sales of furniture to appellee, two or three of them for small amounts, all of them amounting to $613.55; that she had paid thereon, including the $55 allowed as a credit for the furniture she let Davis have, $405, leaving a balance due of $208.55, which had never been paid.

The court instructed the jury, giving requested instruction No. 3, over appellant's objection, as follows:

"You are instructed that, while under a contract of conditional sales for a single chattel, or for a number of chattels sold for a lump sum, title will not pass between the vendor and vendee until full payment of the entire contract price, still, if, in the contract, there are separate and distinct articles upon which separate prices are fixed and agreed, such a contract is severable, and installments as paid shall be credited against the items shown on the contract in the order in which they appear, and title to said articles passes to the vendee as such payments fully pay the prices fixed against said articles." And also in instruction No. 4, allowing the jury to assess damages if they find the property had been converted, its value on the date of conversion, with interest, "together with such sum as you may find from the evidence was the reasonable rental value of the property so converted from the date of its conversion to this date."

The court also amended appellant's requested instruction No. 3, and gave it as amended, over his objection, striking out the last line, "and your verdict should be for the defendant," and inserted in lieu thereof, "damages for the taking of any property which had not been fully paid for"; and from the verdict on the judgment against him for $468.70 this appeal is prosecuted.

Wooldridge & Wooldridge, for appellant.

Rowell & Alexander, for appellee.

KIRBY, J., (after stating the facts). There is no dispute about the several purchases of furniture and furnishings, that they were made at different times, and a separate written contract, descriptive of the articles purchased and retaining the title thereto in the vendor until the purchase price was fully paid, was executed at the time of the purchase.

Appellant insists, first, for reversal, that the court erred in not holding the account for all the different purchases of furniture made a single account, as charged on appellant's ledger, and an entire contract of purchase, not severable or divisible, under which he had the right to repossess the property at any time so long as any part of the purchase price remained unpaid.

This contention cannot be sustained, however. There were, in fact, several purchases made at different times, and separate written contracts executed with each of such purchases, retaining the title in the vendor of the items described therein until payment in full of the purchase price. There is no expression in these different contracts tending to show any intention of the parties to make of the several purchases but one account or contract of purchase, notwithstanding the same reservation of title was made in each of them. Nor does any one separate purchase of such furniture furnish any consideration for another, so far as any definite expression of an intention of the parties to that effect is concerned. The different purchases of furniture and the written separate contracts therefor, neither furnishing any consideration for the other, cannot be regarded as an entire contract, as contended by appellant, but must be held, as they appear to be, separate contracts.

The court erred, however, in giving appellee's said instruction No. 3. In each of said contracts of conditional sale the title to all the property purchased and described therein was expressly retained until the full

payment of the entire amount of the purchase money, and notwithstanding the different articles purchased were included with the prices designated to be paid for each, the title to all the property described remained in the vendor so long as any part of the purchase money for the whole amount thereof remained unpaid.

The court also erred in giving appellee's requested instruction No. 4, allowing the jury to assess as damages, in addition to the value of the property converted at the time of the conversion, with interest, the rental value of the property converted from the date of the conversion. 8 R. C. L. 486, par. 47; *American Soda Fountain Co.* v. *Futrall,* 73 Ark. 464, 84 S. W. 505, 10 Am. St. Rep. 64; *Sonsee* v. *Jones & Green,* 157 Ark. 131, 248 S. W. 289; *Hudson* v. *Burton,* 158 Ark. 619, 250 S. W. 898.

For the errors designated the cause must be reversed, and remanded for a new trial. It is so ordered.

STEVENS v. HUBBARD.

Opinion delivered April 9, 1928.

1. JUDGMENT—CONSENT DECREE.—Where a case was submitted to an attorney by consent of the parties and the decree was prepared by such attorney in the chancellor's absence and was approved and adopted by the chancellor and regularly entered on the chancery records as a decree of the chancery court, such decree became a decree of the court as though the chancellor had heard the cause himself and rendered the decree entered of record.
2. JUDGMENT—VACATING DECREE AFTER TERM.—A decree prepared by an attorney to whom the case was submitted by the parties in the chancellor's absence and approved and adopted by the chancellor and entered as the chancellor's decree could not be vacated after the term in which the decree was rendered, where no grounds under Crawford & Moses' Dig., §§ 1316, 6290-6296, were alleged.
3. JUDGMENT—NUNC PRO TUNC ENTRY.—Where a cause was submitted to an attorney by consent of the parties on their motion in the absence of the regular chancellor, and the attorney prepared a decree which was approved and adopted by the regular chancellor, and entered on the records of the chancery court, such decree became the decree of the chancery court, and the court

erred in amending the record by a *nunc pro tunc* order to show that such purported decree was in fact rendered by the attorney assuming to act as special chancellor without authority.

Appeal from Poinsett Chancery Court; *T. A. McLin,* Special Chancellor; reversed.

J. S. Mosby, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

C. T. Carpenter, M. P. Watkins and *T. T. Mardis,* for appellee.

KIRBY, J. This appeal comes from a judgment sustaining a motion to vacate and a decree vacating the decree of the Poinsett Chancery Court foreclosing a vendor's lien on certain lands in said county. The motion was filed by appellees, the Hubbards, against whom the foreclosure decree was rendered, and by the sureties on the supersedeas bond given on appeal to the Supreme Court.

The appellants failed to file a transcript of the record in the Supreme Court within 90 days, as required, and it was dismissed on motion under Rule 7, at the cost of appellants and the sureties on the supersedeas bond.

None of the grounds provided in § 6290-6296, C. & M. Digest, for vacation of decrees after the expiration of the term, was alleged in the motion, which alleged that the case was heard in vacation before Hon. J. F. Gautney, in Craighead County, who was neither the regular nor a specially elected or qualified chancellor; that the decree was entered upon the records of the county without the sanction of or being signed by the regular chancellor, and was absolutely void. The death of Philip Bazenah, the judgment plaintiff, was alleged, and the appointment of A. Stevens as administrator of his estate, the appellant herein, and prayer was made for vacation of the judgment and a temporary restraining order.

Stevens, the administrator, filed a response, denying all the allegations of the motion, except the rendition of the decree and his appointment as administrator; alleged that the decree was rendered by consent of all

parties, indorsed and approved by the regular chancellor, and regularly entered of record, and that the defendants prayed an appeal to the Supreme Court and gave a supersedeas bond, and, failing to comply with Rule 7 of that court, the appeal was dismissed. It was further alleged that T. T. Mardis, one of the petitioners, had no interest in the cause, except that he signed the supersedeas bond in the cause on appeal, and was seeking to avoid liability thereon. By amendment he denied the jurisdiction of the court to pass on the motion, since none of the grounds for vacating a judgment after the expiration of the term, as provided by §§ 1316 and 6290, C. & M. Digest, were alleged in the petition; alleged further that the decree entered in the cause was the decree of the regular chancellor, Hon. J. M. Futrell, the original copy of which was attached, bearing the initials of the chancellor, authorizing the clerk to enter it of record. A copy of the supersedeas bond executed in the case on the first appeal was also attached.

It was further alleged that T. T. Mardis was the only solvent surety on the supersedeas bond; the dismissal of the appeal in the former case for failure to comply with Rule 7; that, because of the filing of the supersedeas bond, respondents had been precluded from collecting rents on land embraced in the decree to the amount of $750, which had been paid to A. R. Nichols, one of the defendants, and that the property had not been insured by defendants, and the house thereon had been destroyed by fire during the pendency of the appeal, at a further loss of $1,500, the cost of replacement, and that Mardis, under the terms of his bond, was bound to the payment of all rents and damages to the property during the appeal, and that the proceeding was but a collateral attack upon the decree regularly rendered in the cause, the validity of which cannot be inquired into by the court herein. Prayed for dismissal of the petition to vacate for want of equity, or, in the alternative, for judgment in the sum of $2,250, with interest from the date of the

supersedeas bond, and for damages to the property destroyed by fire.

Appellees then filed a motion for a *nunc pro tunc* order to correct the decree, alleging that the cause was heard by J. F. Gautney, by consent, in Craighead County, as special chancellor, on the 16th day of June, 1926, but the record in the case fails to disclose the fact, and it should be amended to speak the truth.

The testimony shows that the case was submitted to Hon. J. F. Gautney, an attorney at Jonesboro, by consent of the parties, on their own motion, the regular chancellor being absent engaged in a campaign for nomination to the office of Judge of the Supreme Court, was heard, findings made, and the suggested form of the decree prepared by Gautney, approved by the attorneys and given to the regular chancellor and approved, adopted and initialed by him as his decree in the case, and regularly entered upon the chancery records as the findings and decree of the chancellor.

There was no attempt made to elect or select Mr. Gautney as special chancellor, nor did he assume to act as such, but only agreed to examine the record, at the request of the attorneys of the parties, and make and suggest such findings and decree as should be rendered therein, all of which was adopted and approved by the regular chancellor, the suggested form of decree being ordered entered of record as made, and rendered in vacation by him. Such being the case, it became the decree of the chancery court as though rendered by the chancellor by consent of the parties, or on a regular hearing by him, as fully and completely as though the chancellor had heard the cause himself throughout and rendered the decree entered of record.

There was no allegation in the motion to vacate or any ground provided by the statute for vacation of decrees after the expiration of the term in which they were rendered. Nor was there any testimony introduced warranting the chancellor in holding that the form

of decree so adopted, approved and rendered by the regular chancellor and entered of record, was a decree attempted to be rendered in vacation by one not regularly elected as special chancellor, and was not the decree of the chancery court and entitled to all such credit or authority as though the cause had been regularly heard throughout by him.

It follows that the court erred in amending the record by a *nunc pro tunc* order to show that the purported decree was in fact rendered by an attorney assuming to act as special chancellor without authority, never having been regularly elected or selected as such special chancellor, and in not denying both the motion to vacate the decree and for the *nunc pro tunc* entry.

The decree is accordingly reversed, and the cause remanded with directions to deny both the petition for vacation of the judgment and the motion for a *nunc pro tunc* order to correct the record of the judgment.

Justices WOOD, SMITH and MEHAFFY dissent.

JONES v. DOWELL.

Opinion delivered April 9, 1928.

1. MORTGAGES—INTENTION OF PARTIES.—In order to ascertain whether a mortgage secures an indebtedness other than the note specifically described therein, it is proper to consider the entire mortgage.
2. MORTGAGES—INDEBTEDNESS SECURED.—A mortgage given to secure the payment of a note and providing for the payment of other indebtedness due to the mortgagee secured both the note and the debt for any other advances.
3. PAYMENT—APPROPRIATION.—Where a debtor made payment to his creditor several days before a note was due, and neither party made application of such payment, the law applied it to the payment of a debt then due, and not to the note which was not due.
4. PAYMENT—APPLICATION.—A payment on a note made after it was due should be applied first to the payment of interest.
5. MORTGAGES—SALE BY SUBSTITUTED TRUSTEE.—Where a deed of trust provided that if the trustee was incapacitated by absence or

other cause, another trustee might be appointed, a sale by a substituted trustee in the absence of the trustee was valid.

6. APPEAL AND ERROR—QUESTION NOT CONSIDERED BELOW.—In an action involving an adverse claim to land, a contention that sale under a deed of trust was void for lack of appraisement will not be considered on appeal when it was not raised in the trial court.

7. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—The chancellor's finding of facts will not be set aside on appeal unless against the preponderance of the evidence.

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

B. L. Beasley, for appellant.

DuVal L. Purkins, for appellee.

MEHAFFY, J. This action was begun in the Bradley Circuit Court by plaintiffs, who are appellants here. Plaintiffs alleged that they were the owners and entitled to the possession of the lands described in their complaint; that the defendants were in the actual possession of said lands under some claim unknown to the plaintiffs, and refused to give possession. Plaintiffs claimed under B. J. Lewis, who had purchased said lands from the Rock Island Townsite Company. There was no dispute about the title of B. J. Lewis. Plaintiffs are the only heirs of B. J. Lewis. They allege that defendants were in the wrongful possession of said lands, and refused to deliver possession to the plaintiffs.

Defendants filed answer and motion to transfer to equity. The motion to transfer to equity was granted by the court, over the objections of plaintiffs. Defendants admitted they were in possession of the lands in controversy, and alleged that J. P. Lansdale advanced the money to B. J. Lewis to purchase said lands. That B. J. Lewis and his wife, who is now Mary Lewis Sanders, made a note and mortgage or deed of trust to secure the payment of the indebtedness due to Lansdale. R. W. Carnley was named as trustee in the deed of trust. That H. C. Johnson was substituted as trustee in place of R. W. Carnley. After B. J. Lewis died, the debt to Lansdale not having been paid, H. C. Johnson, substituted

trustee, advertised and sold the land in controversy under the power of sale contained in the deed of trust, and F. R. Dowell became the purchaser. The evidence shows the execution of the note and deed of trust, the sale under the power of sale contained in the mortgage, and it also shows the indebtedness existing at the time of the sale. Plaintiffs moved to transfer the case back to the circuit court, which motion was overruled.

Counsel for appellants state that there is only one question involved, and that is whether the attempted foreclosure sale is valid or void. The lower court held that it was valid, and to reverse that decree plaintiffs prosecute this appeal.

Lewis was indebted to Lansdale, in addition to the note, for supplies furnished. And it is first contended by appellants that the deed of trust was given for the purpose of securing the note for $300 due December 15, 1918, and that nothing whatever was said about future advances in the deed of trust, and that therefore the mortgage was not intended to secure the payment of any debt other than the $300 note. The mortgage or deed of trust covered not only the 15 acres involved in this suit, but also block 52 in the town of Hermitage, some live stock, and the entire crop of cotton and corn to be grown during the year 1918 in Bradley County by the mortgagors. And the mortgage contained the following: "This sale is on condition that, whereas we are justly indebted to J. P. Lansdale in the sum of $300, evidenced by our note of even date, due and payable on December 15, 1918, and bearing 10 per cent. interest from date until fully paid, and have agreed to pay all taxes assigned against the property and to keep the premises insured."

And it also contains the following: "Now if we shall pay said moneys at the time and in the manner aforesaid, and all other indebtedness which may be due said J. P. Lansdale, and all taxes and insurance, then the above conveyance shall be null and void, else to remain in full force."

The deed of trust then contains the power of sale.

In order to ascertain the intention of the parties in the mortgage and whether or not any indebtedness is secured by said mortgage other than the $300 note, it is proper to consider the entire mortgage. This court has frequently held that each case calls for an interpretation of the language of the mortgage, so as to determine whether the description falls within the rule announced. That is, within the rule adopted by this court. See *Patterson* v. *Ogles,* 152 Ark. 395, 238 S. W. 598, and cases there cited.

We think, under a proper construction of the mortgage, it secures the debt for advances made as well as the $300 note mentioned. The 15 acres of land only was sold under the power of sale in the mortgage. The mortgage included, as we have said, block 52 in the town of Hermitage, some live stock, and the entire crop raised by the mortgagors, and provided for the payment of all other indebtedness and taxes and insurance. But whether it included the advances or not appears to be immaterial in this case.

Appellant argues that, when you apply the rule as to the application of payments, the note secured by the mortgage would be paid and whatever indebtedness there was in addition to that would not be secured by the mortgage, and therefore the mortgagee would have no right to sell. The first payment of $250.70 was made before the note was due, and the rule with reference to application of payments, if neither the debtor nor creditor made any application, would require this payment to be applied to a debt that was due rather than to the note which was not due. In fact, the creditor would not have had the right to apply this payment, which was made before the maturity of the note, to a debt not due.

The rule is stated in Cyc. to be that the law will apply the payment to a debt that has matured rather than one not yet due. 30 Cyc. 1242.

Again it is said: "Except where equitable principles require a different disposition thereof, or where a

different application has been made by the parties themselves, it is a well-settled rule that a payment should be applied by the court to the oldest debt, where there is more than one debt. That is, the debt first becoming due." 30 Cyc. 1243.

It is also held by many courts that the oldest debt means the first debt due, and not the first debt contracted. Numerous cases are cited under the above section of Cyc.

The following is a note in 30 Cyc. 1244: "Where several notes have been given at the same time by the same person and payable to the same party, but falling due at different times, partial payments made by the debtor to the creditor when the notes are all due will be applied to the payment of principal and interest of the note first due, and so on in this order until the last note is paid."

In this case we have the payment made some days before the note is due, and, as neither party made any application of the payment, the law applies it to the payment of the debt due and not to the note which was not yet due.

Another rule well settled is that even a payment that was thereafter made, if it applied to the note, would go first to the payment of interest.

"As to the appropriation of payments, there is no proof that the right of appropriation was exercised by either party at the time the payments were made, and the court below found that they were made generally, and appropriated them according to priority, the first payment to the first items on the accounts between the parties, which was the rule approved in *Kline* v. *Ragland,* 47 Ark. 111, 14 S. W. 474, where it is held that "when, in the absence of appropriation by a debtor, the creditor appropriates payments from him to a running account, the law will apply them to the items of the account in the order of their dates." Citing *Price* v. *Dowdy,* 34 Ark. 285; and continuing, the court said: "The latter case says, 'a different agreement may be shown by evidence'." *Lazarus* v. *Freidheim,* 51 Ark. 371, 11 S. W. 518.

The court in the above case holds that they are paid according to the priority. As we have already shown, however, that means of debts that are due. The creditor would have no right and the law would not apply a payment to a debt that was not due rather than to a debt that was due.

"The right of a creditor to make application of payments to one of several debts owing from the debtor applies only to those that are then due, and does not apply at all when the debtor himself makes the appropriation." *Gates Bros.* v. *Burkett,* 44 Ark. 90.

Applying the payments that were made according to these rules, the first payment that was made would have to go to the payments other than the $300 note, because it was not due. Subsequent payments, even if they were applied to the note, would be applied first to interest; so that it would make but little difference in the result whether the deed of trust secured the payment of the accounts or not.

Appellants next contend that the substituted trustee was without authority to act in the attempted foreclosure sale, and calls attention to *Stallings* v. *Thomas,* 55 Ark. 326, 18 S. W. 184. It appears from the quotation that the deed of trust in that case provided that the beneficiary might substitute another trustee in case the trustee named in the deed fails or refuses to execute, and the court held that, since he had never been asked to make the sale, it could not be held that he had failed or refused to execute it. But in the case at bar the deed of trust provided that, if the trustee was incapacitated by sickness, absence, death or any other cause, a trustee might be substituted, and the undisputed proof shows that the trustee, Carnley, was absent, and, that being true, the beneficiary had a right to substitute Dowell.

It is next contended by appellant that the sale is void because there was no appraisement. The record does not show whether there was an appraisement or not, and this was not an issue in the court below, and there-

fore cannot be considered here. And of course, if the sale is valid, as held by the court below, this is a complete answer to appellants' next contention, that Dowell was holding as mortgagee in possession.

It is argued also that the 15 acres of land involved in this controversy was the homestead of B. J. Lewis and his family, and that some of his heirs are minors. If the sale was valid under the power of sale in the mortgage it would be unimportant whether it was a homestead or not; but the undisputed proof shows that the mortgage included the 15 acres involved in this suit, and this tract of land was described by metes and bounds in the mortgage, and the mortgage provides that, in addition to that, block 52 in the town of Hermitage is mortgaged. Block 52 may or may not be contiguous to the 15 acres. If it were not, of course the 15 acres would not be a part of the homestead. If it were contiguous, it would then depend upon the value as to how much could be claimed as a homestead. But the undisputed proof shows that the homestead, block 52, was included, but that Lansdale would not sell that, and told the widow of B. J. Lewis that he would not sell it, and it is therefore not involved in this suit.

As to whether the deed of trust had been correctly satisfied was a question of fact to be determined by the court, and, even if it had been satisfied on the record through mistake and the debt had not been paid, such satisfaction would not prevent a sale of the property to collect the debt. But all of the facts were determined by the chancellor, and we could not reverse on that unless we could say that his finding was against the preponderance of the evidence.

Our conclusion is that the decree of the chancery court is correct, and it is therefore affirmed.

CROW v. FONES BROTHERS HARDWARE COMPANY.

Opinion delivered April 9, 1928.

1. SALES—IMPLIED WARRANTY.—In a sale of manufactured goods, where there is no opportunity for inspection by the purchaser, there is an implied warranty that the articles are merchantable and reasonably fit for the purpose for which they are intended.
2. SALES—IMPLIED WARRANTY.—The rule as to the implied warranty of merchantability and fitness for purpose intended does not apply where the purchaser demands a specified article and it is shipped by the seller direct from the manufacturer to the purchaser.
3. SALES—IMPLIED WARRANTY.—Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

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

D. T. Cotton and *Watkins & Pate,* for appellant.

Owens & Ehrman and *Pryor, Miles & Pryor,* for appellee.

MEHAFFY, J. Plaintiff, a resident of Van Buren County, Arkansas, 38 years of age, brought suit in the Pulaski Circuit Court against Fones Brothers Hardware Company, a corporation organized and doing business under the laws of the State of Arkansas, and engaged in the business of selling hardware and other commodities in the city of Little Rock. Among other things it sells fuse, which is used in lighting and exploding dynamite and powder.

The plaintiff, on the 3d day of August, 1926, was in the employ of the Highway Department of Arkansas, and his principal duty was to use dynamite in clearing highways of obstructions. He was, on the date mentioned, at work on road number 65, in Van Buren County, Arkansas, blowing stumps and rocks from the right-of-way. He cut a piece of fuse eighteen or twenty inches in length, to which he attached a cap, and to which was also attached

dynamite, and this was placed where the obstruction was necessary to be removed. He was using Clover Leaf Brand of fuse, which was manufactured by the Ensign-Bickford Company of Simsbury, Connecticut, and had been using the same brand of fuse for quite a while, and it had a burning speed of one foot to each minute after it was lighted. At the time mentioned in plaintiff's complaint he cut the fuse eighteen or twenty inches in length, attached the cap and dynamite in the usual manner, using care, prudence and caution, lighted the fuse, expecting that it would require a minute and a half before the explosion, and this would have given him time to walk to a place of safety. But, when he lighted the fuse, it exploded instantly, causing him to lose the sight of one of his eyes and impair the sight of the other so that he is practically blind, and he suffered other injuries on the head, face and body.

The fuse he was using was furnished to him by the State Highway Department, and he alleged that the Highway Department had purchased it from Fones Brothers Hardware Company. It is alleged that Fones Brothers Hardware Company knew the fuse was to be used in blowing stumps and obstructions from highways and that a slow-burning fuse was necessary; that, in selling the same to the Highway Department, the seller impliedly warranted that the fuse was a slow-burning fuse and fit and suitable for the purposes for which it was purchased and to be used, and, by reason of its failure to furnish this character of fuse, it is liable to plaintiff for the injury which occurred, resulting in his damages.

The defendant answered, denying the material allegations in the complaint.

After hearing the evidence, the court below directed a verdict for the defendant. Plaintiff filed a motion for a new trial, which was overruled, and exceptions saved, and the plaintiff duly prosecuted his appeal to this court.

The evidence on the part of the plaintiff tends to show that he was working for the Highway Department,

and was using explosives, and had attached to the dynamite a fuse about eighteen or twenty inches in length. He put the dynamite, fuse and cap in the hole in the usual way, and stuck a match to the end of the fuse, and it exploded immediately, within a couple of seconds, injuring his eyes, destroying one of them, and almost destroying the other. He was also injured about the neck, and his flesh was burned. He had been at work for the Highway Department about ten or twelve months; had been handling powder on county roads for about eighteen years. At the time of the accident he was using Clover Leaf Brand of fuse, and had not used any other brand of fuse during his employment with the Highway Department. He had tested this brand of fuse, and found that it ranged from 45 to 60 seconds to the foot. That is, it would take from 45 to 60 seconds for a foot of said fuse to burn after being lighted. If this fuse had burned in the usual way he could have been in a place of safety before the explosion. He put in numerous shots, and this is the only accident he ever had. The explosion was instantaneous when he lighted the fuse. Before this accident his health was good. He had used Hercules and Dupont powder. The dynamite that he used at the time of the accident did not seem to explode quite as quickly as the Hercules or Dupont. The Highway Department furnished the dynamite and the fuse. Plaintiff had made tests as to the burning speed of fuse several times before the accident, and it ranged from 45 to 60 seconds to burn a foot. He got the fuse from the Highway Department, but does not know where the Highway Department got it. He was using the same kind of dynamite that he had been using during his employment with the Highway Department, and he prepared his shot according to the instructions that accompanied the dynamite box and fuse, and fixed it just like he had been preparing his other shots.

Other witnesses testified to seeing the accident, and to the effect that the explosion occurred immediately after the fuse was lighted. And they testified to sub-

stantially the same facts with reference to the accident as was testified to by the plaintiff.

Testimony also showed that the method of ordering material of this kind was that the foreman or man working a section made requisitions on the Little Rock office for materials, and the purchasing department would either ship the material or authorize him to purchase it locally. The shipments of dynamite and fuse were largely from Little Rock, from the State warehouse. The fuse used at the time of the accident was bought from Fones Brothers Hardware Company. They began to use the fuse from Fones Brothers Hardware Company about the first of September, 1925, and had bought fuse from no other jobber since that time. They had always bought the Clover Leaf Brand. When they ordered from Fones Brothers Company they expected them to send them the Clover Leaf Brand.

A witness identified the bill of lading, and testified that on April 12, 1926, the Hercules Powder Company delivered about 30,000 feet of Clover Leaf fuse, and witness signed for it on that date. The shipment was delivered on account of Fones Brothers Hardware Company. He receipted for it in the warehouse of the Highway Department. When the requisition was received from Van Buren County, the Highway Department sent the Clover Leaf Brand. This fuse had been placed in the warehouse April 5 by the Hercules Powder Company, for the account of Fones Brothers Hardware Company. There was no other fuse in the warehouse except the Clover Leaf Brand. A slip or billing on the package showed that the package was shipped through the Fones Brothers Hardware Company of Little Rock.

The appellant insists on a reversal of the judgment, contending that there was an implied warranty by Fones Brothers Hardware Company that the fuse that it sold to the State Highway Department, and which caused the injury complained of, was suitable for the purposes for which it was ordered.

The first case to which appellant calls attention is the case of *Neel* v. *West-Winfree Tobacco Company,* 142 Ark. 505, 219 S. W. 326, and quotes from the syllabus as follows:

"In a sale of manufactured goods, where there is no opportunity for inspection by the purchaser, there is an implied warranty that the articles are merchantable and reasonably fit for the purpose for which they are intended."

We think the above statement of the law is correct, especially where the manufacturer of goods makes a sale to a person who has no opportunity to inspect, or where a dealer has the goods in his possession with the opportunity to inspect and the buyer has no opportunity to inspect same, and purchases relying on the seller's judgment or information and the fact that the seller had the opportunity to know about the quality of the goods. But the above statement is not the rule where the purchaser demands a specified article and it is shipped direct from the manufacturer to the purchaser. In the instant case the Highway Department specified the article it wanted; it purchased the Clover Leaf Brand of fuse. This was a brand that the Highway Department had been using for quite a while, and this particular brand was bought through Fones Brothers Hardware Company. It was not manufactured by appellee, and the particular fuse about which complaint is made was never in the possession of the appellee, but it was delivered direct to the purchaser, the Highway Department, by the Hercules Powder Company. The purchaser would doubtless have refused to accept any other brand. It knew as much about the quality of the goods as the appellee knew. In the particular instance neither had any opportunity to inspect.

"Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually sup-

plied, there is no warranty that it shall answer the particular purpose intended by the buyer." Williston on Sales, second edition, 229.

There would be no reason for the seller to be bound by an implied warranty when the buyer described particularly the kind of article it wanted to purchase and the manufacturer sent that particular article. It might not be suitable for the use intended by the purchaser, but the seller would certainly have a right to assume that, when the purchaser described the article, called for a particular kind, that was the kind desired. The purchaser had been using this kind of fuse, knew as much about it as the appellee knew, it was never in the possession of the appellee, it had no opportunity to examine it, and could not have known any more about it than the appellant, and there was therefore no reason for an implied warranty.

Appellant next calls attention to *Main* v. *Dearing*, 73 Ark. 470, 84 S. W. 640. In that case the court stated:

"Ordinarily the law implies no warranty of quality, leaving that a matter of contract between parties, but there is an exception to this rule as thoroughly recognized as the rule itself. When a manufacturer offers his goods for sale, where the opportunity of inspection is not present before the purchase, the vendee necessarily relies on his knowledge of his own manufacture. In such cases the law implies a warranty that the article shall be merchantable and reasonably fit for the purpose for which it was intended."

It will be noticed that the court said, in the last case, that the purchaser had no opportunity to inspect, and that he necessarily relied on the knowledge of the manufacturer as to his own goods. The manufacturer, of course, would know, would have an opportunity to inspect and ascertain whether the goods were suitable, but we have no such case here; Fones Brothers Company never had an opportunity to see or inspect the goods complained about at any time. The goods were never in

its possession, and the vendee could not have relied on the knowledge of Fones Brothers Hardware Company. It could not do that, because Fones Brothers Company never had the goods in its possession. One of the reasons why a dealer is held on an implied warranty is that the purchaser has no opportunity of inspection, and he is therefore entitled to rely and will naturally be presumed to have relied on the seller's skill and judgment. But, as to the particular goods sold in this case, the purchaser could not have relied on any implied warranty, because he bought the goods by description, called for a particular brand which the Fones Brothers Hardware Company did not have in stock, and did not see or inspect, and hence could not have known anything about the character of the goods, certainly could not have known any more than the purchaser. It would be unreasonable to say that the Fones Brothers Hardware Company, who had no opportunity to see the goods, had any superior skill or knowledge, and of course the purchaser did not rely and would not have been justified in relying on any implied warranty of Fones Brothers, under the circumstances in this case.

"Even though inspection would not reveal the defect in the goods, it is possible for the buyer to select them, relying upon his own judgment, and, if he does this, the seller, at least in the absence of guilty knowledge, will not be liable on an implied warranty." Williston on Sales, 2 edition, § 235.

"The rule excluding implication of warranties in sales of known, described and definite articles, is simply an application of the general principle stated in both statutes, that reliance on the seller's skill and judgment is a prerequisite to the imposition of an obligation upon him." Williston on Sales, 2 edition, § 236A.

Appellant next calls attention to the case of *Hercules Powder Company* v. *Rich* (C. C. A.), 3 F. (2d.), 12, and quotes from that opinion. In that opinion it is stated that the plaintiff, testifying to his conversation with

Bailey, said: "I asked the kind of fuse that I would get. He said he would give me safety fuse. I told him that I couldn't use anything except slow-burning safety fuse with a minute per foot. He says, 'That is what I will ship.' * * * So he sold me 500 caps, blasting caps, 500 electric globe caps that is to be used with a powder with which we connect the wire, regular 'B' caps; that is, the blasting caps supposed to be used by fuse of various kinds and touching off by fire. I told Mr. Bailey that I couldn't use anything except the slow-burning fuse of a burning speed of a minute per foot. He says 'That is what you will get.' "

There is no such evidence in the case at bar.

J. D. McGlathery testified in substance as follows: That the fuse that appellant, Crow, was using at the time of the accident came from the State Highway Department, shipped through Fones Brothers Hardware Company of Little Rock, Arkansas, and was consigned to L. B. McGlathery, at Shirley, Arkansas. When the shipment of fuse arrived at Shirley the witness carried it out to road No. 65 and placed it in the shop building for use. This shipment of fuse was delivered at Shirley, Arkansas, on the 26th day of May, 1926.

Vanderberg testified that when McGlathery, county superintendent, made the requisitions on him for fuse, he sent him Clover Leaf Brand. That the fuse he sent McGlathery was placed in the warehouse on April 12 by the Hercules Powder Company for the account of Fones Brothers Hardware Company. He did not have any other fuse in the warehouse but the Clover Leaf Brand, and from the time he became connected with the Highway Department he had no other brand of fuse except the Clover Leaf Brand. Vanderberg was the storekeeper for the Highway Department, and he shows that this fuse was delivered by the Hercules Powder Company, that it was the Clover Leaf Brand, and that, while it was delivered for the account of the Fones Brothers Hardware Company, it was delivered by the

Hercules Powder Company direct to the warehouse of the Highway Department.

The court said in the Hercules Powder Company case, above referred to:

"If the jury believed the testimony of plaintiff, they were warranted in finding that the party selling the fuse —one Bailey—was fully cognizant of the purpose for which it was intended; that plaintiff told him he could not use anything except a fuse of a burning speed of a minute per foot, and that Bailey assured him that was what would be shipped; that such statement was not one merely of an opinion, but was a distinct affirmation of a fact and intended to influence the sale, and that plaintiff relied on such affirmation in making the purchase. Hence that the words, if used, constituted a warranty."

We have no such testimony in this case. Fones Brothers made no promise at all, and, as a matter of fact, knew less about what was wanted than the purchaser. Fones Brothers Hardware Company was not the seller in the sense that they had the goods in store and made a sale direct, but the order was given, sent to the Hercules Powder Company for a particular brand of fuse, and that brand was delivered by the powder company to the purchaser direct.

In the Hercules Powder Company case referred to, the fuses complained of were sent to the branch office at Little Rock for the purpose of sale. Bailey was the agent in charge of the branch office, and engaged in selling the goods of the defendant, that is, the Hercules Powder Company. The fuses in question in the Hercules Powder Company case were sent to the agency in Arkansas for the purpose of being sold in the business of the agency. The goods in the instant case were not sent to Fones Brothers Hardware Company to be sold. Bailey was the agent of the Hercules Powder Company, and the court held that he had authority to make warranties. In view of his handling fuses of different burning periods, it was said that nothing could be more natural, less out

of the ordinary, than to have the authority as such general sales agent to make warranties of a reasonable period for the fuses to burn. He could not otherwise have made the sales.

It was also said in the Hercules Powder Company case, quoting from Benjamin on Sales:

"But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given. * * * When one contracts to supply an article in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the vendor, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied; and the better doctrine is that this rule applies to dealers as well as to manufacturers, and not to manufacturers alone, as the plaintiff in error contends."

But, as we have already said, there was nothing done at any time, so far as this record shows, by the Fones Brothers Hardware Company that would justify the buyer in believing that Fones Brothers Hardware Company knew anything about the goods or that would justify the buyer in relying on the superior judgment and skill of the Fones Brothers Hardware Company. If a manufacturer or dealer sells an article of this character, and knows the use for which it is intended, the weight of authority is that there is an implied warranty that the goods are suitable for such use, and also that the dealer as well as the manufacturer may be bound by an implied warranty. However, we know of no case where a shipment was made direct from the factory, and buyer described the goods that he wanted, that another would be held liable on an implied warranty simply because the goods were shipped through it.

Appellee discusses the question of whether there could be any liability in this case because the sale was

not made to the injured party, and that the dealer is not liable to any persons other than the persons to whom the sales are made. But it is unnecessary to decide that question in this case, because we hold that, under the circumstances and evidence in this case, the Fones Brothers Hardware Company could not be liable in any event, even to the buyer himself.

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

BOONE v. STATE.

Opinion delivered April 9, 1928.

1. CRIMINAL LAW—DISCRETION AS TO POSTPONEMENT.—In a prosecution for murder where the State's witness, present with defendant at the time of the killing, was permitted to testify in rebuttal, and, after several witnesses testified in surrebuttal, defendant moved that the court adjourn until morning, it then being 20 minutes of midnight, in order that the State's witness might be impeached, *held* it was not an abuse of discretion not to permit the case to remain open for further testimony, or in refusing to open the case next morning, where, even though the witness were impeached, it would still leave sufficient testimony unimpeached, so that an exclusion of impeaching testimony was not prejudicial.
2. CONSPIRACY—UNLAWFUL COMBINATION.—The general rule is that where persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in a criminal result, though not the particular result meant, all are liable.
3. CONSPIRACY—PURPOSE TO COMMIT FELONY.—In a prosecution for murder, going out on the highway to start a difficulty, while armed with a shotgun and a butcher knife, *held* evidence of a purpose to commit a felony.

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

H. L. Veazey, for appellant.

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

McHANEY, J. Appellant was indicted, charged with murder in the first degree for the killing of one Harold

Robin. He was convicted of murder in the second degree, and sentenced to eighteen years in the penitentiary, and has appealed to this court to reverse the judgment and sentence against him.

This is a companion case to that of *Tracy Sanderlin* v. *State,* recently decided by this court, *ante* p. 217. The facts in this case are substantially the same as they were in that case, and we will not repeat them here. The facts show that the deceased was killed by being cut or stabbed with a knife held by Sanderlin, and appellant was indicted and convicted on the theory that he was present, aiding and abetting Sanderlin in such act. One Ed Lane is also under indictment charged with the same offense as that against appellant, but at the time of this trial he was in jail awaiting trial.

After the defense had rested, the State put Ed Lane on as a rebuttal witness, but it does not appear whose testimony his was supposed to rebut. He testified that he was with appellant and Tracy Sanderlin at the dance the night Harold Robin met his death, and that they came from the dance back to Monticello, to Jesse Boone's cafe, to which appellant had the keys, where he ate a bowl of soup; that appellant went up to the front of the restaurant and picked up a shotgun, and that Sanderlin picked up a bread knife or a butcher knife, put it up his sleeve, and that they all went back out the Wilmar road, and had the difficulty which resulted in Robin's death. Lane had not testified in the Sanderlin case, but was awaiting in jail on the charge against him, and was called out of jail by the State and used as a rebuttal witness. This was about 11:30 at night. After four witnesses for appellant had testified in surrebuttal, the following took place:

"Mr. Harris: At this point, twenty minutes to twelve o'clock—twenty minutes of midnight—and court having been in session since nine o'clock this morning, and the last witness placed on the stand by the State in rebuttal being a surprise witness to us, I would like to

ask the court to adjourn until in the morning, so we will be able to meet the proof which has been made by the State by putting on some witnesses to prove that they would not believe the witness Lane on oath. By the court: The court overrules the motion of the defendant, and holds that the defendant ought to have anticipated the introduction of this witness, and the court rules that the testimony must close tonight. Mr. Harris: The defendant states that they did not anticipate it, and would like to have until nine o'clock in the morning to impeach him—to prove that they would not believe him on oath. By the court: You can do that. You ought to have had those witnesses, but if you have not them now, the court holds that this case must close tonight, that is, the testimony. To which ruling and action of the court in refusing to grant defendant's motion to adjourn until morning the defendant at the time objected, his objections being overruled, he at the time saved his separate and several exceptions. Defendant rests. State rests.

"Note: On the morning of October 12, 1927, at the opening of court on the morning following the taking of the testimony, the defendant moved the court to be permitted to introduce witnesses to impeach the testimony of the witness Ed Lane, introduced in rebuttal on the part of the State, and offers the witness George Campster and offers to ask the following questions: Q. Do you know the general reputation of Ed Lane in the community in which he lives for truth and morality? A. (Expected answer). I do. Q. Is that reputation good or bad? A. (Expected answer). Bad. Q. Basing your answer upon his general reputation in a matter in which he is interested, would you believe him on oath? A. (Expected answer). I would not. By the court: The court refused to permit the witness to be introduced, and refused to let him testify, to which ruling and action of the court in refusing the request of the defendant the defendant objected; his objection being overruled, he at the time saved his separate and several exceptions.

"Thereupon the defendant offered to introduce the witnesses George Fish, Elmo Lawson, and E. G. Jeffcoat, whom they offered to ask the same questions and expected the same answers as shown on the preceding page, where it shows the questions to be asked of the witness George Campster and his expected answers. The court refused to permit the defendant to introduce the above witnesses, George Fish, Elmo Lawson and E. G. Jeffcoat, to which ruling and action of the court in so doing the defendant at the time objected; his objection being overruled, he at the time saved his separate and several exceptions."

This is the first error assigned by appellant for reversal.

It is urged that the court abused its discretion in refusing to permit the case to remain open until the next morning to enable the defendant to secure the witnesses named, and to have them testify to the bad reputation of the witness named, and to the fact that they would not believe him on oath. A majority of the court is of the opinion that the court did not abuse its discretion in refusing to permit the case to remain open for further testimony until the following morning, or in refusing to reopen the case the next morning to permit witnesses to testify in this regard. Appellant himself testified that he secured the gun and put it into the car, and the witness Miss Gertrude Lassiter testified that she saw Tracy Sanderlin with a large knife, something like a butcher knife, in his hand, but did not see him when he stabbed or cut Robin. Therefore, even though appellant had been permitted to impeach Ed Lane's testimony in the manner sought, still it would leave his own admission of having put the gun in the car, and the testimony of Gertrude Lassiter as to the knife, unimpeached. Hence its exclusion was not prejudicial. Mr. Justice WOOD, Mr. Justice SMITH and the writer of this opinion do not agree with the conclusion reached by the majority.

The next assignment of error is that the court erred in giving instruction No. 11 on behalf of the State. It is as follows:

"The court instructs the jury that, if you find from the evidence that Tracy Sanderlin, Ed Lane and Basil Boone, being in a car, stopped the same on the highway with the common intent to obstruct the same, and did obstruct the road for the common purpose of stopping any person traveling thereon, in order that they might raise a difficulty with such person; and by reason of such common conduct on their part an altercation arose, in which Harold Robin was cut and killed by either one of the three, the defendant, Basil Boone, being present, aiding and abetting in the acts and conduct aforesaid of his companions, then each of the three would be guilty of an unlawful homicide in some degree; and if the fatal injury was inflicted upon Robin with malice aforethought, but without premeditation or deliberation, then the defendant would be guilty of murder in the second degree; and if the fatal injury was inflicted on Robin with malice aforethought and after premeditation and deliberation, by either one of the three, then the defendant, Basil Boone, would be guilty of murder in the first degree."

It is objected to on the ground that it makes a common intent to commit a misdemeanor the plan itself for the commission of a felony, whereas the common plan must have been to commit a felony. We do not think the instruction is open to this objection.

The general rule is that, where persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in a criminal result, though not the particular result meant, all are liable. Thus, in *Carr* v. *State,* 43 Ark. 99-106, the lower court had given the following instruction:

"If the defendant was jointly with others assembled together in the commission of a trespass, or perpetration of a crime, and one or more did a criminal thing in

no way connected with the joint understanding, the defendant is not liable."

Criticising this declaration, the court quoted with approval from Bishop on Crim. Law, § 636, as follows:

"A man may be guilty of a wrong which he did not specifically intend, if it came naturally, or even accidentally, from some other specific, or a general, evil purpose. When therefore persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminate in a criminal result, though not the particular result meant, all are liable."

We do not think the instruction is subject to the criticism that it makes the common plan to commit a misdemeanor the foundation for a conviction of a felony. As the language of the instruction, "stopped the same on the highway with the common intent to obstruct the same, and did obstruct the road for the common purpose of stopping any person traveling thereon, in order that they might raise a difficulty with such person." Raising a difficulty with some person might or might not be a misdemeanor, but going out to start a difficulty, armed with a shotgun and a butcher knife, is some evidence of a purpose to commit a felony. It depends upon what kind of a difficulty was raised.

What we have said with reference to this instruction also disposes of appellant's contention that the court erred in refusing to give his requested instruction No. 10.

It is also urged in this case that the court erred in refusing to instruct the jury on manslaughter, as requested by him. We held in the Sanderlin case that the evidence there did not justify an instruction on manslaughter. We have examined the record here and fail to find any additional evidence which would have justified the requested instruction.

No errors appearing, the judgment is affirmed.

SCOGIN v. SCOGIN.

Opinion delivered April 9, 1928.

1. TRUSTS—PAROL EVIDENCE.—Under Crawford & Moses' Dig., § 1497, providing that all deeds shall be construed to convey a complete estate of inheritance in fee simple, unless expressly limited by appropriate words in such deeds, a deed absolute on its face cannot be shown by parol testimony to have been in trust for the benefit of the grantor, in the absence of fraud, accident, or mistake or of a fiduciary relation existing between the parties.
2. TRUSTS—EXECUTION OF DEED UNDER MISTAKE OF LAW.—Where a deed executed by husband and wife was absolute on its face, the wife claiming to be the owner of property, and that she executed the deed to satisfy the fears of the grantees that they might outlive her, and through the mistaken belief that the property would be hers, notwithstanding the deed, because of her husband's representations, the wife could not establish a resulting trust in the property, unless the testimony in support of a mistake of law was clear, unequivocal and convincing.

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

B. L. Beasley, for appellant.

DuVal L. Purkins, for appellee.

McHANEY, J. Appellants are the collateral heirs of Josiah H. Scogin, who died intestate and without issue, in Warren, Arkansas, and appellee is the widow of James H. Scogin, a brother of Josiah Scogin.

On March 1, 1909, Josiah H. Scogin purchased the land in controversy from C. S. Thompson, and took the title thereto in the name of his brother, James H. Scogin. It is contended by appellants that Josiah borrowed $200 from his brother, James, and had the deed made to him as security therefor. The consideration recited in the deed is $200. It is the contention of appellee that she furnished the money with which to buy the land and build the house, in the sum of $1,100, and that the title was taken in the name of her husband because of this fact; that, having furnished all the money that went into the property, her husband held the naked legal title thereto in trust for her. On August 10, 1917, appellee and her

husband, James H. Scogin, executed and delivered to Josiah H. Scogin their warranty deed, conveying said land to him, which recited a consideration of $200 cash in hand paid by Josiah H. Scogin. Josiah and his sister, Mrs. Mary Martin, lived together in Warren, and occupied the house and premises in controversy up to the death of Josiah, which occurred in 1923.

Appellants contend that this latter deed is corroborative of their contention that Josiah had borrowed $200 from his brother, James, had paid it back, and that the deed of August 10, 1917, was executed because such indebtedness had been paid. On the other hand, appellee contends that this deed was wholly without consideration, and executed by her and her husband at the earnest solicitation of Mrs. Mary Martin, who feared that appellee and her husband might predecease herself and brother Josiah, and that the collateral heirs might take the property away from them and deprive them of a home. She further contends that she did not understand the effect of this latter deed, and that she joined with her husband in executing it, not knowing that it would deprive her of her beneficial interest therein; that it was executed by reason of a mutual mistake of the parties as to the significance and effect thereof; that none of them intended that appellee, who had furnished the money, should be deprived of the fee in the land.

The case was submitted to the chancellor on conflicting evidence. We do not think it would serve any useful purpose to set out this testimony. The chancellor found that the appellee had furnished all the money for the purchase and improvement of the property, and that the title was taken in her husband and held in trust by him for her; that the second deed was made at the insistence of Josiah and Mrs. Martin, not with any desire to defeat appellee's superior rights in the premises, but sprang from a fear that they might outlive her; that Josiah Scogin, by virtue of the latter deed, took no better or greater title than that of James H. Scogin, who held it in trust for his wife; and that appellee did not

waive her equity by joining with her husband in said deed. A decree was entered enforcing a resulting trust against said property, and declaring appellee to be the owner in fee of the lands in question, for which she was given a writ of possession.

Other matters were discussed and adjudicated in the decree, but from the disposition we make of this case we do not find it necessary to discuss them.

Assuming, but not deciding, that the evidence is sufficient to establish a resulting trust in appellee's favor in and to the land in controversy, by reason of having furnished the money to pay therefor, title to which was taken in her husband's name, still we are of the opinion that the appellee cannot be held to have acquired title to this property by a resulting trust, because of the deed she signed, acknowledged and delivered under date of August 10, 1917. This deed was executed and acknowledged by James H. Scogin in Warren, Arkansas, and by him sent to his wife in Memphis, Tennessee, where she signed and acknowledged it, separate and apart from her husband. She then returned it to her husband in Warren, Arkansas, where it was delivered to Josiah Scogin. It recited a consideration of $200, and was a deed absolute on its face. Under this state of facts, a deed absolute on its face cannot, by parol testimony, be shown to have been given in trust for the benefit of the grantor, in the absence of fraud, accident or mistake, or a fiduciary relation existing between the parties.

Section 1497, C. & M. Digest, provides: "The term or word 'heirs,' or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; *but all deeds shall be construed to convey a complete estate of inheritance in fee simple, unless expressly limited by appropriate words in such deeds.*" Here the deed is absolute on its face, and there are no words of limitation, appropriate or otherwise, contained therein. Appellee says she executed this second deed by joining with her husband therein; that she did so in order to

satisfy the fears of Mrs. Martin, and through the mistaken belief that the property would still be hers, notwithstanding such deed, and that she was induced to this belief by representations of her husband. It is not alleged nor proved that she was induced to execute same through fraud or accident, but merely by mistake of law. Assuming that this is such a mistake as is contemplated by the law, still it would not be sufficient to destroy her deed, unless the testimony in support thereof is clear, unequivocal, satisfactory and convincing.

In *Mason* v. *Harkins*, 82 Ark. 569, 102 S. W. 228, it was said: "But, even if the testimony of the appellee was equal in weight to that of appellant upon this proposition, she would fail, because a written instrument will not be overturned by parol testimony, unless the evidence be clear, unequivocal and decisive." Citing *McGuigan* v. *Gaines*, 71 Ark. 614, 77 S. W. 52; *Goerke* v. *Rodgers*, 75 Ark. 72, 86 S. W. 837.

In *Tillar* v. *Henry*, 75 Ark. 446, 88 S. W. 573, it was said:

"Constructive trusts may be proved by parol, but parol evidence is received with great caution, and the courts uniformly require the evidence to establish such trusts to be clear and satisfactory. Sometimes it is expressed that the 'evidence offered for this purpose must be of so positive a character as to leave no doubt of the fact,' and sometimes it is expressed as requiring the evidence to be 'full, clear and convincing,' and sometimes expressed as requiring it to be 'clearly established.' " Citing cases.

The above has been the rule of this court in an unbroken line of cases, from *Crittenden* v. *Woodruff*, 11 Ark. 82, down to the present time. Without reviewing the evidence, but after a careful examination thereof, we hold that appellee has not met the requirements of this rule, and that the chancellor erred in holding that she had. It necessarily follows from the foregoing that the case must be reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

TANKERSLEY *v.* PATTERSON.

Opinion delivered April 16, 1928.

1. EQUITY—ACCOUNTING BETWEEN PARTNERS.—In a suit for accounting and settlement of partnership affairs, the jurisdiction of equity is practically exclusive.
2. PARTNERSHIP—MATTERS INCLUDED IN ACCOUNTING.—Items growing out of a partnership business and necessarily included in rendering an accounting of the partnership affairs were properly embraced in the master's account and allowed by the chancellor in a suit for accounting, though not specifically pleaded.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—The chancellor's finding in allowing items of the account of the partnership, *held* not against the preponderance of the evidence.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

STATEMENT OF FACTS.

R. H. Tankersley brought this suit in equity against Sam Patterson for an accounting in a dairy partnership. Patterson filed an answer in which he denied owing the plaintiff on account of the partnership, and presented certain items which grew out of the contract of partnership, which he claimed he was entitled to have charged against the plaintiff in the accounting. The chancery court appointed a master to make a statement of the accounts between the parties.

It appears from the record that, in October, 1923, R. H. Tankersley and Sam Patterson formed a partnership to operate a dairy near Fort Smith, Arkansas. Tankersley owned the farm where the dairy was operated, the cattle, and the dairy equipment. Patterson was to furnish all the labor, manage the dairy, and account to Tankersley each week for his share of the profits. The profits were to be divided equally between the partners. The partners bought a truck for delivery purposes out of the profits of the business. The business was operated in this way until about October 1, 1926, when Tankersley accused Patterson of withholding money which had been earned in the partnership business. During the whole of the three years the partners had made weekly settle-

ments, and Tankersley had accepted the statements made by Patterson. During this time the cattle had increased from twenty to fifty-six in number.

The chancellor sustained certain exceptions to an itemized statement of the account rendered by the master, and a decree was rendered in accordance with the opinion of the court. The finding and decree of the chancery court were in favor of the defendant, Patterson; and to reverse the decree the plaintiff, Tankersley, has duly prosecuted this appeal.

Warner, Hardin & Warner, for appellant.

A. A. McDonald, for appellee.

HART, C. J., (after stating the facts). It is first contended by counsel for the plaintiff that the decree should be reversed because some of the items allowed by the chancellor were not embraced in the cross-complaint of the defendant. We do not deem it necessary to discuss this contention at length. As we have already seen, the plaintiff brought this suit in equity against the defendant for an accounting of their partnership in running a dairy. The undisputed evidence shows that they were to divide the profits equally. The plaintiff was to furnish the cows, equipment and dairy farm; and the defendant was to manage the dairy, and to furnish all the labor and feed. It is well settled in the law of partnership that, in a suit for an accounting and settlement of the partnership affairs, the jurisdiction of equity is practically exclusive. *Short* v. *Thompson,* 170 Ark. 931, 282 S. W. 14. All the items embraced in the account of the master and found by the chancellor were items growing out of the partnership. Hence they were necessarily included in rendering an account of the partnership affairs. They grew out of the partnership business, and were necessary in the adjustment of the partnership accounts. Hence it does not make any difference whether they were specifically pleaded or not.

One of the principal items relied upon by the plaintiff for a reversal of the decree was that the chancellor erroneously allowed the defendant $24 for one-half of

the manure hauled away from the dairy farm. As we have already seen, the dairy was conducted upon the farm of the plaintiff, and the proceeds were to be divided equally between the partners. Tankersley testified that he specifically reserved the manure. Patterson testified that nothing was said about the manure, and that it was necessary to have it hauled away from the dairy farm so that the dairy could be successfully and practically operated. The evidence for the defendant shows that 64 loads of manure were hauled away from the dairy farm by a tenant of the plaintiff, and spread on his farm. It was shown by the testimony of another witness that the owner of a dairy in the same vicinity had paid seventy-five cents a load to have manure hauled on his land. There were 64 loads hauled away from the dairy farm and spread over the land of the plaintiff which was cultivated by one of his tenants. This would have amounted to $48, and the chancellor was justified in finding that the defendant was entitled to a credit of $24 for one-half of the manure hauled away from the dairy farm as being the value of hauling the manure from the dairy farm and spreading it upon the farm of the plaintiff.

The court also allowed Patterson the sum of $32, which was for his services in repairing a house and fence belonging to the plaintiff. According to the testimony of the defendant, he was required to make these repairs, and they were necessary in order to preserve the property and to keep it fit for use in the partnership business. Hence it cannot be said that the findings of the chancellor on these items were against the preponderance of the evidence.

We do not deem it necessary to set out or discuss in detail the various items allowed to the respective parties by the chancellor. They were very small amounts, and in no instance can it be said that the finding of the chancellor was against the weight of the evidence. The plaintiff commenced this action against the defendant on the theory that the defendant had not accounted to him in the weekly settlements for an equal division of the profits

of operating the dairy which were in his hands. The plaintiff, however, was unable to furnish proof in support of his complaint, and for that reason failed to maintain his suit.

The findings of fact made by the chancellor cannot be said to be against the weight of the evidence; and, according to our settled rule in such cases, the decree must be affirmed.

St. Louis-San Francisco Railway Company v. Missouri Pacific Railroad Company.

Opinion delivered April 16, 1928.

1. Contracts—effect of breach.—The general rule that a party to a continuing contract of mutual and dependent covenants cannot require the other party to perform executory stipulations while he fails to perform a contract on his part, *held* subject to exceptions growing out of the nature of the thing done and conduct of the parties.
2. Railroads—joint use of Y track—enforcement.—In a suit by a railroad to enjoin another railroad from interfering with an agreement providing that plaintiff should be entitled to use a certain Y track as long as it maintained the south leg of the Y, evidence of the defendant's conduct showing an intention to refuse to allow plaintiff to maintain such south leg of the Y, precluded defendant from complaining of plaintiff's failure to comply with the contract, and warranted the court in finding that plaintiff was not guilty of such failure to perform as would release defendant from compliance.

Appeal from Lawrence Chancery Court, Eastern District; *A. S. Irby,* Chancellor; affirmed.

STATEMENT OF FACTS.

The Missouri Pacific Railroad Company, successor to the St. Louis, Iron Mountain & Southern Railway Company, brought this suit in equity against the St. Louis-San Francisco Railway Company, successor to the Kansas City, Fort Scott & Memphis Railroad Company, to enjoin the defendant from interfering with the existing arrangement at Hoxie, Arkansas, with reference to the use of the wye tracks under a contract dated September

27, 1895, between the St. Louis, Iron Mountain & Southern Railroad Company, party of the first part, and the Kansas City, Fort Scott & Memphis Railroad Company, party of the second part.

The contract recites that a controversy had arisen between the parties as to the ownership and use of the tracks of the two railroad companies at Hoxie, Arkansas. That part of the contract relating to the controversy in the present suit reads as follows:

"It is agreed between the parties hereto that, so long as the party of the first part shall use the Y tracks at Hoxie, Arkansas, the party of the first part shall maintain the south leg of said wye from the headblock on its main line to the heel of the frog at the intersection of said south Y with the main line of the Kansas City, Fort Scott & Memphis Railroad Company, as shown on accompanying blue-print, which is made a part of this agreement; and that, so long as the party of the first part shall maintain the south leg of the said wye as aforesaid, it shall be entitled to use both legs of the Y as well as necessary tracks to enable it to transport engines and cars from the south to the north leg of the Y, or *vice versa.* It is also agreed that the party of the second part, during the continuance thereof, may use, as it has heretofore, so much of the tracks of the party of the first part as it may need in moving engines and cars between the west ends of the legs of said Y. The use of the tracks of one party by the other shall be subject to the control and directions, as to time and manner of use, of the owner of the tracks; and the use by either party of the other's main track shall be made under order of the owner's train dispatcher."

On January 29, 1906, the St. Louis-San Francisco Railway Company, which had succeeded to the rights and property of the party of the second part in the contract dated September 27, 1895, entered into a contract with the St. Louis, Iron Mountain & Southern Railway Company relating to the construction and joint use of a passenger station where the lines of said railroads crossed

at Hoxie, Arkansas. On October 7, 1912, the St. Louis-San Francisco Railway Company entered into another contract with the St. Louis, Iron Mountain & Southern Railway Company for the construction and joint use of a freight station at said point to replace the old one, which had been destroyed by fire.

W. E. Brooks was the superintendent of the Missouri Pacific Railroad Company, which had succeeded to the property and rights of the St. Louis, Iron Mountain & Southern Railway Company under said contract, from June 1, 1917, to January 10, 1919. During this time no question was made about the right of appellee to use the wye tracks above referred to for all purposes.

A. A. Miller was division engineer of appellee, and, during his time as said division engineer, had charge of the tracks at Hoxie, Arkansas. Appellee maintained the tracks there, including the south track of the wye, from June, 1912, until June, 1917. From this time until in February, 1920, the United States Government maintained the tracks at Hoxie, Arkansas, during the period of our part in the World War.

According to the testimony of W. W. Wamsganz, he had been connected with the auditing department of appellee since April, 1909, and was familiar with bills presented by appellant with reference to maintenance charges for the wye tracks at Hoxie. Appellant presented bills for one dollar a car for switching charge over the wye as far back as April, 1915, and also during 1916. These bills were returned by appellee to appellant, because it did not think they were proper charges under the contract of September 27, 1895.

Other evidence for appellee tended to show that it was necessary for appellee to use the north leg of the wye to reach the joint freight depot, and it was necessary to use the south leg of the wye to reach the joint stock pens.

The Missouri Pacific Railroad Company owns the ends of the leg of the wye located on its right-of-way, and the St. Louis-San Francisco Railway Company owns

all the rest of the wye. The contract under consideration recites that 19 9/10 feet of track of the wye on the south leg is situated on the right-of-way of appellee, and 161 2/10 feet of track of the north leg of the wye is on the right-of-way of appellee. In other words, the record shows that appellee owns the end of both legs of the wye located on its right-of-way and appellant owns all the rest of the wye.

According to the testimony of witnesses for appellant, it acquired its rights under the contract about November 1, 1916, and the controversy about the wye tracks had started prior to that time, and has continued ever since. The freight station at Hoxie belongs to appellant, and it has permitted appellee to use the north leg of the wye to serve the freight-house. The passenger depot is partly on the property of appellant and partly on the property of appellee, and is owned jointly by the railroad companies. The stock pens are also owned jointly, but the freight station is owned by appellant.

Appellant served notice on appellee that, after the 12th day of November, 1921, it would not be permitted to use or run its engines and cars upon the tracks constituting the wye at Hoxie, Lawrence County, Arkansas. It is the contention of appellant that appellee should pay for cars that are moved over the north leg of the wye track to the joint freight depot, and it has used constant efforts to induce appellee to enter into a contract for continuance of the use of said wye tracks. Since the government has relinquished control of the railroads, the wye tracks at Hoxie have been maintained by appellant. During the course of the controversy, appellee has written to appellant that it would reimburse it for any amount expended by it in maintaining the south leg of the wye.

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

The court found the issues in favor of appellee, and it was decreed that appellant be enjoined from interfering in any manner with the use of said wye tracks by appellee under the contract of September 27, 1895. To

reverse that decree the appellant has duly prosecuted this appeal.

E. T. Miller, E. L. Westbrooke, Jr. and *E. L. Westbrooke,* for appellant.

Edward J. White, Harry L. Ponder and *Thos. B. Pryor,* for appellee.

HART, C. J., (after stating the facts). At the outset it may be stated that appellee first instituted proceedings against appellant before the Railroad Commission of Arkansas for an order requiring appellant to permit appellee to continue the joint use of the wye tracks at Hoxie, Arkansas, under the agreement of September 27, 1895. Upon a record which contains practically the same facts as the present one, the Arkansas Railroad Commission ordered appellant to permit appellee to continue the joint use of its wye tracks at Hoxie, Arkansas. Appellant prosecuted an appeal to the Pulaski Circuit Court, and that court confirmed the order of the Arkansas Railroad Commission, upon the evidence and pleadings before said commission. Upon the appeal to this court, it was held that the action of the Railroad Commission amounted to the exercise of judicial functions, and that it had no such power. Hence it was held that it could not determine the rights of the two railroads under the contract of September 27, 1895, relating to the joint use and maintenance of the wye tracks at Hoxie, Arkansas. It was pointed out that the parties must enforce their rights under the contract in the courts, and that the court having proper jurisdiction of the matter could, by appropriate orders, preserve the rights of the parties until the case was finally disposed of. Hence the judgment of the circuit court was reversed, and the cause was remanded with directions to it to quash the order of the Railroad Commission. *St. Louis-San Francisco Ry. Co.* v. *Missouri Pacific Rd. Co.,* 156 Ark. 259, 245 S. W. 806.

The circuit court obeyed the mandate of this court, and subsequently suit was commenced against appellant by appellee to compel the enforcement of its rights under the contract of September 27, 1895, and the prayer of

the complaint is that appellant should be enjoined from interfering with the agreement existing at the time between the parties to this suit with reference to the wye tracks at Hoxie, Arkansas.

Counsel for appellant seek to reverse the decree under the general rule that one party to a continuing contract of mutual and dependent covenants cannot require the other to perform executory stipulations while he fails or refuses to perform the contract on his part. *Phillips & Colby Construction Co.* v. *Seymour*, 91 U. S. 646, 23 L. ed. 341. Hence it is contended by counsel for appellant that the failure of appellee to maintain and keep in repair the south leg of the wye under the contract of September 27, 1895, releases appellant from compliance with the contract.

There are exceptions to this general rule, growing out of the nature of the thing to be done and the conduct of the parties. Under the terms of the contract of September 27, 1895, it was provided that, so long as the party of the first part, which was at that time the owner of the railroad now operated by appellee, shall maintain the south leg of the said wye, it shall be entitled to use both legs of the wye as well as the necessary tracks to enable it to transport engines and cars from the south to the north leg of the wye, or *vice versa*. The chancellor was justified in finding that appellee and its predecessor in title complied with this requirement of the contract until the first part of June, 1917. On this point a division engineer testified in positive terms that appellee and its predecessor in title had maintained the wye tracks under the contract from June, 1912, until June, 1917, and we do not think there is any satisfactory contradiction of his testimony. J. H. Quay, a section foreman of appellant, testified that he had maintained the south leg of the wye for appellant during the years 1918 to 1920 and up to the time he was testifying. He said that he did this under instructions given him by his roadmaster. We think, however, the witness was mistaken on

this point. No doubt he did the work under instructions from his roadmaster, but he was not doing it for appellant but for the United States Government until the 28th day of February, 1920. The division engineer testified positively that, during the period of government control, the United States maintained the wye tracks. Thus it will be seen that it cannot be claimed by appellant that appellee failed to maintain the south leg of the wye until at least after the 28th day of February, 1920.

The record shows that, before this time, appellant was demanding additional compensation from appellee for the use of the wye under the contract of September 27, 1895, and appellee was at all times denying the right of appellant in this respect. The record also shows that the managers of the respective roads recognized, in April, 1918, that there was no chance of an agreement as to the construction to be placed upon the contract under consideration. It is true this was during the period of government control, but the same persons were retained as managers of the road during this period. In September, 1920, appellant gave notice to appellee of its intention to terminate said agreement. The matter has been continually in process of litigation of some kind during these years. Appellee contended for its rights under the contract during all this time and wrote to appellant that it would pay the cost of maintaining the south leg of the wye. It will be remembered that, according to appellant's own evidence, it had taken charge of the tracks during the year of 1918 and ever since had maintained them. This action, together with the attendant circumstances, showed a tendency on its part to refuse to allow appellee to maintain the wye during these years, and it cannot now complain that appellee has failed to comply with the terms of the contract because the failure was caused by the refusal of appellant to allow appellee to repair and maintain the south leg of the wye. Its conduct in doing so, coupled with its repeated demands

during these years to appellee for an additional contract, warranted the court in finding that appellee was not guilty of such failure to perform the contract on its part as would release appellant from compliance with it.

The decree will therefore be affirmed.

UNION & PLANTERS' BANK & TRUST COMPANY *v.* POPE.

Opinion delivered April 16, 1928.

1. MORTGAGES—JURISDICTION TO SET ASIDE CONFIRMATION ORDER.—The chancery court had jurisdiction of a motion to set aside an order confirming a foreclosure sale, made on an adjourned day at the same term of court at which confirmation of the sale of lands had been made.
2. MORTGAGES—WHEN FORECLOSURE SALE FRAUDULENT.—While mere inadequacy of price will not justify the chancery court in refusing to approve a foreclosure sale, yet, if the purchaser has been guilty of any unfairness or has taken any undue advantage, the sale will be regarded as fraudulent and will be set aside.
3. MORTGAGES—INADEQUACY OF PRICE IN FORECLOSURE SALE.—Great inadequacy of price in the foreclosure sale requires only slight circumstances of unfairness by the party benefited by the sale to raise a presumption of fraud.
4. JUDGMENT—CONTROL OF COURT DURING TERM.—A court has the power to set aside or modify its decrees at any time during the term, and this rule applies to an adjourned day of the term.
5. APPEAL AND ERROR—HARMLESS ERROR.—The action of the chancery court in setting aside a foreclosure sale without giving notice of the application to the purchaser *held* not to constitute reversible error, where the circumstances established the mortgagor's rights to have the sale set aside, as such notice was not a prerequisite to the exercise of the court's jurisdiction.
6. APPEARANCE—EFFECT OF TAKING APPEAL.—An appeal by a purchaser at a foreclosure sale from the action of the court in setting aside the sale has the effect of entering his appearance to the application to set aside the sale.
7. COSTS—DISCRETION OF COURT IN CHANCERY.—Costs in chancery cases are within the discretion of the court.

Appeal from Crittenden Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Union & Planters' Bank & Trust Company and Henry Craft, trustee, brought this suit in equity against J. H. Pope and his wife, Lady P. Pope, and T. A. Pope to foreclose a mortgage on certain real estate situated in Crittenden County, Arkansas, to secure the indebtedness of J. H. Pope in the sum of $30,000.

The record shows that on the 16th day of March, 1921, J. H. Pope executed a mortgage on said real estate to Henry Craft, trustee, to secure the sum of $30,000, evidenced by a promissory note. On the 30th day of March, 1901, J. H. Pope and Lady P. Pope had conveyed to Thomas A. Pope a one-half undivided interest of a one-half undivided interest in said land. On the 30th day of March, 1921, T. A. Pope executed a mortgage on said lands to secure the note of J. H. Pope above referred to in the sum of $30,000. The mortgage contains the following:

"And the said T. A. Pope hereby covenants with the said Henry Craft, trustee, that he will forever warrant and defend the title to said lands against all lawful claims whatever, except an interest in said land to the extent and value of $4,000, which the said Pope reserves from this conveyance, and except the claim of Clara Spates to a life estate in and to the southwest quarter of the northeast quarter of section 14, township 6 north, range 8 east."

On the 2d day of June, 1924, a decree of foreclosure was entered of record in said suit. The decree recites that the case was heard on the complaint of the plaintiff, together with the exhibits thereto, and the original note sued on, and the answer of Lady P. Pope and the separate answer of J. H. Pope. The decree also recites service of summons by a certified copy of the complaint upon T. A. Pope at Franklin, Tennessee. It was decreed that the plaintiff should recover of J. H. Pope $33,439.59, and it was also decreed that the land should be sold in satisfaction of said sum.

A sale was duly had of said lands by a commissioner appointed for that purpose on March 14, 1927, and the Union & Planters' Bank & Trust Company became the purchaser of the land at the sale for the sum of $140. Union & Planters' Bank & Trust Company was the plaintiff in the suit, and was the owner of the note by J. H. Pope for $30,000, said note having been transferred to it in due course of business. No exceptions were filed to the report of sale, and it was in all things approved and confirmed by the chancery court on March 21, 1927, which was a day of the March term, 1927, of the Crittenden Chancery Court.

On the 21st day of March, 1927, the deed from the commissioner to the Union & Planters' Bank & Trust Company was presented in open court, and, upon examination, was in all things approved. This was also on a day of the March term, 1927, of the Crittenden Chancery Court.

On June 25, 1927, T. A. Pope filed a motion to set aside the sale of said land. In support of the motion he alleged that, under the terms of the trust deed, which is a part of the record in the case, T. A. Pope reserved an interest to himself in said lands of $4,000, and that he is ready to make the land bring that amount or more at a resale of the land. He alleges that his interest reserved in said land is a superior lien to the claim of the plaintiff. Therefore he prays that the sale and order of confirmation as to the interest of T. A. Pope in said land be set aside and that he be given an opportunity to assert his rights.

On the 25th day of June, 1927, the following order was entered of record:

"Union & Planters' Bank & Trust Company, plaintiffs v. J. H. Pope et al., defendants.—No. 2960—Order.

"On this the 25th day of June, 1927, being an adjourned day of the March term, 1927, of this court, there came on for hearing the motion of T. A. Pope, a nonresident defendant in this cause, who had hereto-

fore not appeared in person or by attorney and on whom no actual process had been served, to set aside the sale of his interest in the lands described in the complaint, which sale was made on March 14, 1927, and confirmed by this court on March 21, 1927, by decree recorded in minute book N, at page 156, and acknowledgment appearing of record on page 157 of said minute book, and, the court having considered same, it is hereby ordered and decreed that said order of confirmation of said sale and acknowledgment of delivery of deed to the Union & Planters' Bank & Trust Company of the interest of said T. A. Pope in the land described in the complaint filed in this cause, be and the same is hereby set aside. Ordered and decreed this 25th day of June 1927."

The Union & Planters' Bank & Trust Company appeals to the Supreme Court to reverse this order or decree.

B. J. Semmes, for appellant.

R. H. Crockett and *J. T. Coston,* for appellee.

HART, C. J., (after stating the facts). The order appealed from was made on an adjourned day of the same term of the court at which a confirmation of the sale of the lands in which T. A. Pope had an interest was made. Hence the court had jurisdiction in the matter. *Wofford* v. *Young,* 173 Ark. 802, 293 S. W. 725.

The record shows that T. A. Pope owned the fee simple title to an undivided one-fourth interest in 1,360 acres of land which were embraced in the mortgage foreclosed. The consideration recited in his deed was $4,000, and the deed was executed to him on the 30th day of March, 1901, which was 27 years ago. Lady Pope, the wife of J. H. Pope, does not appear to have signed the mortgage. The mortgage was given to secure an indebtedness of $30,000 of her husband. This tends to show that the interest of T. A. Pope in said lands was worth much more than the sum of $140 for which the lands were bid in at the foreclosure sale by the plaintiff. In addition thereto, the mortgage executed by T. A. Pope

contains an express exemption of an interest in said lands to the extent and value of $4,000. This indicates that the parties at the time believed that the interest of T. A. Pope in said lands was worth more than $4,000, and the legal effect of the clause was to reserve in said T. A. Pope the sum of $4,000 at the foreclosure sale of his interest in said land. In other words, if the lands did not sell for more than $4,000, no legal sale of them could be made under the mortgage, for T. A. Pope had expressly exempted from sale his interest to the value of $4,000.

While this court has held that mere inadequacy of price will not justify a chancery court in refusing to approve a sale and deprive a purchaser of the benefits of his purchase, yet, if a purchaser has been guilty of any unfairness or has taken any undue advantage, the sale will be regarded as fraudulent, and the party injured will be permitted to set aside the sale. Great inadequacy in price requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud. *Stevenson* v. *Gault,* 131 Ark. 397, 199 S. W. 112, Ann. Cas. 1918E, 433; *Moore* v. *McJudkins,* 136 Ark. 292, 206 S. W. 445; *Chapin* v. *Quisenberry,* 138 Ark. 68, 210 S. W. 641; and *Wofford* v. *Young,* 173 Ark. 802, 293 S. W. 725. In *Schroeder* v. *Young,* 161 U. S. 334, 16 S. Ct. 512, 40 L. ed. 721, the rule is stated that, where there is great inadequacy of price, coupled with circumstances tending to show that the land was sold in such manner that its full value could not be realized, the court is justified in setting aside the sale. Here there was notice, by the terms of the mortgage itself, that T. A. Pope had excepted from its provisions an interest in the land to the value of $4,000. Hence, under the circumstances described by the record, the chancellor was justified in setting aside the sale of the interest of T. A. Pope in said land; and it was his duty to have done so if proper notice of the application had been made.

Counsel for appellant seek to obtain a reversal of the order setting aside the sale on the ground that no notice of the application to vacate the sale was given to the Union & Planters' Bank & Trust Company, under the rule laid down by this court in *Miller* v. *Henry,* 105 Ark. 261, 150 S. W. 700, and the general rule announced in an annotation to that case in Ann. Cas. 1914D, 758. It is true that, under the authorities there announced, notice should have been given to the purchaser of the application to vacate the sale after it had been confirmed. But, under the circumstances, this action of the court is only, in general, reversible error, and was not a prerequisite to the exercise of jurisdiction by the court. It is well settled in this State that a court has the power to set aside or modify its decrees at any time during the term, and this rule applies to an adjourned day of the term. *Wofford* v. *Young,* 173 Ark. 802, 293 S. W. 725.

Under the circumstances of this case, however, we do not think this error of the chancery court constitutes reversible error. The Union & Planters' Bank & Trust Company was the plaintiff in the case, and, as such, was a party to the suit before it became a purchaser at the foreclosure sale. It does not make any difference whether T. A. Pope was legally served with summons in the mortgage foreclosure suit or not. He became a party to this proceeding by moving to set aside the sale under the foreclosure decree. While no notice was given to the Union & Planters' Bank & Trust Company of the application of T. A. Pope to set aside the sale under the foreclosure decree and the confirmation thereof, the court did set aside said sale, and had the jurisdiction to do so. An appeal has been taken only from the action of the court in setting aside the sale, and the appeal to this court has the effect of entering the appearance of the Union & Planters' Bank & Trust Company to the application to set aside the sale. Having appealed to this court, the plaintiff became a party to the proceeding, and must follow the cause to its conclusion or take the consequences. *Hodges* v. *Frazier,* 31 Ark. 58; *Ben-*

jamin v. *Birmingham,* 50 Ark. 443, 8 S. W. 183; *Walker* v. *Walker,* 147 Ark. 376, 227 S. W. 762; and *Lingo* v. *Swicord,* 150 Ark. 384, 234 S. W. 264.

Under the views we have expressed above as to the rights of T. A. Pope under the reservation or exception in his mortgage, he would have been bound to prevail if notice had been given to the plaintiff of his application to set aside the sale. Hence no useful purpose could be served by reversing the order setting aside the sale and remanding the cause, with directions to the chancery court to set aside the sale upon the facts established. This would be an empty victory for the plaintiff, and could result in no useful purpose.

The costs in a chancery case are within the discretion of the court, and it is our opinion that the costs of the appeal should be paid by the plaintiff, who is the appellant in the case.

Argument is made by counsel for appellant as to estoppel which should apply to Lady P. Pope. We do not deem it necessary to discuss or to determine this issue, for it is not involved in this appeal. No appeal was taken by Lady P. Pope, and the appeal of the plaintiff does not in any wise affect her rights in the premises. The record expressly shows that the plaintiff only appealed from the decree of the chancellor in setting aside the foreclosure sale in so far as it affected the interest of T. A. Pope.

Therefore the decree will be affirmed.

FAYETTEVILLE v. BAKER.

Opinion delivered April 16, 1928.

1. CERTIORARI—VALIDITY OF ORDER CANCELING LEASE.—Where an order setting aside a lease of certain rooms of the courthouse by the county court to a city shows on its face that the city was not present in court or that it received no notice of the cancellation of the lease, the order was void on its face, under Crawford & Moses' Dig., § 6238.
2. CERTIORARI—WHEN APPROPRIATE REMEDY.—Where there is want of jurisdiction of the lower court, either of the subject-matter or of the parties or an excess of jurisdiction apparent on the face of the record, certiorari is the appropriate remedy.
3. CERTIORARI—VOID JUDGMENT.—Certiorari lies to quash a void judgment, even though the judgment might have been vacated and set aside on appeal.
4. COUNTIES—CONTROL OF COUNTY COURT OVER COURTHOUSE.—Under Const., art. 7, § 28, and Crawford & Moses' Dig., § 2279, relating to the powers of the county court, that court had jurisdiction to lease rooms in the courthouse and a parcel of land on the courthouse grounds to a city for city uses, and such contracts were not *ultra vires*.

Appeal from Washington Circuit Court; *J. S. Maples*, Judge; reversed.

George A. Hurst, for appellant.

WOOD, J. The city of Fayetteville instituted this action in the chancery court of Washington County against the county judge, the county clerk, and sheriff, to restrain them from removing from the two southeast rooms of the courthouse of Washington County all employees of the city of Fayetteville and all records, books, papers and other property belonging to the city of Fayetteville, and from a vault in the basement of the county courthouse of Washington County all records, books and papers belonging to the city of Fayetteville.

The plaintiff alleged, in substance, that, on the 18th of June, 1923, it had leased from Washington County two rooms in the courthouse and a vault in the basement of the courthouse of Washington County for the use of the plaintiff as a police court, mayor's office, council chamber, and office of the city water plant, and

other official city business; that the contract of lease which was entered into with the county court of Washington County was spread upon the records of such court. The contract was made an exhibit to the plaintiff's complaint. Plaintiff further alleged that this contract was entered into for a period of five years from and after December 9, 1922; that on the 25th day of October, 1926, plaintiff entered into a contract with the county court of Washington County, which contract was made an exhibit to the complaint, by which the city leased the rooms and vault as above described for a period of five years from and after December 9, 1927. It is alleged that, in the last contract, the city leased certain ground space on the courthouse grounds. The exhibits set out the terms of the contracts showing that the city agreed to pay to the county the sum of $40 a month in advance as rentals for the property leased from the county. The plaintiff alleged that it went into possession and was then in possession of the property mentioned in the leases, and had complied fully with the terms of the contract, and that its time under the leases had not expired; that, notwithstanding this fact, the county court of Washington County entered an order on its record at its April term, 1927, adjudging that the city of Fayetteville, on or about October 1, 1927, vacate the two rooms and the vault and the other property of the county then held and occupied by the city and its officials, and that one of the rooms be occupied by the county superintendent of schools and the other by the county farm and home demonstrator, and the rest of the property be used and occupied for county purposes only, and directing the sheriff to serve a copy of the order upon the city and to carry out and enforce the order on or before the first day of October, 1927. Plaintiff further alleged that on October 10, 1927, the county court of Washington County entered an order on its records directing the clerk to issue a writ commanding the sheriff to remove the city officials and all of their records, books,

papers, furniture, etc., and other property, and also to remove from the lot or parcel of land upon which the courthouse was situated all personal property and buildings belonging to the city of Fayetteville. Plaintiff alleged that no action in ejectment had been instituted against the plaintiff to recover the possession of the rooms and the lot; that the plaintiff had no notice whatever of the order and proceedings of the county court as alleged, and had not been given an opportunity to be heard upon the lease contracts with the county. It further alleged that it was not necessary for the uses of the county that the county court make the orders mentioned, and it set forth the facts showing this to be the case. It was alleged that the officers mentioned were threatening to carry out the void orders of the county court, and, unless restrained, would so do. Plaintiff prayed that they be enjoined from executing such void order, and for all proper and special relief.

On the 21st of October, 1927, the defendants filed a demurrer and motion to dismiss, in which they set up, first, that the complaint did not state a cause of action; and second, that the court had no jurisdiction of the subject-matter set forth in plaintiff's petition. The chancery court sustained the demurrer, holding that it had no jurisdiction. The plaintiff excepted to the ruling of the court, and moved the court to transfer the cause to the law court. The cause was duly transferred to the law court, and plaintiff was by the court allowed to amend the prayer of its complaint so as to pray the circuit court for a writ of certiorari to bring up the records of the county court so that the orders of which complaint is made might be quashed by the circuit court.

The defendants renewed their demurrer and motion to dismiss the complaint in the circuit court. The circuit court, in the hearing upon demurrer, found that the order of the county court providing for the city offices was regular and valid; that the remedy of the plaintiff was by appeal from those orders, and that the circuit

court at that time had no jurisdiction to issue a writ of certiorari. The court thereupon entered its judgment dismissing the complaint. The plaintiff stood upon its complaint, and prayed an appeal to the Supreme Court, which was by the court granted.

1. According to the allegations of the complaint, the orders of the county court were final orders or judgments rendered against the appellant without notice to the appellant. Such being the case, these orders were absolutely void. They show on their face that they were void because the county court, in these orders, in effect, set aside and canceled the lease contracts that had been entered into between the county court and the appellant without giving the appellant any notice whatever that such orders would be made. The orders themselves do not recite that the appellant was present in court or that it had received any notice of the contemplated cancellation of the lease contracts. The order of the county court of April 4, 1927, after reciting that the lease should be canceled, by directing that notice of such order be served on the city, shows that the order was *ex parte,* and that the city of Fayetteville had not been theretofore notified of the proceeding. The demurrer to the complaint admits this fact. Where there is a want of jurisdiction below, either of the subject-matter or parties, or an excess of jurisdiction, apparent on the face of the record, certiorari, says this court, "is the appropriate, if not the only, remedy." *Grinstead* v. *Wilson,* 69 Ark. 587-591, 65 S. W. 110, and cases there cited. Our statute declares that all judgments and orders rendered by any of the courts of this State against any one without notice, and all proceedings thereunder, shall be absolutely null and void. Section 6238, C. & M. Digest. See *Sovereign Camp W. O. W.* v. *Wilson,* 136 Ark. 546-51, 207 S. W. 45, and other cases in note to the above section of C. & M. Digest. "Certiorari lies to quash a void judgment, even though the judgment might have been vacated and set aside on

appeal." *Browning* v. *Waldrip*, 169 Ark. 264 (quoting syllabus 5), 273 S. W. 1032, and cases cited.

2. This brings us to the question of whether or not the lease contracts set forth in appellant's complaint were beyond the jurisdiction of the county court to enter into them. Article 7, § 28, of the Constitution confers upon the county court jurisdiction in every case necessary to the local concerns of their respective counties. Section 2279, C. & M. Digest, among other things provides that the county court of each county shall have the following powers and jurisdictions: "To have the control and management of all the property, real and personal, for the use of the county; * * * to sell and cause to be conveyed any real estate or personal property belonging to the county, and to appropriate the proceeds of such sale for the use of the county; to disburse money for county purposes, and in all other cases that may be necessary to the internal improvement and local concerns of the respective counties."

Under these broad general powers conferred upon the county court by the Constitution and statute, *supra,* we hold that it is within the jurisdiction of the county court to enter into a contract to lease the rooms in the courthouse and the parcel of land on the courthouse grounds to the appellant, under the facts stated in the complaint. These contracts therefore were not *ultra vires.* See *Little Rock C. of C.* v. *Pulaski County,* 113 Ark. 439, 168 S. W. 848. We are not called upon, under the allegations of the complaint, to determine whether the lease contracts entered into between the county court and the appellant were improvident or whether any grounds existed for avoiding or canceling such contracts.

It follows that the court erred in sustaining the demurrer and denying the appellant's prayer for writ of certiorari. The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings according to law.

MANSFIELD LUMBER COMPANY v. NATIONAL SURETY COMPANY.

Opinion delivered April 16, 1928.

1. MECHANICS' LIENS—CONTRACTOR'S BOND.—A bond given by a contractor binding principal and surety to indemnify the owner against claims for labor and material, not having been approved by the clerk of the circuit court, nor filed in the clerk's office as required by Crawford & Moses' Dig., §§ 6915, 6916, *held* not a statutory bond.
2. MECHANICS' LIENS—CONTRACTOR'S BOND.—A bond by a contractor providing that such contractor should satisfy all claims and demands incurred under contract and indemnify the owner against all costs incurred by him, and providing that the surety shall pay all persons having contracts for labor or material, *held* for the benefit of the owner and materialman and laborers, though not a statutory bond, and imposed liability on the surety for the costs of materials furnished in constructing the building.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; reversed.

Dobbs & Young, for appellant.

Warner, Hardin & Warner, for appellee.

SMITH, J. Appellant, the plaintiff below, alleged the following facts as constituting a cause of action against appellee, the defendant below.

Plaintiff is a corporation engaged in selling building material, and the defendant Rambo-Miller Construction Company is a partnership doing business as a construction company, and the defendant National Surety Company is a corporation doing a surety and indemnity business. On June 12, 1926, the defendant Rambo-Miller Construction Company, hereinafter referred to as the construction company, entered into a building contract with a committee of the First Baptist Church of Fort Smith to construct certain improvements on the church building, which bound the construction company to furnish all labor and material in the construction of said improvement. In conformity with the contract, the construction company entered into a bond with the National Surety Company, hereinafter referred

to as the surety company, as surety. So much of the bond as is necessary to consider here reads as follows:

"Know all men: That we, Rambo-Miller Construction Company, of Fort Smith, Arkansas, hereinafter called the principal, and National Surety Company, hereinafter called the surety or sureties, are held and firmly bound unto the First Baptist Church of Fort Smith, Arkansas, hereinafter called the owner, in the sum of $35,000, for the payment whereof the principal and surety or sureties bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly, by these presents:

"Whereas, the principal has, by means of a written agreement dated June 12, 1926, entered into a contract with the owner for the furnishing of all labor and material and the construction of a Sunday-school building and alterations and enlargement of the church auditorium, a copy of which agreement is by reference made a part hereof. Now therefore the condition of this obligation is such that, if the principal shall faithfully perform the contract on his part and satisfy all claims and demands incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect. Provided, however, that no suit, action or proceeding by reason of any default whatever shall be brought on this bond after six months from the day on which the final payment under the contract falls due."

Plaintiff further alleged that, after the execution of the bond, the construction company purchased from it certain building material to be used in the construction of the improvement, and that, in reliance upon said

bond, plaintiff sold and delivered material to the construction company of the value of $568.70. An itemized statement of the material furnished was made an exhibit to the complaint. The construction company failed to pay for the material, as did also the surety company, upon demand, wherefore judgment was prayed against both the construction company and the surety company.

A demurrer was filed to this complaint by the surety company, which was sustained by the court, and, plaintiff refusing to plead further, the complaint against the surety company was dismissed, and this appeal is from that judgment.

It was held by this court, in the case of *Thomas Mfg. Co.* v. *Prather,* 65 Ark. 27, 44 S. W. 218, that, where a promise is made to one upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor for a breach of his promise, and that holding has since been adhered to by this court. *Stewart-McGehee Construction Co.* v. *Brewster, etc. Mfg. Co.,* 171 Ark. 197, 284 S. W. 53. The question presented for decision is therefore whether the bond made a part of the plaintiff's complaint was executed for the benefit of materialmen who furnished material used in the performance of the building contract, or was for the exclusive benefit of the owner of the building.

It is virtually conceded by appellant that the bond here sued on is not a statutory bond, such as is authorized by §§ 6915 and 6916, C. & M. Digest, as it was not approved by the clerk of the circuit court of the county in which the building is situated, as is provided by § 6915, nor was it filed in the office of the clerk of the circuit court, as is required by § 6916. It is insisted, however, that, although the bond may not be a statutory bond, under which the surety would be liable to all materialmen and laborers, it is nevertheless a common-law bond, and made, not for the benefit of the owner alone, but for the benefit of laborers and materialmen as well, and the correctness of this contention is the question for decision.

The leading case on this subject in this State is that of *Eureka Stone Co.* v. *First Christian Church,* 86 Ark. 212, 110 S. W. 1042. This case was decided by a divided court, and was later to some extent distinguished in the case of *Morris* v. *Nowlin Lbr. Co.,* 100 Ark. 268, 140 S. W. 6, in which last-mentioned case two members of the court voted to expressly overrule the first-mentioned case. It was not overruled, and has since been followed, but it has always been recognized as a borderline case, the doctrine of which was not to be in any manner extended. The liability there sought to be enforced against the surety depended upon the construction of article fifteen of the bond, which read as follows: "That there shall be no liens filed on said building or work, either for labor done thereon or for materials furnished in its construction, and the contractor shall pay all artisans, materialmen and laborers doing work on or about said building or other work; and if, for any cause, such lien shall be filed by any person, then and in such case the contractor shall pay and satisfy the amount that may be due and owing," etc.

In the opinion construing this bond it was said that the intention of the parties in executing it was to be gathered from the whole instrument, and that, if it was intended to secure the payment of materials furnished to the contractor, the materialmen should recover on the bond as one executed for their benefit, but that, if the bond only secured the church—the owner—against claims and liens, then it became a bond of indemnity to the church, and the materialmen were not entitled to recover thereon. The materialmen sought to recover in that case upon the clause of the contract which provides that the contractor shall pay all the materialmen, but it was said, in answer to this contention, that the subject in contemplation of the parties was the protection of the church against liens that might be asserted against the building. This view was adopted because the majority were of the opinion that the language

immediately preceding, as well as that which follows, the portion of the bond quoted showed that the object in view was to protect the church from the filing of liens and to provide for their payment in case they were asserted.

Here, however, more comprehensive language was employed. The bond first provides that the principal—the construction company—"shall faithfully perform the contract on his part and satisfy all claims and demands incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default."

If the bond contained only the provisions just stated, it could well be said, as was held in the Eureka Stone Company case, *supra*, that the bond was for the benefit of the owner only, and was intended to protect the owner against liens that might be asserted against the building by laborers and materialmen whose demands had not been discharged by the contractor. But the bond here sued on further provides that the construction company and its surety "shall pay all persons who have contracts directly with the principal for labor or materials."

If effect is given to the language last quoted as adding anything to the portion of the bond first quoted, it must be held that it was intended to impose the obligation, not only that the contractor should faithfully perform the contract on its part and satisfy all claims and demands incurred in its performance, and fully indemnify and save harmless the owner "from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default," as is first provided, but shall, in addition, "pay all persons who have contracts

directly with the principal for labor or materials," as is further provided.

The improper use of pronouns appearing in the bond suggests the high degree of probability that the bond executed was such a blank form of bond as would have been used had §§ 6915 and 6916, C. & M. Digest, been complied with by having it approved by and filed with the clerk of the circuit court, and there would be no question about liability under the statutory bond, as the purpose of the statute is to give all laborers and materialmen a cause of action on the statutory bond, the proper execution of which operates to deprive them of a lien on the building which the statute gives where no statutory bond is executed. In other words, while the bond is not a statutory bond, in that it was not executed in the manner provided by the statute, its provisions and conditions are broad enough to cover the liability imposed by the statute had it been executed as the statute requires. We are of the opinion therefore that the bond was not executed for the sole benefit of the owner, but for the benefit of materialmen and laborers as well, and the demurrer to the complaint should not therefore have been sustained.

Opposing counsel have submitted briefs reviewing many cases from other jurisdictions in which sureties have been held liable under somewhat similar bonds for the satisfaction of the demands of materialmen and laborers, and other cases in which somewhat similar bonds were held to have been executed solely for the benefit of the owner. We do not review these cases, for to do so would require a discussion of the points of difference between the various bonds construed. Moreover, it is believed that the cases of *Eureka Stone Co.* v. *Church* and *Morris* v. *Nowlin Lbr. Co., supra,* and the subsequent cases which have followed them, fully announce the principles which must control here.

The judgment of the court below is therefore reversed, and the cause remanded with directions to overrule the demurrer.

STATE v. GUTHRIE.

Opinion delivered April 16, 1928.

1. EMBEZZLEMENT—CONVERSION OF CUSTOMER'S MONEY.—An instruction that an allegation that the officer of a corporation converted a customer's money to his own use would be sustained, if the testimony showed that such money was mingled with that of the corporation, under such officer's order or with his permission, *held* proper.
2. EMBEZZLEMENT—INSTRUCTION.—On a trial of an officer of a corporation on embezzlement of a customer's money mingled with that of the corporation, the court correctly charged the jury that the testimony must show that defendant knew that the corporation was insolvent and unable to pay such money out of its funds or assets.
3. EMBEZZLEMENT—WRONGFUL INTENT.—Wrongful intent to convert another's property, thereby depriving him of it permanently, is an essential ingredient of the crime of embezzlement.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; affirmed.

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

SMITH, J. Appellee was tried and acquitted under an indictment charging him with the crime of embezzlement. Evidence offered to support the allegations of the indictment was to the following effect: Appellee was the president and managing officer of the John A. Guthrie Mortgage Company, a corporation engaged in the business of selling real estate mortgages, for which service a brokerage fee was charged. A note to the order of the corporation would be executed and secured by a mortgage on land owned by the maker of the note. The corporation would transfer the note and mortgage to the purchaser, and would account to the borrower for the proceeds of the sale, less the brokerage fee. Such a note and mortgage were executed to the corporation by James H. Ruth and wife, and the same were sold by the corporation for a sum which netted $990, less the brokerage fee. This money was not paid to Ruth, after demand. Upon receiving this money it was mingled

with other money belonging to the corporation, and this was done under the direction and with the permission of appellee as managing officer of the corporation, but without the knowledge or consent of Ruth.

The corporation was insolvent, and was unable to pay Ruth the sum of money which had been collected by the corporation for his account. The testimony was conflicting as to whether appellee was aware of the insolvency of the corporation, and there appears to be legally sufficient testimony to support a finding either way upon that question. Appellee testified that he considered the corporation solvent at the time the transaction with Ruth was had, as an audit of the corporation's affairs had shown the corporation to be solvent.

Over the objection of the State the court gave an instruction numbered 11-A, which reads as follows:

"You are instructed that, before you can convict the defendant of the charge of embezzlement in this case you must find that the defendant, John A. Guthrie, at the time the money of Ruth was intermingled with the funds of the Guthrie Mortgage Company, if you find it was so intermingled, had personal knowledge of that fact or took some part in the intermingling of said money with the funds of the Guthrie Mortgage Company, and, if you find that the money of Ruth was intermingled with the funds of the Guthrie Mortgage Company with the knowledge or by the direction or by permission of the defendant, you must further find, before you can convict him, that, at the time of such intermingling, the defendant, Guthrie, knew that the Guthrie Mortgage Company was insolvent, and unable to pay said money to Ruth out of its funds or assets."

It is insisted by the State that this instruction is erroneous and resulted in the acquittal of the accused, inasmuch as it imposed upon the State the burden of showing, not only that Ruth's funds were intermingled with those of the corporation with the knowledge or by the direction of appellee, but that appellee knew, when

this was done, that the corporation was insolvent and unable to pay said money to Ruth out of its funds or assets. As other indictments, based on similar transactions, are pending against appellee, in which the same instruction will probably be given, the State has perfected this appeal to have it determined, before other trials are had, whether the instruction is a correct declaration of the law. It is the insistence of the State that, if Ruth's money was converted to the use of the corporation by appellee or under his direction, without the knowledge or consent of Ruth, it is immaterial that appellee may not have known that the corporation was in fact insolvent when that transaction occurred.

The indictment charged appellee with having converted Ruth's money to his own use, and it may be first said that the instruction correctly charged the jury that this allegation would be sustained if the testimony showed that Ruth's money was mingled with that of the corporation under appellee's order or with his permission.

This subject is extensively discussed in the case of *State of Washington* v. *Thomas,* 123 Wash. 299, 212 Pac. 253, 33 A. L. R. 781, and in the annotator's note to that case. In that case the Supreme Court of Washington quoted with approval the following statement of the law from 14A C. J., page 244:

"Also—at least where the crime charged involves guilty knowledge or criminal intent—it is essential to the criminal liability of an officer or servant of a corporation that he actually and personally do the acts which constitute the offense, or that they be done by his direction or permission."

The Washington case also quotes approvingly at some length from the case of *Milbrath* v. *State,* 138 Wis. 354, 131 Am. St. Rep. 1012, 120 N. W. 252, in which case a corporation took over and converted assets previously held for a client by a partnership which the corporation succeeded. It was there said:

"The evidence is ample to support the contention that it was put in the corporation safe and mingled with the funds of the insolvent corporation and deposited in its bank account, with the consent and by the act of the defendant conjointly with Wagner. * * * There cannot be much doubt that this constituted a conversion of the money by the defendant and Wagner. But was the money converted to their own use? One may convert money of another to his own use by paying it out upon his private or personal debt. *Guenther* v. *State,* 137 Wis. 183, 118 N. W. 640. If this is true, he can convert the money to his own use by putting it into the treasury and mingling it with the funds of an insolvent corporation which is under his control and management, and of which he is a stockholder and officer in charge. The benefit he receives in the first case by discharge of his personal debt is equal to the whole amount of the money so paid. The benefit which he receives in the second case is not equal to the whole amount of the money so paid. But the extent to which defendant was benefited does not constitute the test. It is paid to his own use in either case. It is paid into that which is a mere instrumentality created by him under sanction of law, but as much under his control and as subservient to his will as the furniture of his office or the books of account in which he records his transactions. Under such circumstances there is no room for the legal fiction of separate corporate personality or for distinction between the defendant's acts as officer of the corporation and his acts as an independent natural person.' In that case the defendant was charged individually, as here."

The majority are also of the opinion that the court correctly charged the jury that it was essential that the testimony show and the jury find therefrom that appellee knew the corporation "was insolvent and unable to pay said money to Ruth out of its funds or assets," and that this is true because a wrongful intent to convert another's property, thereby depriving him

permanently of it, is an essential ingredient of the crime of embezzlement. If appellee did not know, or was not charged with knowledge of facts from which notice would necessarily be imputed, that the corporation was insolvent, there was no embezzlement of Ruth's money, as that would be payable to and recoverable by him upon proper demand of the corporation, and appellee must have known that the necessary or probable consequences of mingling Ruth's funds with those of the corporation would be to deprive Ruth thereof before he would be guilty of the crime of embezzlement, and if he did not have this knowledge, or if it were not necessarily imputed to him by the facts and circumstances shown in the testimony, then he was not guilty of embezzlement, and the instruction so correctly declared the law.

It is therefore the opinion of the majority—in which Mr. Justice WOOD and the writer do not concur—that the instruction was a correct declaration of the law under the issues joined, and the judgment of the court below is therefore affirmed.

FOOTE v. BLANKS.

Opinion delivered April 16, 1928.

FRAUDULENT CONVEYANCES—CONVEYANCE TO NEPHEW.—A debtor's conveyance of property to his nephew was not fraudulent as to a creditor subsequently obtaining a judgment, where the nephew paid in cash the fair market value of the property for the purpose of enabling the debtor to pay pressing obligations.

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

Y. W. Etheridge, for appellant.

Compere & Compere, for appellee.

HUMPHREYS, J. On the 26th day of August, 1927, appellant obtained a judgment in the circuit court upon a note against J. P. Blanks, one of the appellees, for $1,000. On September 9 following he brought this suit

in the circuit court of Ashley County against appellees, to set aside certain conveyances of real estate and bank stock by J. P. Blanks to the other appellees for the alleged purpose of defeating appellant and his other creditors from collecting their claims against him, thereby defrauding them. It was alleged that J. P. Blanks was insolvent, and rendered so by conveyances of his real estate and bank stock to his co-appellees, without consideration, and with knowledge by the grantees that the conveyances were made to defeat his creditors. The lands were conveyed by several deeds of conveyance on the 17th day of February, 1926, to L. W. Blanks, a nephew of J. P. Blanks, who subsequently conveyed a part of them to the Elon Company and a part to the Hamburg Investment Company, two corporations which were owned by his brother and himself. On the same day J. P. Blanks assigned his stock, amounting to $19,000, in the Hamburg Bank to L. W. Blanks, who subsequently transferred it to his mother, L. G. Blanks.

Appellees filed an answer, admitting the conveyances were made, but denying that they were voluntary and without consideration, or that they were made for the purpose of defrauding the appellant and the other creditors of J. P. Blanks.

The cause was submitted to the court upon the pleadings and depositions of the witnesses, which resulted in a dismissal of the complaint of appellant, based upon substantially the following findings, to-wit:

"That each of the conveyances were made in good faith, and for a reasonable and fair consideration, and that none of them were made for the purpose of hindering or delaying the creditors of J. P. Blanks, and that said J. P. Blanks was not insolvent at the time he made said conveyances herein mentioned by him to L. W. Blanks, and that L. W. Blanks paid a fair consideration in each and every instance, and there was no fraud in any manner in said conveyances to L. W. Blanks,

and that L. W. Blanks had a perfect right to transfer said bank stock to L. G. Blanks and the lands to the Elon Company and the Hamburg Investment Company, and that none of the parties herein made or received said conveyances with any intent to defraud any creditors of the said J. P. Blanks."

Appellant contends for a reversal of the judgment upon the ground that J. P. Blanks was insolvent when he instituted this suit, and that the property in question was conveyed to a relative and close friend, who admitted that he purchased same for the purpose of helping his uncle and who, it is claimed, was unable to satisfactorily explain the transactions. Appellant cites the case of *Harris* v. *Smith,* 133 Ark. 250, 202 S. W. 244, in support of his contention. The court said in that case that: "The various transactions were out of the ordinary, and Harris' explanation of them was unsatisfactory. The learned chancellor correctly found that the stock of merchandise was transferred to the Wyss Lumber & Trading Company without consideration and in fraud of appellees and other creditors, and that the moneys deposited in the City National Bank in the name of Wyss Lumber & Trading Company belonged to R. P. Harris."

The record in the instant case does not reflect that the several transfers were made without consideration, and that the vendor and vendee were unable to make a satisfactory explanation of the transactions. On the contrary, it appears that the conveyances were made for adequate considerations, and that the consideration received was applied to the payment of *bona fide* debts of J. P. Blanks. It also appears that his obligations were pressing, and the only way he could meet them was to sell a large part of his holdings. His nephew came to his rescue, and bought most of his property for a fair market value. He used his mother's insurance money to buy the bank stock, and paid twenty cents above par for it. After purchasing it he transferred the stock to his mother. He had ample funds with

which to purchase his uncle's property, and actually paid him cash for it, which was used to pay his uncle's pressing debts. After conveying the property in question, J. P. Blanks had a large block of stock left in the Doyle Dry Goods Company, and other assets amounting to about $2,500. These transfers were made two years before the institution of this suit, and just what became of the Doyle stock and his other assets in the interim does not appear. The rule applied in the Harris case, *supra,* was that announced by Mr. Chief Justice HILL for the court in the case of *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913, which is as follows:

"It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and when they are voluntary they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors."

The rule was applicable and controlling under the facts in the Harris case, *supra,* but cannot be applied in the instant case, because the facts are entirely different in the two cases. In the Harris case the conveyances were made without consideration and to defraud his creditors, while in the instant case they were made for fair considerations and for the purpose of paying the pressing debts of J. P. Blanks. The findings of the trial court were in accordance with the weight of the evidence. The decree is therefore affirmed.

BODNAR v. STATE.

Opinion delivered April 16, 1928.

1. CRIMINAL LAW—MISCONDUCT OF JURORS.—Uncontradicted affidavits filed by accused, after her conviction for selling whiskey, in support of a motion for new trial, stating that two of the jurors, while eating dinner during their separation on the day of the trial, talked about the case, saying that from outside reports about people being drunk and fighting at her house she was bound to be guilty whether officers found liquor in her house or not, *held* to make out a *prima facie* case of misconduct by such jurors.
2. CRIMINAL LAW—JURORS RECEIVING INFORMATION OUTSIDE OF COURT.—It is improper for jurors to receive information concerning the merits of a case they are trying, except in open court and in the manner provided by law.
3. CRIMINAL LAW—AFFIDAVIT SUPPORTING THE MOTION FOR NEW TRIAL.—Uncontradicted affidavits supporting defendant's motion for new trial, on the ground of misconduct of jurors, must be accepted as true.
4. CRIMINAL LAW—KNOWLEDGE OF JUROR'S MISCONDUCT.—Knowledge of accused's husband, during the trial, of misconduct of jurors while separated, is not attributable to accused so as to charge her with negligence in failing promptly to file a motion for new trial on that ground, and filing a motion for a new trial at the same term at which the verdict was rendered, nearly three weeks after conviction, was timely, under Crawford & Moses' Dig., § 3218.

Appeal from Sebastian Circuit Court, Greenwood District; *J. Sam Wood,* Judge; reversed.

A. V. Anderson, for appellant.

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

HUMPHREYS, J. Appellant was indicted for selling whiskey in the circuit court of Greenwood District of Sebastian County, and subsequently on the 10th day of January, 1928, was convicted and adjudged to serve a term of one year in the State Penitentiary as a punishment for the crime, from which judgment this appeal has been duly prosecuted.

On the day of her conviction she filed a motion for a new trial, which was overruled on the following day. She then prayed an appeal to the Supreme Court, which

was granted. On the first day of February following, during the same term of court, she filed a motion to set the verdict aside and to grant her a new trial on account of the misconduct of Carter and Hannah, two of the jurors who tried her case, upon the additional ground that they obtained information about her case and talked to each other concerning the same while separated during the noon hour, contrary to the admonition of the court. The allegation of misconduct in the amended motion for a new trial was supported by three affiants, one of them being appellant's husband, to the effect that, on the day of the trial, while said jurors were eating dinner, during their separation by permission of the court, they talked about appellant's case, saying that, from all outside reports about people being drunk and fighting at appellant's house, she was bound to be guilty, whether what the officers found in her house was liquor or not. It was alleged in the motion that appellant received no information of the conversation or that the two jurors had talked to parties during the noon recess, until after her conviction. The jury were unable to agree upon a verdict before dinner, but did agree and return a verdict of guilty a short time after the noon recess.

Appellant assigns as reversible error the refusal of the court to grant a new trial on account of the alleged misconduct of said jurors.

The uncontroverted affidavits filed by appellant in support of her motion for a new trial made a *prima facie* case of misconduct on the part of the two jurors. *Shropshire* v. *State,* 86 Ark. 481, 111 S. W. 470; *Brackenridge* v. *State,* 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

Receiving information by jurors relative to the merits of a case they are trying, except in open court and in the manner provided by law, is improper. *Capps* v. *State,* 109 Ark. 193, 159 S. W. 193, 46 L. R. A. (N. S.) 741, Ann. Cas. 1915C, 957.

The State did not contradict the statement contained in the affidavits, hence they must be accepted as true. The integrity of the trial was impeached by allowing the jurors to receive information of appellant's guilt or circumstances tending to show her guilt from other sources than through the sworn testimony of witnesses in the case, introduced and examined in the regular way. According to the trend of conversation between the two jurors, the outside reports which they received influenced them in arriving at the guilt of appellant.

It cannot be successfully contended that appellant was negligent in filing her amended motion for a new trial. The knowledge of her husband was not attributable to her on account of the marital relationship. Under our statutory system of criminal procedure a defendant is allowed to move at any time during the term of court at which convicted to set the verdict aside on account of the misconduct of any of the jurors trying the case. Section 3218 of Crawford & Moses' Digest provides that the application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment. It was said in the case of *Corning* v. *Thompson*, 113 Ark. 237, 168 S. W. 128, that a motion for a new trial should be made at the same term at which the judgment is rendered.

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

DRUMMOND v. ALPHIN.

Opinion delivered March 12, 1928.

1. MINES AND MINERALS—DRILLING OF WELLS—COMMENCEMENT OF OPERATION WITHIN YEAR.—Where an oil and gas lease, covering 27 scattered tracts of land, provided that in case operations were not commenced and prosecuted with due diligence within one year, the lease should be void, but that a forfeiture could be prevented by payment of quarterly rentals until drilling operations were commenced, after which no rent was to be paid, a drilling of two wells *held* not a compliance with the lessee's obligation to continue development of lands.
2. MINES AND MINERALS—FORFEITURE OF LEASES.—Where an oil and gas lease, covering 27 scattered tracts of land, provided that forfeiture for the lessee's failure to begin operations within one year, would be prevented for five years or until drilling operations were commenced, failure of the lessees to begin development work on other tracts of land after drilling of discovery wells on two individual tracts, authorized a cancellation of such portions of the original leases as had not been explored.

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

Marsh, McKay & Marlin, for appellant.

L. B. Smead, Robert C. Knox, H. P. Smead, John Bruce Cox and *C. E. Wright,* for appellee.

SMITH, J. On April 21, 1919, J. S. Alphin and wife executed to Vincent L. Hanson an oil and gas lease covering 1,947 acres of land in Union County, Arkansas. The lease described twenty-seven tracts of land, which are widely scattered over the county, some being as much as thirty miles from others, and, altogether, the lands were in eleven different townships. The lease contained the grant of all rights usually found in such instruments, and reserved to the lessor "the equal one-eighth royalty or share of all oil produced and saved upon the premises, to be delivered at the well," etc., and required the lesssee to pay $200 per annum, payable quarterly, for the product of any well producing gas exclusively.

It was provided in the lease that, in case operations were not commenced and prosecuted with due diligence within one year, the grant should be void, but that for-

feiture might be prevented by the lessee paying quarterly, from year to year for five additional years, a rental of twenty-five cents per acre until drilling operations are commenced, after which no rent was to be paid, and that "the completion of a well shall operate as full liquidation of all payments under this provision during the remainder of the term of this grant." No rent was to be paid while drilling operations were being carried on in good faith, whether these operations were successful or not.

It was further provided that: "In case the party of the second part should bore and discover either oil or gas, then in that event this grant, incumbrance or conveyance shall be in full force and effect for twenty-five years from the time of the discovery of said product, and as much longer as oil or gas may be produced in paying quantities thereon; the party of the second part binding itself, after discovery of oil or gas in paying quantities, to prosecute diligently the work of production of oil or gas, and deliver the one-eighth of the oil as above provided and the payment of two hundred and no/100 dollars per annum for gas (if a gas well) as above provided." "This grant is not intended as a mere franchise, but is intended as a conveyance of property above described for the purpose herein mentioned, and it is so understood by both parties to this agreement. Lessee shall have the right to surrender this lease, or any portion thereof, by written notice to the lessor, describing the portion of above tracts that it elects to surrender, and the acreage rental hereinbefore set forth shall be reduced in proportion to acreage surrendered."

In August, 1926, Alphin, the lessor, brought suit, in which he set out the above lease, and alleged that Hanson, the lessee, had sublet or assigned the lease as to various portions of the lands there described, and these sublessees or assignees, twenty or more in number, were made parties defendant along with Hanson.

The complaint alleged an assignment of the lease in so far as the same covered or affected the west half of the southeast quarter of section 24, township 16 south, range 16 west, which, by mesne conveyances, was acquired by the Unity Petroleum Company, and that company had developed the eighty-acre tract described by drilling a well which was producing oil. It was alleged that, as to the remaining 1,867 acres, there had been no development or prosecution for oil or gas, and it was prayed that the lease be canceled as a cloud upon the title, except as to the eighty acres above described.

Some of the defendants filed no answer or other pleading, and a decree by default was rendered against them.

Hanson and certain other of the defendants filed a demurrer to the complaint, upon the grounds that it did not state a cause of action entitling plaintiff to the relief prayed, and because "the complaint shows on its face that the oil and gas lease referred to in plaintiff's complaint is a single and undivided contract, and that, before the term of years named in said lease had expired, oil and gas was being produced from said leased premises, and that, by the terms thereof, said oil and gas lease is to remain in force and effect so long as oil and gas are produced from the leased premises." The demurrer to the complaint was overruled, and, defendants electing to stand on the demurrer, the relief prayed was granted.

Alphin also filed a suit against Fred G. Drummond *et al.*, in which he alleged the execution by himself of a lease to I. Felsenthal similar to the one given Hanson, and that Felsenthal had assigned or sublet leases to various persons. The Felsenthal lease covered 1,710 acres, lying in seventeen different townships and comprising thirty-one different tracts of land, and these lands were as widely scattered as were the lands involved in the Hanson lease. It was alleged in the complaint that, of all the assignees or sublessees of Felsenthal, only the Woodley Petroleum Company had developed a well, this

being on the southeast quarter of the northwest quarter of section 24, township 16 south, range 16 west, one of the tracts of land described in the Felsenthal lease.

The assignees or sublessees under the Felsenthal lease were made defendants, some of whom failed to answer, and, as against those who failed to answer, a decree was rendered by default, canceling the lease. Other defendants filed a demurrer similar to the one filed in the Hanson case, and, the demurrer being overruled, the defendants stood thereon, and a decree was rendered canceling their leases. The cases have been consolidated, and are presented here as a single appeal.

It is the insistence of appellants that the allegations of the complaint show such compliance with the provisions of each lease as to defeat the granting of the relief prayed, inasmuch as it is alleged in each complaint that one of the sublessees has developed a producing oil well.

Appellants rely upon the paragraph of each lease which provides that: "In case the party of the second part should bore and discover either oil or gas, then in that event this grant, incumbrance or conveyance shall be in full force and effect for twenty-five years from the time of the discovery of said product, and as much longer as oil or gas may be produced in paying quantities thereon." Appellants interpret this language of the leases as showing that the parties contemplated that, if oil was discovered, the lessee should have twenty-five years longer in which to explore other tracts of land embraced in the lease than that upon which the original discovery well should be drilled. It is pointed out by appellants that the complaint does not allege that the drilling of additional wells is necessary to prevent draining the oil from under the lands described in the lease by other wells adjacent to these lands. In addition to the insistence that appellants have substantially complied with the requirements of the leases, it is also urged that, if there has been any breach, it is only partial, and that the lessor is therefor remitted to an action at law for damages.

Appellants cite numerous cases to sustain their contentions, but, upon the question of substantial performance of the requirements of the leases, they rely chiefly upon the decision of this court in the case of *Hughes* v. *Cordell,* 174 Ark. 757, 296 S. W. 735. It is the opinion of the majority, however, that the Hughes case is not controlling here. That case did quote with approval a syllabus from the case of *Duke* v. *Stewart* (Tex. Civ. App.), 230 S. W. 485, reading as follows: "Where owner leased as an entirety and by lease required lessees to develop the land for oil, without providing for development of any particular acre or tract thereof, the development of a portion of the land by a sublessee accrued to the benefit of the lessee, precluding the owner from declaring lease forfeited as to another portion held by lessee or successors for nondevelopment thereof." But it will be remembered that the lease in that case covered a tract of land containing only 90.26 acres. The original lease in that case was made February 16, 1920, and on September 27, 1922, the lessee contracted for the drilling of a well on a sixteen-acre tract constituting a part of the ninety-acre tract, and the first well was brought in on January 14, 1923, and seven wells were drilled altogether on the sixteen-acre tract. In that case the plaintiff, Hughes, sought to treat the assignment of a portion of the land as an abandonment of the unassigned portion, but the court held that the original lease of the ninety-acre tract was an entirety, and that the subleases were for the purpose of development of a portion thereof, and that the development of a portion of the land by a sublessee accrued to the benefit of the original lessee, precluding the owner from declaring the lease forfeited as to another portion for nondevelopment.

There is no purpose here to impair the authority of that case, but it is thought that it would be an extension of it if it were held to apply to the facts of this case.

In the case of *Duke* v. *Stewart, supra,* from which we quoted, and which we followed in the case of *Hughes*

v. *Cordell,* it was also said: "On the facts before it the trial court properly instructed a verdict for defendants, and this judgment is affirmed without prejudice as to the rights of appellants or their assigns to bring a new suit or suits, should the holders under this original lease fail to perform the obligations imposed upon them by this contract;" citing the case of *Fisher* v. *Crescent Oil Co.,* (Tex. Civ. App.), 178 S. W. 905. The obligation there referred to was that of prosecuting the work of development, and the case of *Fisher* v. *Crescent Oil Co.,* there cited, is illuminating on the exact question here in issue. The first syllabus in that case reads as follows:

"Complainant, in consideration of $6,400, conveyed all the oil and other minerals in certain land described, with the right of entry to drill and operate for oil, reserving one-eighth of all the oil produced, the lease to be void if the lessees did not commence operations by a certain date, and providing that, if oil was discovered, the lease should be in effect for 25 years thereafter, which conditions extended to the heirs and assigns of the parties. The lessees assigned to two different assignees, one of whom, within the time prescribed, brought in a producing oil well, which failed in about a year, after which the casing was drawn out, and the other of whom drilled a well, which proved to be dry. *Held,* in the lessor's suit against the second assignee to cancel the lease, that the discovery of oil by one of the assignees executed the contract and vested rights under the entire lease for the 25 years specified, but required the lessees to continue operations during such term, and that their failure to operate would work a forfeiture, though a temporary cessation of work would not."

The 25-year clause in that case reads as follows: "In case the parties of the second part shall bore and discover either oil, gas or other minerals, then in that event this grant, incumbrance or conveyance shall be in full force and effect for twenty-five years from the time of discovery of said product, and as much longer as oil, water, gas or other minerals can be produced in paying quantities thereon."

It thus appears that the 25-year clause in that case is almost identical with the 25-year clause in the instant case, and, while the court held that the discovery of oil by a sublessee vested rights under the entire lease for 25 years, yet it also held that the lessees were required to continue operations during said term, and that their failure to operate would work a forfeiture, although a temporary cessation of the work would not.

It was not the intention of this court, in the case of *Hughes* v. *Cordell, supra,* to extend the doctrine of the cases there cited and followed, and it is now held that, while the development of a portion of a lease inures to the benefit of the original lessee, that fact does not relieve the original lessee from the duty of proceeding with the development of the tract as an entirety in the manner contemplated by the express and implied covenants of the lease. The question therefore arises whether the drilling of one well on each lease complied with and discharged the obligation of the original lessee to continue to develop the lands for oil or gas, or might wait twenty-five years before doing so.

If appellants are correct in their interpretation of the contract, they have, for the period of twenty-five years from the date of the drilling in of the respective discovery wells, discharged their obligations to the lessor, and during this time will not be required to pay even the annual rental of twenty-five cents per acre, for a producing well has been brought in under each lease, nor are they required to surrender any portion of the lands on which they conclude drilling would not be profitable, as the lease contract authorizes them to do.

As has been said, the lands here involved are widely scattered, and the drilling of the wells which are producing oil has not determined whether oil might not be discovered under other lands. It is true, as appellants assert, that the complaint does not allege that there is a drainage of oil from under these lands by wells which have been drilled by other persons, but it is true also that, unless appellants explore for oil, the

lands may remain undeveloped as long as the lease is outstanding.

The leases were made in 1919, and suits to cancel them were brought in August, 1926. One of the producing wells was drilled in April, 1923, and the other in May of that year, so that more than three years elapsed after the last well had been brought in before the institution of the consolidated suits, and, under the allegations of the complaint, nothing has been done towards the further development of the land during that interval.

In the case of *Millar* v. *Mauney,* 150 Ark. 161, 234 S. W. 498, it was said:

"The contract set up in the complaint does not create the ordinary relation of landlord and tenant. It is not a contract by which the lessees are to occupy the property for residence, mercantile, manufacturing or agricultural purposes, and in which the lessor, landlord, receives a certain stipulated sum for one month or for one year for the use of the premises leased. But it is a contract for the exploration and development of the leased lands 'for diamonds and other precious stones and valuable minerals.' As compensation for the use of his lands for such purposes, the lessor receives, by way of rental or royalty, a certain percentage of the output from the development of the leased property. In other words, this is strictly a lease for 'mining purposes,' such as was under consideration by this court in the case of *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837. In that case we said: 'In the construction of mineral leases such as is involved in this case, the authorities uniformly hold that there is an implied obligation on the part of the lessee to proceed with the search and also with the development of the land with reasonable diligence, according to the usual course of such business, and that a failure to do so amounts, in effect, to an abandonment, and works a forfeiture of the lease.' And further: 'According to the uniform holding of the authorities, the law will read into this lease a covenant on the part of the lessee that

it will, with due and proper diligence, search the land described in the lease for minerals and with due and proper diligence develop the same. This implied covenant is in effect a condition upon which the lease was made; a failure or refusal to perform that condition results in a forfeiture of the lease.' "

After reviewing a number of authorities, including several prior decisions of this court, it was there further said:

"If the conduct of the lessees in contracts of this nature is such as to show that they do not intend, in good faith, to perform the covenants by which they are bound, then they have, in legal effect, rescinded those covenants and released the lessors from the obligations of the contract, and the latter are justified likewise in treating the contract as rescinded." And this case is also authority for holding that an action may be brought in equity to cancel a lease under such circumstances.

Through the industry of counsel many of, and possibly all, the leading cases bearing on the question here under review have been cited and discussed. We do not review these cases or attempt to distinguish them, for to do so would unduly protract this opinion, as the authorities are not harmonious. The majority are content, under the allegations of the complaint, to say that appellants have not, except as to the two tracts upon which producing wells have been developed, prosecuted the work of development which the original lease contracts contemplated, after bringing in the discovery wells. As supporting this view, the following cases may be cited: *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837; *Mansfield Gas Co.* v. *Parkhill,* 114 Ark. 419, 169 S. W. 957; *Mauney* v. *Millar,* 150 Ark. 161, 234 S. W. 498; *Murdock* v. *Sure Oil Co.,* 171 Ark. 61, 283 S. W. 4; *Brewster* v. *Lanyon Zinc Co.* (C. C. A.), 140 Fed. 801; *Papoose Oil Co.* v. *Rainey,* 89 Okla. 110, 213 Pac. 882; *Fox Petroleum Co.* v. *Booker,* 123 Okla. 276, 253 Pac. 33; *Alford* v. *Dennis,* 102 Kan. 403, 170 Pac. 1005; *Brown* v. *Union Oil Co.,* 114 Kan. 166, 270 Pac. 286;

W. T. Waggoner Estate v. *Sigler Oil Co.* (Tex. Com. App.) 284 S. W. 291; *White* v. *Green River Gas Co.* (C. C. A.), 8 Fed. (2d) 261; *Id.* 270 U. S. 660, 46 Sup. Ct. Rep. 356, 70 L. ed. 786; *McCamey* v. *Freel,* 121 Kan. 189, 246 Pac. 500.

Upon the question of the remission of appellee to an action at law for a suit for damages for a partial breach of the contract, it may be said that the original lessee has, by assigning and subletting various portions of the leases, made many leases out of the various tracts of land, and no one of these assignees or sublessees could be held responsible for the dereliction of other assignees or sublessees. Indeed, two of them have complied with their subleases by developing the land, and they could not be sued for damages, nor would it be equitable to cancel their leases because of the default of others.

In the case of *Millar* v. *Mauney, supra,* it was held (to quote the third syllabus) that, "Where a lessee in a mining lease, the consideration of which is a royalty to be paid, has, after a reasonable time, failed to begin and to continue the work of development and exploration provided in the contract, the lessor has three remedies, viz: (1) he may sue in equity to cancel the contract and recover incidental damages; (2) he may sue at law for damages for breach of the contract; or (3) he may treat the contract as rescinded, and sue at law to recover possession of the property leased."

The majority are of the opinion, upon the authority of the cases previously cited herein, that appellants have failed, beyond a reasonable time, to begin the work of exploration and development as provided in the original leases, after drilling the discovery wells, and that the cancellation of such portions of the original leases as had not been explored was properly decreed.

A case which contains an exhaustive review of the authorities and which is thought to sustain the decrees here appealed from is that of *Brewster* v. *Lanyon Zinc Co.,* 140 Fed. 801. This is a decision of the Circuit Court of Appeals of the Eighth Circuit, the opinion being

delivered by Mr. Justice Van Deventer, then a circuit judge.

It is therefore the opinion of the majority—in which view the writer does not concur—that the decrees of the court below are correct, and should therefore be affirmed, and it is so ordered.

WARD v. PELTON.

Opinion delivered April 16, 1928.

1. SCHOOLS AND SCHOOL DISTRICTS—LEGISLATIVE CONTROL.—The Legislature has plenary power in the establishment and division of State or counties into school districts.
2. SCHOOLS AND SCHOOL DISTRICTS—DISTRICT OVERLAPPING BOUNDARIES OF COUNTY.—Acts 1927, p. 531, providing for organizing into a county unit school district of all territory in Pulaski County outside of single and special school districts within cities of over 10,000 population, abrogates special school districts composed partly of land within the county and incorporates territory of the county within a county district, though included in a special school district within territory in an adjoining county by Acts 1891, p. 148, as effectively as though such act were expressly repealed.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

Troy W. Lewis and *Clayton Freeman,* for appellant.

E. B. Dillon and *George W. Emerson,* for appellee.

KIRBY, J. The sole question for determination on this appeal is whether the territory in Pulaski County organized into the Alexander School District with territory of Saline County, by special act 82 of the Acts of 1891, has been included in the county unit district of Pulaski County, organized under act 152 of the Acts of 1927, and the special act in that respect repealed by the later general act.

The said act 152 of 1927 was construed and held to be not in conflict with the Constitution in *LeMaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327.

Said act 152 provides for the organization into a school district of all the territory in the county outside of the single and special school districts within cities with a population exceeding 10,000 inhabitants as shown by the last Federal census, and that such district shall at once become the owner of all the property belonging to the former school districts of the county outside of the special and single school districts within such cities, and shall be a special or single school district, with all the powers and responsibilities of a single or special school district in cities of the first class. Sections 5 and 6.

It is also expressly provided, in the last paragraph of § 6, that every school district, except those in which there is a city of not less than 10,000 inhabitants, "whether created by county courts, county boards of education or by special acts of the Legislature, shall cease to exist when a county school district as herein provided for has been created, and its directors, trustees, agents and teachers shall turn over to the county board of education all its books, records and other property."

The act also requires the county school district to assume and perform all obligations of any valid contract to which any district of the county is a party.

Under said act 82 of 1891 six sections of land in Pulaski County were included in the special school district, the "Alexander School District," but it was provided therein that the school taxes on the property included in Pulaski County and that included in the district in Saline County should be levied and collected by the respective officers of the different counties and paid into the county treasuries for the benefit of the special school district, and the children were required to be enumerated within the district, and the number living within the territory of the particular county returned to the county examiner of that county in order to the apportionment of the school tax in accordance with the number of children in each county.

The Legislature had plenary power in the establishment and division of the State or counties into school districts, and the evident purpose of this act 152 of 1927 was to organize all the territory within the county, not especially excepted as included in single or special school districts in cities of not less than 10,000 population, into the county school district. It expressly provides that every other school district, save the excepted single or special school districts in cities and towns of not less than 10,000 population, "whether created by county courts, county boards of education or by special acts of the Legislature, shall cease to exist when a school district as herein provided for has been created," and as effectively abrogates any special school district composed partly of the lands within the county organized into the county school district as though the entire district was within the limits of the county; the result being to incorporate the territory of the county, notwithstanding it had been included in a special school district with territory in an adjoining county by a special act of the Legislature, as effectively as though said special act had been expressly repealed.

We do not need to suggest what may be done with that portion of territory of the Special Alexander School District in Saline County, the authorities of that county having ample authority to dispose of it, and no injustice will result from the dismemberment of the district, since the new law provides that the county school district shall take care of, perform and discharge the valid contracts and obligations of the dismembered joint district, so far as same is a charge against the lands of Pulaski County withdrawn therefrom.

There being no error in the record, the judgment is affirmed.

WATSON v. POINDEXTER.

Opinion delivered April 16, 1928.

1. PLEADING—MATTERS REACHED BY DEMURRER.—Facts which do not appear in the allegations of the complaint cannot be taken advantage of on demurrer.
2. PLEADING—ADMISSIONS BY DEMURRER.—A demurrer admits allegations properly pleaded with all intendments and inferences arising therefrom.
3. HOMESTEAD—EQUITABLE ESTATE.—An equitable estate will support a homestead right, and form a sufficient basis under the law for a claim of homestead.
4. HOMESTEAD—NONJOINDER OF WIFE.—A married man cannot make a valid conveyance of the homestead if his wife fails to join in the execution of the deed, nor can he make a contract to convey the homestead which would be obligatory upon the wife or of any validity without her joining in the execution of such instrument.
5. HOMESTEAD—ASSIGNMENT OF HUSBAND'S INTEREST.—Where a husband had paid for land occupied as a homestead, but had not received a deed, his assignment of his contract as security for a loan was void where the wife failed to join, and she was entitled to have such deed canceled and to have the conveyance of the property from the vendor to her husband.
6. DIVORCE—DISPOSITION OF HOMESTEAD.—Where a wife was the innocent party in a suit for divorce, the court in decreeing conveyance to the husband of property purchased and occupied as a homestead could award the homestead to the wife along with the custody of the dependent child during its minority and so long as appellee remains a widow.

Appeal from Logan Chancery Court, Northern District; *John E. Chambers,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit for divorce against her husband, Dewey Poindexter, alleging three of the statutory grounds therefor—habitual drunkenness for the space of a year on the part of the husband; that he was guilty of cruel and barbarous treatment such as to endanger her life, and offered such indignities to her person as rendered her condition intolerable. She later filed an amendment to her complaint, alleging that she and her husband had acquired, by their united efforts, a small

home in the town of Paris, on the south half of block 2, Ledgerwood Addition, worth about $1,500, in which her husband was living with his family now. That the house was purchased from Joe Watson, Sr., in 1921, under an ordinary written contract of sale, for the consideration of $950; that she and her husband immediately moved into the house and started paying it out in accordance with the contract, and that they continued to reside on the property as their homestead, and paid all the money due on the property in accordance with the contract. That it was fully paid out, but the same had not been conveyed to him in accordance with the terms of the contract; that, after such full payment, he borrowed some money from the defendant, American Bank & Trust Company, upon his note, indorsed by Joe Watson, Jr., as security; that, in order to secure the indorser, he delivered to him the paid-up contract of purchase of the property, with the notes and receipts; that this was all done over the protest of plaintiff, who did not consent to or join in any such agreement or contract for the conveyance of the homestead. That she lived with her husband upon and occupied the premises as a homestead about four years from the time of its purchase until more than a year after all the purchase money had been paid, and her husband, the defendant, had become entitled to a deed therefor. That the assignment of the contract from Joe Watson, Sr., to Joe Watson, Jr., was made without her consent, and that the property was later wrongfully conveyed by Joe Watson, Jr., to the American Bank & Trust Company in payment of the note executed by her husband for money borrowed from said bank, and for which the said Joe Watson, Jr., had become surety. It was alleged that these transactions were had without her consent or concurrence, that she did not join in any of them, and that the conveyance of her said homestead was absolutely void, and should not affect her homestead rights nor that of her husband. Asked that all these parties be made defendants; that the attempted assignment of the

contract of purchase of the homestead by her husband to Joe Watson, Jr., and his conveyances of the property to the bank, be declared void, and the deed canceled; that the property be declared the homestead of her husband, Dewey Poindexter, subject to all her rights and equities and those of their minor child.

Joe Watson, Jr., filed a general demurrer, which was overruled, and he then filed an answer, denying the allegations of the complaint, and that the contract of sale was in his possession or that of the American Bank & Trust Company, and alleged that he entered into a contract of sale of the property to Dewey Poindexter for $900; that the first two notes given for the purchase money were paid when due, but, before the last note was paid, early in 1924, Poindexter wanted to enlarge the dwelling, and borrowed from defendant and his partners, for whom he was working, $100 for that purpose. Later in the summer he wanted to go into the grocery business and to borrow $1,500 for that purpose. That he agreed with Dewey Poindexter and his wife, Ruby Poindexter, to enable them to borrow this money, to sign their notes to the bank as surety, and was paid the balance of the purchase money, "and contract was surrendered to Joe Watson, Jr., to be held until the said $1,500 note was paid by defendant, Dewey Poindexter, and his wife, Ruby Poindexter," when a deed was to be executed to the premises. That the note to the bank was never paid, and, after it had become due, and Poindexter and his wife had become insolvent, and made an assignment of the grocery business to their creditors, and when the bank demanded payment of him of their debt, for which he was surety, he had declared the contract of sale of the land forfeited, and had conveyed the land by warranty deed, in which his wife joined, to the bank in payment of the $1,500 Poindexter note, with interest.

Watson, Sr., denied the allegations of the complaint, the amended complaint, and disclaimed any interest in the property.

The bank neither denied nor made admission as to the allegations of the purchase of the land by appellee's husband and the contract of sale thereof; admitted that it was composed of city lots, but denied that it was held and occupied by the appellee with her husband for more than one year after all payments were made under said contract and before the sale of same to the bank. Admitted the allegation that Dewey Poindexter, the appellee's husband, had borrowed the money from the bank, and procured the signature of Joe Watson, Jr., and Tom Watson as sureties, and that Dewey Poindexter had transferred the contract of sale and whatever title he had in the property to Joe Watson to secure him for his indorsement, and that Joe Watson had executed and delivered to the bank his warranty deed conveying the real estate in payment of his liability as indorser upon the note of Dewey Poindexter upon the loan made to him. That it had no knowledge or information about the conveyances or assignments of the contract of purchase of the lands between the Watsons and Poindexter. That it purchased same for the consideration of the note and interest due it from Dewey Poindexter, upon which Joe Watson, Jr., was surety; that it was a fair consideration, and accepted without any attempt to defraud. Prayed, in case the deed was canceled, that the bank be restored to its rights under the note for the money loaned, delivered in payment for the real estate, and for judgment against Dewey Poindexter, Joe Watson, Jr., and Tom Watson for the amount of same with interest.

The testimony was sufficient to support the allegations of the complaint for divorce, and also showed that appellee's husband, Dewey Poindexter, had purchased the land in controversy under a written contract of sale, and that he and his wife immediately moved on the premises and continued to occupy same as a homestead. That, more than a year after all payments under the contract of purchase had been duly made and Dewey Poindexter was entitled to a conveyance of the prop-

erty, he made a new arrangement, without the consent of his wife or her joining in any way in the transaction, and turned over the contract of purchase to Joe Watson, Jr., to secure him against his indorsement of Poindexter's note to the bank for $1,500 to enable him to go into the grocery business. All the parties knew that Dewey Poindexter and his wife, appellee, had established their homestead on the property immediately upon its purchase under the contract of sale; that it was occupied as such homestead by them long after all the purchase money under the contract had been paid, and it continued to be occupied as their homestead to the time of the rendition of the decrees herein.

There was no testimony tending to show that the wife consented to the assignment or transfer of the contract of purchase of the land after it had been paid for, and certainly none tending to show that she joined in any such assignment or conveyance.

The court rendered a judgment for the divorce on the first hearing and postponed the consideration on the homestead question until later, when it held the assignment to Watson and the conveyance of the lands to the bank void, and canceled the conveyance to the bank as a cloud upon the title of Dewey Poindexter, and ordered Joe Watson, Jr., to execute and deliver a warranty deed to the homestead of appellee and her husband, Dewey Poindexter, to Dewey Poindexter within 10 days specified for performing the condition of the contract; and that appellee with her child is entitled to the possession and control of the homestead, describing it, during the minority of the child, Hilda Louise Poindexter, and so long thereafter as appellee remained a widow. The complaint was dismissed as to Joe Watson, Sr., and from the decrees Joe Watson, Jr., prosecutes this appeal.

Hall Brothers, for appellant.

White & White, for appellee.

KIRBY, J. It is insisted for reversal that the court erred in overruling the demurrer to the complaint. Appellant urges the objection, however, against the com-

plaint for things not alleged therein, rather than because of the insufficient allegations thereof. If the vendor of the land by the written contract could not and did not make a valid contract for their conveyance, that fact did not appear in the allegations of the complaint, and certainly could not be taken advantage of on demurrer, which admitted all the properly pleaded allegations with all intendments and inferences arising therefrom.

The undisputed testimony shows that Dewey Poindexter, with his wife, Ruby Poindexter, appellee, established their homestead upon the land purchased under the contract of sale, immediately, and continually resided thereon until long after the full purchase price therefor was paid and Poindexter was entitled to his deed of conveyance. It is no longer questioned that an equitable estate will support the homestead right and form a sufficient basis under the law for the claim of homestead. *Spaulding* v. *Haley,* 101 Ark. 296, 142 S. W. 172; *Kirby* v. *Vantreece,* 26 Ark. 370.

It is also true that a married man cannot make a valid conveyance of the homestead if his wife fails to join in the execution of the deed, and that he cannot even make a contract to convey the homestead which would be obligatory upon the wife or of any validity, without her joining in the execution of such instrument. Section 5542, C. & M. Digest; *Waters* v. *Hanley,* 120 Ark. 465, 179 S. W. 817; 13 R. C. L. § 84, page 625.

No error was committed by the court in canceling the deed of conveyance of this homestead from Watson to the bank, nor in directing its conveyance to Dewey Poindexter under the terms of the contract of purchase which had been performed by him, and it was also competent for the court to award the homestead to appellee, the innocent party, along with the custody of the dependent child during the minority of such child, and so long thereafter as appellee remains a widow. *Woodall* v. *Woodall,* 144 Ark. 159, 221 S. W. 463.

We find no error in the record, and the decree is in all things affirmed.

STATE v. DABNEY.

Opinion delivered April 16, 1928.

AUTOMOBILES—TAX ON CARRIER OF PASSENGERS.—One who rents or hires to individuals applying therefor automobiles to be operated by the hirer at his own risk and discretion was neither a private nor a public carrier of passengers, nor engaged in the business of using motor vehicles for transportation of passengers for hire, within the meaning of the Acts Sp. Sess. 1923, pp. 55, 59, § 36, requiring payment of a tax in addition to registration fees.

Appeal from Pulaski Circuit Court, First Division; *Abner McGehee,* Judge; affirmed.

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

Martin K. Fulk, for appellee.

KIRBY, J. This appeal necessitates the construction of § 36(d) of act 5, Special Acts of 1923 (Castle's Supplement to Crawford & Moses' Digest, § 5166). Information was filed against appellee charging him with operating motor vehicles for hire without the payment of license fee required under said section. The case was tried on an agreed statement of facts, which the court held insufficient to support a conviction, and dismissed the cause, from which the State has prosecuted this appeal.

The appellee, George Dabney, operates a business in the city of Little Rock under the style or name of "Drive-It Yourself Company." He owns 23 automobiles, all passenger cars, including coupes, sedans and touring cars. He conducts his business by leasing them to the customers, who come to his garage where they are kept, under a contract in printed form, the customer himself being in exclusive control of the car during its operation. He does not have in his employ any drivers or chauffeurs, does not drive the leased cars himself, nor operate a jitney, taxicab line, or motor bus business. A certain price is charged for the leased car, which is used by the bailee at his own discretion, and the rental charged is the same whether the customer alone occupies

the car or whether he carries other persons with him. Virtually all the cars rented are used exclusively within the limits of the city of Little Rock. Appellee refused to pay the license fee required under said section of the statute.

The statute provides, § 36:

"(d) In addition to the registration fees herein provided for all motor vehicles, when such vehicles are used for the transportation or delivery of persons for hire, there shall be paid two dollars and fifty cents ($2.50) for each passenger-carrying capacity. * * *

"(m) Each of the fees herein authorized is declared to be a tax on the privilege of using the vehicle on the public roads and highways of the State of Arkansas."

Subdivision (n) of § 36 declares it a misdemeanor for any person to operate or permit the operation of a vehicle without having paid the required fee.

The classification is made herein for charging an additional fee for motor vehicles "when such vehicles are used for the transportation or delivery of persons for hire" according to the carrying capacity of the vehicle.

The undisputed testimony shows that the appellee was not engaged in the business of operating a jitney, taxicab or motorbus line, but only in renting or hiring to individuals, who applied therefor, cars of different styles and sizes, to be operated by the hirer at his own risk and discretion. Such operation of such business did not constitute appellee either a private or public carrier of passengers or his business the using of motor vehicles for the transportation or delivery of persons or passengers for hire within the meaning of the act. He was not a carrier of passengers at all, nor liable to the payment of the additional tax required under § 36 (d) of the act. *Forbes* v. *Reinman,* 112 Ark. 417, 166 S. W. 563, 51 L. R. A. (N. S.) 1164; *Locke* v. *Ft. Smith,* 155 Ark. 158, 244 S. W. 11; *Winfrey* v. *State,* 133 Ark. 357, 202 S. W. 23; *State* v. *Bee Hive Auto Service Co.,* 137 Wash.

376, 242 Pac. 384; *State* v. *Robinson,* 42 Minn. 107, 43 N. W. 833, 6 L. R. A. 339; *Burlington* v. *Unterkircher,* 99 Iowa 401, 68 N. W. 795; *Rathborn* v. *Ocean Accident Guaranty Ass'n.,* 299 Ill. 562, 132 N. E. 754, 19 A. L. R. 140; *Booth* v. *Dallas, Texas* (Tex. Civ. App.), 179 S. W. 301, 4 R. C. L. 549.

No error was committed in so holding, and the judgment is affirmed.

THRELKELD v. BAPTIST HOSPITAL.

Opinion delivered April 16, 1928.

EVIDENCE—PAROL TESTIMONY TO CONTRADICT WRITING.—Where defendant signed a guaranty of payment of a hospital bill, in his individual capacity, it was inadmissible for him to prove that the guaranty was signed as superintendent of the company for which the patient was working when injured, with the intent only to bind such company.

Appeal from Crawford Circuit Court; *J. O. Kincannon,* Judge; affirmed.

D. H. Howell, for appellant.

Starbird & Starbird, for appellee.

KIRBY, J. Appellee brought this suit against appellants on an account for an indebtedness of the sum of $314.05 for service alleged to have been rendered to appellant Threlkeld while confined as a patient at appellee's hospital in Alexandria, La., it being also alleged that appellant Gerhardt had guaranteed in writing the payment of the account.

A. L. Threlkeld was an employee of the Vincennes Bridge Company of Vincennes, Ind., at work upon the construction of a bridge near Trout, in Louisiana, and appellant Gerhardt was foreman or superintendent of the construction of the bridge, and father-in-law of appellant. Threlkeld was injured in the course of his employment on October 6, 1926, and taken by Gerhardt to the Baptist Hospital at Alexandria, La., for treatment, being admitted there on the afternoon of that day. On October

11 Gerhardt signed the following notation on the ledger sheet upon which Threlkeld's account was being kept: "This bill is guaranteed in full by me, and I hereby sign my name. F. O. Gerhardt. Now at Trout, Louisiana; permanent address, Alma, Arkansas."

Suit was brought against both appellants for the services rendered, the payment of which was guaranteed by Gerhardt. Appellants denied the allegations of the complaint.

The undisputed testimony shows the amount of the account charged to Threlkeld was correct, a copy of it in fact having been "O.K.'d" by him, and that Gerhardt signed the guaranty.

Testimony was introduced showing that, under the workmen's compensation law of Louisiana, the bridge company, appellant's employer, was bound to the payment for his hospital bill and medical treatment to the sum of $250, and also to the payment of a certain per cent. of the amount of wages that would have been earned during the disability caused by the injury at the regular contract price.

Gerhardt offered to testify that he did not intend to personally guaranty the payment of Threlkeld's account for medical treatment, etc., at the hospital, but only to bind the company to its payment by signing the guaranty.

The superintendent of the hospital said he understood the liability of the employer, under the law, for payment of hospital bills and medical treatment to an injured employee, and stated that he was only trying to have secured, by obtaining the guaranty of Gerhardt, the payment of any amount that should become due for treatment of Threlkeld while he was in the hospital, since his injury was so severe as to apparently require his staying therein longer than the amount the employer was required to pay would satisfy the account for.

After the introduction of the testimony in chief, appellant was allowed to amend his answer to allege

that he signed the guaranty as the superintendent of the bridge company, and on its account placed Threlkeld, another employee, in the hospital, and, as such agent, contracted with appellee for his care and treatment.

The court directed the jury to return a verdict for the amount sued for, and from the judgment thereon this appeal is prosecuted.

Appellant insists that the court erred in directing the verdict.

The undisputed testimony showed that the account sued on was correct, it had been O.K.'d by the injured employee to whom the services were rendered, and appellant Gerhardt did not deny its correctness, but attempted to show by parol testimony that, in signing the guaranty for its payment, he did so as the superintendent of the Vincennes Bridge Company, for whom Threlkeld was working at the time of his injury, acting as its agent, and intending only to bind the company to the payment of the account by such guaranty. The court correctly refused to allow the introduction of parol testimony to alter, contradict or vary the terms of the written guaranty, whose meaning is plain and unambiguous. *Bryant Lumber Co.* v. *Crist,* 87 Ark. 434, 112 S. W. 965; *United Drug Co.* v. *White,* 145 Ark. 96, 223 S. W. 372.

There being no conflict in the testimony, no error was committed in directing the verdict, and the judgment is affirmed.

BAILEY v. FENTER.

Opinion delivered April 16, 1928.

1. WORK AND LABOR—INDEBTEDNESS FOR SERVICES RENDERED.—In an action to recover for services rendered, in which proof showed the performance of services for which plaintiff had not been paid, the question as to the existence and amount of the indebtedness was for the jury.

2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by substantial evidence is conclusive on appeal.

3. WORK AND LABOR—RECOVERY ON QUANTUM MERUIT.—In an action on an express contract to recover for services rendered, an instruction authorizing recovery on a *quantum meruit* in case the jury found there was no express contract was warranted where both parties, without objection, introduced testimony tending to show the value of the services performed.
4. PLEADING—FAILURE TO FILE AFFIDAVIT TO ACCOUNT.—A complaint in an action on a contract for services rendered, which states the cause of action, is not demurrable under Crawford & Moses' Dig., §§ 1187, 1189, though plaintiff failed to file an affidavit to establish the account sued on as required by § 4200.
5. WORK AND LABOR—PRESUMPTION OF PROMISE TO PAY.—Where one accepts the services of another, the law implies a previous request and a subsequent promise to pay.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

John E. Harris, for appellant.

T. O. Abbott, for appellee.

MEHAFFY, J. The plaintiff, appellee here, on June 15, 1926, filed suit in the Union Circuit Court against the defendant, J. E. Bailey, alleging that the defendant was indebted to him for services in the sum of $868, with interest from January 1, 1924.

Defendant filed answer, denying the material allegations of the complaint, and, some time thereafter, filed a demurrer to the complaint, alleging as grounds therefor: "The complaint fails to have attached thereto as an exhibit an itemized statement of the account sued upon, and fails to have a sufficient account sued upon incorporated in said complaint."

The court overruled the demurrer, and defendant saved exceptions. After the overruling of the demurrer both parties announced ready for trial, a jury was impaneled, and, after hearing the evidence and the instructions of the court, returned a verdict for plaintiff in the sum of $500, and judgment was entered for that amount.

Defendant filed motion for new trial, which was overruled, exceptions saved, and this appeal is prosecuted to reverse said judgment.

The appellant urges a reversal on three grounds. First, that the court erred in refusing to give defendant's instruction No. 1, which instructed the jury to find for the defendant; second, because the court erred in giving the court's instruction upon the question of *quantum meruit;* and third, because the court erred in overruling defendant's demurrer to the complaint.

Appellant first insists that the court erred in refusing to give the peremptory instruction requested by him. Appellant does not mention this question in his motion for a new trial. He does, however, state in his motion for a new trial that the verdict is contrary to the evidence and contrary to both the law and the evidence. If the evidence was not sufficient to support the verdict, of course it would have been the duty of the court to direct a verdict for the defendant. But the proof is undisputed that plaintiff performed services for the defendant for which he had not been paid. The defendant himself testified that he did not have any agreement with Fenter at any time during 1923 to pay him $200 a month; that what he owed Bailey and what the Bailey-Murray Oil Company owed him was paid jointly, $75 during the month of August. He said also that Fenter might have had a little more work to do if he ordered feedstuff, although that was not his business. And although the defendant testifies that Fenter never mentioned any balance that he was claiming, and never told him that he was going to charge him $225 a month, or $200 a month, and testified that nothing was said about $200 a month, and that Fenter told him that if he would see that he got his room rent and a little eating money he would take care of his books, if witness could pay him a little bit, and witness testified that he told him he would do his best, but he did not know whether he could or not. Defendant also admitted writing a letter and testified that he gave Fenter authority to act for him in trying to save his property; that it would take very little of his time; and the plaintiff testified very positively about doing the work.

Whether Bailey owed Fenter anything at all, and, if he did, the amount of the indebtedness, were both questions of fact for the jury, and there was substantial evidence to support the verdict of the jury, and the verdict is conclusive on this court.

Counsel for appellant argue that, according to defendant's statement, he had paid all that he owed plaintiff at the rate of $75 per month, and that, at the filing of the suit, he would not have owed him anything. However, he also testifies that he did some work, and it was a question for the jury to determine how much.

It is next insisted by appellant that, if Fenter is entitled to anything at all, he is entitled to recover what he sued for, and not entitled to recover on a *quantum meruit* basis. Appellant relies on the case of *Bayou Meto Drainage Dist.* v. *Chapline,* 143 Ark. 446, 220 S. W. 807, and quotes from that case as follows: "Where there is no agreement as to a stipulated sum for the fee in the employment of an attorney, then the attorney can recover for services rendered upon *quantum meruit.*" In that case it was contended on the part of the plaintiffs that there was an agreement for the customary fee. However, there was a controversy about what the contract was, just as there is in this case, and both parties introduced testimony for the purpose of showing the value of the services. There is in this case proof of employment to perform services, but no evidence to show an agreement as to the amount to be paid for the services. It is true that plaintiff alleged in his complaint that there was a contract for $200 a month, and it appears that, in the absence of defendant, the plaintiff, who kept the books, had charged the defendant with $200 a month. He did not, however, testify that the defendant agreed to pay this amount, but he did testify that defendant, in effect, said that he would make it all right. In other words, pay him what his services were worth. And again, although the plaintiff alleged a contract and the defendant denied it, evidence was admitted without objec-

tion tending to show the value of the services performed. The defendant himself introduced evidence tending to show that there was very little work to be done; that it would take only a very short time each day to do all that plaintiff was required to do, and, of course, if he had been contending that there was a contract or relying on the fact that defendant's suit was based on an express contract, testimony of the value of his services would have been inadmissible. That is, if he had a right to recover on an express contract fixing a definite amount, the contract would, of course, govern as to the amount of recovery, and testimony as to the actual value of the services would be inadmissible.

The court in discussing this question said:

"Under the issue joined the court did not err in refusing to admit testimony showing the value of appellants' services. Without reference to the value of the services, they were either entitled to five per cent. of the sale price of the land, or they were not entitled to anything. Where there is an express contract for services at a fixed compensation, there can be no recovery *quantum meruit.*" *Christian & Taylor* v. *Fancher,* 151 Ark. 102, 235 S. W. 397.

In the case of *Bayou Meto Drainage Dist.* v. *Chapline,* referred to by appellant, the court said:

"The appellants answered, denying all the material allegations of the complaint except the employment of the appellees by the appellants. They set out in their answer that appellants had refused to pay the appellees because these fees were unreasonable and greatly in excess of the fee for which the appellants contracted with the appellees. * * * Moreover, under the undisputed evidence in this case, the commissioners did not fix the fee of the appellees until after the services which they had been employed to render had all been performed. The compensation for their services was fixed by the board at the time they were discharged, not when they were employed. The preponderance of the evidence

shows that the appellees were employed and that the compensation to be paid for their services was not stipulated in advance. The appellees are therefore entitled to recover upon *quantum meruit.*"

In the case last cited the defendants stated in their pleadings and in their evidence that there was an express contract fixing the amount. The appellees denied this. In the case at bar the plaintiff in his complaint stated that he was entitled to so much under the contract, but the evidence on the part of both the plaintiff and defendant was admitted without objection as to the character and amount of services performed. And the defendant in the instant case contends that the contract was for $75 a month. It is true that the plaintiff said that he was suing on a contract, but in the Bayou Meto Drainage District case the suit was on a contract, the defendants claiming that the amount was fixed, and the plaintiffs claiming that it was to be the customary amount.

We think the court did not err in giving instruction No. 2, which authorized a recovery if the jury found for the plaintiff in whatever sum the evidence showed would be reasonable for the services performed, if they did not find that there was a contract fixing the amount.

It is next insisted that the court erred in overruling defendant's demurrer. This contention is based on § 4200 of Crawford & Moses' Digest. That section provides as follows:

"In suits upon accounts, the affidavit of the plaintiff, duly taken and certified according to law that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account, either in whole or in part; in which case the plaintiff shall be held to prove such part of his account as is thus denied by other evidence."

It will be observed that this section only provides that, when this section is complied with, this shall be sufficient to establish the same, etc., but it does not require the plaintiff to file the affidavit, and, if a complaint states

a cause of action, the mere fact that the affidavit provided for in the section referred to is not filed would not justify the court in sustaining a demurrer to the complaint.

Section 1187 of Crawford & Moses' Digest provides:

"The complaint must contain: (1) The style of the court in which the action is brought. (2) The style of the action, consisting of the names of all the parties thereto, distinguishing them as plaintiffs and defendants, followed by the words, 'complaint at law,' if the proceedings are at law, and by the words 'complaint in equity,' if the proceedings are equitable. (3) A statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action. (4) A demand of the relief to which the plaintiff considers himself entitled."

A complaint for work or labor or services that complies with § 1187, above quoted, states a cause of action.

Section 1189 provides that the defendant may demur to the complaint where it appears on its face:

"(1) That the court has no jurisdiction of the person of the defendant, or the subject of the action; or, (2) that the plaintiff has not legal capacity to sue; or, (3) that there is another action pending between the same parties for the same cause; or, (4) that there is a defect of parties plaintiff or defendant; or, (5) that the complaint does not state facts sufficient to constitute a cause of action."

The complaint in this case states facts sufficient to constitute a cause of action, and the court properly overruled the demurrer.

But where one accepts the services of another the law implies a previous request and a subsequent promise. It was said by this court: "We are of the opinion that the court erred in its instructions to the jury. It is an elementary principle of the law of contracts that, where a party accepts the beneficial results of another's services, the law implies a previous request and a sub-

sequent promise." *Nissen* v. *Flournoy,* 160 Ark. 311, 254 S. W. 540.

The verdict of the jury is not without substantial evidence to support it, and the case is therefore affirmed.

BARHAM v. FEDERAL RESERVE BANK.

Opinion delivered April 16, 1928.

1. FRAUDULENT CONVEYANCES—VOLUNTARY TRANSFER OF PROPERTY.—Where an insolvent debtor makes a voluntary transfer of property, not exempt, to those who are near of kin, whether he intends it as a fraud or not, it operates as a fraud on his creditors as a hindering, delaying or defeating them in the collection of their claims.
2. FRAUDULENT CONVEYANCES—HINDERING CREDITORS.—An insolvent debtor cannot take money which justly belong to his creditors and build a house, nor can he make a valid conveyance of his property for such purpose and thereby hinder and delay a creditor.
3. FRAUDULENT CONVEYANCES—PRESUMPTION OF FRAUD.—Conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care, and if voluntary they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors.
4. FRAUDULENT CONVEYANCES—CONVEYANCE TO WIFE.—In a suit against a debtor to have certain conveyances of his property set aside as fraudulent and subjected to payment of a judgment against the debtor, evidence *held* to support a decree of the chancellor that the title to certain property was in the debtor and not in his wife.
5. FRAUDULENT CONVEYANCES—EVIDENCE.—In a suit to have conveyances set aside as fraudulent and to subject property to the payment of a judgment against a debtor, the circumstances developed in the case, the relation of the parties, and the credibility of the witnesses are all matters to be considered by the chancellor in determining all questions of fact.
6. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Findings of the chancellor will not be disturbed unless they are against the preponderance of the evidence.

Appeal from Crittenden Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

J. R. Pugh, Caraway, Baker & Gautney, for appellant.

R. V. Wheeler and *S. V. Neely,* for appellee.

MEHAFFY, J. The appellee, plaintiff below, had obtained a judgment against L. L. Barham in June, 1924, on which execution was issued December 24, 1924, and no property could be found upon which to levy the execution.

On February 5, 1925, this suit was begun in the Crittenden Chancery Court against L. L. Barham, Alma E. Barham, C. E. Barham and V. Lee Brunson. Plaintiff alleged that L. L. Barham was the owner of certain described property, that he executed a deed of trust, but that said deed was without consideration, and that it was made with the intent to prevent plaintiff and other creditors of L. L. Barham from collecting their debts. Plaintiff alleged that on September 7, 1923, L. L. Barham purchased certain property, but had it conveyed to his wife, and it was also alleged that other property was purchased by L. L. Barham and deeds made to his wife, and that all these deeds were made to the wife instead of to L. L. Barham for the purpose of hindering, delaying and defrauding the creditors of L. L. Barham. Plaintiff also alleged that L. L. Barham conveyed certain property to his daughter, V. Lee Brunson, for the purpose of defrauding creditors. It was sought to have these conveyances set aside as fraudulent and to subject the property to the payment of the judgment against L. L. Barham.

The answers of the defendants denied the material allegations of the complaint.

Plaintiff also alleged that certain other money was gotten by L. L. Barham and transferred to his wife, Alma E. Barham, in fraud of his creditors.

The defendant, L. L. Barham, testified, in substance, that Alma E. Barham was his wife, V. Lee Brunson his

daughter, and C. E. Barham his brother. That on December 21, 1923, he and his wife executed a deed of trust to C. E. Barham, conveying certain property in the town of Earle to secure the payment of a note to C. E. Barham. That C. E. Barham was in the lumber business at Marks, Mississippi, bought a lot, and erected a house for their mother, who is an invalid, and L. L. Barham was to pay one-half of the purchase price, and to pay the monthly bills incurred by his mother. Did not know the exact amount of the debt. The house was erected in 1917 and 1918 at a cost of about $4,000. Did not remember the price of the lot. He also testified that on September 7, 1923, W. W. Harrison conveyed certain property to Alma E. Barham. That Alma E. Barham and Mrs. Brunson opened a garage in the town of Earle. Prior to that time Brunson, the husband of V. Lee Brunson, and a man named Aldridge were in the garage business, and went into bankruptcy. Alma E. Barham and V. Lee Brunson then opened a garage with a capital of $2,000. The money used by Alma E. Barham was got from her father. The money with which Alma E. Barham purchased the property was money that her father gave her. The property where the gin is belongs to Mrs. Barham. The money was borrowed from the Federal Reserve Bank in witness' name. Witness insisted on his wife signing notes, but the cashier said it made no difference, and she did not sign them.

Witness' wife bought other property from J. C. Barham. Witness has not paid the money secured by the deed of trust to C. E. Barham, except two or three thousand dollars. Does not remember the date of the transfer of his stock in the Bank of Commerce to his son. It was in November, 1923. Conveyed his stock in the Crittenden County Bank & Trust Company to his son. Was a director and vice president of the Bank of Commerce after his stock was transferred.

Alma E. Barham owns property purchased from Nesbitt and others. The contract was made in 1924. Witness' wife furnished the money to make the payment.

Alma E. Barham also owns 160 acres south of Earle. This was bought in 1923, 80 acres of it, and the other early in 1924. She borrowed the money for the second 80-acre tract from the Joint Stock Loan Bank of Memphis. The money came from her father. She received between eight and ten thousand dollars from her father. Witness had been using part of it, and part of it was invested in Liberty bonds. Her money was in the Bank of Commerce at the time this property was purchased. Witness had authority to draw checks on Mrs. Barham's account. Alma E. Barham owns the gin. She bought it from the Continental Gin Company for $5,700, and had paid $3,000 out of moneys received from the operation of the gin. Witness made a statement of his financial condition to the Bank of Commerce in August, 1924. Does not know whether the statement shows that he had notes and trade acceptances amounting to $33,100. Made the statement to J. C. Moore, and insisted on him getting witness' wife to sign it. Told Mr. Moore that his wife owned the stuff. His wife's property consisted of bank stock, various notes, the details of which witness does not remember. Did not read the statement, and Mr. Moore filled it out. Signed it without reading it. Does not recall whether he had $31,100 of notes at that time or not. Does not recall that he had $2,800 in accounts receivable, and does not remember whether he made such statement. Did not have any live stock in 1924. In 1923 he possibly had 15 or 20 head, and sold them to various people.

The statement made by witness to the Bank of Commerce September 9, 1924, shows that he owns $8,000 stock in garage. Witness did not fill out the statement, and did not have the stock in the garage. Did not have anything in it. His wife owned it. While witness signed notes, he told Mr. Moore at the time it was his wife's debt, and insisted on her signing it, but Mr. Moore said it was not necessary. Witness does not know how much he owed the bank at that time. Made a statement in 1923,

but if he stated he owned anything in the garage it was wrong, for the garage was Alma E. Barham's. Possibly made a statement in 1924 that he was farming 2,000 acres. Other real estate valued at $5,000 refers to property in the town of Earle. Witness has his home, worth $6,300, in block 64. Statement shows $15,000 machinery, but witness does not know whether he owned that much at that time. Alma E. Barham bought the farming implements from witness' son and Albert Horner, and witness paid it for her out of her account; some money that her father gave her. Witness' wife put $2,000 in the garage and $3,000 in farming implements, and put $2,500 in land she bought; $1,200 in the land she bought from Barham and $1,200 in the gin. The home was in witness' name.

Witness does not own any automobiles. They belong to his wife. He had three or four cars in 1924, but sold them. The mortgage to the Joint Stock Land Bank is $6,500, and there are no other outstanding mortgages against the real estate. Made statement of assets and liabilities in 1923, but does not remember having made one in 1922. The statement shows witness worked 2,000 acres in 1923, but that is not true. Statement shows witness owned real estate, including residence, of the value of $18,100. Shows bank stock and stock in garage at $17,200, but that is not correct. Does not own the garage, and does not recall that that statement was made, and does not recall the total of the statement for 1923.

Witness made a deed to his daughter, and she has been in possession of the note since 1919 or 1920, and witness just failed to put the deed on record. Property witness had in 1923 was lost in the bank and in farming. Lost $20,000 in stock and deposits. Did not give his wife anything. Did not give her deed to property. Deeds were made direct from parties to her. Prior to 1923 did not think Mrs. Barham had an account with the Bank of Earle. She opened account in December, 1923. Witness had been using her money. They kept

his separate, but did not keep books. Witness' wife knew what her father had given her, and in 1920 witness erected a garage building and sold it for $25,000. At that time Mrs. Barham wanted her money, and they had a settlement, and she had around $10,000 then. She bought a section of land later and made about $6,000 profit. Witness' wife got a portion of the earnings. Mrs. Alma E. Barham's father is still living. Lives with witness. He is old and blind. Gave Alma E. Barham this money several years ago. He owned 160 acres of land in Mississippi, and sold it and gave his daughter, Alma E. Barham, $6,000. That dates back to 1905 or 1906. Then, after witness moved to Crittenden County, Alma E. Barham's father gave her some more money, $1,500 or $2,000. Up to that time witness' wife did not have any bank account. Witness had possession of the money all the time, and when it was in the bank it was in witness' name. The property was bought in witness' name, but he always consulted his wife. Witness' wife bought Liberty bonds in 1917, about $5,000 worth, and sold them in 1920 and put part of the money in the garage. Witness always assessed his wife's property. Prior to 1923 she never had any personal property. Does not think the garage was ever assessed, and Liberty bonds did not have to be assessed.

Witness' son looks after the gin, and signs Alma E. Barham's name to most of the checks. Witness signs but few checks himself. Does not owe the Bank of Commerce $3,000. That is a part of the bank's property. The agreement between the vice president and witness shows what the $3,000 was for. Witness had an agreement with the bank that the $3,000 was not an obligation, but that witness had title to the property for the bank.

W. F. McCorkle testified, in substance, that he is deputy State Bank Commissioner, and had charge of the records of the Bank of Commerce, at Earle. The bank failed November 29, 1924. The record shows loan to L. L.

Barham of $5,000 in August, 1924, note due November 12, 1924. The proceeds of the note were deposited to the credit of Alma E. Barham. Note of $4,000 discounted June 5, 1924, due October, 1924, was deposited to the credit of L. L. Barham, less the discount, and the proceeds on the same day were charged to L. L. Barham's account and credited to Alma E. Barham's account. On December 15 L. L. Barham had to his credit a balance of $3.26. The Federal Reserve Bank has the $4,000 note. The collateral pledged to secure the $4,000 note is shown by notation. In addition to the $4,000 and $5,000 notes, Barham owed the bank $3,044.55.

V. S. Fuqua testified that he is managing director of the Federal Reserve Bank of St. Louis, and was such in 1924. Received the $4,000 note executed by L. L. Barham to Bank of Commerce, and at the same time a statement signed by L. L. Barham, dated August 9, 1924. In October, 1924, Nesbitt and others made a contract with L. L. Barham to convey certain property at $40 an acre.

J. C. Moore testified, in substance, that he was connected with the Bank of Commerce of Earle until it closed. Had known L. L. Barham several years. Property known as Sallew property was conveyed to L. L. Barham. This property was conveyed to Barham, and he gave a note for the purchase price. But the payment shows that the note was not to be paid, but the property was held by Barham, and he was to make a deed to anybody the bank might designate. Witness did not think he put anything on the financial statement of Mr. Barham except what he furnished him. Does not remember that Barham told him that Mrs. Barham owned the property. Does not recall that Barham wanted Mrs. Barham to sign the statement.

J. R. Pugh, an attorney, testified, in substance, that in 1924 Barham came to his office with some negroes, and stated that they were selling property. Witness prepared a contract, and, after the contract was prepared showing that L. L. Barham was the purchaser, L. L.

Barham told witness that his wife was the purchaser, and he wanted the contract rewritten, and the deed was made later. It was made to Mrs. Barham. Does not remember how much was paid. Payments were made by check and by exchange. Barham gave witness a piece of Memphis exchange to Mrs. Alma E. Barham, and there was a check on the Parkin Bank by Mrs. Alma E. Barham.

W. W. Harris testified that he worked for Barham and Brunson as bookkeeper. Remembers Mrs. Barham receiving some money in 1923. She put in more money from the garage than she received.

J. C. Borum testified that he sold lots in Earle to Mrs. Barham in 1924. Was paid by check by Mrs. Barham, but does not remember the signature. The negotiations on the part of Mrs. Barham were made by L. L. Barham. He told witness that Mrs. Barham was the purchaser. She executed a trust deed to secure payment of the balance.

B. B. Brunson testified that he began the garage business in 1919 with L. L. Barham as his partner. Partnership existed seven or eight months. Had a falling out, and dissolved, and then a man named Aldridge and witness continued the business for two years and went into bankruptcy. After that, witness and Mrs. Barham started the business up. Witness and wife, who is the daughter of L. L. Barham, live in Earle, and own their property, and put the improvements on it after the lot was given to the wife. Mrs. Barham furnished the money to start the garage business.

The chancellor entered a decree, holding the transfers mentioned in pleadings and evidence fraudulent and void, except the conveyance to V. Lee Brunson of lot 4, block 64, was not void, and that V. Lee Brunson was the owner. Exceptions were saved, and appeal prosecuted to reverse said decree.

It is first insisted by the appellant that the court erred in declaring the deed of trust executed by L. L.

Barham and wife to Harris, trustee for C. E. Barham, to be without consideration, fraudulent, and void. It is insisted that the court erred, and that no witness was called to contradict Barham's statement. And that the only reason that suspicion is cast upon the act is due to the fact that the conveyance is to the brother of L. L. Barham. Appellant cites and relies on the case of *Martin* v. *Banks,* 89 Ark. 77, 115 S. W. 928. But in the Martin case both Mr. and Mrs. Martin testified and showed that, at the time of their marriage, Mrs. Martin had $1,600 derived from her father's estate. Martin failed in business, and went to work on a salary. Martin's testimony and that of his wife was that he devoted his earnings to the support of his family and invested Mrs. Martin's money for her. All of the investments were made in her name, and the property always kept in her name, and no mingling of her property with her husband's.

In the instant case Barham himself testified that his wife got property from her father, and that it dates back to 1905 and 1906, and that she never had any account in the bank. She did not handle the money. Barham kept it and used it himself. It is true, he says, that he consulted his wife about investments, but it was all done in his name, and she never had any account in the bank or any money in her own name until about the time the judgment was obtained against Barham. Her father, from whom it is claimed she received the money, is old and practically blind, and lives with his daughter. Mr. Barham, in his testimony, says that his brother is in the lumber business at Marks, Mississippi, and bought a lot and erected a house for their mother, and that witness agreed to pay one-half of it, and executed the deed of trust to secure the payment to his brother. But he also shows that the house was built in 1917 and 1918, and the deed of trust was made on December 21, 1923, about five or six years after the house was built. And the proof by Mr. Barham himself shows not only that, but that all of the business was conducted by him in his name prior

to this judgment which it is sought to collect. His statements show that he was worth in the neighborhood of $70,000.

"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." *Davis* v. *Cramer,* 133 Ark. 224, 202 S. W. 239.

With reference to this particular transfer, while the evidence does not show when the lots were bought, nor for whom, nor how much they cost, nor in whose name they were held, it does show that the house was built in 1917 or 1918, and there is no reason or explanation of why it was not paid for at the time. Whether it is in the mother's name or the brother's, the evidence does not show. At any rate, an insolvent debtor could not take money which justly belonged to his creditors and build a house, nor could he make a valid conveyance of his property for such purpose and thereby hinder and delay his creditors.

"It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and when they are voluntary they are *prima facie* fraudulent; and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors." *Harris* v. *Smith,* 133 Ark. 250, 202 S. W. 244.

It is also insisted by appellant that the court erred in declaring the title to the southwest quarter of the northwest quarter of section two and the southeast quarter of the northeast quarter of section three to be in L. L. Barham. This is the property about which Mr. Pugh

testified and for which he drew the contract. The contract was drawn in Mr. Barham's name, and afterwards he testifies that objection was made because of that, and the deed was made to Mrs. Barham. Mr. Barham himself testifies about this transfer. That it was bought some time early in 1924, and that his wife borrowed the money for the second 80-acre tract. And the other was paid by L. L. Barham with a draft on his wife's account, and that this money came from her father. But this was in the latter part of 1923 and the early part of 1924, and the money, according to his testimony, that she had received from her father was received five or six years before this, kept in his name all the time, and used and managed by him.

Transactions between husband and wife are scrutinized and examined with great care, and especially when the transactions affect the rights of creditors. Mrs. Barham herself does not testify. Neither does the father, and the only testimony with reference to receiving the money is by Mr. Barham, and, as to whether this tract of land was that of L. L. Barham or his wife was a question of fact, and we think the decree of the chancellor is supported by the preponderance of the evidence.

It is next insisted by appellant that the court erred in finding that L. L. Barham was the owner of lots 26 and 27 in block 13. This property was purchased in September, 1924, from John C. Borum, and L. L. Barham testifies that his wife borrowed the money, or he did for her, from the Federal Reserve Bank. It was borrowed in L. L. Barham's name, the notes were signed by him, and, until recently before this purchase, Mrs. Barham had had no bank account, did not keep her money in her name, and whatever money she had was kept in the name of L. L. Barham. And we think the testimony justified the chancellor in finding that this property was the property of L. L. Barham.

The testimony of the witnesses, the circumstances developed in the case, the relation of the parties and

the credibility of the witnesses are all matters to be considered by the chancellor in determining all questions of fact. And, where the findings of the chancellor are not against the preponderance of the evidence, they will not be disturbed on appeal. *Watkins* v. *Parker,* 81 Ark. 609, 99 S. W. 1106; *Hyner* v. *Bordeaux,* 129 Ark. 120, 195 S. W. 3; *McKinney* v. *New Rocky Grocery Co., ante,* p. 463.

While the trial in this court is *de novo,* yet the findings of a chancellor will not be disturbed unless they are against the preponderance of the evidence. And in this case we think the findings of the chancellor are supported by a preponderance of the evidence, and the decree is therefore affirmed.

SIMPSON v. TEFTLER.

Opinion delivered April 16, 1928.

1. ELECTIONS—TIME FOR HOLDING.—When the Legislature names the day on which an election shall be held, holding the election on any other day is unauthorized, and the election so held is void.
2. ELECTIONS—AUTHORITY OF LEGISLATURE.—The Legislature alone has authority to provide for an election, and any election held without authority is void.
3. ELECTIONS—TIME OF HOLDING.—Where the time of holding an election is fixed by statute, the election officials have no authority to change the date, such provision being mandatory.
4. ELECTIONS—SUBMISSION OF MEASURE TO PEOPLE.—Acts 1925, p. 324, providing for a stock law effective from the date of the order of Monroe County Court after approval by a majority of the voting electors, violates the provision of the constitutional amendment for 1920, that no measure shall be submitted to the people by the General Assembly except proposed constitutional amendments.
5. STATUTES—CURATIVE ACTS.—The Monroe County Stock Law, Acts 1925, p. 324, being a local law, an election held thereunder on a different date from that specified therein was not validated by Acts 1927, p. 227, validating irregular "no-fence" law elections, since the Legislature, being prohibited from passing local acts by constitutional amendment (Acts 1927, p. 1215), cannot make effective a void local act theretofore passed.

Appeal from Monroe Circuit Court; *W. J. Waggoner,* Judge; reversed.

X. O. Pindall, Peyton D. Moncrief, A. G. Meehan and *John W. Moncrief,* for appellant.

S. S. Jefferies, for appellee.

MEHAFFY, J. In 1925 the Legislature passed an act to provide a stock law and to regulate the operations of the same in Monroe County, Arkansas. Section 1 provides for the establishment of the district, embracing the whole of Monroe County, and § 2 makes it unlawful for the owner or manager of the stock described to permit said stock to run at large beyond the limits of his own land or lands leased, occupied or controlled by him within the territory of Monroe County. Section 3 provides for impounding the stock, giving notice, and for the sale of the property and for the charges for keeping. It also provides, in addition to the charges for keeping the stock, that the owner be liable for all damages committed by the stock while running at large. Section 4 provides that the owner permitting the stock to run at large shall be guilty of a misdemeanor, etc. Section 6 is as follows:

"On Wednesday, the first day of April, 1925, there shall be held an election at the usual voting places in the various townships in Monroe County, at which election there shall be submitted to the landowners of Monroe County the question of 'For stock law' and 'Against stock law,' at which election persons shall be eligible to vote as hereinafter provided."

The act then provides for the sheriff giving notice of the election, and also provides for the election commissioners to appoint judges, and the judges are required to take the oath as in the general election laws. The act also provides that the election commissioners, not later than 10 days after the election, shall proceed to ascertain and declare the result of said election, and within 15 days after the date of the election shall file in the office of the county clerk of said county a certificate, and in the event a majority of the voters vote

for the stock law, the county court of Monroe County shall, on the first day of its July term, 1925, enter an order upon the county court records of said county, declaring the act adopted and in full force and effect. And it is further provided that this act shall, from and after the date of said order of said county court, to-wit, the first Monday in July, 1925, take effect and be in full force and effect.

There was no emergency clause, and the act could not take effect until 90 days after the adjournment of the Legislature, which was the 12th day of March, 1925. No election was held on April 1, 1925, but an election was held on the 11th day of August, 1925, and the county court acted upon the report of the commissioners on the 5th day of October, 1925.

The appellant, whose hogs had been impounded, brought a suit in replevin to recover four head of hogs that had been impounded. There was a verdict against appellant, motion for new trial was filed and overruled, and the appeal is prosecuted to this court to reverse said judgment.

There was no effort to enforce the stock law in Monroe County until after passage of act 84 in 1927. Act 84 is an act to validate special elections held for creation of no-fence laws, and it provides that all elections heretofore held in the State of Arkansas where the question of the creation of no-fence law or stock law has been submitted to the vote of either the electors of said no-fence district or the landowners of said district, as prescribed by said acts, where the majority of the voters in said elections voted in favor of said law, notwithstanding the fact that said elections so held were irregular by reason of same being held on a different day from the day named in said acts or other causes, that said no-fence law or stock law be, and the same are hereby declared to be, valid, effective and binding, and shall be in force and effect from and after the

passage of this act as if said elections were held in strict conformity with the law creating the districts.

The first question to be determined is whether the election held on August 11, 1925, was void, the act requiring the election to be held on the first day of April, 1925.

When the Legislature fixes the time, names the day on which an election shall be held, said election must be held on that day. The holding of an election on any day other than that named by the Legislature is not authorized, and the election is void.

"For the purpose of organizing the system of government hereby established and putting the same into operation in the first instance, the selectmen of the town of Fall River, for the time being, shall, within 30 days after the acceptance of this act, issue their warrants, seven days at least previous to the day so appointed for calling a meeting of said citizens, at such place and hour as they may deem expedient, for the purpose of choosing a warden, clerk, and inspectors for each ward, and all other officers whose election is provided for in the preceding sections of this act. The selectmen issued their warrant, warning the electors to hold their first meeting, under the statute, for the choice of ward and city officers, and for the election of a county treasurer. It was held by the Supreme Court that, as to the office of county treasurer, the election was illegal and void." Paine on Elections, 268.

"But statutes prescribing the days for holding an election are generally mandatory, and elections held on different days will be void. * * * Where it is provided by law that an election shall be held within 50 days after the presentation of the petition therefor, an election held after the expiration of the 50 days will be void." Paine on Elections, § 310.

"It is, of course, essential to the validity of an election that it be held at the time and in the place provided by law." McCrary on Elections, 4th edition, 153.

Again, it is said in § 176 of McCrary on Elections: "It must be conceded by all that time and place are of

the substance of every election, while many provisions which appertain to the manner of conducting an election may be directory only."

"Those provisions of a statute which affect the time and place of the election and the legal qualifications of the electors are generally of the substance of the election, while those touching the recording and manner of conducting the mere details of the election are directory." McCrary on Elections, 228.

This court said, in deciding when a law went into effect:

"No public act shall take effect, or be in force, until ninety days from the expiration of the session at which the same was passed; and consequently the act did not take effect, and was not in force, until ninety days after the 10th of April, 1869; so that, in fact, on the 3rd of November, 1868, ten months before the act took effect, when, it is claimed, an election was held and a majority vote taken in favor of railroads, the act authorizing the same was not in force; and if not, then the election was held without authority of law, and was void." *State* v. *Little Rock, Mississippi River & Texas Ry. Co.,* 31 Ark. 701.

The Legislature alone had authority to provide for an election, and any election held without authority is a nullity.

"It is claimed by plaintiff that the ordinance under question by its own terms could not have taken effect until the 11th day of March, and that no step could have been legal under it until that time. That by its terms the election, even if legal, could not be held until 30 days after the 11th of March, or until the 12th of April, instead of the second of April, as the day for election; it was an impossibility which could not be accomplished, and therefore any action held under it was void." *Hensley* v. *Hamilton,* 2 Ohio Circuit Decisions, 114.

"When therefore the day of election for town officers was changed by law, we are of opinion the law

necessarily changed the day for the election of trustees. The change followed as a logical result. The provisions of acts 1867 and 1869, when considered with the Constitution and the township organization law, clearly lead to this conclusion." *Kelley* v. *Cabu,* 112 Ill. 23, 1 N. E. 167.

In the above case the town had held two elections, but by the general law it was provided that the election for officers contemplated by this act shall be held on the second Tuesday in April. The important question in the case was whether the election held on the first Tuesday in April was held on the day provided by law. Prior to the act under discussion by the court there had not been uniformity, elections in some places being held on one day and others on a different day, but the court held the day named for the election was the only day on which an election could be held.

The Kansas court said:

"And, having fixed the time within which such an election must be held, it seems to us it intended that compliance with this requirement should be essential to its validity. It may perhaps be worthy of notice, though only a slight circumstance, that the requirement of notice and the limitation of 50 days are both in the same section and couched in the same terms of obligation. The publication of notice comes plainly within the decision in 1 Kansas 273, as essential to the validity of the election. Does it not seem reasonable that the Legislature intended that both should be essential? We are led to the conclusion that the district court erred in its ruling, and the case will be remanded with instructions to reverse the order refusing a temporary injunction, and proceed further in accordance with the views herein expressed." *Gossard* v. *Vaught,* 10 Kansas 162.

In Missouri an election was held to remove a county seat, and the order for an election was made upon the 5th day of April, calling the election for the 14th day of June following, a space of 70 days. The court said:

"The commissioners had the power, upon the establishment of the fact that three-fifths of the legal voters of the county so petitioned, to order an election to decide the matter of the removal of the county seat from one point and its location at another; but such election they must cause to be held within fifty days from the establishment of such fact, and in time to afford thirty days notice of the election. The right to order being thus circumscribed, the board could only so proceed, unless, as is suggested, the time prescribed was simply in the nature of a direction, and not a mandate. As has been frequently decided by this court, when the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it. * * * So here the commissioners, 'within fifty days thereafter shall cause an election to be held.' It would be straining the meaning of words to say that the natural, ordinary interpretation of such language was that, sometime within fifty days, the commissioners should order an election to be held at any future time their discretion or caprice might dictate; and yet this is the conclusion urged by counsel for defendants, in substance. He claims that, jurisdiction once acquired by the presentation of the petition, the subsequent order in the case at bar was what the statute contemplated, or at most an irregularity. * * * When the Legislature has said to this board of special limited powers, You shall cause an election to be held within a certain time, who shall say that the matter of time is immaterial? The intention may have been to protect the petitioners; for, if the construction urged be adopted, the board could place the election at such a distance of time as to render the order a practical nullity; and there would then be no redress, as that would be simply an error under the regular pursuit of authority, not subject to review by this or any other court; or the intention may have been something other, or for multiple purposes; but there stands the plain language, and it should not be frittered away." *State* v. *McGinnis,* 6 Nev. 104.

"After the passage of this act, the general election, by the new Constitution, was changed to November; and it is now insisted that the true interpretation of the act fixed this election to be holden annually, at a general election. We put a different construction upon the provision. The word 'general' was merely descriptive of the election, the time of holding which was fixed on the 'first Monday in August,' 1847, 'and every year thereafter,' which would fall again on the first Monday of August succeeding. Had it been the intention of the Legislature to make the 'general' election day the time, instead of the 'first Monday in August,' the date of the month and the day of the week may well have been omitted, without leaving the least ambiguity, in case of any change in the laws; or the same thing would have been accomplished by repeating the terms, and at the 'general' election 'every year thereafter.' * * * Much additional technical verbiage might have been added, the proofs could not have been enlarged, nor essential facts multiplied. He would have a right to show that the election had not been held by persons authorized to hold it, or that proper returns had not been made, evidencing and declaring that election." *The People ex rel. Dixon* v. *Shaw,* 14 Illinois Rep. 476.

"By the Constitution (art. 10, § 2), the power of fixing the times for the election of county officers is vested in the Legislature. When a time has been so fixed, any election held at a different time is unauthorized and void. The act of April 18, 1870, having repealed all prior laws on the subject, its first section contains the only provision fixing the time for the election of county auditors. The single question in the case therefore is, what time does that section fix for the election? * * * They have plainly fixed the election on the second Tuesday of October, 1871. It is therefore useless, and it would be going out of the case, and in effect deciding the rights of parties not before us, to inquire whether the Legislature had the constitutional power to pro-

long the old terms of office. Whether they had or had not this power, they have fixed the election for October, 1871. And we can see no force or logic in the argument by which it is attempted, first, to strike from the section the words of the proviso prolonging the term, and then, by a literal rendering of the remaining words of the section, by themselves considered, to determine the time fixed for the election. This would be to mutilate the section and garble its meaning. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. * * * The meaning of the Legislature must be gathered from all they have said, as well from that which is ineffective for want of power as from that which is authorized by law. Read in this way, the meaning of the section admits of no controversy. It fixes the election on the second Tuesday of October next preceding the expiration of the term as so prolonged, which will be the second Tuesday in October, 1871." *State* v. *Dombaugh,* 20 Ohio 167.

The act in question fixes the date of the election on the first Monday in April. The meaning of this admits of no controversy. The Legislature had the power, in fact it was the only branch of the government that did have the power, to fix the date, and it fixed the date so that there can be no question about it. And elections must be held on the day fixed by law, and those elections held at other times, at times not fixed by law, are void. The Legislature fixes the time for the election of State and county officers. The Legislature only can change that time. The law fixes the time for primary election in Arkansas. If no election was held on that day, would it be contended that the sheriff could give notice of an election three of four months thereafter, or any time thereafter?

This court said, in a case in replevin for possession of hogs: "The point in the case is whether the

statute in question was ever put in force in the territory where appellant's hogs were found running at large.

"The act provides for submission to the voters, either at a special or general election, of the question whether or not it shall be put in force in the given territory, and that, if it shall appear that a majority of the votes cast on the question are in favor of the law, it shall be the duty of the county court or county judge to make and enter an order declaring the law to be in force in the territory. * * * The question of adopting the statute was submitted to the voters of Hempstead County at the general election in 1902, again at the general election in September, 1904, and at the presidential election in November, 1902, but did not receive a majority of the votes on the question at either of these elections. It was again voted on at the general election in 1906, and received a majority of the votes, whereupon the county judge made an order declaring the statute to be in force in the territory named.

"It seems clear to us that the statute contemplated a submission of the question to the voters at a special election to be called by the county judge, or, in the event of his failure to call the election, that it be submitted finally at the next succeeding general election for State and county officers. The language of the statute does not reasonably admit of any other construction. It says that, "in the event such special election be not ordered and held prior to the next general election for State and county officers, the question shall then be submitted to the electors." * * * Therefore it cannot be presumed that the Legislature intended that the question might be submitted every time and as often as the election commissioners might see fit to print the question on the tickets at a general election.

"It was doubtless within the power of the Legislature to provide for resubmission of the question of adoption of the statute by the voters, but a considera-

tion of the language of the statute convinces us that such was not the intention." *Hood* v. *Bell,* 86 Ark. 366, 111 S. W. 801.

"But the specification of time in a statute may be imperative and may operate as a limitation upon the power of those who are to act under it. This will depend upon the intention of the Legislature; and an intention to make time of the essence of the thing to be done may be disclosed either by the express language of the law or by necessary implications from its terms." Black on Interpretation of Laws, 2 edition, 547.

It may be conceded that the authorities are not in entire harmony on the question whether the provision in the statute fixing a day for an election is mandatory or directory. Some courts have held that it is directory.

Appellee calls attention to an Oklahoma case which holds that the provision in the statute is directory. In that case, however, it was impossible to hold the election on the day fixed by the statute. *Board of Directors of School District 27 of Okla. County v. Board of Excise of Okla. County,* 31 Okla. 553, 122 Pac. 520.

Appellee also calls attention to the same case in Annotated Cases 1913E, 639, and calls attention to the note dealing with various phases of elections held on the wrong date. But the notes referred to state that the statutory provision as to the time for holding an election is ordinarily mandatory.

Appellee also calls attention to 9 R. C. L. 998, and quotes from § 19, on page 998. But the section quoted from begins with the announcement of the general rule as follows: "It may be stated as a general rule that the election of a person to an office at a time not authorized by law is void."

The section also contains the following: "From these decisions the rule may be deduced that, where the date of the election is not left to the determination of the officials, but is unequivocally fixed by statute, the election officials have no authority to change the date.

In other words, such a statutory provision is ordinarily to be regarded as mandatory."

The same section also contains the following statement: "And so it has been frequently held that, where an election is not held within the time limited, it cannot be held afterwards, and, if so held, is void."

While there is authority for holding the statute fixing the day of election as directory, the weight of authority, and, we think, the better rule, is that such provisions are mandatory.

Another question discussed by counsel is whether the Legislature had authority to submit the question to the people. The constitutional amendment adopted in 1920, before the passage of the act, contains, among other things, the following: "But no measure shall be submitted to the people by the General Assembly except a proposed constitutional amendment or amendments as provided for in this Constitution."

Appellee contends that the Legislature had authority, and states that the identical question was brought before this court in *Lemaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327. The court there construed the act of 1927, which provided for the establishment for consolidated school districts in counties having a population of 75,000 or more, etc. The court said in that case:

"The statute does not delegate legislative power, so long as it is complete in itself when it has passed the Legislature, even though it is left to a vote of the people when it shall come into operation. In the case at bar the law is complete in itself. It declares the result which may come from holding the election under its provisions. It is simply a case where the Legislature passed a complete statute, but made its enforcement depend upon the will of the people, to be expressed at an election called under the provisions of the act for that purpose."

That act, however, provided that it should take effect and be in force from and after its passage. It

was a complete act, and went into effect without regard to any election, but it simply provided that, upon the petition of not less than 100 qualified electors of any one county, the board might call an election of all the legal voters in the county. And if a majority voted for the county school district, the county board of education should then enter an order, etc.

But act No. 108 of 1925, providing for a stock law in Monroe County, provides: "In the event the majority of the voters voting at said election shall vote 'For stock law,' as shown by said certificates of said election commissioners, the county court of Monroe County shall, on the first day of its July term, 1925, enter an order upon the county court records of said county, declaring this act adopted and in full force and effect, and this act shall, from and after the date of said order of said county court, to-wit, the first Monday in July, 1925, take effect and be in full force and effect, and all laws and parts of laws in conflict herewith be and the same are hereby repealed."

This act did not go into effect merely by its passage by the Legislature, but it is expressly stated that it shall go into effect when a majority have voted for the law and the county court has made an order. That from and after that date it shall go into effect. This law violates that provision of the Constitution which says no measure shall be submitted to the people by the General Assembly except a proposed constitutional amendment or amendments as provided for in this Constitution.

The amendment also defines the word "measure" to mean any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character. Certainly that covers the bill submitted to the people of Monroe County. The Constitution prohibits the Legislature from submitting any measure. Here was a measure submitted to the people, a bill to become a law only when a majority of the people

had voted for it and there had been an order of the county court, as provided for in the act. The provision of the Constitution is plain and unambiguous, and that provision prohibits submitting measures like this to the people to become effective as a law only when adopted by the people. The law therefore never became effective, the election held at a time different from the date fixed by the Legislature was void, and the law itself a nullity. And the law of 1927 declaring elections under no-fence laws valid could not affect this election, if it was void.

"A curative statute is only intended to cure defects in the execution of a mortgage, and cannot, in the very nature of things, render valid an act which was absolutely void in the beginning. * * * The curative act in question did not purport to cure anything except defective instruments, and does not purport to render valid and effectual an act which had never been done." *Hall* v. *Mitchell,* 175 Ark. 641, 1 S. W. (2d.) 59.

Act 84 of 1927 was a curative act, and undertook to cure defects or cure acts that were irregular, but there is no irregularity about the proceedings with reference to the Monroe County stock law. The election was void, and the act therefore never became effective.

The 1927 act could not be effective for another reason. The amendment adopted at the general election October 5, 1926, provides:

"The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

The Legislature, under this amendment, could not pass a special act. And if a special act had been passed before the adoption of this amendment, but had not gone into effect, the act of 1927, undertaking to cure a defect, would, in effect, be passing a local act. If the election, held at the time it was, had been valid, then the act of 1927 would have been wholly unnecessary and would have had no effect at all. If the election was invalid, then the

law was void; and if the 1927 law was intended to render a local law valid, then it was in effect the passage of a local law, and this it could not do under the amendment to the Constitution above referred to. If the Legislature could not pass a local act it could not make effective a local act that was void. It could not do indirectly what the Constitution prohibits it from doing directly.

This case is reversed, and remanded with directions to enter a judgment for the plaintiff.

EDLIN v. MOSER.

Opinion delivered April 16, 1928.

1. PARTNERSHIP—INTEREST IN PROFITS OF REAL ESTATE DEAL.—Where parties entered into a joint enterprise for the purpose of acquiring and reselling real estate for their mutual benefit, each to share equally in the profits, they became partners in the particular deal.
2. PARTNERSHIP—PROFITS FROM EXCHANGE OF REAL ESTATE.—In an action by a partner for an interest in the profits realized in an exchange of lands, evidence *held* to show that defendant partner secured title to land in the name of a codefendant without plaintiff's knowledge, through connivance with such codefendant and with fraudulent intent to deprive plaintiff of an interest in the profits.
3. TRUSTS—RESULTING TRUST.—Where title to property is taken in the name of one for the benefit of partners, a resulting trust not within the statute of frauds (Crawford & Moses' Dig., §§ 4862, 4866) was created against him in favor of such partners.
4. TRUSTS—CONSTRUCTIVE TRUST.—Where a partner took title to real estate received in exchange for partnership realty in the name of a third party, without his copartner's knowledge, with fraudulent intent to deprive the latter of any interest in profits, the transaction constitutes a constructive trust, to which the statute of frauds (Crawford & Moses' Dig., §§ 4862, 4866) does not apply.
5. PARTNERSHIP—ORAL CONTRACT FOR DEALING IN LANDS.—Under an oral contract to acquire and resell real estate for mutual benefit of a partnership, a partner may recover his interest in the partnership real estate, title to which had been fraudulently

taken in the name of another for the purpose of defeating his interest therein.

Appeal from Garland Chancery Court; *W. R. Duffie,* Chancellor; affirmed.

George P. Whittington, Robinson, House & Moses, Frank Pittard and *Harry E. Meek,* for appellant.

E. P. Toney, James E. Huff and *Martin, Wootton & Martin,* for appellee.

McHANEY, J. There is a very large record in this case, more than 1,100 pages, in two volumes. It will therefore be impossible to do more than state in a general way the substance of this controversy and the conclusions of law to be drawn therefrom, and at the same time confine this opinion within reasonable limits.

Appellants, Abraham Edlin and his son, J. Kenneth Edlin, are residents of Chicago, and engaged in the real estate brokerage business, while appellee is a resident of Indianapolis, Indiana, and engaged in the real estate brokerage business there, and has been for the past fourteen years. It appears from the evidence that he is a man in good standing with financial institutions in his own city, but of comparatively small means. In May, 1925, appellee and appellant, Kenneth Edlin, associated themselves together for the purpose of engaging in the real estate business for their joint benefit, each to share the profits and losses therefrom equally. After thus associating themselves, they engaged jointly in certain real estate transactions, the first being the purchase by them of an undivided one-half interest in a farm in Fayette County, Indiana, in which appellee already owned the other undivided one-half interest. In acquiring the outstanding undivided one-half interest appellee paid $2,500 cash, and Kenneth Edlin executed and delivered his note for the other $2,500, indorsed by appellee, which note has never been paid. After thus acquiring the equity in said farm, they traded it for a Chicago apartment building, known as the James Court, assuming a $200,000 mortgage thereon, and took the title thereto in the name of one

Frank J. Smidl, a straw-man, who was the chauffeur of appellant, Abraham Edlin. They thereafter made diligent efforts to sell or exchange the James Court property, and in other real estate efforts traveled extensively through Indiana, Illinois, Louisiana, Mississippi and Arkansas. They finally traded the James Court property for a plantation in Louisiana of 5,500 acres, together with all the personal property, live stock and crops on said plantation, subject to a mortgage of $35,000, and, as a part of the consideration, were given a third mortgage on the James Court property in the sum of $12,500. In their attempts to dispose of the James Court property they negotiated with Harry Daley, of Hot Springs, son of James E. Daley, the owner of a long-term lease on the Broadway Hotel in Hot Springs, for the exchange of this property for the lease on the hotel, both going to Hot Springs and negotiating personally with Harry Daley there. Daley interested his father in this matter, and they went to Chicago, at the invitation of Kenneth Edlin and Moser, to investigate the James Court property. In the meantime they had exchanged same for the Louisiana plantation, and they undertook to interest Mr. Daley in other property in Chicago, and he finally agreed to exchange his hotel property, free from any liens or incumbrances thereon, for a certain property in Chicago, known in the record as the Croninger property, subject to an incumbrance of $200,000.

On the 15th day of August, 1925, they entered into a written contract with James E. Daley for this exchange of property, the contract being signed by James E. Daley and the same Frank J. Smidl, the straw-man for Moser and Kenneth Edlin. At the time this contract was entered into they had not acquired the Croninger property, so as to be able to effect an exchange, but, on August 18, three days after the execution of the contract by Daley and Smidl, they procured the execution of a contract by the owner of the Croninger property, by which he agreed to convey same to the said Smidl for $25,000 in cash, sub-

ject to outstanding incumbrances in the sum of $200,000, the cash consideration to be paid within ten days, or not later than August 28, and the whole deal to be consummated as of September 15, through the Chicago Title & Trust Company. In both of these contracts it is undisputed that Moser and Edlin were the real parties in interest, and that Smidl held the naked legal title for their use and benefit. Appellant, Abraham Edlin, was thoroughly familiar with the two contracts above mentioned. Immediately after securing the contract on the Croninger property, Kenneth Edlin and Moser left for Hot Springs, stopping at the Broadway Hotel, for the purpose of securing a loan of $25,000 on the hotel property to enable them to pay the $25,000 cash called for in the contract for the Croninger property. On their arrival in Hot Springs, Kenneth Edlin attempted to negotiate this loan. He applied to the Security Bank in Hot Springs for a loan of $30,000 to be secured by a first mortgage on the Broadway Hotel property, but did not get any loan or the promise of one. He then applied to the Arkansas Trust Company for a loan of $30,000 with such security.

Up to this point there is no disagreement in the evidence, of a substantial nature, but here the parties differ as to what occurred, appellee stating that Kenneth reported to him that the Arkansas Trust Company would make a loan of $30,000, and that all that was necessary was to get the papers in shape, show a clear title to the Broadway property, execute the note and mortgage therefor, and thus consummate the deal for the exchange of such properties; while Kenneth Edlin testifies that he reported to Moser that the Arkansas Trust Company would make the loan provided their financial and moral responsibility was shown to be good, upon an investigation to be made by Mr. Henderson, the president of the trust company, and that they both then agreed that they would have no chance of securing the loan; that they then left Hot Springs without undertaking to secure the loan

from any other bank there, although there were three or four others, and returned to Chicago. While in Hot Springs on this mission, and shortly before their departure for Chicago, Moser sent the following telegram to his wife in Indianapolis: "Deal financed. Fine. Leave here for Chicago tomorrow. Home Saturday some time. Mail Florida abstracts in my desk to me, Great Northern Hotel, Chicago, immediately. This matter same as completed."

They arrived in Chicago August 22, where a settlement was had with appellant, A. Edlin, relative to the James Court property, in which Moser was paid $3,352 as his share of the profits. Moser then returned to his home in Indianapolis, and shortly thereafter went to Louisiana and Mississippi in furtherance of their joint enterprises, leaving Kenneth Edlin in Chicago to close up the Broadway Hotel deal, and on the 2d or 3d of September was joined by Kenneth Edlin in the prosecution of their real estate work. Moser says the settlement relative to the James Court property was friendly, whereas appellants testify that appellee was very much dissatisfied with it, and became very angry, but finally accepted it. They both testify that A. Edlin asked them how the Hot Springs deal was getting along, and that they both told him it could not go through, as they had been unable to secure the loan of $30,000, and that A. Edlin, at that time, stated that he might take it over. A. Edlin says that they both told him that they were through with the deal, and that he went into it with the understanding that they were both out of it; that they gave it up because they were unable to finance the $25,000 cash payment for the Croninger property. Either on the 22d or 23d of August, after Moser had gone, Kenneth Edlin communicated with Mr. Daley, who was then in Chicago, and informed him that the deal was going through, and asked him to take immediate steps for its consummation. He told Daley that he and Moser were partners in this and other matters. Upon receiving this

advice, Daley telegraphed two parties in Houston, Texas, who were interested with him in the Broadway Hotel, to meet him at Hot Springs at once, and that he left immediately for Hot Springs, arriving there on the 24th, and that Kenneth Edlin arrived on the same train with him. He prepared a deed to be executed by the corporation holding the record title to the Broadway Hotel to James E. Daley, and another deed conveying the same property from Daley and wife to appellant, Abraham Edlin. Mr. Daley thought he was dealing with Kenneth Edlin and Moser all the time, that they were partners in this transaction, and that he executed the deed to A. Edlin at Kenneth Edlin's suggestion. The deed from Daley and wife to A. Edlin had to be mailed to Mrs. Daley at Houston, Texas, for her signature and acknowledgment. It was acknowledged by her on the 27th day of August. On the 24th Kenneth Edlin received assurance from the trust company that they would make the loan for $30,000 on the hotel. He also had the title to the Broadway Hotel property examined. Both of the above mentioned deeds were dated August 25. He returned to Chicago, and was there on the 28th, when the $25,000 was due to be paid for the Croninger property. On August 27, Mr. Henderson, president of the Arkansas Trust Company, wrote the Drexel State Bank of Chicago, the following letter, and received the following reply thereto:

"Mr. J. Kenneth Edlin, of the brokerage firm of Abraham Edlin & Company of your city, is now in Hot Springs and is negotiating the purchase of a hotel here. In connection with the purchase he has made application to us for a loan of $30,000, which we are willing to advance. However, before doing so, we desire to obtain some definite information as to the financial responsibility of the firm and of Mr. Edlin, their business methods, etc. The title to the property will be taken in the name of Abraham Edlin, and he will execute the mortgage and note to us.

"We will very much appreciate it if you will give us whatever information you may have as to the Messrs.

Edlin. Any information you may furnish us will be held in strict confidence, and we will be glad to reciprocate the favor at any time we can serve you."

"August 31, 1925.

"Arkansas Trust Co.,
"Hot Springs National Park, Ark.

"Gentlemen: Attention Mr. Henderson.

"We are in receipt of your favor of the 27th inst., inquiring regarding Mr. J. Kenneth Edlin of the brokerage firm of Abraham Edlin & Co.

"In reply beg to say that we do not have an account under the name of J. Kenneth Edlin, but J. V. Edlin has carried a small checking account with us. Mr. Abraham Edlin has banked with us since February, 1924, is carrying a good four-figure balance at the present time. Dealings satisfactory.

"Yours very truly,
"....., Cashier."

On the 28th day of August, after Kenneth had returned from Hot Springs, knowing that the loan would be made, Croninger came to the office of A. Edlin for his $25,000 cash payment. By agreement with A. Edlin, and on the payment by him of $1,000, the time was extended to pay the balance until a later day. Within the time the loan from the Arkansas Trust Company was consummated by Kenneth Edlin, in the name of A. Edlin, who signed the note and mortgage, and all the papers were forwarded to the Chicago Title & Trust Company for the purpose of having it deliver all deeds, the money on the loan, and settle the transaction between all parties concerned, which was accomplished on September 15, 1925.

On the back of Exhibit D to the deposition of A. Edlin, which is an application prepared by the Chicago Title & Trust Company, Frank J. Smidl on that day executed an order, indorsed thereon as follows: "Pay amount payable to me to order of J. Kenneth Edlin."

Appellee testified that he had no knowledge of any change in their plan to have the title to the Broadway

Hotel taken in their joint names, or in the name of Smidl for their joint benefit, until the 9th day of September, when he was in the office of A. Edlin's attorney, adjoining that of A. Edlin, where he saw a deed lying on the desk, conveying the Broadway Hotel to A. Edlin, and that he at that time objected, and insisted on his rights being protected in and to said property; that they had quite an angry discussion between them regarding the matter, and that at this meeting he was, for the first time, advised that it was the intention of appellants to exclude him from any interest in the deal. He thereafter instituted this action in the Garland Chancery Court to recover his interest in the profits of this deal.

On March 2, 1927, the court entered an interlocutory decree in favor of appellee to an undivided one-half interest in and to the Broadway Hotel property, subject to the mortgage aforesaid, and divesting a one-half interest out of appellants, and investing same in appellee, and directing the execution of a conveyance thereof to appellee, in which decree the court retained jurisdiction to state an account between the parties for the rents and profits accruing subsequent to October 1, 1925. This decree was later made final, and, in addition, appellee was given judgment for $5,024.64 against appellants, for which a lien was fixed upon the property for the payment thereof. From these decrees this appeal is prosecuted.

The diligence of learned counsel on both sides, in the preparation of briefs and citation of authorities for our assistance in deciding this case, is commendable. These briefs raise many questions we do not find it necessary to discuss or decide. We think the principal question is one of fact, that is, whether the relations existing between Kenneth Edlin and appellee constituted a partnership, and whether, under the facts in this case, the primary object of the suit was to recover an interest in land, and, the agreement therefor not being in writing, would be barred by the statute of frauds, §§ 4862 and 4866 of C. & M. Digest, or whether a suit for the recovery

of an interest in partnership profits, which would not be barred by the statute of frauds. We think a decided preponderance of the evidence shows that the parties entered upon a joint enterprise as partners, for the purpose of acquiring and reselling real estate for their mutual benefit, each to share equally in the profits, and that they are therefore partners in this particular deal; that they acquired the Croninger property in the name of Smidl with the view of trading it for the Broadway Hotel, which contract was also taken in the name of Smidl, and that Smidl held same as a trustee for the benefit of J. Kenneth Edlin and Moser; that Kenneth Edlin secured the loan of $30,000 from the Arkansas Trust Company in the name of A. Edlin without appellee's knowledge or consent, and, furthermore, took the title to the Broadway Hotel in the name of A. Edlin without the knowledge, consent, or even acquiescence of appellee, but through connivance with his father, and with a fraudulent intent to deprive appellee of any interest in the profits of the transaction. The proof showed the Broadway Hotel to be worth, on a conservative estimate, $100,000, which represented a net profit to them, after deducting the mortgage, of $70,000. This represented the profit to the partnership in the whole transaction, by which they exchanged the Croninger for the Broadway property. It did not cost A. Edlin one penny. True, he advanced on the Croninger property $1,000 on August 28, but he got it all back on September 15, plus about $2,500 in cash on account of the excess loan from the Arkansas Trust Company over the cash payment on the Croninger property, and expenses. It is true that A. Edlin incurred some expenses, approximately $2,500, in getting the transaction closed, all of which was returned to him out of the loan. Upon delivery of the instruments aforesaid to Smidl, a resulting trust was created as against Smidl, in favor of Kenneth Edlin and Moser, and, if the deal had been finally consummated through Smidl, but for their use and benefit as contemplated, it is not even

contended by appellants that the statute of frauds would be applicable, because a suit to enforce a resulting or constructive trust is specifically exempted from the statute of frauds.

We do not think that Moser abandoned his interest in the transaction, as contended by counsel for appellants, but, on the contrary, we are of the opinion that a preponderance of the evidence shows that he did not abandon, and that the taking of the title to the property in the name of A. Edlin, under the circumstances in this case, constitutes a constructive trust, or trust *ex maleficio,* and that the statute of frauds has no application under such a situation. In *Bray* v. *Timms,* 162 Ark. 247-271, 258 S. W. 338, 345, it was held that parol evidence is admissible and competent under § 4868, C. & M. Digest, to establish a resulting or constructive trust, and said: "But the statute also wisely provides that, where any conveyance shall be made of any lands or tenements by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by the above rule. See § 4868, C. & M. Digest. Were the rule otherwise, a statute which was intended to prevent fraud would, in many cases, be a potent instrument of fraud."

The court in that case quoted from 1 Pomeroy's Eq. Jur., § 155, as follows:

"The second great division of trusts, and the one which in this country especially affords the widest field for the jurisdiction of equity in granting its special remedies, so superior to mere recoveries of damages, embraces those which arise by operation of law from deeds, wills, contracts, acts or conduct of parties, without any express intention, and often without any intention, but always without any words of declaration or creation. They are of two species, 'resulting' and 'constructive,' which latter are sometimes called trusts *ex maleficio;* and both these species are properly described by the generic term 'implied trusts.' Resulting trusts

arise where the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent, in theory of equity, appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title. In such case a trust results in favor of the person for whom the equitable interest is thus assumed to have been intended, and whom equity deems to be the real owner. * * * If one party obtains the legal title to property not only by fraud, or by violation of confidence or of the fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

In that case the authorities are collected and reviewed at length, and it was there said, again quoting from Mr. Pomeroy, that the law is well established that trusts *ex maleficio* will be declared "whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentation, concealment, or other undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests." 3 Pomeroy's Eq. Jur., § 1053. We therefore conclude on this point that A. Edlin holds the legal title to the Broadway Hotel property for the benefit of Moser and himself, or Moser and Kenneth Edlin.

Appellants rely upon the cases of *Beebe* v. *Olentine,* 97 Ark. 390, 134 S. W. 936, and *O'Bryan* v. *Zuber,* 168 Ark. 613, 271 S. W. 347, as authority preventing appellee from recovering an interest in the Broadway Hotel, for the reason that it is a suit to recover an interest in land or real estate on an oral agreement, which is prohibited

by the statute of frauds. We do not think these cases are authorities in point here. In the Olentine case, a partnership agreement for the purchase and resale of lands was involved, but the lands had been sold at a profit, and the court was dealing with money, and not with land. In *O'Bryan* v. *Zuber,* a partnership existed for the purpose of operating an orchard and dividing the profits. Zuber contended that he was entitled to a one-half interest in the land, which was to be paid for out of the profits of operating the orchard. He contributed nothing to the purchase of the land, and relied upon a parol agreement with O'Bryan, in which O'Bryan was to advance the purchase price, and was to be repaid out of the profits of operation. Here the facts are different. Here, from the result of their joint efforts, there is a profit from partnership activities, both in money and land, or a lease on land. They both contributed jointly to the acquisition of such property. By their joint efforts the Croninger property was acquired and traded for the Broadway property, which resulted in a profit to them of the Broadway property, subject to the mortgage. There was a surplus fund realized from the mortgage, over and above the cash purchase price for the Croninger property, and we think this suit primarily is to compel a division of profits realized from a partnership activity. We are furthermore of the opinion that they acquired the Broadway property for the purpose of reselling it, and we know of no rule of law that would prevent a partner from recovering his interest in partnership real estate, the title to which had been fraudulently taken in the name of another for the purpose of defeating his interest therein. *Toll* v. *Lewis,* 136 Ark. 318, 206 S. W. 442.

Finding no reversible error, the decree of the chancery court is affirmed.

TAYLOR v. SIMPKINS.

Opinion delivered April 16, 1928.

1. BANKS AND BANKING—INSOLVENT BANK—PROOF OF CLAIM.—Crawford & Moses' Dig., § 722, as amended by Acts 1923, p. 520, § 5, requiring proof of claim within one year after the Bank Commissioner takes over an insolvent bank's assets, *held* inapplicable to a claim of a nonresident depositor without notice of the bank's insolvency or notice to file claim where the Commissioner had the full amount of the deposit in his hands for payment on demand from funds loaned by other banks for the payment of depositors.
2. BANKS AND BANKING—BANK COMMISSIONER TRUSTEE WHEN.—The Bank Commissioner, in accepting money loaned to an insolvent bank by other banks and turned over to him for payment of all depositors, became a trustee, whose duty it was to apply such funds to the purposes of the trust.

Appeal from Jefferson Chancery Court; *H. R. Lucas,* Chancellor; affirmed.

R. W. Wilson, for appellant.

Rowell & Alexander, for appellee.

McHANEY, J. Appellant has correctly stated the case as follows:

"On January 5, 1925, the Citizens' Bank of Pine Bluff, Arkansas, was found to be insolvent, and the Bank Commissioner, Charles McKee, took charge of its affairs, and appointed C. A. Fullinwider, special deputy, in charge. On the same day the bank and the directors thereof entered into a contract with five other banks of Pine Bluff for sufficient money to pay all depositors, etc., not exceeding $2,300,000. The assets of the Citizens' Bank, including the money borrowed, were turned over to the Bank Commissioner for the purpose of liquidating the affairs of the Citizens' Bank. All local depositors were taken care of by the five banks, but the intervener's (being a nonresident, and not being located) deposits remained in the hands of the commissioner. The Bank Commissioner complied with the statutes in giving the various notices, but the intervener did not make proof of her claim or demand payment until August 26, 1926, when same was refused.

"Intervener claims that the contract supersedes the statute of limitations as set out in § 722 of C. & M. Digest and amended by § 5 of the act 627 of the General Assembly of 1923. Appellants contend that payment is prohibited by the provisions of the above statute, and that the contract does not prevent the running of the statute of limitations; that the fund obtained by the Citizens' Bank and its directors was not a trust fund, but only for purpose of paying the depositors, etc., in accordance with the law, the same as if no funds had been borrowed.

"The chancellor found that the one-year statute of limitations for presenting and making proof of her claim and the additional six months for filing suit after her claim was rejected did not apply, and that the intervener, Doshia Simpkins, is entitled to recover, and from that decree the Bank Commissioner has appealed."

The only question for our determination is whether the appellee is barred by the one-year statute of limitations, as contained in § 722, C. & M. Digest, as amended by § 5 of act 627 of 1923. A part of this section is as follows:

"The commissioner shall cause notice to be given by advertisement in such newspapers as he may direct, weekly for four consecutive weeks, calling on all persons who may have claims against the said estate, to present the same to him and make legal proof thereof, at a place and at a time to be fixed by the said commissioner in said notice. At or after the expiration of said time the commissioner shall give, either personally or by depositing in the mail, a further ten days' notice to all creditors who have not yet then proved their claims and whose names and addresses are known to him. No claim shall be allowed unless proof thereof has been presented to the commissioner within one year from date on which the commissioner takes over the assets of the liquidated bank. If the commissioner doubts the justice or the validity of any claim, he may reject the same and serve

notice of such rejection upon the claimant, either by depositing the same in the mail or personally. An affidavit of the service of such notice, as also of any such ten days' notice, which shall be *prima facie* evidence thereof, shall be filed with the commissioner. An action upon a claim so rejected must be brought within six months after such service."

She did not present her claim within that time. She in fact presented it about six months later, and the Bank Commissioner, although having the money in his hands which had been turned over to him by the five other banks in Pine Bluff for this purpose, declined to pay same, and refused her claim, on the ground that he was prohibited from so doing by the above statute.

This act of 1923 amended and changed the banking laws of this State in many respects. The above section, which is quite lengthy, and too long to set out in full herein, prescribed the procedure for the commissioner to take in winding up the affairs of an insolvent bank in the ordinary way, that is, where he takes over the assets and liabilities and proceeds to liquidate it by collecting the assets, turning them into cash, and paying its debts. It provides for the payment of dividends on the claims filed from time to time as cash is accumulated in his hands for this purpose. In such a case it would be necessary for the Bank Commissioner to determine, within a reasonable time, what the provable claims against the bank were, in order that he might make distribution of the funds by way of dividends. The statute of limitations, as fixed in the act, therefore very properly applies to such a case, as otherwise the Bank Commissioner would not know the amount of dividends he might declare and pay at any given time. But the facts in this case are wholly different. Here the Bank Commissioner is not proceeding under the statute to liquidate the affairs of the Citizens' Bank of Pine Bluff, but by virtue of a contract between it and the other five banks in Pine Bluff. Funds to the extent of the total deposits in the

bank were turned over to him for the express purpose of paying all depositors. It was not contemplated that dividends would be declared and paid to the depositors from time to time until the assets of the bank were exhausted, but each and every depositor became immediately entitled to the full amount of his deposit on demand. Appellee, being a nonresident, did not know of the insolvency of the Citizens' Bank, and received no notice from the Bank Commissioner directing her to file her claim. The exact amount of her deposit was shown upon the books of the bank, and he knew she was a depositor and entitled to the sum allowed her by the court in this action. The concluding sentence in the above section of the act of 1923 reads as follows: "The commissioner may pay over any such unclaimed deposits or dividends when the same are claimed within apt time, as aforesaid, to the person respectively entitled thereto, upon evidence satisfactory to himself or upon order of the chancery court."

This clause has no particular application, except that it shows that there is some discretion left to the commissioner and the court to pay unclaimed deposits, even after the time provided for. That part of the contract between the Citizens' Bank and the other five banks in Pine Bluff which is peculiarly *apropos* here reads as follows:

"At the request of the parties of the first part, the parties of the second part have agreed and do hereby agree to lend to the Citizens' Bank of Pine Bluff such amount as may be necessary, together with the cash which said Citizens' Bank has on hand, to pay all deposits, bills payable, outstanding drafts, acceptances and current bills of said Citizens' Bank, not exceeding $2,300,000, the proceeds of such loan to be used for said purposes and as may be agreed upon and directed by the said parties of the second part. The Citizens' Bank of Pine Bluff hereby agrees to repay to the parties of the second part the amount so loaned, on demand, with interest thereon

at the rate of six per cent. per annum from date until paid."

By taking charge of the Citizens' Bank the same day the above agreement was made, the money was turned over to the commissioner for the purposes indicated, and in accepting it he became a trustee, whose duty it was to apply the funds received by him to the purposes of the trust. It is not claimed that the fund has been exhausted by the payment of deposits and other liabilities of the bank, so that this claim cannot be paid, but, on the contrary, it is admitted that the Bank Commissioner has in his hands the funds with which to pay same. It could not lawfully be paid to any one else, and the manifest justice and equity of the case is that it be turned over to her.

We are therefore of the opinion that the statute of limitations has no application to the facts in this case, and that the Bank Commissioner is under the same duty to pay this deposit on demand as the Citizens' Bank of Pine Bluff would have been had it not been taken over by the Bank Commissioner. The judgment of the chancery court is therefore correct, and it is affirmed.

GRAYSON v. MIXON.

Opinion delivered April 16, 1928.

1. LANDLORD AND TENANT—SUIT FOR RENT PREMATURE WHEN.—A landlord's suit to recover a month's rent due under a contract was premature, where it was brought before the expiration of the 10 days' grace allowed by the contract for the payment of each month's rent.
2. LANDLORD AND TENANT—SUIT FOR RENT PREMATURE WHEN.—A landlord's suit for the whole amount of rent due under a five-year contract was premature, when it was brought before the expiration of the time for which the contract was to run.
3. LANDLORD AND TENANT—ABANDONMENT OF PREMISES.—Upon the tenant abandoning the premises, the landlord's right of action to recover the full amount of rent due accrues only at the end of the term when all of the installments of rent have matured.

4. LANDLORD AND TENANT—ACCEPTANCE OF TENANT'S ABANDONMENT.—Where a landlord accepts the abandonment by the tenant of the leased property and rents the property on his own account, the tenant is not liable for future rent.
5. LANDLORD AND TENANT—ABANDONMENT OF LEASE—RIGHT OF ACTION.—A landlord may refuse to accept the abandonment of the premises by the tenant and sue him for the rent as it falls due each month; or if he so elects, he may treat the lease agreement as at an end and sue immediately for damages for breach of the contract and recover the difference between the amount of rent reserved and the reasonable rental value for the remainder of the term, if the rental value be less than the amount reserved in the lease; or the landlord may wait until the end of the term and sue for the difference between the rent reserved and the actual amount of rent received from the subletting on the tenant's account.
6. LANDLORD AND TENANT—LIABILITY OF TENANT ON ABANDONMENT OF LEASE.—Where, on the abandonment of leased premises by the tenant, the landlord is unable to rent the premises, the tenant is liable for the full amount of the rent reserved.
7. LANDLORD AND TENANT—LIEN ON TENANT'S FURNITURE.—Where a contract between the landlord and the tenant provided for a lien on the tenant's furniture to secure the prompt payment of the rent, the court could not extend such lien to recover damages for the breach of the lease.

Appeal from Columbia Chancery Court; *J. Y. Stevens,* Chancellor; reversed in part.

Gaughan & Sifford, for appellant.

McKay & Smith, for appellee.

McHANEY, J. This appeal is from a decree sustaining a demurrer to appellant's complaint against the appellees, and dismissing it for want of equity. The complaint states, in substance, that, on January 1, 1926, the appellant entered into a lease contract with appellee, Mixon, whereby he leased to him a certain hotel property situated in the town of Stephens, Ouachita County, Arkansas, for a term of five years, for the annual rental of $3,000, payable monthly in advance at $250 per month; that appellee entered into possession of the property and operated it until the first day of May, 1927, paying the rental therefor in accordance with his contract; that on the 11th day of April, 1927, Mixon gave appellant

notice in writing that he would not occupy said building, or pay any rental subsequent to May 1, 1927, and that he did vacate the hotel on that date, thereby breaching his contract to pay the rental for the remainder of said five-year period; that the amount of rental due by him under said contract, or that he was to pay under the same, is the sum of $11,000, and the plaintiff prays judgment against said defendant for said sum.

It was further alleged that the lease contract was in writing, and by its terms gave the appellant a lien on all the furniture in said hotel belonging to the lessee to secure the payment of said rental, and that the instrument was acknowledged and filed for record in the recorder's office of Ouachita County; that the furniture has been removed from the hotel, stored in a warehouse in the town of Stephens, with A. Foster, and that it is now in his possession as bailee for hire, a copy of the lease agreement being attached to the complaint.

A further provision is in the lease to the effect that the lessee should have ten days of grace in which to pay the rent before the lessor could declare a forfeiture.

The appellee, People's Bank, was made party defendant because it claimed a lien upon the furniture, to the end that their respective rights therein might be determined. The prayer was, in addition to the judgment for balance due on rent, that appellant's lien on the furniture be foreclosed and applied to the satisfaction of said indebtedness.

Mixon did not plead, answer or demur to the complaint. Appellee, People's Bank, demurred to the complaint, which the court sustained, and, as heretofore stated, dismissed the complaint for want of equity.

This suit was brought on May 5, 1927, five days after the rental for May accrued, and five days before the expiration of the ten days of grace allowed. It was therefore prematurely brought, if the complaint be treated as a suit for rent, for which it specifically prays judgment. Appellant could not sue for the whole amount of the rent

due under the contract at that time, as the agreement was, it should be paid monthly in advance, with ten days of grace from the first of each month, and the full amount of rent had not accrued. And if the complaint be treated as a suit for one month's rent, it was premature, for the reason that the ten days allowed in which to pay had not expired at the time of bringing this suit. *Meyer* v. *Smith*, 33 Ark. 627, is the first case in our own decisions relating to the subject. It was later cited in *Williamson* v. *Crossett*, 62 Ark. 393, 36 S. W. 27, where, referring to that case, it was said: "It was held in that case that, when the tenant abandons the premises, refuses to pay rent, and repudiates the tenancy before the expiration of the lease, the landlord may take possession, and rent for the benefit of whom it may concern, and hold the tenant liable for any portion of the rent unpaid at the end of the term." In *Meyer* v. *Smith* it was further held that the landlord, by retaking possession under the circumstances in that case, did not, as a matter of law, accept surrender of the lease, and that a recovery could be had at the end of the term for the difference between the rent reserved and that realized by renting for the benefit of the tenant.

In *Williamson* v. *Crossett* it was held that, under the circumstances in that case, the surrender of the lease had been accepted, and that there was therefore no liability for the future rent after surrender and acceptance.

In *Hayes* v. *Goldman*, 71 Ark. 251, 72 S. W. 563, this court said: "Now, any acts which are equivalent to an agreement on the part of a tenant to abandon, and on the part of the landlord to assume possession of the demised premises on his own account, amount to a surrender of the term, by operation of law." Citing cases.

"An express agreement to accept the surrender need not be shown, for the landlord's assent may be implied by operation of law from the manner in which he uses the property after its abandonment by the tenant." 2 Wood, Landlord & Tenant (2 ed.) 1173.

"If the landlord takes charge of the property after the tenant has abandoned it merely to protect it from injury, or if, knowing that the tenant does not intend to return, he rents it for the account of the tenant, these acts may not show assent on his part, but if, after an abandonment, he takes possession, and rents the premises on his own account, this is conclusive evidence of a surrender." Citing cases.

In that case, the court quoted from 2 McAdam, Land. & Ten. (3 ed.) 1283, as follows:

"When a tenant abandons premises, and returns the keys to the landlord, the latter may accept the keys as a surrender of possession, thereby determining the tenant's estate, and relet the premises on his own account, or he may accept the keys and resume possession conditionally by notifying the tenant or other person returning the keys that he will accept the keys but not the premises, and relet them on the tenant's account, in which case the tenant may be held for any loss in rent caused by his abandonment and the subsequent reletting."

Under these cases it would appear that the landlord's right of action on the lease against his tenant for an abandonment of the leased premises for the whole amount of the rent reserved would only mature at the end of the term, when all the installments had matured, and when he would know that the full amount of rent reserved in the lease had been lost. Also it would appear that, if he takes possession of the property and subrents it for the benefit of the lessee, his right of action will mature at the end of the term, when he has ascertained the full amount of difference between the rent reserved and that obtained by the subletting.

Of course if he accepts the abandonment and rents the property on his own account, the tenant is not liable for future rent. It would appear also that the landlord could refuse to accept the abandonment, let the premises lie idle, and sue the tenant for the rent as it matured under the lease, in this case, on the 10th day of each

month. In *Bradbury* v. *Higginson,* 162 Cal. 602, 123 Pac. 797, it was held that, although the tenant abandon the premises, the landlord has no right of action for the rent until it falls due. If the landlord so elects, he may treat the lease agreement as at an end and sue for damages for breach of the contract, in which case he could bring his action immediately on the breach and recover the difference between the amount of rent reserved and the reasonable rental value for the remainder of the term, if the rental value be less than the amount reserved in the lease, or he could wait until the end of the term and sue for the difference between the rent reserved and the actual amount of rent received from a subletting on the tenant's account.

If the landlord is unable to rent the premises, the tenant would be liable for the full amount of the rent reserved. Authorities sustaining the rules of law as herein announced may be found in extended notes to the case of *Higgins* v. *Street* (Okla.), 14 Am. & Eng. Ann. Cases, 1086, and 13 L. R. A. (N. S.) 398.

In the case now before us there is nothing in the record to show whether the appellant has retaken possession of the premises, but we announce these rules in view of the disposition we make of this case.

If the complaint in this case be treated as a suit for the recovery of damages for a breach of the contract, the lien retained in the lease contract to secure the payment of the rent does not secure the amount to be recovered in damages for breach. If appellant elects to treat the contract between him and Mixon as at an end, the relation of landlord and tenant has ceased to exist, and there is no provision in the contract giving appellant a lien on the furniture for damages for the breach for the term, but only to secure the payment of the rent.

In *Few* v. *Mitchell,* 80 Ark. 243, 96 S. W. 983, Few rented land to certain tenants, who mortgaged the crop to Mitchell for supplies. In a contest between Few and

Mitchell as to the priority of their respective liens, Few sought to recover damages and collect same under his landlord's lien for neglect of the crop and for rental value of lands not cultivated, in violation of the contract, and this court said: "The landlord's lien is primarily for rent alone, and has been extended by statute to advances of necessary supplies, money, etc. Kirby's Digest, §§ 5032-3. It cannot be extended beyond the terms of the statute, and the claims here asserted are not within the statute." See also *Kaufman* v. *Underwood*, 83 Ark. 118, 102 S. W. 718, 119 Am. St. Rep. 121.

While the lien here involved is by contract and not by statute, we think by analogy the same rule applies, and that we could not extend the lien in the contract to cover damages for the breach thereof, as the contract itself provides that the lien is given "to secure the prompt payment of the rent."

Since, as has been seen, if the complaint be treated as a suit for rent, even for one month, it was prematurely brought, and if it be treated as an action for damages, there is no lien on the furniture, the decree of the chancery court will be affirmed as to the People's Bank. As to appellee Mixon, however, the decree will be reversed, and remanded for further proceedings according to law and the principles of equity and not inconsistent with this opinion.

KIRBY, J., dissents.

CROWE v. SECURITY MORTGAGE COMPANY.

Opinion delivered April 16, 1928.

1. HIGHWAYS—ASSIGNMENT BY ROAD DISTRICT OF CERTIFICATE OF PURCHASE FOR TAXES.—A road improvement district organized under Road Laws 1919, vol. 1, p. 1071, is authorized to assign a certificate of purchase issued under a decree foreclosing a lien of the district for unpaid taxes, in order that the lands may be placed again on the taxbooks and bear their proper share of the cost of improvement.
2. HIGHWAYS—TIME FOR REDEMPTION FROM TAX SALE.—Acts 1925, p. 1033, extending for 3 years the period of redemption of lands for nonpayment of assessment in improvement districts, did not become a law until 90 days after adjournment of a session pursuant to Constitution, Amendment 13, as it did not contain the emergency clause, and therefore it did not prevent the operation of Acts 1921, p. 296, limiting the period of redemption to 2 years, which period expired before the later statute went into effect.
3. STATUTES—RETROACTIVE EFFECT.—Where a statute does not indicate that it was intended to have a retroactive effect, a presumption is to the contrary.
4. EVIDENCE—JUDICIAL NOTICE OF LEGISLATIVE RECORDS.—The courts take judicial notice of the records of both branches of the Legislature.
5. HIGHWAYS—STATUTE RELATING TO PUBLICITY FOR TAX SALES.—Acts 1923, p. 445, relating to additional publicity for tax sales of land and sale of land for nonpayment of local improvement assessments, not being retroactive in operation, *held* inapplicable to a commissioner's sale made before the date on which the act became effective.

Appeal from Arkansas Chancery Court, Northern District; *H. R. Lucas,* Chancellor; reversed.

Floyd Wingo and *W. A. Leach,* for appellant.

SMITH, J. This action involves the title to the north half of the southwest quarter and the southeast quarter of the southeast quarter of section five, township two south, range four west, lying in the Northern District of Arkansas County.

The Northern Road Improvement District was organized under special act No. 247, passed at the regular 1919 session of the General Assembly (Special Road

Acts 1919, page 1071, volume 1), and benefits were duly assessed under the authority of the act against all the lands in the district, including the lands above described. The taxes were not paid on the above-described lands for the year 1921, and both tracts were duly returned by the collector of taxes as delinquent on April 11, 1922. Thereafter suit was brought by the district to enforce payment of the delinquent taxes, and on February 13, 1923, a decree was rendered foreclosing the lien of the improvement district for the 1921 taxes, and the lands were ordered sold by a commissioner appointed for that purpose.

This suit was brought under the authority of § 13 of the act creating the district, which provides that the county collector shall not sell the land returned delinquent for the nonpayment of the improvement taxes, but shall report such delinquency to the board of commissioners of the improvement district, who, after adding a penalty of 25 per cent., are required to enforce payment of the delinquent taxes by proceeding in the manner provided by §§ 23 and 24 of act 279 of the Acts of 1909 (Acts 1909, page 829), but it was there provided that the landowner might redeem his land at any time within five years from the time "when his lands have been stricken off by the commissioner making the sale."

Section 23 of the act of 1909, *supra,* provides that the proceeding to enforce payment of delinquent taxes shall be in the nature of a proceeding *in rem,* and by § 24 of that act it is provided that if, at the sale by the commissioner, no one offers to bid the taxes, penalty, interest and costs due on any tract of land, the "commissioner shall bid the same off in the name of the said board of directors, * * * bidding therefor the whole amount due as aforesaid, and shall execute his deed therefor, as in other cases under this act, conveying such land to such * * * board."

On April 5, 1923, pursuant to the decree of sale, the lands above described were offered for sale, and, there being no bidder therefor, the same were struck off to

the road improvement district, and a certificate of purchase was issued to it. This sale was duly reported to and confirmed by the chancery court, and the commissioner was directed to execute deeds to the various purchasers at the sale.

On April 5, 1925, the commissioners of the improvement district assigned its certificate of purchase to J. E. Duncan, and on January 5, 1926, a commissioner's deed was duly executed to Duncan as such assignee, and on April 24, 1926, Duncan conveyed the lands to appellant, J. R. Crowe, who now claims title thereto by virtue of such deed.

Appellee, Security Mortgage Company, is the owner of the original title to the lands here in controversy, and in January, 1927, brought this suit to redeem from the sale for the 1921 taxes and to cancel the deed to appellant Crowe as a cloud on its title. The court granted the relief prayed, but held that, inasmuch as Crowe and Duncan had redeemed the lands from separate decrees of sale for other taxes, appellant Crowe was entitled to a lien on the lands for the amount expended to effect these redemptions, and from that part of the decree there was no appeal (*Turley* v. *St. Francis County Road Imp. Dist. No. 4,* 171 Ark. 939, 287 S. W. 196), but Crowe has appealed from that part of the decree holding that the right of redemption from the 1921 sale existed.

The act of 1919 creating the improvement district provided, as has been stated, that the proceedings to enforce payment of the delinquent taxes shall be in accordance with the procedure provided by act 279 of the Acts of 1909, but that the owner should have the right to redeem at any time within five years from the date of sale. Later, by act No. 223, passed at the 1921 session of the General Assembly (Acts 1921, page 296), the period of redemption was shortened to two years, and the validity of this last-mentioned act was upheld by this court in the case of *Northern Road Imp. Dist.* v. *Meyerman,* 169 Ark. 383, 275 S. W. 762, which case arose

under a commissioner's sale made under the authority of special act No. 247 of the Acts of 1919, *supra*.

At the 1925 session of the General Assembly, act No. 346 was passed (Acts 1925, page 1033), extending for a period of three years, in addition to the time then allowed by law, the right to the landowner to redeem, and it was the opinion of the court below that this act applied to the sale here in question, and gave the owner the right to redeem at the time that application was made. The court below was also of the opinion that, as the act creating the improvement district did not, in express language, authorize the commissioners of the district to sell lands struck off to it by the commissioner, it could not assign the certificate of purchase nor otherwise dispose of any lands struck off to it.

The court below was also of the opinion that the right of redemption existed because of the noncompliance with the provisions of act No. 445 of the Acts of 1923 (General Acts 1923, page 395), entitled "An act to require additional publicity to tax sales of lands and sale of land for local improvement assessments."

Section 1 of this act provides that: "When any lands are sold under the decree of chancery court for delinquent taxes or assessments levied by any special or local improvement district, * * * the clerk of said court shall, within ten days after the filing in his office of the report of the court's commissioner making any such sale, prepare and file with the county clerk of the county in which the lands are situated, a certified list of the lands so sold; said list to contain a description of each tract under which the same was sold, the name of person or persons in whose name each tract was assessed and sold, the date of the sale, the name of the purchaser of each tract at such sale, and the amount of taxes, including penalty and costs, for which each tract was sold."

It was the opinion of the court below that the statute limiting the right of the delinquent owner to redeem

his property from the sale did not begin to run until this statute had been complied with, and that, inasmuch as there had been no compliance with this statute, the right of redemption had not been barred.

The first question presented is that of the right of the improvement district to assign the certificate of purchase issued it under the decree foreclosing the lien of the district for the unpaid 1921 taxes. We think the district had this right. The act creating the district imposed upon the commissioners the duty of collecting all delinquent assessments, and they were required to institute suits for this purpose, and the act provided that, if no bids were offered for any particular tract of land, the same should be struck off to the commissioners for the amount of the taxes, penalty, interest and costs, and, if a redemption was not perfected within the time limited by law, a fee-simple title vested in them for the use of the district.

If thereafter these lands were not required to bear their proportionate part of the burden of the cost of the improvement, the burden on other lands not delinquent would necessarily be increased until the full amount of the betterment assessed against such lands would be required to be levied against them in order that the obligations of the district might be discharged. This could be avoided only by selling the lands as the district acquired them, in order that they might again be placed on the taxbooks and thereafter bear their proportionate part of the cost of the improvement.

In reviewing previous decision on this question in the case of *Chicago Mill & Lbr. Co.* v. *Drainage Dist. No. 17,* 172 Ark. 1059, 291 S. W. 810, it was said:

"It was pointed out in those cases that the lien of the district continued until the taxes were paid, or until the lands themselves were acquired by the district through sales for the nonpayment of the taxes, and that, when the delinquent taxes were paid, they became available, and should be used in paying the obligations of the dis-

trict; and further, that, if the lands were sold to the district, and not redeemed, then the entire value of the lands to be realized by a sale thereof would be available for this purpose. So that, while a delay would be entailed in obtaining and applying revenues from the delinquent lands, these revenues would finally be obtained and applied, and thus no unequal burden would be imposed."

In the case of *Blanton* v. *Jonesboro Bldg. & Loan Assn.*, 176 Ark. 315, 3 S. W. (2d.) 964, it was expressly held that an improvement district might sell, for such sum as it could obtain, lands the title to which had been acquired by the district through a sale to it for delinquent taxes, even though the act creating the district did not expressly confer that power.

So therefore it must follow that the improvement district had the right to assign certificates of purchase for lands sold it for a sum not less than the taxes, penalty, interest and costs for which the lands were sold. Therefore when, on April 5, 1925, the commissioners of the district assigned the certificates of purchase issued to them to Duncan, under the sale made April 5, 1923, pursuant to the decree of foreclosure, Duncan acquired the same rights he would have acquired had he himself been the original purchaser at the commissioner's sale.

As we have said, it was the opinion of the court below that the right to redeem existed under both act 346 of the Acts of 1925 and act 445 of the Acts of 1923; but we do not concur in the view that either act gave that right.

Act 346 provides that the time for redemption of any land upon which default has been made in the payment of improvement district taxes shall be "extended for a period of three years in addition to the period of redemption heretofore fixed by law for the redemption of lands for the nonpayment of such annual assessment in any and all improvement districts." This act was approved April 1, 1925, and on that date the improvement district had not assigned the certificate of pur-

chase issued to it on the sale made by the commissioner on April 5, 1923, and that certificate was not assigned until April 5, 1925, which was just two years after the date of the sale. If therefore act 346 was in effect as a law on the date of its approval, the period of redemption was extended; as it might have been, inasmuch as the certificate of purchase on that date was outstanding in the name of the district. We have held that, while the period of redemption may not be extended after there has been a sale to an individual, as such legislation would impair the obligation of the contract arising out of the sale (*Northern Road Imp. Dist.* v. *Meyerman,* 169 Ark. 383, 275 S. W. 762; *Smith* v. *Spillman,* 135 Ark. 279, 205 S. W. 107, 1 A. L. R. 136; *Hogg* v. *Nichols,* 134 Ark. 280, 204 S. W. 211), such legislation is valid where the sale was to the district itself, as no contractual right arose in the latter case. *Walker* v. *Ferguson,* 176 Ark. 625, 3 S. W. (2d.) 694.

The amendment to the Constitution submitted as Amendment No. 13, and commonly referred to as having that number, was in effect when act 346 of the Acts of 1925 was passed by the General Assembly (*Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865), but it contained no emergency clause, and it did not therefore become effective, under Amendment No. 13, until ninety days after the final adjournment of the session at which the act was passed. *Fenolio* v. *Sebastian Bridge Dist.,* 133 Ark. 386, 200 S. W. 501; *Arkansas Tax Commission* v. *Moore,* 103 Ark. 48, 145 S. W. 199.

Before the expiration of this ninety-day period the two years allowed by act 223 of the 1921 session for redemption from sales had expired. *Northern Road Imp. Dist.* v. *Meyerman, supra.*

It is true, as we have said, that act 346 of the 1925 session had been approved at the time the commissioners of the improvement district assigned to Duncan the certificate of purchase, and it was the theory of the court below that, as this act had been approved, all persons must have known that ninety days after the adjournment

of that session the right of redemption would be extended for a period of three years, and that parties purchasing lands held by an improvement district were bound by such notice, and, having taken the lands with notice that the time of redemption would be changed, they stand in the same relation they would have been in if they had taken the assignment after the act went into effect. But this does not follow. No rights could be predicated upon act 346 until it became a law, and prior to that time all parties had the right to contract under the then existing law.

In the case of *St. Louis, I. M. & So. Ry. Co.* v. *Roddy,* 110 Ark. 161, 161 S. W. 156, the facts were that Roddy was killed by the defendant railroad company three days after the amended lookout statute was passed (act No. 284, page 275, of the Acts of 1911), and an instruction was given at the trial of the suit of his administrator for damages for his death, based upon this statute. This was held to be error, for the reason that the statute contained no emergency clause, and did not become a law until ninety days after the adjournment of the session at which that act was passed.

In the case of *Thompson* v. *State,* 151 Ark. 369, 236 S. W. 608, the facts were that the General Assembly had passed a special act detaching territory from one school district and attaching it to another. The act contained no emergency clause, and it was held not to apply to the action of the school directors, who, after the passage of the act, but before it became a law, tore down and removed a school building from the detached territory.

In the case of *Gaster* v. *Dermott-Collins Road Imp. Dist.,* 156 Ark. 507, 248 S. W. 2, the electors in a road improvement district undertook to hold an election under the provisions of a special act which did not become effective until ninety days after the adjournment of the session of the General Assembly which had passed it, for the reason that it contained no emergency clause, and the election was there held to be premature and void. It was there said: "Since the emergency clause was not

attached to the act showing the existence of an emergency, the act was the subject of a referendum under Amendment No. 7 of the Constitution, *supra,* and did not become operative until ninety days after the Legislature adjourned."

So here we conclude that, as act 346 of the Acts of 1925 did not contain the emergency clause, it was not a law for any purpose until ninety days after the adjournment of the session of the Legislature at which it was passed, and did not therefore prevent the operation of act 223 of the Acts of 1921, *supra,* then the law barring all rights of redemption within two years from the date of the commissioner's sale, as the act of 1921 provided. Under the act of 1921 the right to redeem expired April 5, 1925, and act 346 did not become a law until after that date. See also *Wilkes County* v. *Coler,* 180 U. S. 506, 21 S. Ct. 458, 45 L. ed. 643.

As it is conceded that the provisions of act 445 of the Acts of 1923, *supra,* were not complied with, it remains to determine what effect this failure had on the sale here under review.

It may be first said that there is nothing about the act of 1923 to indicate that it was intended to have a retroactive effect, and the presumption is, of course, to the contrary. So strong is this presumption that (to quote a syllabus in the case of *Mosaic Templars of America* v. *Bean,* 147 Ark. 24, 226 S. W. 525), "all statutes are to be construed as having only a prospective operation, unless the Legislature expressly declares, or otherwise shows a clear intent, that it shall have a retroactive effect."

This act of 1923 was approved March 20, 1923, which was prior to the date of the commissioner's sale, which, as we have said, occurred April 5, 1923, and it contained an emergency clause which sufficiently declared an emergency to make the act immediately effective under the original I. & R. amendment, commonly referred to as Amendment No. 9. But this amendment had been superseded by the later initiative and referen-

dum amendment, herein referred to as Amendment No. 13, under which last-named amendment it was required that a separate vote be taken upon the emergency clause, and that this clause receive a two-thirds vote of all the members elected to each house of the General Assembly.

We take judicial notice of the records of both branches of the General Assembly, and we thus know that no separate vote was taken on the emergency clause contained in the act, and, this being true, the act did not immediately go into effect. *Road Imp. Dist. No. 16* v. *Sale,* 154 Ark. 551, 243 S. W. 825. It did not therefore become effective as a law until ninety days after the adjournment of the session at which it was passed, and prior to that time the commissioner's sale was made, and the act did not apply to that sale, as it was not retroactive in its operation.

In the case of *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653, it was held that the fact that a separate roll-call was not had on the emergency clause did not invalidate the statute, but only rendered that clause inoperative. So that, while act 445 was valid, notwithstanding the emergency clause was not, it did not, through the lack of a valid emergency clause, become a law until after the commissioner's sale had been made, and, for this reason, did not apply to that sale, as the act of 1923 was not retroactive in its operation.

We conclude therefore that the court was in error in canceling the deed of the commissioners to Duncan, based upon the commissioner's sale, and also the deed from Duncan to appellant Crowe, and in according the original owner the right to redeem from the sale under which they claim, as that right was barred under act 223 of the Acts of 1921, *supra.* *Northern Road Imp. Dist.* v. *Meyerman, supra.*

It appears that appellee expended the sum of $312.42 in the redemption of the lands here in litigation from sales for the 1922 and 1923 taxes, and it should be reimbursed for those expenditures.

The decree of the court below will therefore be reversed, and the cause dismissed in so far as the cancellation of the deeds from the commissioners to Duncan and from Duncan to appellant is concerned, but a decree will be rendered in favor of appellee for the amount of the 1922 and 1923 taxes, with the interest thereon, and a lien therefor will be declared in its favor, to be enforced by appropriate orders of the court.

KIRBY, J., dissents.

UNION & PLANTERS' BANK & TRUST CO. v. ELDER.

Opinion delivered April 16, 1928.

APPEAL AND ERROR—JUDGMENT ON SUPERSEDEAS BOND.—On affirming a judgment for a certain proportion of the assets in the hands of a receiver, the judgment on the supersedeas bond should not be for a specific sum, but should fix liability and remand the case with directions to ascertain the amount of such liability.

Appeal from Prairie Chancery Court; *Frank H. Dodge,* Chancellor; judgment modified.

Emmet Vaughan, for appellant.

Daggett & Daggett, for appellees.

HUMPHREYS, J. This case was affirmed (*Purvis* v. *Elder,* 175 Ark. 780, 1 S. W. (2d.) 36), whereupon appellee moved for judgment on the supersedeas bond, which was granted. In keeping with the order, the clerk of this court entered a judgment for $2,592, using as his guide the amount shown by the receiver's report in the record. The judgment rendered in the trial court was not for a specific sum. Our attention has been called to the fact that the judgment was not for a specific amount but for a portion of the assets in the hands of the receiver, and that the receiver's report appearing in the record was not his final report but, on the contrary, was his first report, which did not show all legal disbursements. In view of this fact it was error to enter a judgment here for a specific sum on the supersedeas bond,

but the same should have fixed the liability on the bond, and the case should have been remanded with direction that the amount thereof be ascertained by the trial court after allowing the receiver such amounts as have been paid out by him on order of the trial court.

STATE v. PHILLIPS.

Opinion delivered April 23, 1928.

1. ANIMALS—PETITION FOR STOCK-LAW ELECTION.—A petition without a requisite number of signers, adding a township to those named in prior petitions, each of which was in like form, referred to others, and represented that they were in effect one petition, could not be joined with them and made the basis of an order calling the stock-law election under Crawford & Moses' Dig., §§ 321-332, as amended by Acts 1921, p. 427; there being a variance between the description of the territory described in the original petitions and that described in the order calling the election.
2. ANIMALS—PETITION FOR STOCK-LAW ELECTION.—A petition containing the requisite number of signers for a stock-law election is a jurisdictional prerequisite to the exercise of the county court's jurisdiction to call the election, which it cannot do on its own motion.
3. ANIMALS—VALIDITY OF ORDER CALLING STOCK-LAW ELECTION.—The invalidity of a county court's order calling a stock-law election in six townships, one of which was added by a petition not signed by the requisite number of qualified electors, was not cured by a chancery court decree restraining the holding of the election in such townships, the chancery court having jurisdiction to restrain the election, but not to cancel or amend the county court's order.
4. ANIMALS—INVALIDITY OF ORDER CALLING STOCK-LAW ELECTION.—An order of the county court calling a stock-law election under Crawford & Moses Dig., §§ 321-332, as amended by Acts 1921, p. 427, not being signed by the requisite number of qualified electors, was not validated by Acts 1927, p. 227, validating special elections for creation of "no-fence" laws on different days than that named in the act, or for other causes.

Appeal from Craighead Circuit Court, Jonesboro District; *W. W. Bandy,* Judge; affirmed.

STATEMENT OF FACTS.

Eli Phillips was convicted before a justice of the peace and fined $5 for allowing his stock to run at large, in violation of the local option stock law. Upon appeal he was tried before the circuit court sitting as a jury, upon an agreed statement of facts, which is substantially as follows: The requisite number of qualified electors of the townships of Jonesboro, Herndon, Powell, Brooklyn and Nettleton filed a petition in the county court praying for an order giving them the right to vote on the question of restraining horses, cattle, etc., from running at large in said townships. Several petitions were circulated at the same time, and each petition contained a clause reciting that the qualified electors signed the petition knowing that other petitions of the same effect were being circulated, and they authorized the petition signed to be consolidated with the other petitions of like form and character so as to constitute and be presented to the county court as one petition. Subsequently an additional petition was circulated adding the township of Greenfield to those above named. The requisite number of qualified electors did not sign this petition. It was, however, considered by the county court as being a part of the other petitions above referred to and described, and all of the petitions were considered as one. It was thereupon ordered by the county court that an election be held on the 5th day of January, 1926, at the usual voting places in said townships, for the purpose of determining whether the prayer of the petition should be granted. Notice of the election was given as required by statute. Upon the petition of certain residents of Greenfield Township, the chancery court of Craighead County made an order restraining the holding of said election in Greenfield Township. On the 5th day of January, 1926, the special election was held in each of said townships except Greenfield. On January 8, 1926, the election commissioners of Craighead County filed a report in the county court showing the result

of said election in all of said townships except Greenfield, and the result of said election shows that the stock law carried in Powell, Brooklyn, Nettleton, Herndon and Jonesboro townships.

The judgment of the circuit court recites the finding of facts by the court substantially as above stated. Thereupon the circuit court declared the law to be that the county court had no authority to render the order calling an election for January 5, 1926, for the purpose of voting on the question of restraining animals in the townships of Jonesboro, Herndon, Nettleton, Brooklyn, Powell and Greenfield. The court was of the opinion that the order was void because it fixed the boundaries of the proposed district different from that in the only petition submitted from which the court could have acted. It was therefore ordered and adjudged that Eli Phillips was not guilty of violating any law of the State of Arkansas by permitting his stock to run at large within the boundaries of the above-named townships, and he was discharged from custody. The State has brought the case here on appeal.

Ivie C. Spencer, for appellant.

Penix & Barrett, for appellee.

HART, C. J., (after stating the facts). The judgment of the circuit court was correct.

The stock district in question was attempted to be formed under the provisions of §§ 321-332 inclusive of Crawford & Moses' Digest, as amended by act 427 of the General Acts of 1921. See General Acts of 1921, p. 427. Under § 321 of Crawford & Moses' Digest, as amended by act 427 of the Acts of 1921, whenever twenty-five per cent. of the qualified electors of three or more townships in a body, as shown by the election returns for Governor at the last election preceding the date of the petition, shall petition the county court to vote on the question of restraining certain designated animals from running at large, the county court shall make an order for such election in said townships at any general elec-

tion for State, county and township officers, or at a special election called for the purpose. Several different petitions were circulated at the same time, signed by the requisite number of qualified electors, asking that a special election be called in the townships of Jonesboro, Nettleton, Herndon, Powell and Brooklyn. Each of these petitions was of like form, and referred to the others, and represented that they were in effect one petition. This is true because each of the petitions was for the identical purpose. They asked for a local option stock-law election to be held in five different townships, which were named in each petition. The different petitions therefore constituted a unit for the calling an election in the same townships. Another petition was filed, asking for the calling of a stock-law election in these five townships, and there was added the township of Greenfield. This petition, however, did not contain twenty-five per cent. of the qualified electors, as required by the statute. It could not become a part of the unit of the other petitions which called for the election in the same five townships and which did contain more than twenty-five per cent. of the qualified electors of said townships.

The order of the county court was based upon the petitions filed, and ordered the special election to be called in the six townships, including Greenfield Township. There was a variance between the description of the territory embraced in the petitions which contained the requisite number of qualified electors and the territory described in the order of the county court calling the special election to be held January 5, 1926. This was fatal to the validity of the order. The petitions calling for the election in the townships of Jonesboro, Brooklyn, Powell, Nettleton and Herndon constituted a unit because, although the signatures were to different petitions, they were all written in precisely the same language and had the same end in view. When the petition adding Greenfield Township was circulated, this

constituted a materially different petition, and it could not be joined with the others. Not having the requisite number of signers, it could not be made the basis of an order calling the election. The county court had no right to call the election except upon a petition as provided by the statute; and a compliance with the provisions of the statute in this respect was a prerequisite to the exercise of jurisdiction by the county court. It could not call a stock-law election on its own motion.

In *Fesler* v. *Eubanks,* 143 Ark. 465, 220 S. W. 457, it was held that a petition selecting and grouping three or more adjoining townships in a stock district is jurisdictional, and that an order of the county court calling for a stock-law election not based on such petition is void, and subject to collateral attack. The reason for such holding is clearly stated in *Coleman* v. *Hallum* (Comm. of Appeals of Texas), 232 S. W. 296, where it was said:

"The petition for an election is fundamental and jurisdictional. It is the basis of the court's action in ordering the election. The court is not at liberty to disregard the request to order the election prayed for, if the requisites of the statute have been complied with; nor is it at liberty to alter the request for an election by ordering an election different from the one called for by the petition. The construction contended for would ascribe to the commissioner's court the doing of an unauthorized act—the ordering of an election without a petition as a basis thereof—and also the ordering of an election that would be void because of the uncertainty as to what was to be submitted and voted upon therein."

It is claimed, however, that this defect in the order of the county court was cured by the decree of the chancery court restraining the holding of the election in Greenfield Township. We do not agree with this contention. The chancery court had jurisdiction to restrain the election because it was made upon a void order, but it had no jurisdiction to cancel or amend the order of

the county court. As we have already seen, the order of the county court must be based upon the petitions filed; and it was void because the order as made was not based upon the petition of the requisite number of qualified electors as provided by statute. No subsequent decree of the chancery court could give validity to the order of the county court.

Finally, it is contended that the order of the county court was made valid by the curative act passed by the Legislature of 1927, which was an act to validate special elections held for the creation of "no-fence" laws. Acts of 1927, p. 227. The act by its terms proposed to validate said elections which were irregular by reason of being held on a different day from the date named in the act, or for other causes. It does not in any sense attempt to validate an election which had no validity in the beginning, or which was held under a void order of the county court.

Therefore we hold that the judgment of the circuit court discharging Eli Phillips was properly rendered, and the appeal of the State will be dismissed.

SMITH v. BANK OF MARIANNA.

Opinion delivered April 23, 1928.

EVIDENCE—PAROL EVIDENCE CONTRADICTING WRITTEN AGREEMENT.—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.

Appeal from Lee Circuit Court; *W. D. Davenport*, Judge; reversed.

STATEMENT OF FACTS.

Ben H. Smith instituted this action in the circuit court against the Bank of Marianna to recover the sum of $130, alleged to be due on an advertising contract. The bank filed an answer in which it denied that the

plaintiff had complied with its contract, and alleged that the plaintiff had refused to deliver suitable advertising material according to the terms of the contract.

The contract sued on was introduced in evidence. It was in writing, but a synopsis of its terms will be sufficient to determine the issue raised by the appeal. Ben H. Smith contracted to give the bank seventy-eight "Who's Who" advertising engravings, with ads and lobby cards, bulletin, and copy of monthly letter. The bank agreed to pay for the service, which was for eighteen months, at $2 per week, or a total of $156. Failure to pay any installment when due rendered the entire balance due. It was provided that all promises and agreements were stated in the contract and that verbal agreements with salesmen were not authorized. The contract also contained a clause that it was the entire contract, and that the purchaser of the advertising material acknowledged that the contract had been read carefully.

The cashier of the bank was a witness for it, and admitted that, under the terms of the contract, the bank agreed to pay $156 for the material supplied, and that a down-payment of $26 had been made. The material mentioned in the contract was promptly sent to the bank and received by it. The electric bulletin was broken, but the seller offered to supply a new one. The cashier of the bank said that the bank refused to pay for the advertising material because the reading-matter would not "tie-in" with the cuts, and the salesman had represented that they would "tie-in."

There was a verdict and judgment for the defendant, and the case is here on appeal.

Griffin Smith, for appellant.

HART, C. J., (after stating the facts). The sole reliance of the plaintiff for a reversal of the judgment is that the court erred in allowing the defendant to introduce evidence to show that the salesman of the plaintiff represented, at the time the contract was executed, that

the reading material would "tie-in" with the cuts. No such provision was inserted in the contract. On the contrary, in plain terms the contract recites that it is the sale of "seventy-eight Who's Who advertising engravings with ads and lobby cards, bulletin, and copy of monthly letter." The contract provides that all promises and agreements are stated therein, and that verbal agreements with salesmen are not authorized.

We are of the opinion that the court erred in allowing the testimony of the cashier of the bank to be introduced before the jury. His testimony to the effect that the salesman told him that the advertising material would "tie-in" with the cuts was plainly contradictory of the terms of the written contract. This court has uniformly enforced 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. *Federal Lumber Co.* v. *Harris,* 152 Ark. 448, 238 S. W. 611; *Delaney* v. *Jackson,* 95 Ark. 135, 128 S. W. 859; and *Pictorial Review Co.* v. *Rosen,* 171 Ark. 719, 285 S. W. 385.

In the last case cited the court upheld a ruling of the trial court to the effect that parol evidence would be admitted to show that a traveling salesman had induced a customer to sign a printed form of contract in blank because he was in a hurry to catch a train, and promised to fill in the terms of the contract in accordance with the terms of their agreement. The purchaser had confidence in him, and relied upon his representation. The salesman filled out a contract different from the one the purchaser made, and, as soon as the purchaser found it out, he countermanded the order and notified the company not to ship the goods. The court held that the evidence of the purchaser was not a contradiction of the writing, but showed what was the real agreement between the parties.

No such condition exists in the case at bar. The evidence for the bank, which was admitted over the

objections of the plaintiff, was to the effect that the salesman of the plaintiff had represented that the advertising material bought would "tie-in" with the cuts. As we have already seen, this was contradictory of the terms of the written contract which was signed by the parties after being written. Therefore the court erred in admitting it over the objections of the plaintiff, and for that error the judgment must be reversed.

Inasmuch as the case seems to have been fully developed, no useful purpose could be served by remanding it for a new trial. The undisputed evidence shows that the sum of $130 is due the plaintiff by the defendant on the contract, and that the whole of this amount is due. This amount should bear interest under the contract as follows: $52 from February 1, 1927, and $78 from August 1, 1927. It is ordered that judgment be entered here in favor of the plaintiff against the defendant for said sum.

WEBSTER v. TELLE.

Opinion delivered April 23, 1928.

1. CONTRACTS—CONSTRUCTION BY PARTIES.—When the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions.
2. INSURANCE—ASSIGNMENT OF POLICIES.—Evidence *held* sufficient to justify a finding that there was an oral and equitable assignment of policies by insured to his wife.
3. INSURANCE—RIGHT OF INSURED TO ASSIGN POLICY.—Life insurance policies are choses in action, which the insured has a right to assign for a money consideration, or to give away, so long as the assignment does not involve an illegal, fraudulent, or wager transaction.
4. INSURANCE—ORAL ASSIGNMENT OF POLICY.—An oral assignment of a life insurance policy by insured to his wife is valid, notwithstanding a provision of the policy made for the benefit of the company, requiring a written assignment, where the company made no objection to a verbal assignment.

5. INSURANCE—WAIVER BY INSURER OF PROVISIONS IN POLICY.—Provisions in a policy of insurance made for the benefit of the insurer may be waived by the insurer.
6. APPEAL AND ERROR—EVIDENCE CONSIDERED ON APPEAL.—The Supreme Court will consider only the competent testimony in the record of a chancery court, or such only as the chancellor should have considered.
7. WITNESSES—COMPETENCY OF WIDOW.—A widow claiming to be beneficiary under her husband's life insurance policy is a competent witness in her own behalf and could testify to facts relative to her right, so long as she did not testify to transactions with or statements of her deceased husband.
8. WITNESSES—COMPETENCY OF WIDOW.—Testimony of a widow claiming to be beneficiary under life insurance policies of her deceased husband, that she was in possession of the policies prior to her husband's death, was competent and relevant.

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

T. O. Abbott and *C. B. Crumpler,* for appellant.

John E. Harris and *E. L. Compere,* for appellee.

WOOD, J. On April 13, 1922, the Prudential Insurance Company of America, hereafter called company, issued two insurance policies to Edwin M. Telle, each in the sum of $5,000, insuring his life in favor of the Alexander Refining Company, Inc. Each of the policies contained the following provision:

"Change of beneficiary. If the right to change the beneficiary has been reserved, and if the insured shall have attained to majority according to the laws of the State in which insured resides, the insured may, at any time while this policy is in force, by written notice to the company at its home office, change the beneficiary or beneficiaries under this policy, such change to be subject to the rights of any previous assignee and to become effective only when a provision to that effect is indorsed or attached to the policy by the company, whereupon all rights of the former beneficiary or beneficiaries shall cease."

The right to change the beneficiary was not reserved in either one of the policies. On October 14, 1925, the

company, at the request of Telle and of the beneficiary named in the policies, exchanged the beneficiary named by substituting the "executors, administrators or assigns" of the assured, instead of the beneficiary originally named. Telle obtained a loan on the policies in the sum of $638. In a financial statement made December 18, 1926, by E. M. Telle to the Exchange Bank & Trust Company of El Dorado, Arkansas among other things, is the following: "Life insurance carried for $15,000. Beneficiary, wife."

On January 11, 1927, Telle executed his last will and testament, which, among other things, provides:

"I have made my beloved wife, Bernice Phillips Telle, the beneficiary of three life insurance policies of $5,000 each (giving the date and number of the policies). All of these policies are in the Prudential Insurance Company of America. There is a loan of about $1,200 to be deducted from the total of $15,000. I request that from the proceeds she shall pay the National Bank of Commerce of El Dorado $7,500, due March 5, 1927. This is the amount that they have loaned Mrs. Telle on her house, No. 825 West Main Street, El Dorado, Arkansas. She loaned this amount to me, which I used in my business. * * * I appoint Mr. N. L. Webster of El Dorado, Arkansas, as agent to wind up the business. I regret exceedingly that some heavy investments in the year 1926 proved to be unprofitable and so depleted my cash balance to such an extent that I am unable to continue in business any longer. There will be a loss to the creditors, because the property will not sell at a forced sale for the actual cost price."

On the 12th day of January, 1927, Telle committed suicide at the Marion Hotel, Little Rock, Arkansas, while the policies of insurance named in the will were in full force and effect. On the 18th of January, 1927, the will of Telle was duly probated, and letters testamentary were issued on January 19, 1927, to N. L. Webster, the executor named in the will. Proof of death was sub-

mitted to the company, and it admitted liability on the two policies in the sum of $9,435.46. Webster demanded payment of the amount due under the policies as executor of the estate of Telle. Mrs. Bernice Telle, the widow, demanded payment to her of the amount due under the policies.

On April 26, 1927, the company instituted this action in the Union Chancery Court, naming the executor and Mrs. Telle as defendants. It admitted its liability under the policies and its willingness to pay the same to the person legally entitled thereto, and tendered into court the sum of $9,435.46, and prayed that Webster and Mrs. Telle be required to interplead for the funds in order that their respective rights be determined and that the company might pay the sum due under the policies to the person adjudged by the court to be entitled thereto.

N. L. Webster and Mrs. Telle each filed an interplea for the funds. Webster alleged that he was entitled to the funds under the will, in which he was named executor, and under the policies, by the terms of which the sums due under same were to be paid to him as executor. Mrs. Telle alleged that she was entitled to the funds as the beneficiary under the terms of the will, naming her as the sole beneficiary, and under the terms of the policies on the ground, as she alleged, that Telle, during his lifetime, had assigned and delivered the policies to her as security for certain money she had loaned him, and which was due at the time of his death. She further alleged that Telle, during his lifetime, by written declaration and by the solemn declaration made in his will on the day before his death, had made her the beneficiary in the policies. She alleged that any reasonable method adopted by her husband to make her the beneficiary under the policies would legally change the beneficial interest to her, and that she was entitled to recover both as equitable assignee and as substituted beneficiary.

Webster replied to the interplea of Mrs. Telle, denying its allegations.

It was conceded by the executor and Mrs. Telle that the sum of $9,435.46 was due under the policies, and this amount was paid by the company into the registry of the court, and the company was discharged from further liability under the policies. The action progressed between the interpleaders, the executor and Mrs. Telle, as to which of them was entitled to the fund in court. The cause was heard upon the pleadings and exhibits, the depositions of witnesses and an agreed statement of facts, and the court found in favor of Mrs. Telle, and rendered a judgment accordingly in the sum of $9,435.46, with interest, from which judgment N. L. Webster, the executor, duly prosecutes this appeal.

Learned counsel for the appellant, in their excellent brief, say: "There are but two issues involved in this appeal. The first issue is: Was there a change of beneficiary in the two life insurance policies in favor of appellee, prior to the death of Edwin M. Telle, the assured? The second issue is: Was there a debt owing by the assured at the time of his death to the appellee, and was there an assignment of the insurance policies to secure that debt?"

The conclusion we have reached on the first issue as stated by counsel makes it unnecessary to set out all of the testimony adduced on the second issue. The original beneficiary named in the policies was the Alexander Refining Company, Inc., which, at that time, was the employer of the assured, Edwin M. Telle.

The policies contain, among others, the following provision: "If there be no beneficiary living at the death of the insured, the amount of insurance payable shall be paid to the executors, administrators or assigns of the insured, unless otherwise provided in the policy. The right to change the beneficiary has not been reserved by the insured." Notwithstanding this provision of the policies, that "the right to change the beneficiary has not been reserved by the insured," it will be observed that the parties to the insurance contracts, to-wit, the

insurance company, the Alexander Refining Company, the beneficiary, and Edwin M. Telle, the insured, on October 14, 1925, agreed to change, and on October 19, 1925, did change the beneficiary from the refining company to "the executors, administrators or assigns of the insured." In making the change the provisions of the policies in regard to the change of beneficiary as set out above were followed. The parties therefore to the contracts of insurance seem to have treated the provisions of the policies with reference to change of beneficiary, where there was a change, as binding. Therefore, if it could be said that there had been a change in the beneficiary of the policies from the executors, administrator or assigns of the insured to the appellee, Mrs. Bernice Phillips Telle, then we would be inclined to follow the provisions of the contracts of insurance as construed by the parties themselves in order to effectuate such change. For the law is that, "when the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions, and the subsequent acts of the parties showing the construction they have put upon the agreement themselves are to be looked to by the court, and, in some cases, may be controlling." 9 Cyc. 588; 6 R. C. L. 862. But, as we construe the "change of beneficiary" clauses in these insurance contracts, there has been no change of beneficiary since the change was made from the refining company to that of "executors, administrators or assigns of the insured." The beneficiary in the policies at the time of Telle's death, if there had been no assignment of the policies, was his executor, the appellant. But, if the policies had been assigned by Telle to his wife, then the beneficiary was his assignee, Bernice Phillips Telle, the appellee.

This brings us to the question—and, as we view it, the only question—necessary to be decided in the case, to-wit, whether or not the beneficial interest under the policies had been assigned by the assured, Edwin M.

Telle, to his wife, Bernice Phillips Telle. The provision in the policies of insurance with reference to the assignment of such policies is as follows: "Any assignment of this policy must be in writing, and the company shall not be deemed to have knowledge of such assignment unless the original or a duplicate thereof is filed at the home office of the company. The company will not assume any responsibility for the validity of an assignment." This provision of the policies was not complied with by the assured, and the appellant therefore contends that there was no assignment of the policies. But the appellee contends that she was the assignee under the policies under an oral and equitable assignment thereof.

The competent testimony on this issue is substantially as follows: The appellee testified that the policies had been in her possession ever since three or four days before she executed a mortgage to the National Bank of Commerce, on January 5, 1926, at which time she examined each of the policies, and they are the policies which were delivered to her. She kept the policies a few days, but did not have any place to lock them up. She next saw the policies of insurance after her husband's death. The mortgage she referred to secured a loan by her from the National Bank of Commerce at El Dorado, Arkansas, in the sum of $7,500, due six months from date. The property contained in the mortgage constituted her individual property. She did not get the $7,500 for which the mortgage was executed, but her husband took the money and used it in carrying on his business. The insurance policies were delivered to her by Mr. Webster, after her husband's death, wrapped in his will, in a package sent to her from Little Rock, Arkansas, and addressed to her, and when she opened it there were these two policies and the will. No part of the $7,500 which she loaned her husband in 1926, which was borrowed from the National Bank of Commerce of El Dorado, and for which he gave a mortgage

on her El Dorado home property, had ever been paid to her.

The appellant, Webster, testified that the two life insurance policies were delivered to him by the coroner of Pulaski County, in a bundle with other papers. He delivered the insurance policies and all the papers in the package to Mrs. Telle, personally. He did this for the reason that there was a note left by Mr. Telle instructing that these papers be delivered to her.

The declaration in the financial statement made to the Exchange Bank & Trust Company by Telle, to the effect that he carried life insurance for his wife as beneficiary in the sum of $15,000, and also the statement in his will to the effect that his wife was the beneficiary of three life insurance policies in the sum of $5,000 each, have already been set forth. We are convinced that the above testimony is amply sufficient to justify a finding that, as between Telle and his wife, Telle had assigned the insurance policies to her. It was unquestionably the intention of Telle that the amounts due under these policies at the time of his death should be paid to his wife, the appellee. The evidence is susceptible of no other conclusion. True, Telle did not use in his will and in his financial statement the technical word "assign" in referring to the beneficial interest under the policies, but his meaning is clear that he intended that his wife should have the amount of the policies and that he had already made this provision for her. The testimony of Mrs. Telle shows that the policies had been delivered to her prior to Telle's death.

Now, the creditors of Telle had no interest whatever in his insurance policies as long as Telle was alive, because, as long as he was living, he had the right to assign the policies to whomsoever he desired, provided the assignment did not involve an illegal, fraudulent, or wager transaction. His life insurance policies were choses in action, which he had the perfect right to assign for a money consideration, or to give away. As was said

in *New York Mutual Life Insurance Company* v. *Armstrong,* 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997: "A policy of life insurance without restrictive words is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk and thus evade the law against wager policies." And in *Page* v. *Metropolitan Life Insurance Co.,* 98 Ark. 340, 135 S. W. 911, we said: "A life policy is a chose in action, a species of property, which the holder may have perfectly good and innocent reasons for wishing to dispose of. * * * The insured had the same right to give as he had to transfer the policy for a valuable consideration." See also *Matlock* v. *Bledsoe,* 77 Ark. 60, 90 S. W. 848.

There is nothing in this whole record to indicate any fraud in the assignment by Telle of the policies in controversy to his wife. On the contrary, the provision he thus made for her by the assignment of his policies, under the circumstances which surrounded him, was exceedingly commendable. The amount of the policies which he maintained and which he assigned to her was certainly not indicative of any fraudulent purpose to deplete his estate to the injury of his creditors, but rather only to protect the one who was nearest and dearest to him, and who had rendered him every financial and other assistance in her power, and who, above all others, had an insurable interest in his life. Although there was no written assignment of the policies in controversy by Telle to Mrs. Telle, yet, as we have seen, there was an oral, and therefore an equitable, assignment of such policies. In *Citizens' Bank* v. *Moore,* 134 Ark. 554, 204 S. W. 619, we said: "We think the direction for a change in the beneficiary for the purpose of effecting an assignment thereof, together with the delivery of the original policy, constituted an equitable assignment, though not formally made in writing. Parol assignments of insurance policies, when accompanied by deliv-

ery, are sustained as equitable assignments thereof (Citing cases)." That doctrine is applicable to the facts of this record.

But learned counsel for appellant contend that, under the written provisions of the policies set out above with reference to assignments, the policies could not be orally assigned. The language of this provision of the policies shows that it was made for the benefit of the company and not for the benefit of the beneficiary named, or for the assured, his executors, administrators or assigns.

In Cooley's Briefs on Insurance, vol. 2, page 1812, it is said:

"Though it is true in a general sense that, in order to effectuate an assignment of a policy, or any part of it, the terms and conditions imposed by the policy to accomplish that purpose must be complied with (*Metro. Life Ins. Co.* v. *Zgliczenski,* 94 N. J. Eq. 300, 119 A. 29), it is nevertheless a general rule that, where a company makes no objection to an assignment on account of a failure to comply with its rules in relation thereto, and the assignment is otherwise valid as between the parties in interest, no objection can be raised by any of them on account of such formal deficiencies."

To support the text the following cases are cited: *Conway* v. *Supreme Council Catholic Knights of America,* 131 Cal. 437, 63 Pac. 727; *Diffenbach* v. *New York Life Ins. Co.,* 61 Md. 370; *Hewlett* v. *Home for Insurables,* 74 Md. 350, 24 Atl. 324, 17 L. R. A. 447; *Brierly* v. *Equitable Aid Union,* 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297; *Burgess* v. *New York Life Ins. Co.* (Tex. Civ. App.), 53 S. W. 602; *Kendall* v. *Morrison,* 33 Tex. Civ. App. 345, 77 S. W. 31. See also *New York Life Ins. Co.* v. *Rosenheim,* 56 Mo. App. 27, "where the decision was placed rather on the ground of estoppel."

It is the established doctrine of this court that provisions in a policy of insurance made for the benefit of the insurer may be waived by such insurer. *Ætna Life*

Ins. Co. v. *Duncan,* 165 Ark. 395-407, 264 S. W. 835. We are aware of the doctrine announced by this court to the effect that the change of beneficiary in a benefit certificate issued by a fraternal or mutual benefit society cannot be made by the insured unless there is substantial compliance with the by-laws and regulations of the society. *Wilkes* v. *Hicks,* 124 Ark. 192, 186 S. W. 830; *Robinson* v. *Robinson,* 121 Ark. 276, 181 S. W. 300; *Sovereign Camp W. O. W.* v. *Israel,* 117 Ark. 121, 173 S. W. 855; *Caruth* v. *Clawson,* 97 Ark. 50, 133 S. W. 178. Counsel for appellant invoke the doctrine of the above cases to sustain their contention that there was no assignment of the policies in the case at bar because the assignment was not in writing, as the policies require. But the doctrine of these cases has no application to ordinary life insurance contracts or policies issued by standard old-line life insurance companies. While the benefit certificates of fraternal and mutual benefit associations insuring the lives of their members are contracts of insurance upon which such societies or associations are liable to the holders and beneficiaries of such certificates, nevertheless the character of the contracts is wholly different from those of old-line standard life insurance companies. The fraternal, mutual benefit associations are what their names imply. Their policyholders are the only members of the society. The obligations of their policies are discharged by assessments upon their members, and all of the members are mutually and reciprocally interested in the conduct and management of the society according to the constitution and by-laws which they have framed and adopted for the government and conduct of the association to which they belong.

Mr. Niblack, speaking of mutual benefit societies, says: "A society may provide that its contract of insurance may be assigned and transferred only with the consent of the society indorsed thereon. * * * The right of the contracting parties to thus prohibit an assignment of the certificate without the consent of the society

cannot be seriously doubted, and, in view of the restricted nature of the mutual benefit insurance, the propriety, if not the necessity, of such a condition is equally clear. The personal character of each holder of a certificate and the interest he may have in the life of the person thereby insured are essential elements in the contract of mutual indemnity." Niblack, Accident Ins. & Benefit Societies, page 329, § 169. See also Vance on Insurance, page 400, where the author, after setting forth the relation existing between mutual benefit societies and their members, says: "From this statement of the relation between the mutual association and its members it is apparent that the contractual relation strikingly differs from that existing between regular insurance companies and their policyholders."

In *Robinson* v. *Robinson, supra,* speaking of the rights of the members and policyholders to change the beneficiary, we said: "Manifestly, however, such a transaction requires some formalities for the protection of the company, the member, and the beneficiary, and these formalities must be substantially complied with before the change of beneficiary becomes effective."

The doctrine of *Wilks* v. *Hicks, supra,* and the other cases *supra* relied on by counsel for appellant, cannot be extended or applied to policies of insurance like those under review here. The rule applicable here is that announced by Mr. Cooley and the cases cited by him, and is forcefully stated by the Court of Appeals of Maryland in *Diffenbach* v. *New York Life Ins. Co., supra,* as follows:

"Claiming, as the appellants do, under an assignment of policies of life insurance, the validity of which the insurance companies have not denied, but have paid the amounts secured by them into court for payment to whoever may be entitled, the legality of the transaction does not arise, as we think. The proceeds must be disposed of according to the equities of the complainants and defendants, respectively."

As was said by Judge MANSFIELD, speaking for the court in *McDonald* v. *Humphries,* 56 Ark. 63, 19 S. W. 234: "The company, having paid the money into court, was released from liability to either of the parties, and had no further interest in the litigation. The question which remained for the decision of the court involved only a proper disposition of the fund as between the plaintiff and the other defendant."

The assignment of the policies by Telle to his wife *ipso facto* made her, as his assignee, the beneficiary of those policies under their very terms. Thereafter, and at the time of his death, Telle had no interest therein, and of course the executor of his estate and the creditors had none, because they had only such rights as Telle himself had at the time of his death. In reaching the conclusion that the appellee, Mrs. Telle, was the assignee of Telle, and therefore the beneficiary of the policies, we have considered only the competent testimony in the record, or such only as the trial court should have considered under the rule announced in *Latham* v. *First National Bank of Fort Smith*, 92 Ark. 321, 122 S. W. 992, and *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 938, and *Martin* v. *Manning,* 124 Ark. 84, 186 S. W. 302. The appellee was a competent witness in her behalf, and she could testify to facts relevant to her rights, so long as she did not testify to transactions with or statements of the testator. As to these, to be sure, her testimony was incompetent. Constitution 1874, § 2 of the Schedule; *Wilson* v. *Edwards,* 79 Ark. 69, 94 S. W. 327; *Carter* v. *Younger,* 123 Ark. 266, 185 S. W. 435; *Free* v. *Maxwell,* 138 Ark. 489, 212 S. W. 325; § 4144, C. & M. Digest.

Under the above rule of the Constitution and statute, the testimony of the appellee, that she was in possession of the policies prior to the death of Telle, was competent and relevant. This testimony, in connection with the declarations made in the financial statement of Telle and in his will, to the effect that he had made his beloved wife, Bernice Phillips Telle, beneficiary in the

policies, and the testimony of appellant himself, to the effect that he had delivered the policies to Mrs. Telle in accordance with directions contained in a letter written to him by Telle on the day the latter died, proved that the appellee was the beneficiary of the policies.

We do not concur in the statement of counsel for appellant that the declarations of Telle, above mentioned, in his financial statement and in his will, were the result of a disturbed and disordered mind. On the contrary, it occurs to us that these declarations but stated a truth in fact and in law. It was conceded by the appellant that Telle was an intelligent business man. As such, he must have known that, under the terms of the policies in controversy, he could not have made Mrs. Telle a beneficiary merely by appointment, but that the only way she could be made beneficiary would be to assign the policies to her, which he had done. True, as before stated, he did not use the technical term "assignee," but he did state that he had made her the beneficiary in the policies, which, in the light of the policies themselves, necessarily meant that he had assigned the policies to her. The only reasonable conclusion to be drawn from all this testimony is that Telle knew that he had assigned the policies to his wife, and that he was holding the same for her at the time of his death. There is no merit whatever in appellant's contention that the appellee, in view of the above testimony, was but a pledgee of the insurance policies instead of absolute owner thereof. There is nothing in the testimony to justify the conclusion that Telle, at the time he declared that his wife was the beneficiary in the policies, intended thereby to constitute her only a pledgee for the payment of his debts. On the contrary, we are convinced that, when he had declared that she was the beneficiary and gave her possession of the policies, he intended, by this act of assignment in parol, to constitute her the beneficiary and absolute owner of such policies. There is no competent testimony in the

record tending to show that Telle had reserved any right to himself to revoke the parol contract of gift or assignment to his wife of the policies in controversy, and he never, up to the time of his death, asserted any such right. Therefore, at the death of Telle the rights of the appellee to the proceeds of the policies became fixed and binding upon the executor of the estate, and neither he, nor any creditor through him, has a right to assert to the contrary.

The decree of the trial court so holding is correct, and it is therefore affirmed.

CLEVELAND COUNTY BANK v. DOSTER.

Opinion delivered April 23, 1928.

EXECUTORS AND ADMINISTRATORS—RIGHT OF SET-OFF AGAINST PERSONAL REPRESENTATIVE.—Where, after the death of intestate, his administratrix deposited funds in a bank to which intestate was indebted at the time of his death, the bank was not entitled to set-off such deposit against its claims against the intestate.

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

Wynne & Miller, for appellant.

HUMPHREYS, J. Appellee instituted this suit against appellant in the circuit court of Cleveland County to recover $3,840 which she deposited with it in the capacity of administratrix of her deceased husband's estate. Appellant filed an answer, interposing the defense that it applied the deposit to the payment of notes to an equal amount which appellee's intestate owed it at the time of his death.

The cause was submitted to the court without a jury for determination upon the following agreed statement of facts:

"It is agreed by and between the plaintiff and the defendant that the following are the facts and are to be considered as the only facts in this case: The plaintiff,

Lola Doster, is the administratrix of the estate of R. M. Doster, deceased; that she was appointed such by the probate court of Cleveland County on the 31st day of July, 1926; that R. M. Doster, plaintiff's intestate, died on the 29th day of July, 1926; that, at the time of the death of the said R. M. Doster, he was indebted to the defendant bank in the sum of $3,840, represented by three promissory notes, copies of which are filed as exhibits to defendant's answer and admitted to be correct. It is further agreed by the parties hereto that on August 20, 1926, the plaintiff had on deposit in the defendant bank the sum of $3,840 to her credit as such administratrix, and that there remained no other funds on said date to her credit in said bank; that on said August 20, 1926, the defendant bank applied said sum of $3,840 as a credit and as an extinguishment of the indebtedness of the said R. M. Doster, plaintiff's intestate, which indebtedness was represented by said promissory notes, and totaled the sum of $3,840. That on August 4, 1926, the plaintiff deposited with the defendant bank certain checks, made payable to R. M. Doster, in the sum of $2,708.92, which amount was placed to the credit of Lola Doster, administratrix, and that thereafter, on several and divers occasions until the 19th of August, 1926, the plaintiff deposited other checks, payable to her as administratrix, totaling the sum of $7,034.16; that the proceeds of said checks so deposited represented the proceeds from the sale of lumber made by the deceased, R. M. Doster, but sold by the administratrix. It is further agreed that, at the death of the said R. M. Doster, he was wholly insolvent, and that claims totaling $25,000 have been duly presented to and allowed by said administratrix against said estate, including a duly verified claim by the defendant bank for the money being sued on in the instant case; that the estate in the hands of the plaintiff administratrix, when applied to the extinguishment of the probated claims and court costs, will pay the creditors less than 10 per cent., assuming that the amount sued on herein is returned to the administratrix."

The trial court rendered a judgment against appellant for $3,840, with interest thereon from August 20, 1926, until paid, and for the costs, from which an appeal has been duly prosecuted to this court.

It is contended by appellant that, under authority of § 1198 of Crawford & Moses' Digest, it had a right to apply the sum of money belonging to the estate of the deceased in satisfaction of the debt of appellee's intestate. The section of the statute relied upon is as follows:

"Set-off against personal representatives. In suits by executors or administrators, debts existing against their testator or intestate, and owing to the defendant at the time of the death of the testator or intestate, may be set-off by the defendant in the same manner as if the action had been brought by and in the name of the deceased."

Appellant admits that, if the statute is merely declaratory of the common law, it had no right to make the application, as, under the common law, the debts of a decedent could not be set-off in a suit by the executor or administrator against a person indebted to the decedent. Appellant insists, however, that the statute is not declaratory of the common law, but was passed in derogation of the common law. We think the statute is declaratory of the common law. According to its phraseology, it only allows set-offs in suits brought by executors or administrators against debtors of the testator or intestate which would have been set-off had the testator or intestate brought the suit. In the instant case the intestate could not have brought the suit against appellant because it did not owe him anything at the time he died. The right of set-off under the statute applies to existing indebtedness. Any other interpretation of the act relied upon would result in a preference to any debtor of a testator or intestate who might come into the possession of any of the intestate's property after his death. We do not understand that a different rule of interpretation was announced in the cases of *Fishburne* v. *Merchants' Bank of Port Townsend,* 42 Wash. 473, 85 P. 38, 7 Ann. Cas.

848, or in the case of *Ainsworth* v. *California Bank*, 119 Cal. 470, 51 P. 952, 39 L. R. A. 686, 63 Am. St. Rep. 135. The question of the interpretation of the statute or code in those cases turned upon whether the demand of the debtor against the estate of the testator or intestate belonged to the debtor at the time of the death of the testator or intestate.

No error appearing, the judgment is affirmed.

PREWETT v. WATERWORKS IMPROVEMENT DISTRICT NO. 1.

Opinion delivered April 23, 1928.

1. APPEAL AND ERROR—REMAND FOR NEW TRIAL.—The general rule in reversing cases of law is to remand the case for a new trial.
2. APPEAL AND ERROR—REMAND FOR JUDGMENT.—Where an action at law was reversed without directions for trial upon any of the issues involved, the order reversing the case for not rendering judgment in accordance with the views therein expressed and remanding the case for further proceedings was not a remand for new trial, and appellants were not entitled to make any new issues as grounds of defense which might have been but were not presented on the first trial.
3. JUDGMENT—RES JUDICATA.—The principle of *res judicata* extends not only to the questions of fact and law, which were decided on the former trial, but also to the grounds of recovery and defenses which might have been but were not presented.
4. APPEAL AND ERROR—PLEADING—UNAUTHORIZED AMENDMENTS.—Amendments to the answer filed on remand of the cause without permission of the court were properly stricken out.
5. DEPOSITORIES—SUIT ON BOND—DEFENSE.—In a suit by an improvement district against the sureties on the bond of a bank as depository of the district, it was no defense that the defendants became sureties on the false representation of the bank's president that he was also signing the bond as surety, which he failed to do.

Appeal from Little River Court; *Seth C. Reynolds*, special Judge; affirmed.

Shaver, Shaver & Williams and *A. D. DuLaney,* for appellant.

A. P. Steel and *Norwood & Alley,* for appellee.

KIRBY, J. This is the second appeal of this case, a statement of which will be found in *Waterworks Improvement Dist.* v. *Rainwater,* 173 Ark. 523, 292 S. W. 989. It was held on the former appeal, under the facts proved, that the court should have entered judgment in favor of the improvement district upon the bond of the depository bank and the sureties thereon for the sum of $4,000, with interest at 4 per cent. as provided in the contract between the bank and the improvement district.

The case was reversed and remanded, it being said in the opinion: "The court erred in not rendering a verdict in accordance with the views expressed in this opinion, and the judgment will be reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion."

On the remand of the cause the defendants filed an amendment to their answer, setting up that they became sureties upon the bond on the false representation of A. E. Waters, the president of the bank, that he was also signing said bond as a surety; that the plaintiffs knew their signatures were so procured, and accepted the bond without requiring Waters to sign it as a co-surety, thereby knowingly releasing him from any personal liability on the bond, without the knowledge, consent or acquiescence of the other sureties, and that they were thereby released and absolved from any liability or obligation under the bond.

Another amendment alleged that A. E. Waters was the real party at interest in securing the deposit of funds in the bank, of which he owned three-fourths of the stock; that he handled and negotiated all the transactions connected with it, had the bond prepared, and presented to the other sureties, representing that he would sign same as surety and become jointly liable;

that their signatures were procured upon such false representation, and they did not know that Waters was not a surety on said bond until the suit was filed. That he agreed with the defendants to become jointly liable, and fraudulently failed to sign the bond; that he was legally jointly bound by his conduct with the other defendants, if there was any liability incurred by them on the bond, and that Waters should be made a defendant, and if any judgment was rendered against the other sureties it should be rendered against him as well. Alleged the joint liability of Waters under the circumstances, and prayed that he be made a party defendant, and that the cause be continued until the next term, etc.

Appellee moved to strike from the files the amended answers, because any judgment rendered thereon would be inconsistent with the opinion remanding the case, and because the alleged defenses attempted to be set up by the amendments to the answer were known or could have been known to the defendants before the cause was first tried, and because the matters alleged in the amendments stated no defenses to plaintiff's complaint. Appellees also moved for judgment on the mandate for the amount which the court, on the former appeal, held the judgment should have been rendered for.

The court sustained the motion to strike the amendments to the answer, and, appellants refusing to plead further, rendered judgment for $4,187.48, the amount due according to the opinion of the Supreme Court on the first appeal, and from this judgment this appeal is prosecuted.

Appellants insist that the court erred in striking out the amendments to their answer, in not granting a new trial, and in rendering a judgment upon the motion against them on the mandate, without the introduction of any further testimony.

The direction in the opinion reversed the cause for the error of the lower court in not rendering a judgment in accordance with the views expressed therein,

and remanded the cause for further proceedings according to law and not inconsistent with the opinion.

It is true the general rule in cases at law is, upon reversal, to remand for a new trial, but there was no direction specifically made for a new trial upon any or all of the issues involved in this case (*Longer* v. *Carter,* 102 Ark. 72, 143 S. W. 575; *Morgan Engineering Co.* v. *Cache River Drain. Dist.,* 122 Ark. 491, 184 S. W. 57; *Deason & Keith* v. *Rock,* 149 Ark. 401, 232 S. W. 583, and the order was not in fact a remand for a new trial in general, and the appellants were not entitled to inject into the case any new issues as grounds of defense which might have been and were not presented on the first trial. The principal of *res judicata* extends not only to the questions of fact and of law which were decided in the former trial, but also to the grounds of recovery and defenses, which might have been, but were not, presented. *Howard-Sevier Road Imp. Dist. No. 1* v. *Hunt,* 166 Ark. 71, 265 S. W. 517; *Newton* v. *Altheimer,* 170 Ark. 371, 280 S. W. 641; *Harrod* v. *St. L. I. M. & S. R. Co.,* 98 Ark. 596, 136 S. W. 974; *Hollingsworth* v. *McAndrew,* 79 Ark. 185; *Hill* v. *Draper,* 63 Ark. 143, 37 S. W. 574.

The amendments stricken out were not filed by permission of the court anyway, and might have been stricken out on that account. *Ark. State Life Ins. Co.* v. *Allen,* 166 Ark. 490, 266 S. W. 449; *Meador* v. *Weathers,* 167 Ark. 264, 267 S. W. 787; *Temple Cotton Oil Co.* v. *Davis,* 167 Ark. 449, 268 S. W. 38; *Road Dist. No. 6* v. *Hall,* 140 Ark. 241, 215 S. W. 262.

The matter alleged in the amendment attempted to be filed to the answer did not constitute a defense to appellees' cause of action anyway, and could have been stricken out under the allegations in the third paragraph in the motion to dismiss, which was in effect a general demurrer thereto.

The appellants signed the bond, as appears from their signatures thereon, after the bank's signature, by

Waters as president, principal, and each of them must have known in so doing that Waters had not signed as a surety, and their answer admits that they knew this before the first trial. The most they could have expected from his being compelled to become a surety and held liable as such would have been contribution from him for the amount of the judgment recovered against and paid by them as sureties upon the bond upon which he should have become surety if their contention was tenable. This would not reduce their liability to appellee in any degree, and they are not precluded on account of this decision from prosecuting any cause for relief they may have or may be entitled to against the said Waters on that account.

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

SKAGGS v. PRINCE.

Opinion delivered April 23, 1928.

1. DESCENT AND DISTRIBUTION—FAMILY SETTLEMENT.—Where all of the heirs took possession in severalty of the portions assigned to them in a partition proceeding, such partition is enforceable as a family settlement, notwithstanding irregularities therein.
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Where the finding of a chancellor on the question of fact was not clearly against the preponderance of the evidence, it is conclusive on appeal.

Appeal from Randolph Chancery Court; *Alvin S. Irby*, Chancellor; affirmed.

John L. Bledsoe, for appellant.

Walter L. Pope, for appellee.

SMITH, J. At the trial in the court below from which this appeal comes a voluminous record was made. Numerous pleadings were filed, and a large amount of evidence was taken, but, stripped of all superfluities, the question involved is the correct location of the boundary line

between tracts of land owned by appellant and appellee, respectively.

J. H. Skaggs owned a tract of land in Randolph County, adjacent to Black River, incident to which was a ferry across that stream. Skaggs died, childless and intestate, in 1895, and was survived by his widow and six brothers and sisters. The land was an original acquisition, and a partition was made between the widow and these heirs, and the heirs received the part of the land to which the ferry was attached.

In 1897 a suit was brought by certain of these collateral heirs against the others, in which a partition was prayed among them of the portion of the J. H. Skaggs estate which they had received upon the partition of that estate with the widow of J. H. Skaggs. A judgment ordering the partition of the lands among the collateral heirs was rendered in the Randolph Circuit Court, and B. B. Raglin was appointed commissioner to make the partition. Pursuant to this judgment, Raglin, as commissioner, executed deeds to the collateral heirs in severalty to the lands assigned them, respectively, one of these deeds being to the plaintiff, W. L. Skaggs, and another to J. M. Skaggs. The lands assigned and deeded to these brothers of the intestate J. H. Skaggs were coterminous, and were divided by a road known as the Skaggs Ferry Road, so that this road formed the east boundary line of the W. L. Skaggs land and the west boundary line of the J. M. Skaggs land, and was referred to in the commissioner's deeds to them as constituting their east and west boundary lines, respectively.

J. M. Skaggs died intestate, and was survived by two children, Mrs. Lavada Holman and Mrs. Rosa Webb. Mrs. Holman conveyed her interest in the land to her sister, Mrs. Webb, who later conveyed the interest which she had purchased, as well as that which she had inherited, to Oscar Prince, who thus became the owner of the interest which J. M. Skaggs had taken upon the partition by the collateral heirs.

W. L. Skaggs brought this suit against Prince, alleging the facts above stated, and made all persons whose interests have been herein referred to parties. In this suit he prayed the reformation of the deeds of the commissioner, Raglin, both to himself and to his intestate brother, J. M. Skaggs, alleging that both deeds were indefinite, in that the east boundary of one tract and the west boundary of the other was a road, the location of which was not only indefinite, but the said road had been moved to the west, thereby encroaching upon lands assigned to plaintiff, W. L. Skaggs, upon the partition. It was alleged that defendant Prince had thus acquired possession of a strip of land belonging to the plaintiff, and the purpose of the suit was to recover possession of this strip.

Plaintiff himself criticises the partition proceeding under which he acquired his own deed, and the reformation of this deed is one of the grounds assigned for equitable relief.

We do not consider the objections made to the partition proceeding, for, whatever irregularities there may have been in that proceeding, it is enforceable as a family settlement, for all of the heirs have taken in severalty the portions assigned them, and if the exact and definite location of the Skaggs Ferry Road was known and established as it existed at the time of the partition, that fact would settle this litigation, as both parties claim that line as their true boundary.

There was no motion to transfer this cause to the law docket, and of all the persons made parties to this suit appellee Prince was the only one to file an answer or other pleading, as the other parties were correctly of the opinion that their own rights would not be affected by any relief granted or denied to the appellant-plaintiff, W. L. Skaggs.

As the commissioner's deed made the Skaggs Ferry Road the boundary between the W. L. Skaggs tract and the J. M. Skaggs tract, the controlling question of fact

in this case is the location of this road at the time these deeds were executed.

The court below found that the plaintiff, W. L. Skaggs, was not entitled to the possession of the strip of land sued for, and dismissed his complaint as being without equity, and this appeal is from that decree.

This finding of fact by the court was necessarily predicated upon the coincident finding that there had been no material change in the location of the Skaggs Ferry Road since the date of the execution of the partition deeds. It was essential to a recovery on the part of the plaintiff that the testimony show that this road had been moved to the west of its original location, otherwise the defendant could not have acquired any portion of the plaintiff's land. This road was never at any time straight, nor does its width appear to have been always unvarying; in fact, the traffic did not always travel a beaten, defined path. Consequently the testimony is in irreconcilable conflict as to the exact location of the road in 1917, when the commissioner's deeds of partition were executed.

The testimony on the part of the plaintiff is to the effect that the defendant, by clearing his land and building his fence to include the clearing, has moved the road westward so that a portion of plaintiff's land was thereby taken; but a number of witnesses, who appear to be and to have been equally familiar with this road during the time in which it was alleged to have been moved, testified that the road had not been moved to the west, and that its present location is substantially identical with its location in 1917.

We think no useful purpose would be served in reviewing this testimony, and, after carefully considering it, we are left in doubt as to the fact in issue, and, as we are unable to say that the finding of the chancellor on this question of fact is clearly against the preponderance of the evidence, it becomes our duty to affirm the decree appealed from. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160.

The decree is therefore affirmed.

WOOTEN v. WOOTEN.

Opinion delivered April 23, 1928.

1. INSURANCE—FINDING AS TO MENTAL CAPACITY.—The finding of the chancellor that the insured was possessed of sufficient mental capacity to change the beneficiary of an insurance policy, *held* not clearly against the preponderance of the evidence.
2. WITNESSES—INCOMPETENCY OF PHYSICIAN—WAIVER.—Testimony of physicians attending insured *held* admissible under Crawford & Moses' Dig., § 4149, in an action on the policy where the insured in his lifetime for himself and beneficiaries waived the benefit of their disqualification.

Appeal from Jefferson Chancery Court; *Harvey R. Lucas,* Chancellor; affirmed.

Brewer & Cracraft, for appellant.

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

SMITH, J. The Sovereign Camp Woodmen of the World issued a beneficiary certificate to Edd Wooten, which, at the time of his death, on October 25, 1926, was worth $1,173. Ida Belle Wooten was the wife of the insured at the time of the issuance of the certificate, but, in 1920, she obtained a divorce from the insured, and was thereafter deprived of her status as a beneficiary under the constitution of the insurance order, which provided that, in the event of a divorce, the insured spouse should designate another beneficiary, failing which the insurance should be payable to the next of kin of the insured.

Eloise Wooten, an adopted child of the insured, was the next of kin at the time of the insured's death, but, two days before the occurrence of that event, a change of beneficiary was indorsed on the certificate, whereby Thomas F. Wooten, a nephew of the insured, was designated as the beneficiary.

In the suit brought to recover the value of the certificate the insurer filed an answer admitting its liability to the true beneficiary, and it was permitted to pay that sum into court, whereupon it was discharged, and the litigation proceeded between the adopted child and the nephew.

The court below found the fact to be that, at the time of the alleged change of beneficiary, the insured did not have the mental capacity to perform that act, and judgment was rendered in favor of the daughter for the fund in court, and this appeal is from that decree.

The testimony showed beyond question that the insured was devoted to his adopted child, although she lived with his divorced wife, and that he kept in constant touch with his daughter, about whose welfare he was very solicitous, and that he was especially anxious that his daughter should have an education and should be taught music.

The insured had a stroke of apoplexy about a year before his death, which left him an invalid, and thereafter until his death his nephew, Thomas, was kind to him in many ways. The insured had a second stroke on October 12, and was taken to a hospital at Crossett two days later.

Dr. Kimbro testified that he was the insured's physician after the insured was first stricken, and that he saw insured two or three times every week during the year prior to the insured's death, and that he observed a marked weakening, both mentally and physically. After the second stroke the insured was paralyzed on one side; he could not articulate, but made motions with his hands to indicate his wants; he could not speak, and would cry when he attempted to do so, and was in no condition to be interviewed. The prognosis was very unfavorable, as there was a lesion of the brain tissue, and it was the opinion of the witness that the insured would live only a few days after being taken to the hospital, and it was also the opinion of the witness that the insured was not normal mentally, and was incompetent to transact any business when carried to the hospital on October 13.

Dr. Spivey, the physician in charge of the hospital, testified that he saw the insured two or three times each day after the insured was brought to the hospital, and that at no time was the insured competent to transact any business; that he suffered a third stroke on October

21, after which he was conscious only of pain and thirst and hunger, and died on October 25.

The change of beneficiary was made October 23, and the persons then present testified that the insured was conscious, and fully realized what he was doing when he signed the change of beneficiary by mark. The insured was unable to write on account of his condition, but could and did touch the pen, and in this way made his mark, which was witnessed by two of the persons present. Two physicians, who did not see the insured after his stroke, testified, in response to hypothetical questions, that the insured was not necessarily incompetent mentally, even after the last stroke, to transact business. There was certain other testimony of non-expert witnesses on each side of the question; but, without setting out the testimony any further, we announce our conclusion to be that the finding of the chancellor does not appear to be clearly against the preponderance of the evidence.

Only one question of law is raised, and that is the competency of Drs. Kimbro and Spivey to testify as witnesses, it being insisted that their testimony was inadmissible under § 4149, C. & M. Digest, which provides that "no person authorized to practice physic or surgery * * * shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician or (do) any act for him as a surgeon * * *."

Drs. Kimbro and Spivey both testified that the opinions expressed by them were based upon information obtained while waiting on the insured in a professional capacity.

The objection to the admissibility of this testimony may be disposed of by saying that in the "application for membership and participation in the beneficiary fund" made by the insured, appears this statement: "I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force

or may hereafter be enacted in regard to disqualifying any physician from testifying concerning any information obtained by him in a professional capacity."

In the case of *National Annuity Assn.* v. *McCall,* 103 Ark. 201, 146 S. W. 125, 48 L. R. A. (N. S.) 418, Dr. Pringle testified that he had attended the insured, whose death was there in question, before and at the time of his death, as his family physician, and in this way acquired information as to the cause of the insured's death, which he thought he should not disclose. The court refused to require the witness to answer, upon the ground that this information was privileged under the statute referred to. In holding that there was error in refusing to permit the witness to state from what cause the insured had died, inasmuch as the application had waived the benefit of the statute, it was here said:

"This statute accords the privilege to a patient of objecting to disclosures of matters communicated to or information obtained by a physician as such, and this privilege does not cease with the death of the patient. But this privilege may be waived by the patient himself and after his death by his representative; and so, too, where one occupies a relation to the deceased by reason of a contract, such as is involved in this case, wherein he is made the beneficiary of a life insurance policy, he has, by virtue of this statute, a right to object to testimony relative to the communications therein named as privileged, and he has also the right to waive this privilege conferred by it. 4 Wigmore on Evidence, § 2387; *Penn Mut. Life Ins. Co.* v. *Wiler,* 100 Ind. 92, 50 Am. Rep. 769. A person may also, in his written application for insurance, waive the right to object to the testimony of a physician as to information acquired while attending as such."

The testimony of Drs. Kimbro and Spivey was therefore competent, and, as the finding of the court below does not appear to be contrary to the preponderance of the testimony, the decree must be affirmed, and it is so ordered.

LEPANTO SPECIAL SCHOOL DISTRICT v. CONE.

Opinion delivered April 23, 1928.

STATES—VALIDITY OF APPROPRIATION.—Acts 1927, p. 355, providing that the State Auditor could, upon receipt of certificate that taxes heretofore or hereafter assessed for support of any special or rural special school district, had been paid erroneously, draw a warrant for the amount to be paid out of the appropriated school fund, *held* void for failure to make a specific appropriation out of which to pay a warrant in accordance with Const. art. 5, § 29, providing that no money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the maximum amount of which shall be specified in dollars and cents.

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

R. H. Dudley and *J. F. Gautney,* for appellant.

Hal L. Norwood, Assistant Attorney General, for appellee.

HUMPHREYS, J. This suit was brought in the Second Division of Pulaski County Circuit Court by appellant against appellee to compel him to issue a warrant in the sum of $13,861.42 in its favor upon the Treasury of the State, payable out of the unappropriated school funds, under authority of act No. 117 of the General Assembly of 1927. The act provided that:

"Whenever it shall be made to appear by the certificate of the treasurer of any county of this State that taxes heretofore or hereafter assessed by said Tax Commission or Tax Board for the support of any special or rural special school district in this State, or any part thereof, have been erroneously paid to and received by any other school district than that to which it was payable under such assessment, it is hereby made the duty of the State Auditor, upon the receipt of such certificate of the treasurer of any county, describing the property assessed for the benefit of any special school district or rural special school district, and the amount of taxes assessed therein, that have been erroneously paid to and received by any school district other than that to which it was properly payable, to draw his warrant on the

Treasurer of the State of Arkansas, payable to the special school district or rural special school district, for the amount of said taxes so erroneously paid. This act to apply to and cover all erroneous payments heretofore made as well as erroneous payments hereafter made. That, for the purpose of carrying out the purposes of this act, the State Treasurer shall pay said warrant out of the unappropriated school fund of the State of Arkansas."

It was alleged, in substance, in the complaint that, for the years 1913 to 1914 inclusive, taxes in the sum of $13,861.42 were collected on properties of certain public utilities within the boundaries of appellant district for school purposes and erroneously paid to Marked Tree Special School District, and by it expended for educational purposes; that, pursuant to the provisions of said act, it obtained the required certificate of the county treasurer and presented same to appellee in order that he might draw his warrant on the State Treasury, payable to appellant, for the amount of taxes belonging to it which were erroneously paid to said Marked Tree Special School District and by it expended in conducting its school; that appellee refused to issue the warrant.

The prayer of the complaint was for a writ of mandamus commanding appellee, as Auditor of State, to issue the warrant.

Appellee filed the following demurrer, omitting caption and signature, to the complaint:

"(1) The facts alleged do not constitute a cause of action. (2) Act No. 117 of the Acts of the General Assembly of the State of Arkansas for the year 1927 is in conflict with article 16, § 11, of the Constitution, which provides that moneys arising from a tax levied for one purpose shall not be used for any other purpose. (3) The said act does not comply with article 5, § 29, of the Constitution, which provides that 'no money should be drawn from the Treasury except in pursuance of specific appropriation made by law, the purpose of which shall be dis-

tinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents'."

The court sustained the demurrer to the complaint, and appellant refused to plead further, whereupon the court dismissed its complaint, from which is this appeal.

Act No. 117 of the General Assembly of 1927, made the basis of appellant's suit, is void for failure to make a specific appropriation out of which to pay the warrant, in accordance with article 5, § 29, of the Constitution of the State of Arkansas, which is as follows:

"No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriation shall be for a longer period than two years."

The only attempted appropriation of funds out of which to pay said warrant which appellant is demanding that appellee issue is contained in § 3 of said act, which is as follows:

"That, for the purpose of carrying out the provision of this act, the State Treasurer shall pay said warrant out of the unappropriated school fund of the State of Arkansas."

It will be observed that the maximum amount which may be drawn for the purpose mentioned was not specified in dollars and cents. For aught that appears, the Auditor might be required to draw warrants in unlimited amounts for the purpose mentioned. This is inhibited by the Constitution of the State. The requirement in the Constitution is that all appropriations made out of the State Treasury for a special purpose shall state the maximum amount in dollars and cents that may be drawn out for such purpose.

Having reached the conclusion that the act in question is void because indefinite as to the amount attempted to be appropriated for the purpose specified therein, it is unnecessary to decide the other interesting questions presented and ably argued by learned counsel in the case.

The judgment is affirmed.

FIRST NATIONAL BANK v. NEW ENGLAND SECURITIES COMPANY.

Opinion delivered April 23, 1928.

1. TAXATION—LIEN BY PAYMENT OF TAXES.—Where a person pays taxes on land at the request of the owner and for his accommodation merely, no lien on such land as payment exists as against a mortgagee.
2. TAXATION—LIABILITY FOR TAXES OF PERSON IN POSSESSION.—Where a purchaser from a mortgagor in possession of land was receiving the rents and profits, he was bound to pay the taxes, and could not enforce his lien for taxes as against the mortgagee.

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

F. G. Taylor, for appellant.

John L. Bledsoe and *Bowersock, Fizzell & Rhodes,* for appellee.

MEHAFFY, J. This action was begun by appellees on July 28, 1926, in which action they sought to foreclose a second deed of trust executed to them by the defendant, George W. Transue, upon lands in the Western District of Clay County, Arkansas. The appellant, First National Bank, intervened, and was made a party to the suit in October, 1926.

One of the defendants, S. P. Lindsey, filed answer, in which he alleged he had bought the lands embraced in the deed of trust at a trustee's sale in bankruptcy, and that he was the owner of said land by virtue of a deed executed to him by the trustee in bankruptcy proceedings of George W. Transue; that said lands were sold under said bankruptcy proceedings, and defendant, Lindsey, became the purchaser, and received a deed, which was exhibited with the answer.

The only question involved in this appeal is whether or not the lien of appellant for drainage assessments paid by it is prior and paramount to the lien of appellee's deed of trust.

The deposition of S. P. Lindsey is substantially as follows: He was the active vice president of the First

National Bank of Corning, Arkansas. Had known George W. Transue about five years. During the years of 1924 and 1925 witness was cashier of said bank, and, as such cashier, and on behalf of said bank, had some business with the defendant, Transue, with reference to the lands described in plaintiff's complaint. He testified that Transue asked them to look after the renting of said land, collecting of rents, pay the taxes, and look after it for him in general. Transue was absent from the lands and out of the county most of the time. Witness looked after the renting of the land, paid the taxes for him, and any work that needed to be looked after on the place, such as repairing the buildings and looking after the cutting of timber, was done by witness. The rents were applied on Transue's account and indebtedness that he owed the bank and to pay interest to the New England Securities Company. There was an agreement that these rents were to be applied on the account and previous debts. This agreement was part of the agreement, made at defendant's request, that the bank should pay what is commonly called the drainage taxes, and all taxes which included the drainage taxes, and what was generally called State and county taxes. The receipts for the drainage taxes for the years 1924 and 1925 are correct, which the bank paid at the request of defendant, and each are made exhibits to deposition, and marked A and B. The bank paid the State and county taxes for the year 1924 in the sum of $21.38, and receipt is attached as exhibit to witness' deposition. The bank has an assignment of the lien of the Western Clay Drainage District. It is a lien made by the drainage board, and signed by D. Hopson, as president, for the drainage taxes for the years 1924 and 1925. The same are correct and are made exhibits D and E to deposition. The amount for each was $215.

Witness purchased the land described in appellee's complaint at a sale by the bankrupt court; received deed, copy of which is marked Exhibit F to deposition. Wit-

ness took charge of said land under his deed January 1, 1926, and executed a mortgage on the rents of said land to Florence Jones, and attached to witness' deposition a copy of the mortgage made to Florence Jones.

Witness has $133.44, 1926 rents, to apply on the chattel crop mortgage, if he is permitted to retain that, as he has not used any of it. It is witness' intention to deduct the amount expended on the buildings on the farm, about $45, and apply the balance on the Florence Jones note. Mrs. Jones lives in Fayetteville, Arkansas. Since prior to April 28, 1926, and up to the present time, witness has been solvent financially. Witness wrote a letter on the 10th of April, 1924, to George Transue, at Hoxie, Arkansas, with reference to paying the general taxes, in which letter he acknowledged having received letter from Transue, and he inclosed three checks, amounting to $21.62, for which he was given credit, and the letter stated that they would be glad to look after his taxes and use what scrip they could on them. But witness did not have the letter. Transue also requested verbally that witness look after the payment of his taxes, as Transue would be gone most of the year, and wanted the bank to look after the farm in general the same as if it was its own. Copies of two letters are attached to the deposition. Witness could not state whether the State and county taxes for the year were paid on April 10, 1925, or at a subsequent date. Defendant gave instructions each year to pay the taxes, and was especially desirous that the ditch taxes be paid each year on account of avoiding a 25 per cent. penalty thereon. The assignment by D. Hopson, president of the Western Clay Drainage District, of a lien of said drainage district in favor of the First National Bank, was delivered to the bank a week or ten days ago.

J. F. Arnold testified, in substance, as follows: He is 52 years old; a resident of Corning, Arkansas; is field-man for the First National Bank of Corning, Arkansas, and was acting as such during the years 1924

and 1925, and looked after the rental and collecting of rents on the land of defendant, George W. Transue. After making first rental contracts there was a tenant quit, and he had to get other men to take his place. On behalf of the bank, witness looked after collecting rents and the payment to the bank by renters, and getting the crops gathered. Defendant asked witness to see that the tenants were getting along properly, and that they turned in their rent to the bank, and to see that Lindsey did not let his taxes go delinquent, as there was a heavy penalty if the taxes were not paid when due, and witness did that, in accordance with his request and that of the bank. Witness does not know what the rents amounted to, as his business was to see that the tenants left it at the bank, and he kept no record of the amount of either year.

Exhibits mentioned by witness were then introduced, and witness continued. Another exhibit is a letter of Lindsey, cashier, to George W. Transue, dated Corning, April 24, 1924, which is substantially as follows:

"Your letter received regarding the Boulton order for clearing, of which Mr. Boulton was not claiming that you gave him an order for the clearing to the amount of $20, which he claims that you had arranged with him to have the clearing done, and you having arranged with us to look after your farm as to renting it as well as all other matters pertaining to the farm, we of course did not want to pay him anything for something that we knew nothing about, nor had hired him to do any clearing. Mr. Smith was telling me that the officers had posted some kind of a notice on the door of the dwelling on the farm that was in reference to some kind of suit as to the sale of your property. Not knowing anything about the nature of the notice, we notified you, so that you could see about the matter in the event that we could not look after it for you."

Another letter from defendant, Transue, was in substance as follows:

"Don't you think you should send Fred Arnold to see Smith, Sprouse and Story and hurry them up on the cotton job? Don't forget to pay John Smith for oats and John Sprouse $15 for the corn. I am afraid my lawyer is assisting S. A. Foster at Walnut Ridge to beat me out of the cow you have a mortgage on. Will you write him and tell him not to sell the cow and calf, as you have a mortgage on her and the calf?"

Another letter, dated November 20, 1925, to the defendant, Transue, was in substance as follows:

"We have your letter of the 18th, stating that we should send Fred to look after Smith and Sprouse in reference to getting out their crops. Wish to advise that Mr. Arnold has been looking after the matter, as you asked us early in the spring to look after your farm as to renting it and such other matters in reference to the welfare of the farm, hence we have been giving it our attention as your agent, collecting the rents and placing such credit on your account—paid your ditch taxes and general taxes for the year 1924—and still carrying the receipts as having been paid for you as your agent, and trust that you can arrange for them the close of the year, as you will have the ditch taxes for 1925 due this coming December, and we will also look after them for you the same as we have other taxes paid on your farm in general. It is slow getting out cotton on account of continued rains, and the tenants advise us that most they have got out they have had to mud-boat it out. I am writing Mr. Forest at Walnut Ridge in reference to the cow. We have rented all of the farm for the coming year to W. M. Smith, as we think we can handle the entire place better than having several parties on it, which has caused more or less contention this year among the tenants."

The record of Western Clay Drainage District, subdivision 5, was introduced, showing the assessment on the lands.

The chancellor entered a decree to the effect that the plaintiffs, New England Securities Company, have a judgment *in rem* against the defendants for the sum of $357, with interest at the rate of 8 per cent. from February 8, 1923, which judgment is secondary only to that of First National Bank in the sum of $21.38, together with the interest at 10 per cent. The intervener, First National Bank, excepted to the finding of the decree of the court, and prayed an appeal to the Supreme Court, which was granted. The appellee has been granted a cross-appeal, and asks a reversal of that part of the decree declaring a lien for taxes of $21.38 prior to its mortgage lien.

The appellant in its intervention states that the defendant, George W. Transue, transferred to it the possession, care and control of the lands described in appellee's deed of trust, and authorized and requested appellees to pay the taxes and drainage assessments upon said lands, and to rent and collect the rents and account to him for same. The bank was therefore in possession of the land, receiving the rents and profits under an agreement with the owner to pay the taxes. It was the owner's duty to pay the taxes. And the bank, being in possession under a contract with the owner, as alleged by it, to pay the taxes and to collect the rents, was bound under the law and its contract with the owner to pay the taxes, and its payment was a payment for the owner.

It is the contention of the appellant that "one who pays the debt of another by request of the other, which debt is a lien on property, real or personal, has a lien on the property for the amount paid."

It is unnecessary to determine here whether, as between the owner of the land and the appellant, it did, under the contract between the parties, have a lien on the property. The controversy here is between the appellant and the mortgagee. The appellant was under no obligation whatever to pay the taxes.

"When taxes are paid on another's land under such circumstances as to give a right of recovery for the taxes paid, as set forth in the preceding section, the person making the payment will have an equitable lien on the premises for the amount so paid, or, according to the doctrine prevailing in some jurisdictions, will be subrogated to the lien of the State or municipality. But no such lien exists where the payment was voluntary, in the legal sense, or was made at the request of the owner and for his mere accommodation. Nor can this lien be made effective against a subsequent purchaser from the real owner, who had no notice of the circumstances under which the taxes were paid." 37 Cyc. 1154.

According to appellant's own statement, the taxes were paid by it at the request of the owner and for his mere accommodation. And therefore no such lien exists. especially as against the mortgagee.

This court said in a recent case: "Where one is in possession, receiving rents and profits from mortgaged property, he has money received from the property itself with which to pay the taxes, and it has been held that, under such circumstances, he owes the duty to pay the taxes." *Security Mortgage Co.* v. *Harrison,* 176 Ark. 423, 3 S. W. (2d.) 59; *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116.

"It is not disclosed by the record that the claim probated by appellant for taxes was for taxes paid by him during the time he occupied the premises. His occupancy was reimbursement for the payment of the taxes." *Beverly* v. *Nance,* 145 Ark. 589, 224 S. W. 956.

The appellant was not only in possession, receiving the rents and profits, but the proof in this case shows that it actually received as rent for the year 1924 $231.16, and for the year 1925 $199.52, making a total of $430.68, a few cents more than the improvement taxes amounted to. In all these transactions the bank was represented by Mr. S. P. Lindsey, the active vice president of the First National Bank. And he finally became the pur-

chaser of the property. If the taxes were a lien, they were a lien on the land, and appellant's first vice president purchased the land. The appellant, receiving the rents and profits under the contract alleged in this case, was bound to pay the taxes. Instead of doing that, it used the money received for rent to pay a private debt due itself, and then seeks to enforce a lien for the taxes that it paid. As it was in possession of the property, under contract to receive the rents and profits and pay the taxes, it could not use the rents and profits to pay a private debt to itself and then claim a lien on the land as against the mortgagee for the taxes paid.

We do not think the sections of the Digest referred to and discussed have any application.

It follows from what we have said that the case must be affirmed on appeal and reversed on cross-appeal. The case will therefore be affirmed on appeal and reversed and remanded on cross-appeal, with directions to enter a decree making the judgment of the New England Securities Company a lien on the land prior and superior to the lien of the First National Bank.

BANKERS' FIRE INSURANCE COMPANY v. WILLIAMS.

Opinion delivered April 23, 1928.

1. INSURANCE—ACTION AGAINST FOREIGN FIRE INSURANCE COMPANY—VENUE.—Under Crawford & Moses' Dig. § 6150, an action on a fire insurance policy may be brought against a foreign insurance company in a county where the loss occurs.
2. CONTINUANCE—WANT OF DILIGENCE.—It was not an abuse of discretion to overrule a motion for continuance on the ground that defendant insurance company's attorney did not have the policy sued on or a copy thereof, where the case was not called for trial until two months after service of summons, and no effort was shown to get the policy or a copy thereof from the plaintiff or from the home office, if the general agent could not furnish the policy as alleged, since defendant knew when suit was brought that it must answer before noon of the first day of the court's

session after summons had been served 20 days, under Crawford & Moses' Dig., § 1208.

3. CONTINUANCE—DISCRETION OF COURT.—Continuance in civil cases is within the trial court's sound discretion, and its action in granting or overruling a motion therefor cannot be disturbed, in the absence of an abuse of discretion, to appellant's injury.

4. INSURANCE—UNCONDITIONAL OWNERSHIP CLAUSE—BURDEN OF PROOF.—The burden was on an insurer, claiming violation of the sole and unconditional ownership clause in a policy of fire insurance, to show that the land on which plaintiff was living and paying taxes had not been redeemed from tax sale, and that the time for redemption had expired.

5. INSURANCE—UNCONDITIONAL OWNERSHIP CLAUSE—WAIVER.—Where an insurance agent knew at the time of writing a fire insurance policy that insured's interest in the insured property was not sole and unconditional, as where insured told him that the record owner was going to make a deed to insured, which was afterwards done, the provision as to unconditional ownership in the policy was waived.

6. INSURANCE—UNCONDITIONAL OWNERSHIP—LIEN OF IMPROVEMENT ASSESSMENT.—The lien of assessment for improvement benefits does not keep one from being the sole and unconditional owner of property within the provision of a fire insurance policy.

7. INSURANCE—SUFFICIENCY OF OWNERSHIP.—In an action on a fire insurance policy, an instruction that if the land on which the property was located was forfeited for nonpayment of taxes and the legal title thereto was in the State, plaintiff still had a right to redeem, and that this was sufficient compliance with the sole and unconditional ownership clause of the policy, *held* not error.

8. TAXATION—REDEMPTION FROM TAX FORFEITURE—PRESUMPTION.—Where plaintiff was in possession of land which had been forfeited for taxes and was paying taxes thereon, it will be presumed that he had redeemed it.

9. INSURANCE—CONCEALMENT OF TAX FORFEITURE.—Insured *held* not guilty of concealment and misrepresentation of material facts concerning the insured property in not disclosing that the property had been forfeited for taxes and the pendency of suits for, and the chancery court decrees ordering sale thereof for nonpayment of benefit assessments, in the absence of showing that it was not redeemed.

10. INSURANCE—IRON SAFE CLAUSE—WAIVER.—Where an insurance agent inspects the property, and knows that insured does not have an iron safe and knows the manner in which he keeps his accounts and records, insurer waives the provisions in policy

that insured keep account of sales, record of his business, and an iron safe.

11. INSURANCE—UNCONDITIONAL OWNERSHIP CLAUSE—INSTRUCTION.—In an action on a fire insurance policy, defendant's requested instructions to find for defendant if the jury found that insured's daughter had the legal title to the land on which insured building was located was properly modified by adding the words "unless you find that defendant waived said provisions in said policy."

12. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDING.—Questions of fact decided by the jury are conclusive on appeal if supported by substantial evidence.

13. INSURANCE—JURY QUESTION.—Whether insured burned his own property, *held* for the jury on conflicting evidence in an action on a fire insurance policy.

14. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDING.—The Supreme Court does not pass on the credibility of the witnesses on a trial at law, or the weight of their testimony.

15. WITNESSES—INCOMPETENCY OF STATEMENT OF PLAINTIFF'S WIFE.—Since, under Crawford & Moses' Dig., § 4146, a wife is incompetent to testify for or against her husband, it was incompetent in an action on a fire insurance policy to permit defendant's witness to testify that he did not swear it was insured whom he saw set fire to a building because insured's wife had asked him if he was going to swear to such fact, and sat on the front seat in the court with a pistol in a paper bag; since, the wife being incompetent as a witness, it was improper to introduce testimony as to her statements.

16. APPEAL AND ERROR—INVITED ERROR.—A party first introducing incompetent evidence cannot complain of the admission of similar evidence by the adverse party as to the same matter.

17. APPEAL AND ERROR—HARMLESS TESTIMONY.—Where an insured's wife testified as to matters not in strict rebuttal of incompetent testimony introduced by the insurer, this was not prejudicial error where the court instructed the jury that she could testify only with reference to testimony of defendant's witness as to threats by her and that her testimony could not be considered on the question whether plaintiff was entitled to recover, but only on the question whether such threats were made.

18. INSURANCE—ALLOWANCE OF ATTORNEY'S FEE.—Allowance of $350 attorney's fee to plaintiff recovering judgment for $2,200 in an action on a fire insurance policy *held* not excessive.

Appeal from Lawrence Circuit Court, Eastern District; *S. M. Bone,* Judge; affirmed.

G. M. Gibson, for appellant.

Coleman & Reeder, for appellee.

MEHAFFY, J. On the 5th day of November, 1925, the appellant issued a policy insuring F. E. Williams against loss by fire on a one-story building and on stock of merchandise, store and office fixtures and furniture. The insurance on the house was $1,000, on the fixtures and furniture, etc., $1,000, and on the stock of merchandise $200. On the 4th day of December the building and contents were destroyed by fire. The appellee, plaintiff below, brings this suit to collect the insurance.

Defendant filed motion for continuance, which was overruled, and it then filed answer, exhibiting a copy of its policy with the answer. And in its answer it not only denied the allegations of the complaint, but alleged violation of the terms and provisions of the policy in several instances. Attention will be called to these and to the testimony in the opinion.

The appellant first insists that the case should be reversed because the court refused to sustain its motion to dismiss. The motion stated that the defendant was a foreign corporation, and that it designated the Insurance Commissioner of the State of Arkansas as its agent for service, and that it had no agent in Lawrence County. That suit was brought in Lawrence County, and, under the laws of the State of Arkansas, a suit against a domestic corporation may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides, except insurance companies, the action may be brought in the county in which there is an agency of the company, where it arises out of a transaction of such agency.

It is alleged in the motion that § 1174 of Crawford & Moses' Digest provides that an action against a foreign corporation may be brought in any county in which there may be property of or debts owing to the agency, and that this section is in conflict with the Constitution of the United States.

It is argued by appellant that this section of the statute is void under the authority of *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490, 47 S. Ct. 678, 71 L. ed. 1165, decided by the United States Supreme Court May 31, 1927. The appellant evidently overlooked § 6150 of Crawford & Moses' Digest, which provides: "When loss shall occur by fire, lightning or tornado in the burning, damage or destruction of property on which there is a policy of insurance, * * *" one having a policy "may maintain an action against the insurance company taking the risk in the county where the loss occurs." This section applies to both foreign and domestic insurance companies, and the court therefore did not err in overruling appellant's motion to dismiss.

Appellant next insists that the case should be reversed because its motion for a continuance was overruled. The suit was filed and summons served on April 20, 1927. The case was not called for trial until June 16, 1927. The defendant knew when it was served with summons, when the court would be in session, and § 1208 of Crawford & Moses' Digest provides: "The defense to any complaint or cross-complaint must be filed before noon of the first day the court meets in regular or adjourned session after service, where the summons has been served 20 days in any county in the State."

The defendant therefore knew when the suit was filed that it would have to answer before noon of the first day that the court was in session. It could have ascertained immediately whether it had a copy of the policy, and could have made preparations to try the case.

Appellant, however, cites and relies on *North American Union* v. *Oliphant,* 141 Ark. 346, 217 S. W. 1, and states that that lays down the rule relative to continuance in cases similar to the instant case. In that case the court said: "The ground upon which the insistence is based is that appellee changed the theory of his case at the commencement of the trial, to the surprise and prejudice of appellant." The court then called attention to the correspondence between the parties, and continued:

"With this information in hand, appellant was not warranted in assuming that only such letters as were written by appellant itself would be relied upon to establish the contract. The whole correspondence was submitted by appellant as establishing the contract pleaded and relied upon for recovery. With this information in advance, neither surprise nor prejudice resulted to appellant in denying its request for a continuance."

It next calls attention to *State Life Ins. Co.* v. *Ford*, 101 Ark. 513, 142 S. W. 863. In this case the motion for continuance stated that certain proof could be made by an absent witness, and that defendant had used its best effort to reach the witness, that it might take her deposition, but was never able to communicate with her; that, if the case was continued, it could locate her and take her deposition. The motion also stated that the plaintiff failed to file either the original policy or a copy of it with her complaint, and, for that reason, he could not prepare a defense to the action. And the court held that the lower court did not abuse its discretion in overruling defendant's motion for a continuance.

In the instant case appellant does not show any effort to get the policy or a copy of it. If he had been unable to get a copy from the home office, and the plaintiff had refused to let it have the policy so that it could make whatever preparations it thought proper, and then had shown that, by reason of this, it was unable to prepare its defense and had been deprived of the right to interpose or make any defense, the trial court would probably have granted its motion. But it does not claim that it made any effort to get the policy from the plaintiff, and does not show in any way that it was prejudiced.

In the instant case the motion stated that the attorney for the defendant had never seen the policy nor a copy of it prior to the day before trial. And that the general agency through which the policy was written, on account of a loss of a portion of its office files, was unable to furnish the defendant's attorney with a copy. But he does not show that he might not have got a copy from

the office of the company, and does not show that he made any effort to get it from the plaintiff.

A continuance in a civil case is within the sound discretion of the trial court, and the action of the court in granting or overruling a motion for continuance will not be disturbed unless it has abused its discretion to the defendant's injury. And in this case the court did not abuse its discretion. *Holub* v. *State,* 130 Ark. 245, 197 S. W. 277; *Sease* v. *State,* 155 Ark. 130, 244 S. W. 450.

Appellant next insists that the case should be reversed because the court refused to grant instruction No. 1 requested by the defendant. It first argues that there was a violation of the sole and unconditional ownership clause of the policy. The proof shows that the land had been sold for taxes and that the time for redemption had expired. At any rate, this is the contention of appellant. But appellant did not offer to show that the land had not been redeemed, and, since the plaintiff was at the time living on the land and paying taxes, the burden was upon the defendant to show that the land had not been redeemed.

This court has said: "The State could only act through her taxing officers. These officers, the clerk, assessor and collector, had no authority to place or keep these lands on the tax records for the assessment, levy and collection of taxes, unless they had been redeemed from the State, as required by the statute. While there is no proof in the record that the lands had been redeemed, yet, under the above undisputed facts, it will be presumed that the lands had been redeemed." *Wallace* v. *Hill,* 135 Ark. 353, 205 S. W. 699.

It is also contended that this clause as to unconditional and sole ownership was violated because the plaintiff did not have the deed to the property at the time the insurance policy was issued. But the plaintiff testified that he was the true owner of the land, the sole and unconditional owner, but that the record title was in his daughter, but that she was going to make him a deed. He testified that he told this to the agent, and the agent

said he would write the insurance with the understanding that plaintiff get the title transferred to him. The insurance agent said he was going to Memphis next day, and would try to see plaintiff's daughter and get her to fix the deed. He did not get to see her, but came back and told plaintiff he had better mail the deed to her. Plaintiff did this, and the deed was executed.

This proof is undisputed, and the deed was in fact executed and delivered within a week. It appears therefore that, so far as this defect is concerned, the insurance agent who wrote the policy knew all about it, and when an insurance agent who writes a policy knows, at the time that the policy is written, that the insured's interest was not sole and unconditional, that provision of the policy is waived. See *National Fire Ins. Co.* v. *Kent,* 163 Ark. 7, 259 S. W. 370.

So far as the improvement taxes are concerned, there is nothing in the proof that shows violation of the sole and unconditional ownership clause of the policy. If the lien of assessments for benefits kept one from being the sole and unconditional owner of his property, then no person who lives within the bounds of an improvement district would be the sole and unconditional owner of his property.

Appellant next insists that its instruction No. 3 and its instruction No. 4 should have been given. What we have already said answers the objection to the court's refusing to give instructions Nos. 3 and 4, requested by defendant.

The court's giving instruction 2 at the request of the plaintiff was not error. It simply told the jury that, if the land was forfeited for the nonpayment of taxes and certified to the State, and that a legal title was in the State, plaintiff still had the right to redeem, and that this was a sufficient compliance with the policy. The burden would not be on the plaintiff to show that he had a right to redeem if he was in possession, paying taxes. There would be a presumption that he had redeemed. The officers would have no right to put the land on the

taxbooks and to levy and collect taxes from the plaintiff unless he had redeemed or had the right to redeem.

Appellant next insists that the case should be reversed because the plaintiff was guilty of concealment and misrepresentation of material facts and circumstances concerning the insurance and the subject thereof. Appellant says that the uncontradicted and admitted testimony is that, at the time the policy was issued, the land had forfeited for taxes to the State of Arkansas and had not been redeemed within the two-year period, and that the State owned this property. The testimony does show that the land had forfeited, but it does not show whether it had been redeemed. Plaintiff's daughter made a deed to him after the policy of insurance was written and delivered. The plaintiff was in possession, paying taxes. There is no proof that the daughter did not redeem the land. The presumption is that it was redeemed. The fact that the land had been ordered sold, as stated by appellant, under certain decrees of the chancery court, did not violate any of the provisions of the policy. There is no evidence that the plaintiff concealed or misrepresented any material fact or circumstance. The suits that were brought in the chancery court were suits *in rem,* and no notice, so far as the record shows, was served on the plaintiff. Moreover, if the suits had been pending in court and plaintiff had been served, this would not be any violation of any of the terms of the policy, because the plaintiff had the right at any time to pay the assessments, and, if it had been sold, he had a right to redeem it, and there was therefore no violation in this of the sole and unconditional ownership clause, and, so far as this record shows, there was no misrepresentation or concealment.

It is next insisted that the plaintiff violated the record warranty clause of the policy. It is alleged that the violation was caused by plaintiff's failure to take an inventory and to keep an account of sales and record of his business, and that he had no iron safe.

It has been repeatedly held by this court that, where the insurance agent inspects the property himself, knows that the plaintiff does not have an iron safe, and knows the manner in which he keeps his accounts and records, and knows all the facts that the proof in this case shows the insurance agent knew, the company waives these provisions in the policy. The provision in the policy required the plaintiff, if he had no inventory on hand, to make one within 30 days.

There is a conflict in the testimony as to what occurred between the adjuster and the plaintiff, but this was a question of fact properly submitted to the jury, and their finding is conclusive here.

Appellant next insists that the court erred in modifying the instructions by adding the following: "unless you find that defendant waived said provisions in said policy."

Defendant's requested instructions were erroneous without the clause being added. Each of them enumerated certain things, telling the jury, if they found these to be the facts, they would find for the defendant, leaving out entirely the question of waiver. For instance, the undisputed proof shows that the agent knew that the daughter had the legal title, but was intending to make a deed to the assured, yet these instructions say that, if the jury find those facts, they will find for the defendant. Of course this was erroneous; but it was proper to tell them, if they found these facts to be true they would find for the defendant, unless they found that the defendant waived this provision. And this is true of each instruction which is modified by adding the words, "unless you find that the defendant waived said provisions of the policy."

It is unnecessary to set out the instructions. When considered as a whole the instructions fairly submitted all the issues to the jury, and all questions of fact decided by the jury are conclusive on this court if there is substantial evidence to sustain the jury's finding.

It is next contended that the case should be reversed because it is alleged the fire was caused by the act or procurement of the plaintiff. It is true Reed's testimony was to the effect that Williams started the fire and burned his own property. This testimony is contradicted by Williams, and a number of other witnesses testified to facts which are in conflict with Reed's testimony. Reed's testimony was to the effect that Williams poured gasoline or something on the stove and stovepipe and set it on fire. Two or three witnesses swear that the fire started several feet from the stove. Reed also testifies that he saw the fire, and had seen Williams pouring something on the stove or pipe, and testified that it looked like there was some paper set on fire in the stove, and the place flamed up. Reed went home after seeing this, stating that he thought Williams wanted to burn it, and it was none of witness' business. He went home and lay down on the bed, but did not go to sleep, and he was at home when his own store caught fire. It therefore appears that the evidence is conflicting on the question of the origin of the fire, and this court does not pass on the credibility of the witnesses where there has been a trial at law, nor the weight to be given to their testimony, the rule being that if there is substantial evidence to sustain the verdict it will not be disturbed.

It is next contended by appellant that the case should be reversed because the court erred in permitting Mrs. Williams, the wife of the plaintiff, to testify on his behalf.

Section 4146 of Crawford & Moses' Digest makes the husband and wife incompetent as witnesses for or against each other, and appellant contends that this statute is violated by the court's permitting Mrs. Williams to testify.

Appellant's witness, Reed, had testified that he had seen some one set fire to the building and had seen some one in the building, but did not know whether it was Williams or not. The testimony was closed, and the

case went over until the following morning, and appellant's attorney then asked permission to put Reed back on the stand, and this permission was granted, and Reed testified that it was Williams that he saw in the store, and the reason he did not tell it when he was on the stand before was that Mrs. Williams, just before he went on the stand, had asked him if he was going to swear that Williams burned his building, and when he told her he was, she asked him if he meant it, and he told her he did. She went downstairs, and came back with a pistol in a paper bag, and came in and sat on the front seat, and that is the reason witness did not tell the truth about seeing Williams. This action on the part of the appellant was a violation of the statute that he now invokes. If the wife was incompetent to testify, it was just as much a violation of the statute to have some witness to testify to what she said as it would be to put her on the stand and let her testify herself. The statute prohibits the testifying by husband or wife for or against each other, and the appellant should not have offered proof of any declarations or statements of Mrs. Williams. If the law permitted evidence of this character, one could do indirectly what the statute prohibits doing directly. Then it would be manifestly unfair to permit one party to prove statements of the wife and then prohibit her from denying the alleged statements.

"It frequently happens that evidence which might be inadmissible under strict rules is nevertheless introduced into the case through inadvertence or otherwise, under which circumstances it is held that the adverse party is entitled to introduce evidence on the same matters lest he be prejudiced, the rule being that the party who first introduces evidence which is irrelevant to the issues cannot assign error on the admission of evidence from the adverse party relating to the same matter. So, where a part of a conversation, declaration, document, or series of documents, book accounts, letter or correspondence, or transaction, is shown in evidence by one party, the other

party may, for purposes of explanation, show the remainder, or so much thereof as is necessary to a complete understanding of the part already shown, even though the result is to let in self-serving declarations." 22 C. J. 196.

"The transaction with Arnold concerning the payment for his services was collateral, and had no place in the case, as it had no bearing upon the issue as to what amount appellee had agreed to pay appellants to defend him. But appellants are not in a position to complain of the introduction of this question into the case, as they brought it forward and introduced the first testimony concerning it. * * * However, if it was prejudicial, appellants are in no attitude to complain, because they had first drawn out the testimony concerning the payment of this money and the circumstances under which it was paid, and appellee was entitled to have the whole of the transaction given to the jury after a part of it had gone in." *St. L. I. M. & S. R. Co.* v. *Walsh,* 86 Ark. 145, 109 S. W. 1164.

"The defendant is not in a situation to complain that the court admitted evidence to prove that its trains were not stopped at Coal Hill on former occasions. Witnesses for the defense testified that the train stopped on the day of the injury long enough to permit all passengers to alight. To sustain their statement, they testified that the rules of the company required a stop of several minutes, and that it was always made. If the evidence was incompetent, the defendant first introduced it, and cannot complain that the court permitted plaintiff to rebut it." *Ry. Co.* v. *Tankersley,* 54 Ark. 25, 14 S. W. 1099.

In the instant case the appellant is in no position to complain, after having introduced witnesses to testify as to statements made by the wife of plaintiff which were incompetent, and the court did not err in permitting the plaintiff to introduce Mrs. Williams in rebuttal of such testimony.

Appellant complains, however, because Mrs. Williams made other statements and undertook to give testimony that was not in strict rebuttal of the incompetent testimony introduced by appellant. The court had already instructed the jury that Mrs. Williams could not testify except with reference to Reed's testimony as to her threats. The court had told the jury that the testimony would be confined to the question of threats, as to whether or not Mrs. Williams made the threats as testified to by the witness, and that the testimony could not be considered by the jury as testimony in this case as to whether or not plaintiff was entitled to recover on insurance policy, but would be considered only for the purpose of what light it might shed on the question as to whether or not any threats were made to the witness Reed, who has just testified.

After the testimony the court said:

"Gentlemen of the jury, I again instruct you that the testimony of this witness must not be considered by you as testimony bearing on the merits of this case as to whether or not the plaintiff Williams is entitled to a recovery, but you will consider it only on the point relative to threats made by the witness against Reed, if any."

It is next contended by the appellant that the case should be reversed because the court erred in permitting certain testimony, over the objection of the defendant, and in excluding certain testimony over the objection of the defendant. The testimony complained about, however, could not be prejudicial. We have already said that the chancery suits with reference to benefit assessments would not be a violation of any of the provisions of the policy. It did not violate the sole and unconditional ownership clause, and, as long as plaintiff had a right to redeem, he was the sole and unconditional owner. And as we have already stated, as to the tax forfeitures and sales, the plaintiff, being in possession and paying taxes, raises a presumption that it had been redeemed from the State.

The instructions, as we have already said, properly submitted the case to the jury, and it would be useless to set out all the instructions requested in the case.

Appellant finally contends that the attorney's fee allowed by the court was excessive, and that it should be reduced so as not to exceed 10 per cent. of the judgment. The court allowed attorney's fee of $350, and we cannot say that that is excessive.

Finding no prejudicial error, the case is affirmed.

Mr. Justice KIRBY dissents.

APPENDIX

BY ORDER OF THE COURT THE FOLLOWING OPINIONS ARE OMITTED AS OF NO VALUE AS PRECEDENTS.

Abid *v.* Sallah; appeal from Benton Chancery Court; Lee Seamster, Chancellor; affirmed February 20, 1928; per Kirby, J.

Almstadt, Reed & Passmore *v.* Irby & Casner; appeal from Clay Circuit Court, Eastern District; W. W. Bandy, Judge; affirmed February 27, 1928; per Smith, J.

Arkla Sash & Door Company *v.* Fair; appeal from Logan Circuit Court, Southern District; J. O. Kincannon, Judge; affirmed April 16, 1928; per Hart, C. J.

Arms *v.* State; appeal from Searcy Circuit Court; J. F. Koone, Judge; affirmed March 26, 1928; per Smith, J.

Barrett *v.* State; appeal from Pulaski Circuit Court, First Division; Abner McGehee, Judge; affirmed April 2, 1928; per Kirby, J.

Brenard Manufacturing Company *v.* McRee's Model Pharmacy; appeal from Phillips Circuit Court; W. D. Davenport, Judge; affirmed April 30, 1928; per Humphreys, J.

Broderick & Calvert *v.* Flannigan; appeal from Union Chancery Court, First Division; J. Y. Stevens, Chancellor; affirmed April 23, 1928; per McHaney, J.

Brown *v.* State; appeal from Sebastian Circuit Court, Ft. Smith District; J. Sam Wood, Judge; affirmed April 9, 1928; per Kirby, J.

Brown *v.* State; appeal from Phillips Circuit Court; W. D. Davenport, Judge; affirmed March 5, 1928; per Hart, C. J.

Burns *v.* State; appeal from Hempstead Circuit Court; J. H. McCollum, Judge; affirmed March 19, 1928; per Kirby, J.

Calhoun *v.* Sadler; appeal from Cross Chancery Court; A. L. Hutchins, Chancellor; affirmed April 16, 1928; per Humphreys, J.

Carty *v.* Kory; appeal from Lawrence Chancery Court, Eastern District; A. S. Irby, Chancellor; affirmed February 6, 1928; per Mehaffy, J.

Cates *v.* State; appeal from Miller Circuit Court; J. H. McCollum, Judge; affirmed April 9, 1928; per Hart, C. J.

C. M. Gooch Lumber Company *v.* Lane; appeal from White Circuit Court; W. D. Davenport, Judge; affirmed April 2, 1928; per Kirby, J.

Cowan *v.* Cowan; appeal from Mississippi Chancery Court, Osceola District; J. M. Futrell, Chancellor; reversed March 12, 1928; per McHaney, J.

Davidson *v.* State; appeal from Crawford Circuit Court; J. O. Kincannon, Judge; affirmed April 2, 1928; per Mehaffy, J.

Garner *v.* Garner; appeal from Pulaski Chancery Court; Frank H. Dodge, Chancellor; affirmed February 13, 1928; per McHaney, J.

Gilliland Oil Company *v.* Wilburn; appeal from Ouachita Circuit Court; W. A. Speer, Judge; affirmed February 27, 1928; per Smith, J.

Graysonia, Nashville & Ashdown Railroad Company *v.* Alexander; appeal from Howard Circuit Court; B. E. Isbell, Judge; affirmed January 30, 1928; per Mehaffy, J.

Harlan *v.* Paxton; appeal from Clay Circuit Court, Eastern District; W. W. Bandy, Judge; reversed March 12, 1928; per Humphreys, J.

Hawkins *v.* Hawkins; appeal from Pulaski Chancery Court; Frank H. Dodge, Chancellor; affirmed April 30, 1928; per Humphreys, J.

Hodges *v.* West-Terry; appeal from Independence Circuit Court; S. M. Bone, Judge; reversed March 19, 1928; per Mehaffy, J.

Johnson *v.* Edwards; appeal from Polk Chancery Court; C. E. Johnson, Chancellor; reversed November 28, 1927; per McHaney, J.

Jones *v.* Reed, Administratrix; appeal from Howard Circuit Court; B. E. Isbell, Judge; affirmed March 19, 1928; per McHaney, J.

Joyce *v.* Schurmann; appeal from Sebastian Chancery Court, Ft. Smith District; J. V. Bourland, Chancellor; reversed March 26, 1928; per Humphreys, J.

Kelley *v.* Alexander Lumber Company; appeal from White Circuit Court; W. D. Davenport, Judge; affirmed April 2, 1928; per Mehaffy, J.

Liberty Savings Bank & Trust Company *v.* Rolfe; appeal from St. Francis Chancery Court, A. L. Hutchins, Chancellor; affirmed April 16, 1928; per McHaney, J.

Lyle *v.* Proctor; appeal from Craighead Circuit Court, Jonesboro District; W. W. Bandy, Judge; affirmed February 20, 1928; per McHaney, J.

McAdams *v.* Coulter; appeal from Howard Circuit Court; B. E. Isbell, Judge; affirmed February 13, 1928; per Humphreys, J.

McCain, Trustee, *v.* Wilson; appeal from Columbia Chancery Court; J. Y. Stevens, Chancellor; affirmed April 23, 1928; per Kirby, J.

McConnell and McCormick *v.* State; appeal from Washington Circuit Court; J. S. Maples, Judge; affirmed February 13, 1928; per Hart, C. J.

Miller *v.* State; appeal from Washington Circuit Court; J. S. Maples, Judge; reversed March 5, 1928; per Mehaffy, J.

Moss *v.* Warmack; appeal from Nevada Chancery Court; C. E. Johnson, Chancellor; affirmed April 23, 1928; per Hart, C. J.

Murphy *v.* Stennett; appeal from Ouachita Chancery Court, Second Division; George M. LeCroy, Chancellor; reversed April 2, 1928; per Humphreys, J.

O. O. Scroggin & Company *v.* Merrick; appeal from Conway Circuit Court; J. T. Bullock, Judge; reversed April 23, 1928; per Smith, J.

Parmeter *v.* Wilson; appeal from Union Chancery Court, Second Division; George M. LeCroy, Chancellor; affirmed April 9, 1928; per Humphreys, J.

Perrin *v.* Perrin; appeal from Pulaski Chancery Court; Frank H. Dodge, Chancellor; affirmed February 20, 1928; per McHaney, J.

Pierce *v.* State; appeal from Lawrence Circuit Court, Eastern District; S. M. Bone, Judge; affirmed April 9, 1928; per Mehaffy, J.

Rich *v.* State; appeal from Franklin Circuit Court, Ozark District; J. O. Kincannon, Judge; affirmed January 30, 1928; per Smith, J.

St. Louis-San Francisco Railway Company *v.* Percifull; appeal from Craighead Circuit Court, Lake City District; W. W. Bandy, Judge; affirmed February 20, 1928; per Humphreys, J.

Staples *v.* Johnson; appeal from Union Chancery Court, Second Division; George M. LeCroy, Chancellor; affirmed March 12, 1928; per Hart, C. J.

Terrell *v.* State; appeal from Jackson Circuit Court; S. M. Bone, Judge; reversed February 6, 1928; per Hart, C. J.

Tucker *v.* State; appeal from Jackson Circuit Court; S. M. Bone, Judge; affirmed January 30, 1928; per Wood, J.

Wadkins *v.* Bank of Vandervoort; appeal from Polk Chancery Court; C. E. Johnson, Chancellor; affirmed March 12, 1928; per Hart, C. J.

Wilenzick *v.* Simon; appeal from Woodruff Circuit Court, Northern District; W. D. Davenport, Judge; affirmed February 20, 1928; per McHaney, J.

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